

**What Can the European Commission Do
When Member States Violate Basic Principles of the European Union?
The Case for Systemic Infringement Actions**

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What can the European Union – and in particular the European Commission – do about Member States that no longer reliably play by the most fundamental European rules? The question is now urgent because several Member States are already posing such challenges. Treaty reform could give the Commission new powers. But can the Commission act without waiting for the long and arduous process of treaty reform to provide new tools?

I propose a new approach, a simple extension of an existing mechanism: the infringement action. The Commission could signal *systemic complaints* against a Member State by *bundling a group of individual infringement actions together under the banner of Article 2* of the Treaty of the European Union (TEU), which guarantees:

the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹

A *systemic infringement action* would share with ordinary infringement actions specific complaints against the national law or consistent practices of a Member State for violating particular provisions of EU law. As a result, it would have a very concrete ground like a conventional infringement action brought by the Commission under Article 258 of the Treaty on the Functioning of the European Union (TFEU).² By grouping together related complaints thematically under Article 2 TEU, however, the Commission would add the argument that the whole is more than the sum of the parts and that the set of alleged infringements rises to the level of a systemic breach of basic values.

A medical analogy might help to explain how a systemic infringement action would work. The Commission may believe that a Member State is breaching the values of Article 2 TEU, but basing a legal action on “violating the values of the EU” alone would give the Court of Justice of the European Union (CJEU) the same task that a doctor would have in attempting to treat a general complaint of “feeling bad.” A doctor needs a detailed set of concrete symptoms before being able to accurately diagnose a disease, just as the CJEU would need evidence of a pattern of concrete infringements before it could

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¹ Treaty of the European Union (TEU), Art. 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0013:0046:EN:PDF>.

² Treaty on the Functioning of the European Union (TFEU), Art. 258, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0047:0200:EN:PDF>.

diagnose an Article 2 TEU disease. Treating each symptom on its own without aggregating the symptoms into a systemic diagnosis runs the risk of failure because fixing only one symptom or another may not eradicate the disease. Diagnosing a systemic problem in law requires the same sort of evidence as diagnosing a systemic problem in medicine. One needs to observe the full set of relevant symptoms together to understand the fundamental problem. Only then can one be confident of an accurate diagnosis and therefore a more effective treatment.

A systemic infringement action would enable the Commission to signal to the Court of Justice a more general concern about deviation from core principles than a single infringement action would allow. It would also have the advantage of putting before the CJEU *in one case* evidence of a *pattern* of violations so that the overall situation in a particular Member State is not lost in a flurry of individual infringement actions, each of which might go to a different panel of judges at the Court. The CJEU could then either agree with the Commission that the symptoms add up to a disease and find a violation of Article 2 TEU, or the CJEU could find that only certain (or even none of the) individual violations within the larger mix require treatment.

If the CJEU confirms the systemic element of the infringement action and finds a violation of Article 2 TEU, compliance should be assessed in a way that addresses both the particular infringements and the larger breach of EU values. In such a case, a Member State should not be permitted simply to make small fixes to correct individual violations without addressing the larger threat to the principles of Article 2 TEU.

If continued systemic infringement occurs in violation of a CJEU decision, the Commission might then expand its range of sanctions beyond the current set. After all, if a Member State has been found to persistently challenge fundamental values of the EU, then its compliance with burdensome remedies cannot be assumed. Fines levied through an Article 260 TFEU³ action might therefore be collected by putting in escrow some portion of the Member States' EU funding streams until the Member State complies. This power to withhold funds could be given to the Commission through secondary legislation of the sort that has already been used for other conditionalities in funding, like the powers made available under the Excessive Deficit Procedure. This would provide a legal basis for the proposal by the foreign ministers of Germany, Denmark, the Netherlands and Finland⁴ that the Commission find ways to cut the funds of Member States that are in persistent and serious violation of EU principles. Allowing the Commission to stop the flow of funds following confirmation by the CJEU of both a systemic violation and continued noncompliance would ground this proposed sanction in a multi-institutional judgment like other current sanctions, giving the Commission a more "constitutional" basis for its actions.

This suggestion to withhold EU funds is the only part of my proposal that calls for any additional legal authority and such authority can be provided by secondary legislation rather than through treaty reform. The other parts of this proposal can be accomplished under existing authority. The systemic

³ Art. 260 TFEU, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0047:0200:EN:PDF>.

⁴ The Letter From Germany, Finland, Denmark and the Netherlands Request a New Mechanism to Safeguard the Fundamental Values of the EU, 6 March 2013, available at <http://www.rtt.ro/en/scrisorea-prin-care-germania-finlanda-danemarca-si-olanda-solicita/>.

infringement action therefore gives the Commission a new tool to use now in the fight against democratic backsliding without the need for treaty reform.

In the sections that follow, I will explain 1) how a systemic infringement action would work, 2) how assessment of compliance might follow and 3) how fines might be assessed if there is continued noncompliance. Throughout, I will illustrate this proposal using the present situation in Hungary, since that is the leading example that has caused many to worry about the Commission's ability to enforce the treaties.

Part I: Why a systemic infringement action?

Infringement actions under Article 258 TFEU are brought by the Commission to challenge a specific and concrete violation of EU law by a Member State, and they carry the assumption that these violations occur in a Member State that is otherwise generally compliant. But what if the conduct of a Member State raises serious questions about its overall willingness to observe EU law, particularly when a Member State threatens basic EU principles of democracy, rule of law and protection of human rights?

Ordinary infringement actions are important, but they have so far been too small bore to address the structural problems that persistently noncompliant states pose. If a Member State is threatening the basic values of the treaties, chances are that it is violating more than one narrow slice of EU law. Under present practice, however, the Commission picks its battles, so it currently fails to bring many actions that it might otherwise be justified in launching. At the moment, only the major or particularly obvious violations are raised although a Member State may pose many more challenges to EU law.

Even if the Commission were to multiply individual infringement actions to signal greater concern about a particular Member State, however, the Court of Justice is not institutionally able to see the patterns at issue if the cases are filed as they presently are: one by one. The Court of Justice has so many different panels of judges in its normal operation that it is quite possible that each discrete infringement action against a particular Member State could be considered by a different panel at the Court without any specific judge ever seeing the patterns that would demonstrate the more serious threat to the basic values of the treaties. The Commission might be able to overcome some of this fragmentation by requesting that Court of Justice assemble a Grand Chamber to hear the most important complaints against a particular Member State. But these individual infringement actions would still not give the Court of Justice the capacity to take an overall pattern of noncompliance as an important fact in and of itself beyond any one specific infringement. The evidence of the *linkages* among infringing laws and practices would be beyond the boundaries of the specific case that the judges are asked to review. Each individual infringement action presently stands on its own ground alone.

The structural weakness of the individual infringement action was illustrated by the creative, bold, important and successful case that the Commission brought with regard to the decapitation of the leadership of the judiciary that the Hungarian government accomplished through the sudden, forced early retirement of senior judges.⁵ By lowering the retirement age from 70 to 62 with immediate effect,

⁵ 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, available at http://europa.eu/rapid/press-release_IP-12-24_en.htm.

the Hungarian government forced the departure of the most senior 10% of the judiciary, including fully one quarter of the Supreme Court justices and half of the appeals court presidents.⁶ The government then replaced these senior judges with judges of its own choosing, using a new legal procedure that put the choice of such judges into the hands of the president of a new political institution, the National Judicial Office, taking that power away from the judiciary itself. Suddenly a judicial appointments mechanism that had been previously insulated from politics was supplanted by a much more directly political process, just when much of the court leadership was suddenly open to be filled with new judges. The government also gave the president of the National Judicial Office the discretionary power to determine whether any sitting judge should be promoted, demoted, reassigned or disciplined as well as the discretionary power to move any case in the country from a crowded court to a less crowded one, thereby effectively picking the judges who would hear each individual case. The lowering of the retirement age was therefore only the first step in an even more worrying process, disproportionately opening up the most senior judgeships for replacement so that a government-vetted official could both choose the new leadership of the judiciary and also gain new powers over other sitting judges.

The Venice Commission's multiple reports on the state of the Hungarian judiciary⁷ strongly criticized the Hungarian judicial reforms, particularly the outsized powers of the president of the National Judicial Office who now functionally controls the judiciary. The International Bar Association (IBA) also reviewed Hungarian developments and concluded that "the reforms clearly contravened Hungary's international obligations to uphold the independence of the judiciary and the right to a fair trial."⁸ But the European Commission only challenged the sudden lowering of the retirement age as a violation of EU anti-discrimination law. The European Commission's action in the matter of judicial retirements was successful; the Court of Justice delivered a strong judgment against Hungary⁹ in that case. But the Commission and therefore the Court did not analyze the removal of senior judges as a problem of judicial independence, which was the larger issue identified by the Venice Commission and the IBA.

Why would a systemic infringement action do any better? A systemic infringement action could put the various pieces of the puzzle together as a coherent whole under Article 2 TEU to enable the Commission to demonstrate that the specific issue (e.g. the lowering of the judicial retirement age) is connected to a larger pattern (e.g. a set of sudden changes to the way that judges are appointed, promoted, demoted and disciplined in Hungary). This set of legal changes could then be presented as

⁶ Kim Lane Scheppelle, *First Let's Pick All the Judges*, on Paul Krugman's Conscience of a Liberal Blog, New York Times, 9 March 2012, available at krugman.blogs.nytimes.com/2012/03/10/first-lets-pick-all-the-judges/.

⁷ Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e) and Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e).

⁸ International Bar Association's Human Rights Institute (IBAHRI), *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary*, September 2012, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=89D4991A-D61F-498A-BD21-0BAFFA6ABF1>.

⁹ *Commission v. Hungary*, C-286/12, Available at <http://curia.europa.eu/juris/documents.jsf?num=C-286/12>.

evidence of a systemic threat to judicial independence which itself is a crucial component of the rule of law as protected by Article 2 TEU. A systemic infringement action under an Article 2 TEU banner would then enable the Court of Justice to assess systemic violations, which would be necessary to establishing a threat to the basic values of the treaties.

If the Commission were reluctant to invoke the very general principles of Article 2 TEU to bind together a number of individual complaints, it could instead bring a systemic infringement action under Article 4(3) TEU.¹⁰ The Article 4(3) TEU “fidelity principle” requires Member States to “refrain from any measure which could jeopardize the attainment of the [European] Union’s objectives.” Article 4(3) TEU actions have been brought before; direct Article 2 TEU actions have not. Perhaps the Commission would feel on more familiar ground going the Article 4(3) TEU route, grouping together a number of specific complaints as evidence that a Member State government is systematically thwarting the achievement of EU objectives. Given that the national judiciaries are the primary mechanism for enforcing EU law in the Member States, national political domination of the judiciary would raise Article 4(3) TEU issues as well. Either way, a *systemic* infringement action, would still convey the message that the whole is more than the sum of the parts.

Regardless of the specific overarching systemic theory invoked, however, a set of *specific* alleged infringements should be listed in a systemic complaint. Maintaining democracy, guaranteeing the rule of law, protecting human rights and encouraging the attainment of EU objectives are important principles in the abstract, but a little vague when one gets down to the ground. The diversity of different ways that Member States realize these general principles makes it difficult to pin down what precisely is wrong unless a systemic and irregular pattern is alleged in which a series of individually worrying infringements add up to something larger. An Article 2 or Article 4(3) TEU proceeding should therefore use a set of specific objections as its foundation so that the Court of Justice is given explicit laws and practices to examine and so that a Member State is given a concrete agenda to address. At the same time, the *set* of infringement actions brought together in one case should communicate to the Court of Justice that the Member State’s violations are systemic, structural, and cannot be fixed only with small patches of technical compliance.

Why hasn’t the Commission brought such a systemic action to date? Instead of bringing a set of related infringement actions together to show a pattern, the Commission seems to have taken the opposite view: that it cannot and should not launch all infringement actions that it could possibly bring even when a Member State has generated many systemic concerns. The Commission, it would appear, has been selective in picking its battles. As a general matter, this is no doubt a wise strategy. The Commission relies on the continued cooperation of the Member States and might well hope that a strategy of launching only the most easily proven or the most serious offenses would save both itself and the Court of Justice from delving too deeply into the internal affairs of any single Member State. Of course, most infringement actions are resolved before a formal legal action is necessary in any event so the Commission is always more active than its formal actions before the Court of Justice would indicate. But if a Member State persists in failing to respond while generating concern that it is undermining EU values in other ways, perhaps a stronger approach is needed. And the systemic infringement action provides that option.

¹⁰ Art. 4(3) TEU, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0013:0046:EN:PDF>.

The Commission should not approach a systemic infringement action *simply* as a yoked-together set of individual infringement actions it would otherwise bring in a business-as-usual world where it picks its battles. The bundling of infringement actions into a systemic complaint will probably change the threshold for deciding which concrete violations to allege as part of the mix. The Commission could therefore decide to challenge a particular law or practice of a Member State because it constitutes part of a worrisome pattern even if that offending law or practice, taken alone, would not rise to the level that would normally have caused the Commission to bring a separate infringement action. In fact, one crucial argument in favor of the systemic infringement action is that, by putting together a set of alleged violations, it strengthens the case for each individual allegation by providing a context that changes the interpretation of a particular practice in a larger scheme of things. The lowering of the judicial retirement age in Hungary, for example, egregious as it was taken alone, is an even larger problem in the context of the overhaul of the judicial appointments process that was underway at the same time.

Of course, I am not arguing that the Commission should invent infringements where none can be found or to make legal mountains out of inconsequential molehills. But what emerges as an important element of a broader case may depend on its interaction with other related laws and practices. These interactions need to be brought into view in the same legal action so that the Court of Justice can assess the whole picture. Broadening the Commission's field of vision to evaluate the interaction effects¹¹ might lead to a different sense of where the threshold should lie for pursuing an individual infringement action, especially one that is bundled with others to allege a systemic threat to the values of the EU.

The bundling of multiple individual infringements under the Article 2 TEU heading puts some new options before the Court of Justice. The Court could confirm some set of the individual allegations along with a finding of systemic violation of Article 2 TEU. This would permit the Court to develop an Article 2 TEU jurisprudence which would give further guidance to Member States and to EU bodies about the meaning of the core constitutional principles of the Union. It would also, as I will argue below, provide a better framework for achieving more thorough-going compliance. Alternatively, the CJEU could decide in any particular case that Article 2 TEU is not infringed but that nonetheless *some* of the particular alleged violations in the set are confirmed, not rising to the level of systemic violation. In either event, the CJEU should evaluate both the specific alleged violations and the systemic allegation to see whether the whole adds up to more than the sum of the parts or whether all, some or none of the individual alleged infringements should be confirmed on their own. The Commission's allegation of *systemic* infringement would still have to be confirmed by the Court of Justice to find an Article 2 TEU violation, but the Court also has a number of intermediate judgments it could make between finding no violation and finding a systemic violation.

Part II: Assessing Compliance

Suppose that the Commission were to bring a systemic infringement action and the Court of Justice agreed that Article 2 or Article 4(3) TEU was indeed violated. What then?

Successful systemic infringement actions should call for systemic compliance. A Member State should not just be required to fix individual violations that make up the problematic set but also be

¹¹ Kim Lane Scheppelle, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013).

required to address the systemic threat. Compliance should therefore be assessed differently in the systemic infringement action than it is in an individual infringement action to encourage more than superficial patches. Instead, the focus should be on the overall effect of the reforms on the restoration of adherence to important EU values.

A concrete example makes the point more clearly. In the successful Commission infringement action against lowering the judicial retirement age in Hungary, the Hungarian government was ordered to reinstate the judges to comply with the judgment of the Court of Justice. After waiting until it had replaced most of the prematurely retired judges with new appointees, the Hungarian government finally indicated that it would comply by allowing back the senior judges who wanted to return to the judiciary. But the government also said that these prematurely retired judges would not be returned to their former leadership positions because those leadership positions had already been filled. As a result, the judges who insisted on going back to judging were generally assigned by the president of the National Judicial Office to different and lower positions than the ones they left. In the meantime, while this process of engaging in slow-motion compliance was going on, the Hungarian government offered compensation to the prematurely retired judges if they would *not* go back to work, compensation most of the judges accepted. As a result, very few judges have actually returned to judging and none have returned to their leadership posts.

Take one example. Gergely Mikó, the recently appointed head of the important Metropolitan Court in Budapest, noted that 14 of the 70 judges on his court (20%) were forced to retire by the change in the retirement age. As of July 2013, only one had returned.¹² That means that 13 of the 14 judges were successfully removed from the court by the change in the judicial retirement age, despite the successful infringement action. And the court is under new management because change in this court started at the top and disproportionately affected the leadership of the institution.

The Commission put itself in a weak position to insist on a systemic solution by bringing the individual infringement action under EU discrimination law. In discrimination cases, the breach is usually envisioned as violation of an individual right to be treated fairly rather than as an institutional harm. An age discrimination action alleges that the older individuals were treated arbitrarily by a sudden change in the retirement age, not that the institution is worse off when it loses its senior judges. Therefore, compensation of the individuals who had been unjustly harmed would count as a reasonable remedy especially when, as the Hungarian government argued, new judges had already been appointed to the old judges' positions and these new judges also had rights and reasonable expectations to consider. So despite the justifiably aggressive infringement action brought by the Commission, an action that the Court of Justice expedited in response to the fact that the removals of senior judges on grounds on age were ongoing as the litigation proceeded, the Hungarian judiciary now goes on under new management, and most of the prematurely retired judges have never gone back to work. The Commission, as a result, made virtually no difference in the situation on the ground with regard to the independence of the judiciary, even if individual judges were eventually compensated.

European Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding initially said that she would understand compliance in the Hungarian judicial retirement case to mean that the

¹² MTI (Hungarian News Service), Efficiency of Criminal Procedures Increased, Metropolitan Court Leader Says, Politics.hu, 21 July 2013, available at <http://www.politics.hu/20130721/efficiency-of-criminal-procedures-increased-metropolitan-court-leader-says/>.

fired judges would be reinstated in their prior positions.¹³ But if the judges, for whatever reason, no longer want to go back, what can she do? Most of the judges were satisfied by the monetary compensation that the Hungarian government gave them when they won their actions in the domestic labor courts,¹⁴ so how can the Commission insist on the reinstatement of judges who take the money and leave? Perhaps this was why Vice President Reding eventually declared victory in the matter without continuing to insist on the return of the prematurely retired judges. In her major rule of law speech in September 2013, she said:

Hungary has respected – as the rule of law requires – the judgement of the Court of Justice of November last year which confirmed the Commission's view that the anticipated mandatory retirement of 10% of the Hungarian judiciary was not in line with EU law. President Barroso and I were intensely involved in bringing all these matters to a satisfying conclusion from a legal perspective.¹⁵

The framing of the infringement action by the Commission as a small-bore problem of age discrimination enabled the Hungarian government to fix the problem with a small-bore patch of technical compliance: compensation. But the whole infringement action and its enforcement missed the larger point. Even with the quick and strong adverse CJEU judgment and compliance on the Hungarian government's part, the Commission has not been able to influence the entrenchment of political control over the judiciary in Hungary. The threat to judicial independence was not adequately addressed because it was not adequately raised.

A systemic infringement action should therefore not only open up a wider range of allegations to be considered jointly, but should also – when an Article 2 TEU infringement is found – open up a wider range of options for what would count as compliance. If a threat to judicial independence were alleged and confirmed, then the Hungarian government would have to address more than the wishes of the specific judges affected by the one-off lowering of the retirement age. Instead, the government would have to take measures to ensure that faith in the neutrality and objectivity of the judiciary were restored and that judges, particularly the judges who were already in office when this government came into power, were secure in their positions and could not be arbitrarily dismissed. If the prematurely retired judges no longer want to return to their jobs, then correcting what their displacement accomplished should be part of the conversation about compliance, too. This is why the system of appointing, promoting, demoting and disciplining judges should be raised along with the retirement age allegation, because the solution to departure of the senior judges would lie ensuring that the system for hiring new judges resisted political control. Hungary could only come back into line with European values if its political officials could not dismiss older judges who did not owe their careers to the current governing party in order to replace them with newer judges more to the governing party's liking. It would not be easy to design measures to restore judicial independence, of course, but with Article 2 TEU

¹³ Viviane Reding, Hungary and the Rule of Law - Statement of the European Commission in the Plenary Debate of the European Parliament, 17 April 2013. Speech available at http://europa.eu/rapid/press-release_SPEECH-13-324_en.htm?locale=en.

¹⁴ Balázs Áron Kovács for Freedom House, Hungary: Nations in Transit Report 2013, available at http://www.freedomhouse.org/report/nations-transit/2013/hungary#_edn48.

¹⁵ Viviane Reding, The EU and the Rule of Law – What Next?, 4 September 2013. Speech available at http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm.

in play, compliance with a systemic judgment of the CJEU would require that the threat to the independence of the judiciary be addressed so that the rule of law could be restored.

When the Commission decides how to frame an infringement action in the first place, it should be guided by what it would need to accomplish in the compliance phase in order to restore fundamental EU values that were put under threat. The Commission should therefore include in a systemic infringement action the laws and practices that would be crucial to change in order to fix the systemic problem, if the CJEU confirmed the systemic infringement. With the judicial age discrimination case, the Commission focused attention on the unfair treatment of individuals which, important as that is, pales in comparison with the compromised integrity of the whole judicial system. Coupling an age discrimination case with an action challenging the laws that created an overly politicized judiciary would enable the Commission to fashion a remedy along both dimensions – compensation or reinstatement for the concrete individuals affected and also a structural change to the system of judicial selection and management to ensure judicial independence was maintained.

Part III: A New Approach to Fines: Putting EU Funds in Escrow

What if a state remains in persistent noncompliance with basic EU principles? In an ordinary infringement action, the Commission would go back to the Court of Justice for the assessment of a fine under Article 260 TFEU. In a systemic infringement action, the Commission would do the same. But, I would argue, systemic noncompliance in a case of systemic infringement should call for a different method of paying the fine. Instead of billing the Member State to pay the fine from its domestic budget, the Commission and the Court could insist that persistent systemic violators lose their EU funds or, at the very least, have their EU funding streams suspended for as long as the violation continues.

Recently, the foreign ministers of Germany, the Netherlands, Finland and Denmark wrote to the European Commission suggesting that new tools were needed to bring persistently deviating Member States into line:

At this critical stage in European history, it is crucially important that the fundamental values enshrined in the European treaties be vigorously protected. The EU must be extremely watchful whenever they are put at risk anywhere within its borders. And it must be able to react swiftly and effectively to ensure compliance with its most basic principles. We propose addressing this issue as a priority and believe that the Commission has a key role to play here.¹⁶

In particular, they proposed that “as a last resort, the suspension of EU funding should be possible.”

This makes perfect sense. The threat of withholding funds can act as a powerful motivator for a Member State to come into line with European objectives. If a Member State still refuses, it will be clear that Europe cannot always make a Member State change its ways, but at least Europe should not have to pay to see violations of its basic values flaunted.

¹⁶ The Letter from Germany, Finland, Denmark and the Netherlands Request a New Mechanism to Safeguard the Fundamental Values of the EU, 6 March 2013, available at <http://www.rtt.ro/en/scrisorea-prin-care-germania-finlanda-danemarca-si-olanda-solicita/>.

How would a suspension of funds be possible under EU law? The major sanctioning mechanisms are generally embedded in the treaties, and treaty change – with a persistently noncomplying Member State as a veto player – doesn't look very likely. Besides, the problem is now and treaty change takes years.

Secondary legislation could give the Commission the power to suspend EU funds to a persistently noncomplying Member State without requiring treaty change. In other contexts, most notably the Excessive Deficit Procedure (EDP), secondary legislation has already permitted funds allocated for one purpose (e.g. Cohesion) to be docked for failure to comply with the requirements of a different part of EU law (e.g. Stability and Growth). The same sort of secondary legislation could be proposed to deal with Member States that persistently refuse to comply with basic European values in the treaties, allowing EU funding streams to be cut when the Commission and the Court of Justice agree that there has been both a systemic violation and persistent non-compliance in rectifying the problem.

Before proposing a new sanctioning mechanism, however, we should consider the current architecture of existing sanctioning mechanisms within the EU. The primary sanctions available to EU bodies in dealing with noncompliant Member States all involve multi-institutional action. An ordinary infringement action is alleged by the Commission and confirmed by the Court of Justice. An Article 7 TEU procedure that would result in a country losing its vote in the European Council can start with the Commission, Council or Parliament, but must be confirmed by supermajorities of both the Council and Parliament. Putting a country under the Excessive Deficit Procedure and acting to cut EU funds as a sanction requires that the ECOFIN Council confirm a recommendation of the Commission. A sanctioning mechanism given to one EU body that did not have another institutional check within the EU architecture would be an anomaly. Sanctions in the EU have therefore traditionally been – and should remain – multi-institutional processes.

The suggestion of the four foreign ministers that the Commission should have greater capacity to cut funds for persistent deviation from EU norms is therefore not in the spirit of the other sanctioning mechanisms in the treaties unless it is tied to a multi-institutional process. The ministers implied that the Commission might work with the Council to develop sanctions for persistently noncompliant states, but the process of determining whether a particular Member State has violated the treaties should, in my view, be handled as a legal rather than a political matter. If a sanction involves an element of political membership, as Article 7 sanctions do, then a political process is appropriate. But if the question is whether a Member State has systematically violated its treaty obligations through its own laws or practices, as a systemic infringement action alleges, then this is preeminently a legal question. Tying the allegation of a systemic infringement of EU treaty values to a confirmation by the CJEU would keep the process both predominantly legal and relatively familiar as it would follow the pattern established for infringement actions in general. Tying the withholding of EU funds to a systemic infringement action would provide just the sort of inter-institutional agreement that other EU sanctioning mechanisms have.

If the Court of Justice were to confirm a systemic violation of EU law and agree in an Article 260 TEU proceeding to specify a fine, the Commission might then collect the fines ordered by the CJEU by deducting the funds from EU funding streams that the EU would otherwise be paying to the offending Member State. For this, new secondary legislation could provide the authority, on the model of the sanctions permitted under the Excessive Deficit Procedure (EDP). There, the Commission has the power to recommend suspension of Cohesion Funds when a government fails to meet budget targets. The Commission cannot cut funds on its own because a reverse qualified majority of the ECOFIN Council may

veto the Commission proposal to do so. But, as in the case of the systemic infringement action, the EDP ties the docking of EU funds to Member State noncompliance with treaty obligations.

The EDP, however, may tie the disciplinary sanctions only to missed budget targets and not to failure to comply with European values. This is why the four foreign ministers initially suggested that finding “[f]urther ways to promote the rule of law within the framework of the European semester should be explored.” The foreign ministers therefore propose policing European values by adding a more substantive conception of the rule of law to the Europe 2020 goals.

But while one can make the case for enforcing a broader understanding of the rule of law which is already listed among the objectives of the Europe 2020 plan, other important EU values outlined in Article 2 TEU are not specifically defensible in this forum. By contrast, the systemic infringement action permits a robust defense not only of the rule of law, but also of other EU values like the maintenance of democracy and the protection of human rights.

I have argued for a Commission-CJEU mechanism for assessing fines and cutting EU funds, which keeps the sanctions tied to legal judgments rather than arguing for a Commission-Council mechanism that would reflect political judgments. For a cautionary tale about what might happen if a sanctions process for systemic violation were tied to a more political process, we can see what has happened with the EDP which engages the Commission with the Council’s ECOFIN configuration. Shortly, after Hungary’s new constitution came into effect trailing a whole host of worrisome laws, the European Commission proposed cutting Hungary’s Cohesion Funds under the EDP, a procedure to which Hungary had been subject ever since it entered the EU in 2004 and under which Hungary had been the most persistent violator.¹⁷ But the sanctions part of the EDP had never been used before against any country, which lent some credibility to the charge made by the Hungarian government that the sanctions were used selectively. In the end, the sanctions never took effect because other Member States saw that they, too, could be in the crosshairs of the EDP for running too large a deficit in a time of fiscal crisis. Because virtually no other Member States were meeting their budget targets in 2013, cutting funds to one Member State was an untenable political sanction. And so the sanction wasn’t used even though Hungary had the worst deficit record of any EU Member State, a bad record that dated back to long before the global financial crisis that gave Hungary a lot of company in the EDP violators category.

Hungary has provided many reasons for the EU to be concerned about its continued commitment to EU values, but the EDP sanctions could only be tied to continued deficits rather than to bad behavior more generally. Even while the controversies were swirling around Hungary because of its controversial constitutional reforms, the country was able to get out from under the Excessive Deficit Procedure because it instituted a series of extraordinary budget measures that generated more state revenue and cut more state-funded programs without changing anything fundamental in its worrisome new constitutional structure.¹⁸ From this, we can see that not only are existing mechanisms for cutting

¹⁷ European Commission, Commission Proposes to Suspend €495 Million of Cohesion Fund for Hungary for 2013 for Failure to Address Excessive Deficit, Press Release, 22 February 2013, available at http://europa.eu/rapid/press-release_IP-12-161_en.htm.

¹⁸ Council of the European Union, Council Closes Excessive Deficit Procedures for Italy, Latvia, Lithuania, Hungary and Romania, 21 June 2013, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137561.pdf.

EU funds inadequate to address persistent violations of basic values, but also that secondary legislation is capable of establishing just such a sanctioning mechanism, one that cuts funds in one program because of the violations of principles established in another program.

Rather than permanently deducting fines from EU funding streams if a Member State were to be found in systemic infringement of the values of Article 2 TEU, the Commission might consider holding some particular percentage of such funds in escrow until such time as the Member State meets the criteria for systemic compliance that address the violations of Article 2 TEU. In fact, a similar system already exists under the EDP.¹⁹ If a Member State is found to be in violation of fiscal targets, a certain percentage of its Cohesion Funds may be withheld as a “deposit” to the EU, which the EU holds until such time as the deficit is brought back into line. Should the issues not be corrected within two years, the “deposit” may be converted to a “fine,” which is to say that the money would be forfeited by the Member State in question. But otherwise, the funds may be restored if the Member State comes into compliance. That is precisely what an escrow system would do. The withholding of funds acts as an incentive to encourage a Member State to comply because then it would be able to draw on the escrowed funds when it does.

It may be that the reversal of systemic damage to EU values by a Member State would require substantial reforms, and if a Member State has serious and realizable plans for engaging in systemic reform, EU funds could then be released to enable the Member State to carry out this plan. The point, as with ECJ fines more generally, is not to hurt the country and especially not its citizens, but to encourage compliance at the earliest possible moment and to provide assistance for projects that show solidarity with the European Union.

Conclusion: The Systemic Infringement Action—An Idea Whose Time Has Come

In the last five years, European Union has been battered with a double crisis: an economic crisis that has gotten the lion’s share of attention and a moral crisis that is only now starting to sink in. While the EU has already started to bring its institutional competencies into line with Member States’ economic commitments in order to shore up the Euro, the response to the moral crisis is still in its early days. The Tavares Report of the European Parliament has diagnosed the problem in Hungary and shown that there is political will across the European political spectrum to do something to bring Hungary back into the European moral order.²⁰ The many reports of the Venice Commission have also shown just

¹⁹ Council Regulation (EC) 1466/97, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R1466:EN:NOT> on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by Council Regulation (EC) 1055/2005 of 27 June 2005, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005R1055:EN:NOT>, and Regulation (EU) No 1175/2011 - the preventive arm of the Stability and Growth Pact, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1175:EN:NOT>.

²⁰ European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN&language=EN>.

where the problems in the new Hungarian constitutional order lie.²¹ It is time for the Commission to step up to the challenge and to use its existing powers to enforce the treaties in the Hungarian case. The Commission, as guardian of the treaties, has the obligation to ensure that the institutional structures and operating rules of the Member States are brought into line with the moral commitments they made when they joined Europe just as it has the obligation to enforce the financial commitments that Member States made when they joined the Euro.

What I have proposed here is a small adjustment of a well-understood and well-accepted tool: the article 258 infringement action. The systemic infringement action begins from the observation that singling out particular infringements in isolation doesn't properly identify what is wrong when a Member State poses a fundamental challenge to European values. By bringing a *set* of laws, policies and practices before the Court of Justice with a holistic argument about how the pattern infringes not only specific points of European law but also its most fundamental values, the Commission can provide the Court of Justice with the evidence it needs to enforce the most important and fundamental values of the treaties. A systemic infringement action would allow both the Commission and the Court of Justice to give concrete legal meaning to the fundamental normative obligations Member States undertake when they join the EU.

²¹ So far, the Venice Commission has completed nine reports on the new constitutional framework in Hungary. They can be found here: http://www.venice.coe.int/WebForms/documents/by_opinion.aspx.