Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures

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The European Union is experiencing a crisis of values because some Member States are faltering in their commitments to the basic principles that were supposed to be secured by EU membership. Between the financial crisis and the rise of nationalist and far-right parties across the EU, Member State governments have found domestic support both for bashing the EU and for questioning the democratic rotation of power, the unflinching protection of human rights and the security of the rule of law. In this paper, I will propose one way that the European Commission can respond to this backsliding by changing the way it deploys infringement procedures.

While the EU has acted quickly over the last few years to respond to the Euro-crisis, the moral crisis has received far less urgent attention and has caught European institutions largely unprepared. Prospective Member States were required to run the gauntlet of the Copenhagen Criteria to be admitted to the EU, but the Treaties never adequately anticipated that commitments to the values in Article 2 of the Treaty of the European Union (TEU) might be

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1 I would like to thank Gábor Halmai, Dimitry Kochenov, Jan-Werner Müller, Dan Keleman, the participants in the EUI workshop on "Reinforcing Rule of Law Oversight in the European Union" as well as many commentators who have addressed an earlier version of this proposal with such enthusiasm and seriousness. Comments are very much welcome at kimlane@princeton.edu. This article builds on my prior proposals for the systemic infringement action: Kim Lane Schepple, “The EU Commission v. Hungary: The Case for the “Systemic Infringement Action,”” Assizes de la Justice, European Commission, November 2013, at http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversithaspelesystemicinfringementactionbrusselsversion_en.pdf and Kim Lane Schepple, Making Infringement Procedures More Effective: A Comment on Commission v Hungary, Case C-288/12" Eutopia, 29 April 2014, at http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/.

2 Admission to the EU requires that prospective Member States show commitment to these values upon entry. Christoph Hillion (ed.), EU Enlargement: A Legal Approach (Hart 2004).


4 “The Union is founded on 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,
substantially weakened after a Member State gained entry. As a result, the Treaties have no mechanism for throwing out a state that persistently fails to respect the values of democracy, rule of law and human rights.\textsuperscript{5} The “nuclear option”\textsuperscript{6} – Article 7 TEU – permits the EU to remove a Member State’s vote in the European Council.\textsuperscript{7} But Article 7 TEU is more of a quarantine mechanism for the healthy states to avoid being influenced by the pariah state than it is a mechanism for restoring Member State compliance with EU values.\textsuperscript{8} Besides, Article 7 TEU has been widely thought to be unworkable as a practical sanction because supermajorities in the Council and Parliament are required for the success of this option and party alignments at the EU level prevent the key parties from criticizing governments from allied states.\textsuperscript{9} Seeing the problem, the European Commission proposed in March 2014 a new “rule of law mechanism” that provides a roadmap for gathering and assessing evidence that could lead to an Article 7 TEU procedure,\textsuperscript{10} but the European Council’s legal service almost immediately opined that this simple mechanism exceeded the powers of the Commission.\textsuperscript{11} Nonetheless, the Commission seems determined to go ahead in theory, though nothing has followed yet in practice.\textsuperscript{12} The other key proposals on the table – for example, a “Copenhagen Commission” to review Member States for their continued compliance with the Copenhagen Criteria\textsuperscript{13} – are widely assumed to require Treaty change.\textsuperscript{14} Not only would Treaty change take a long time but it requires unanimity. And any Member State that sees itself in the crosshairs of such a proposal has every incentive to veto the change.

\textsuperscript{5} There is, of course, now a procedure for Member States to leave the EU of their own volition: Article 50 TEU. For an analysis: Adam Łazowski, \textit{Withdrawal from the European Union: A Legal Appraisal} (Elgar 2015).

\textsuperscript{6} Commission President José Manuel Barroso called Article 7 the “nuclear option” in his State of the Union Speech in 2012 at \url{http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm}.

\textsuperscript{7} See Christophe Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means,’ in this volume; Wojciech Sadurski, ‘Adding Bite to the Bark: The Story of EU Enlargement, Article 7 and Jörg Haider’ [2010] 16 Columbia J Int L 385.

\textsuperscript{8} I’m indebted to Jan-Werner Müller for this idea.


\textsuperscript{13} The Copenhagen Commission was first proposed by my Princeton colleague Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law within Member States?’ [2015] 21 ELJ 141. See also his paper in this volume.

\textsuperscript{14} Carlos Closa, Dimitry Kochenov and J.H.H Weiler, introduction to this volume.
What, then, can be done with the tools at hand? I propose a new approach which is a simple extension of an old mechanism: the infringement procedure created in Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU). The Commission could signal *systemic breach* of fundamental Treaty obligations by a Member State by *bundling a group of specific alleged violations together* to argue before the Court of Justice of the European Union (CJEU) that the infringement of EU law in a Member State is not minor or transient, but systemic and persistent. Unlike the usual infringement procedure in which narrowly focused elements of Member State action are singled out for attention one at a time, a *systemic infringement procedure* would identify a pattern of state practice that, when the individual elements are added up, constitute an even more serious violation of a Member State’s fundamental EU obligations than the individual elements, taken separately. It is this *pattern* that would give rise to the finding of a *systemic* breach. By using the common infringement procedure in new ways, the Commission would be deploying a tried and true instrument but it would use this familiar method to achieve a more ambitious purpose.

As I will argue below, a CJEU finding of systemic violation could open up a space for the Commission to require systemic compliance with EU values, something a Member State would find more difficult to evade than compliance with a more narrowly tailored judgment and something that would be more likely to ensure accomplishment of the goals of the Union. If a Member State fails to comply with a systemic infringement judgment, we should develop more incentivizing sanctions for restoring European values in the Member State by suspending EU funds.

### I. Rethinking the Ordinary Infringement Procedure

Infringement actions under Article 258 TFEU are typically brought by the Commission to challenge a specific and concrete violation of EU law by a Member State. 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 more...

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16 Wennerås has noted that the Commission seems to prefer bringing multiple separate actions of smaller bore rather than one larger action putting the pieces of a broader puzzle together. This piecemeal approach has made it more difficult for the Commission to win substantial remedies at the compliance and sanctioning stage. Pål Wennerås, Making Effective Use of Article 260 TFEU, in this volume [hereinafter Wennerås, Making Effective Use].

17 Hillion has argued that the desiderata contained in Article 2 TEU are not just vague orienting principles of the Union but are common values that Member States have obligations – even legal obligations – to internalize and promote. Christophe Hillion, “Overseeing the Rule of Law in the EU: Legal Mandate and Means,” in this volume.

general willingness to observe EU law, particularly when a Member State threatens basic EU principles of democracy, rule of law and protection of human rights or persistently undermines the enforcement of EU law within its jurisdiction.\textsuperscript{20}

Ordinary infringement actions are important, but they are often too narrow to address the structural problems that persistently noncompliant states pose. To take one example, consider the infringement action that the Commission brought against Hungary when it suddenly lowered the judicial retirement age and removed from office the most senior 10\% of the judiciary.\textsuperscript{21} This action permitted the Hungarian government to replace many judicial leaders with judges more to their liking and thereby threatened the independence of the judiciary which, in addition to enforcing national law, is crucial to the enforcement of EU law. The Commission brought an infringement action in the matter, claiming age discrimination.\textsuperscript{22} While the Commission expedited the case and won a resounding victory at the CJEU,\textsuperscript{23} the Hungarian government was able to avoid restoring the most important judges to their prior

\textsuperscript{19} Andrew Williams, \textit{The Ethos of Europe: Values, Law and Justice in the EU} (Cambridge 2010); Ester Herlin-Karnell, ‘The EU as a Promoter of Values and the European Global Project’ [2012] 13 German LJ 1225.


\textsuperscript{22} C-286/12 \textit{Commission v Hungary} [2012].

The government offered the judges compensation instead, a reasonable remedy in a discrimination case. Not surprisingly, many of the judges reportedly chose the compensation and collected their pensions instead, rather than return to new jobs in the judiciary. In the end, the Commission had to declare victory and say that the Hungarian government had complied

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24 After an amendment to the law on the judiciary in March 2013 permitting previously retired judges to return to work, the Hungarian government reported that 152 judges were reinstated although only 21 were returned to their original high court administrative positions. Fifty-six chose lump-sum compensation, one reached age 70, which was the original retirement age, and another died. U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2014, Report on Hungary, at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236532. The Hungarian government’s figures indicate that three-quarters of the judges were reinstated, which may have been why the European Commission eventually found that Hungary had complied with the judgment of the CJEU. But these official statistics don’t square with other sources of information about the fate of the judges. First, a number of judges seem to be missing from this report. The government’s numbers only cover 210 judges, when the Venice Commission estimated that the number might be as high as 270. Venice Commission, 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), CDL-AD(2012)001-e, 27, at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29001-e. The International Bar Association thought the number was larger than 270. International Bar Association, Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary (September 2012), at http://www.ibanet.org/Document/Default.aspx?DocumentUid=89D4991A-D61F-498A-BD21-0BAFFA6ABF17. The Hungarian government’s figures don’t seem to account for almost one quarter of the judges who were probably affected by the policy.

The official statistics on the number of judges who returned to their jobs also contrasts sharply with detailed reports about the reinstatement of judges on particular courts, particularly the most important general court in Budapest, the Metropolitan Court. Gergely Mikó, president of court, said that 14 of the 70 judges on his court were forced by the change in the retirement age to retire but only one was reinstated. ‘Efficiency of criminal procedures increased, Metropolitan Court leader says,’ MTI (Hungarian News Agency), 21 July 2013, at http://www.politics.hu/20130721/efficiency-of-criminal-procedures-increased-metropolitan-court-leader-says/. So, on that particular key court the reinstatement rate was only 7% instead of the 72% the government claimed overall. For these reasons, I suspect that the Hungarian government’s numbers may not be reliable.

with the CJEU decision, even though the government had nonetheless been able to engage in a major reshuffle of Hungary’s judicial leadership. This was a conventional infringement action – successful in legal terms. But it changed very little in the troubling situation on the ground.

If a Member State is threatening the basic values of the Treaties or putting the legal guarantees presumed by EU law in doubt, it is probably violating more than one precise slice of EU law. Under present practice, the Commission picks its battles, so it currently fails to bring many actions that it might otherwise be justified in launching. As Wennerås notes, the Commission lacks the resources to monitor application of all EU law across 28 states. But, as he also points out, the Commission has a tendency to see problems as individual trees rather than as larger forests and to bring larger numbers of small cases rather than smaller numbers of large cases. The CJEU has encouraged the Commission to consolidate actions to highlight more “general and persistent” violations, but the Commission uses this option infrequently. As the current Commission practice stands, only some violations – and not necessarily the most substantial ones – are raised in infringement procedures, giving rise to an under-enforcement of EU law.

One remedy to the under-enforcement problem would urge the Commission to simply increase the number of individual infringement actions against persistently violating states. But even if the Commission were to multiply narrowly tailored infringement actions to signal greater concern about a particular Member State, the CJEU is not institutionally able to see the patterns at issue if the cases are filed as they presently are: one by one, and separately, if at all. The Court of Justice has many panels of judges in its normal operation so that it is quite possible that a set of discrete infringement actions could be considered by different panels at the Court without any specific judge ever seeing the patterns specific to a particular Member State that would demonstrate the more serious threat to the basic values of the Treaties. The CJEU, unlike the European Court of Human Rights, does not have the principle that the national judge must sit on every case from her home country (and therefore, in practice, that the same panel of judges hears all of the cases from the same state). Instead, the CJEU assigns cases to panels of judges randomly. Moreover, the case load is sufficiently high that one panel may not know that another panel within the same Court is hearing a case from the same country that

27 Wennerås, Making Effective Use.
28 Ibid. at notes 51-60.
29 Only very occasionally has the Commission filed several cases that link a variety of infringements in a particular area of EU law together to show a pattern of violation. And in some of these cases, the Court has confirmed the patterned violations: C-494/01 Commission v Ireland [2005]; C135/05 Commission v Italy [2007]; C-88/07 Commission v Spain [2009]. But this strategy of showing broader patterns of violation is not a general practice, nor have the cases taken on the more ambitious point of showing a persistent violation of core EU values.
raises some of the same rule-of-law issues unless the cases are on the same narrow doctrinal point.\textsuperscript{30}

The Commission could overcome some of this fragmentation by requesting that Court of Justice assemble a Grand Chamber\textsuperscript{31} 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 because such evidence would be beyond the boundaries of any specific case. But the Court must have a wider field of vision to see what is happening within a persistently violating state to assess the legal situation adequately. A different strategy of framing cases seems called for, a strategy that puts specific violations in a broader view and that sets the stage for the sort of remedies that would be necessary to bring a Member State back into line with basic values. For that, the Commission needs the option of the systemic infringement procedure.

A systemic infringement procedure could be launched when the Commission recognizes that a Member State is engaging in a systemic violation of EU principles and is not just violating a particular narrow provision of EU Law. A systemic infringement action would aim directly at the systemic nature of the violation by compiling a single legal action from a set of troubling laws, decisions and actions. Bundling together a pattern of violations that adds up to more than the sum of the parts would allow the Commission to capture a whole worrisome practice and not just a component part of that practice. That said, the systemic infringement action needs to be more than simply a bundle of unrelated complaints, joined only by coming from a single Member State. The case should be tied together with an overarching legal theory that links the allegations together, making the systemic violation clear and pointing to a systemic remedy.

Bundling together a set of violations to demonstrate a larger pattern is hardly radical; in fact, the Commission has already tried it and the Court has confirmed the practice.\textsuperscript{32} In Commission v Ireland,\textsuperscript{33} the Commission provided evidence that 12 different waste disposal sites in Ireland had been allowed to operate in flagrant violation of the Waste Directive.\textsuperscript{34} The number mattered; one or two sites might have been the fault of specific local governments or site operators. Twelve sites, located all over the country, spoke to a general lack of enforcement of a Directive that had been in force for nearly 25 years at the time that the Commission brought its action. “This tolerant approach [to the enforcement of the Directive],” wrote the Court, “is indicative of a large-scale administrative problem . . . and it was sufficiently

\textsuperscript{30} For the structure of the Court, the composition of the Chambers and the system of assignment of opinions, see Koen Lenaerts, Ignace Maselis and Kathleen Gutman, \textit{EU Procedural Law} para. 2.04, 2.10-2.13 (Janek Tomasz Nowak ed, Oxford 2014) [hereinafter Lenaerts, EU Procedural Law]

\textsuperscript{31} “The Court shall sit in a Grand Chamber when a Member State or an institution of the Communities that is party to the proceedings so requests.” Statute of the Court of Justice, Ch. II, Article 16.

\textsuperscript{32} See the discussion of this issue in Lenaerts, EU Procedural Law at Sec 5.11, pp 166-167 with many examples in the notes).

\textsuperscript{33} C-494/01 [2005].

general and long-lasting to enable the conclusion to be drawn that a practice attributable to Irish authorities existed.”

As the Court argued, one instance of violation would have disguised the systematic nature of the problem and would not alone have been enough for the Court to attribute the failure to the Member State. While the Court did not outline a general standard for determining when the sum of individual violations would add up to more than the sum of the parts, AG Geelhoed opined that a “structural infringement” required demonstration that the violations were of sufficient duration, persisted over a range of particular examples and demonstrated sufficient seriousness to warrant a finding of an infringing pattern.

The Court gave similar judgment against Italy, also for violation of the Waste Directive, after the Commission documented 4,866 illegal tips, located all over the country. The Commission referred to its approach in that case as “horizontal,” enabling it to “identify and correct more effectively the structural problems.” The Court agreed, finding that the Italian government had “generally and persistently, failed to fulfil its obligations.”

“General and persistent” violations have been found in a number of cases where the Commission has brought together evidence of a pattern of violation. But there are also a depressingly large number of cases in which the Commission’s “general and persistent” violation cases were not affirmed by the Court. In each case, however, the Court asserted its willingness to hear “bundled” cases; the cases collapsed over the proof of the pattern, either because not enough instances were investigated, because the duration of the violations was not clear or because the instances investigated did not add up to a pattern on a common subject. The problem, therefore, seems to be evidentiary and not jurisprudential.

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35 C-141/01 at para 133.
36 AG Geelhoed, Opinion in C-141/01, 23 September 2004.
37 C-135/05 Commission v Italy [2007] at para 10.
38 Ibid at para 19.
39 Ibid at para 44.
40 See, e.g., C-88/07 Commission v Spain [2009] (finding Spain in violation of the Directive on medicinal products for human use because it withdrew more than 200 products that were in circulation in other Member States if they were not specifically listed in a national law that did not assess on a case-by-case basis whether the items were dangerous to human health; the case depended on challenging not only the limiting law but also the 200 examples of substances actually removed from pharmacy shelves).
41 Case C-34/11 Commission v Portugal [2012], paras 41-50 (Commission failed to establish air pollution violations for a sufficient number of locations or over a long-enough span of years); Case C-68/11 Commission v Italy [2012], paras 49-57 (Commission failed to specify locations and duration of air pollution); Case C-160/08 Commission v Germany [2010], paras 113—123 (Commission failed to show that the lack of public tenders was widespread in a particular substantive field); Case C-416/07 Commission v Greece [2009], paras 44-49 and 97-100 (Commission failed to provide adequate proof that Greece had failed its obligations to protect animals during transport to slaughter); Case C-342/05 Commission v Finland [2007], paras 32-39 (administrative practice can be a violation of EU law, but it must be shown to be consistent and general); C-156/04 Commission v Greece [2007], paras 44-53 (establishing an administrative practice requires more than two cases); Case C-441/02 Commission v Germany [2006], paras 44-56 (Commission failed to establish an administrative practice of a consistent and general nature).
As these examples indicate, bundling together a series of specific violations to demonstrate a larger pattern is no longer a radically novel idea in the Court’s jurisprudence. But the use I propose is different from the uses we have seen thus far. Instead of simply documenting a pattern that shows EU law has been violated, the systemic infringement procedure would focus on claims that raise questions of more fundamental sort, where the Member State’s commitment to European values would be raised by the way the action is framed. The systemic infringement procedure would therefore be distinguished from the pattern-based cases by the seriousness of the violations alleged in European constitutional terms.

Systemic infringement procedures before the Court could be structured doctrinally in one of several ways. First, and perhaps most ambitiously, they could directly allege that a pattern of Member State conduct violates one or more of the basic principles outlined in Article 2 of the Treaty of the European Union (TEU). This would have the disadvantage of being a novel form of legal action. A number of commentators believe that Article 2 TEU can only be enforced through Article 7 TEU, a distinctly political procedure, which may make judges of the CJEU believe that they are treading on territory that it is not theirs to police. But an increasing chorus of voices is starting to argue that CJEU enforcement of Article 2 TEU is thinkable. For example, Former Commission Vice President Viviane Reding, while she was still in office holding the Justice portfolio, suggested that the Commission might consider grounding an infringement action in Article 2 TEU. Christophe Hillion’s chapter in this volume makes the case more strongly, arguing that the Commission as guardian of the Treaties should be able to enforce Article 2 TEU to ward off more serious violations. He envisions judicial enforcement of Article 2 as a precautionary measure seeking to dissuade offending Member State from engaging in conduct that might spur an Article 7 TEU procedure. Most recently, the “Editorial Comments” in the Common Market Law Review noted that “the Treaties neither restrain nor exclude the Court of Justice’s jurisdiction in relation to Article 2 TEU. Had such limitation been wanted, the primary law-makers could have made it explicit.”

44 Christophe Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means,’ in this volume.
A novel action would take some serious work to launch it. In particular, many of the Article 2 values are stated very broadly, and critics say it would be difficult to create workable definitions of those general terms that would make Article 2 legally enforceable. But one might start with the rule of law, which is not a mysterious concept to a judge. Surely, it includes the idea of judicial independence, and the CJEU already has a jurisprudence specifying what it means for other important EU institutions to be independent. Using these standards, the CJEU could easily assess whether the independence of a Member State’s judiciary had been compromised, something that would raise serious questions about the Member State’s commitment to the rule of law as an Article 2 principle.

Take an example from Hungary. As we have seen, the CJEU already found that the government of Hungary committed unlawful age discrimination when it suddenly lowered the judicial retirement age and fired the senior-most 10% of its judiciary. But surely the problem was not just age discrimination. When criteria for holding office can be changed so that current occupants of judgeships can be suddenly removed from office, this is also an infringement on the independence of the judiciary. In assessing what it means for an institution to be independent, the CJEU could take a page from its own jurisprudence on the independence of data protection officers in Member States. Hungary had just such a case before the Court when the office of data protection ombudsman was reorganized and the current occupant was fired before the end of his term. In that case, the CJEU said:

54. If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence.

If one simply substitutes the word “judge” for “supervisory authority” in that paragraph, one would have a strong argument that the lowering of the judicial retirement age was not just age discrimination, but also a violation of judicial independence. The Court already has the tools, the standards and the existing jurisprudence to do this.

Finding that a country altered the job qualifications for sitting judges might be enough for a systemic infringement action, since it would mean establishing that it was not just one judge, but fully 10% of the judiciary that had been fired in this way, showing a pattern of

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46 Ibid at 625. But the author(s) then went on (at 626) to argue that the EU judiciary could also contribute to the clarification of Article 2 TEU.

47 See, for example, the cases on the independence of data protection commissioners: Case C-288/12 Commission v Hungary [2014] (GC); Case C-518/07 Commission v Germany [2010] (GC); Case C-614/10 Commission v Austria [2012] (GC).

48 See text at n xxx.

49 Case C-288/12 Commission v Hungary [2014].
practice. But in the Hungarian case, there is much more. When the retirement age was lowered, the sitting president of the Supreme Court – too young to be affected by this change – was removed because the government changed the qualifications for his job and applied the changes immediately to him. Former Supreme Court President András Baka has since won a case at the European Court of Human Rights over his firing.\(^{50}\) While the Hungarian government was ensuring a high level of turnover at the highest levels of the judiciary, it also radically overhauled the system of judicial appointments,\(^{51}\) giving the power to appoint, promote, demote, reassign, discipline and remove judges to a single political official close to the government who, for two years, also had the power to move cases from the courts to which they were assigned by law to other courts around the country.\(^{52}\) The Venice Commission\(^{53}\) and the International Bar Association\(^{54}\) found that these measures put the independence of the judiciary in danger.

A systemic infringement procedure could bring together this set of changes – the lowering of the retirement age and consequent termination of judicial appointments, the change of qualifications for judges already in office, the new system for appointing judges that concentrated power in the hands of one political official and the power of this political official to move cases around the court system on her own remit – and allege that the independence of the judiciary has been infringed by each item separately but even more comprehensively by the set together. Article 2’s rule of law provision could provide a doctrinal anchor for this action. One doesn’t have to have a precise definition that covers cases at the margins to identify a case that goes to the heart of a principle and one doesn’t have to have a precise definition of every single term in Article 2 to be able to enforce the terms more amenable to adjudication.

\(^{50}\) *Baka v Hungary* App. no. 20261/12 (ECtHR, 2012).


But legally enforcing the broad principles of Article 2 TEU is not the only theory under which a systemic infringement action could be framed. A systemic infringement procedure could argue, alternatively, that a systemic violation of the basic principles of EU law puts a Member State in violation of Article 4(3) TEU. This is familiar ground to the CJEU, which has already developed an extensive jurisprudence of “sincere cooperation” or loyalty.\(^{55}\) Using this rubric, the Commission would argue that the challenged laws and practices of the Member State systematically interfere with the operation of EU law in the Member State’s jurisdiction and thus violate the Member State’s loyalty obligations.

To see how this might work, consider reframing the proposed infringement procedure on the independence of the judiciary in Hungary as an Article 4(3) TEU action. National courts are, of course, also Union courts, since they are primary enforcers of EU law. If the national courts have been fundamentally reorganized in a Member State to be structurally dependent on political will, then the ability of the national courts to independently assess violations of EU law may be called into question. The laws themselves could be given as evidence that the judiciary has fallen under political influence.

To make the case under Article 4(3) TEU, and to tie the matter more directly to the dangers of mistaken application of EU law, some concrete examples of political pressure being successfully applied to politically vulnerable judges would strengthen the case. Unfortunately, there are already such examples from Hungary, where political officials publicly attacked judicial decisions in cases involving EU law and judges afterwards changed their minds. A tragic car accident in which a drunk driver from Slovakia fell asleep at the wheel and crashed into a car on a Hungarian highway, killing four, may not sound like an EU law case. But when the Slovakian driver was sentenced to six years in prison and given a suspended sentence pending the government’s appeal of the judge’s leniency, an EU law issue emerged. The head of the governing party’s fraction in the Parliament, Antal Rogán, publicly attacked the judge for not jailing the woman immediately, arguing that the Slovakian woman would flee back to Slovakia. And that afternoon, another court revoked the suspended sentence and sent the woman to jail. But the European arrest warrant provides a remedy in case a criminal suspect flees to another EU member state, so citizens of another EU Member State should be treated no differently than citizens of the country where the criminal sentence was issued.\(^{56}\) In another recent case, a Roma school run by the Greek Orthodox Church was challenged because it included only Roma children, after a decision from the European Court of Human Rights had found that Hungarian schools were engaged in pervasive discrimination.\(^{57}\) The lower courts that heard the case noted that the church operated parallel segregated Hungarian and Roma schools, and found

\(^{55}\) For a comprehensive account of the loyalty principle in EU law, see Marcus Klamert, The Principle of Loyalty in EU Law (Oxford 2014).

\(^{56}\) For one detailed account of the case, see Eva Balogh, ‘Political Interference with the Hungarian Judiciary,’ Hungarian Spectrum, 5 December 2013 [hereinafter Political Interference], available at http://hungarianspectrum.org/2013/12/05/political-interference-with-the-hungarian-judiciary/.

\(^{57}\) Horváth and Kiss v Hungary App No 11146/11 [ECtHR, 29 January 2013].
the schools in violation of both the ECtHR decision and the Equal Treatment Act.58 These decisions outraged Education Minister Zoltán Balog who publicly attacked the courts and threatened to change the law. The Supreme Court (Kúria) then reversed the decisions below and upheld the government’s position, despite the obvious conflict with both an ECtHR judgement and the statute transposing the EU directive.59 The strong attacks in the public press by governing party officials against the particular judges who made these decisions and then the later compliance of other judges in the system with these partisan demands have given rise to the public view that the judiciary is now subject to political pressure.60 A Member State in which judges publicly change their minds under political pressure cannot be said to have an independent judiciary. It becomes an EU law matter under Article 4(3) when national legal changes substantially infringe the independence of the judiciary and when the pressure extends to wrongly deciding cases in EU law.

In a third variant of the systemic infringement procedure, the Commission could allege that a Member State has engaged in a systemic violation of a particular substantive area of EU law through a pattern of conduct that adds up to more than the sum of the parts. As we have seen, the Commission has already done this with its “general and persistent” jurisprudence.61 But a systemic infringement procedure could elevate the existing practice to permit it to reach cases that challenge EU values contained in Article 2 TEU, which include protection of human rights. Instead of using Article 2 TEU directly, the Commission could allege that a Member State’s infringement of EU law rose to the level of violating individuals’ rights under the Charter of Fundamental Rights.

Article 51 of the Charter limits the scope of the Charter to EU institutions and “to the Member States only when they are implementing Union law.”62 But if a Member State’s systemic violation of EU law is sufficiently extreme, then the rights of EU citizens within that Member State may be endangered. Perhaps a critic might argue that the Charter should not apply where Member State misapply or doesn’t apply EU law when it should. But that is a formalism bound to fail.63

60 Both the Hungarian Association of Judges and the President of the Hungarian Supreme Court have issued warnings that incidents like this make it appear that judges are politically controlled. Balogh, Political Interference.
61 See text at notes xx-xx.
62 Charter of Fundamental Rights, Article 51(1).
63 See Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights.’ 8 Eur Con L Rev 375 (2012) (arguing that the Charter should apply to Member States’ actions even when they have
If the Commission is the guardian of the Treaties—all Treaties, including the Charter—then it has an obligation to ensure that fundamental rights are protected when violated by Member States implementing EU law. Here, the Commission would not be bringing a case against a Member State that infringed a particular individual’s right, but would instead bring an Article 258 TFEU action for situations in which the regular misapplication of EU law itself generated a practice of widespread rights violation.

It is easier to see how this new form of action would work with an example. The Commission might focus on Hungary’s persistent violations of the Data Protection Directive. Since 2011, the Hungarian government has repeatedly gathered the personally identifiable political opinions of individuals through mass surveys (“social consultations”) without legal limitations on how the data may be used or how long it might be kept. This is not just a violation of Article 8(1) of the Directive, which directly bans government collection of individually identifiable political opinion but it is also a violation of Article 6(1) of the Directive that requires clear legal limits on the collection and use of personal data. Social consultations might also be a violation of Article 28(2) of the Directive which requires the data protection officer to be involved in all personal data collection efforts, given that the data protection ombudsman had been fired when he brought a legal action against this data collection activity claiming, among other things, that he had not been consulted before the questionnaires were sent out. The Court has already established that the prior data protection ombudsman had been fired in violation of the Directive, which requires his complete independence. It could examine the independence of the new data protection officer, who currently housed in an agency nested inside a government ministry, and who has not objected to the practice of social consultation. He dropped the case started by his predecessor challenging these data collection practices and a new social consultation was sent out in spring 2015. The European Parliament resolution against Hungary passed in June 2015 specifically criticized Hungary on the data derogated from EU law). Surely, under this logic, Charter rights should apply to Member States misapplying EU law.


66 Case C-288/12 Commission v Hungary [2014] [GC].

protection issues, including the requirement that people provide personally identifiable information in response to questions about immigration.68

The collection of personally identifiable political opinions without legal limit is not just a violation of the Data Protection Directive, but it is also a violation of the individual right of data privacy protected by Article 8 of the Charter of Fundamental Rights.69 If Hungary were to be found not just to have infringed EU law but also to have violated the fundamental rights of its citizens in doing so, then the shadow of Article 2 TEU would fall over the case. But, if the case were brought as a systemic violation of the Directive plus an allegation of the infringement of a particular right in the Charter, then the CJEU would not have to rule directly on Article 2. In fact, the same logic would apply to our earlier example of judicial independence, because the Commission could add to the bundled set of complaints mentioned there an allegation that these practices caused a violation of Article 47 of the Charter, the right to an effective remedy and a fair trial.70

Systemic infringement procedures identify the seriousness of violations committed by persistently challenging states by raising important EU principles in addition to more technical violations. They therefore also open up a different conversation about what compliance would mean. By grouping together a set of laws, decisions and practices together to make a more general case, the Commission would be laying the ground for arguing that systemic violations of Member State obligations must be met with systemic compliance.

Regardless of the way that it is ultimately grounded in EU law, a systemic infringement procedure would enable the Commission to signal to Court of Justice a more general concern about deviation from core principles than a more narrowly tailored infringement action would allow. It would also have the advantage of putting before the CJEU all at one time evidence of a pattern of violation so that the overall situation in a particular Member State is not lost in a flurry of individual complaints, 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 set of allegations packaged together add up something more systemic in a way that violates basic EU values, or it could find that only some of the allegations within the set violate particular aspects of EU law. Just as with the “general and persistent” cases, the CJEU would ultimately have to determine whether the larger pattern of infringement was demonstrated by the Commission.

II. Reframing Compliance under the Systemic Infringement Procedure

If the CJEU agrees that a Member State’s conduct rises to the level of a systemic violation, then compliance with the Court’s judgment should also be systemic. A Member

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69 Charter, Article 8.
70 Charter, Article 47.
State should be required to fix not just small technical violations in its implementation of EU law but it should also be required to fix the systemic threat to EU principles. Compliance should therefore be assessed differently than in a more highly tailored infringement action. A systemic infringement action should therefore open up a wider range of options for what would count as compliance, something to which the CJEU would contribute by finding a range of linked practices to be violations of EU law.

Pål Wennerås has noted that the Commission often seems not to look ahead to the compliance and sanctions phases when it files infringement procedures under Article 258 TFEU. As a result, the Commission sometimes finds that it must file a new Article 258 TFEU action to mop up the spillover from its initial action to make the sanctions effective. If the Commission goes back to the CJEU for to assess a fine for failing to comply with the initial decision of the Court under Article 260 TFEU, the sanctions must be limited to failure to do what the CJEU ordered. If the CJEU found no violation of a neighboring provision or practice that would be essential to change in order to get full compliance with its ruling, then the CJEU will not approve of sanctions that target the provision or practice that was not raised in the initial action. This problem, which becomes especially visible under Article 260 TFEU, no doubt blows back over the ability of the Commission to effectively enforce a judgment in the first place as it seeks initial compliance. If an infringing Member State can see that the Commission’s hands are tied, enforcing the ruling of the Court and precisely no more, the Member State can evade systemic compliance by limiting its responses as narrowly as possible to those specific items. If infringement of EU law extends to the infringement of EU principles, however, a narrowly tailored CJEU ruling may not provide enough leeway to the Commission to ensure full compliance.

Take the Hungarian judicial age discrimination case, for example. Instead of bringing the case as a matter of age discrimination, suppose the Commission brought the question of judicial independence before the CJEU in a systemic infringement procedure, claiming that Hungary was violating the rule of law under Article 2 TEU or that it was infringing the loyalty principle under Article 4(3) TEU. If the CJEU confirmed the systemic infringement, 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, unlike in the simple discrimination case. With a more systemic framing, compliance could require measures to ensure that faith in the neutrality and objectivity of the judiciary was restored. This might include ensuring in law and practice that judges were secure in their positions and could not be arbitrarily dismissed, demoted or disciplined if they ruled against the government. If the prematurely retired judges no longer wanted to return to their jobs, then compliance should consider difference it made that they had been removed.

In this example, and in fact in almost any case one can imagine that would rise to this level of seriousness, the Commission will probably not be the first institution to take note of the problems and to assess both what is happening and what should be done to correct the

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71 Wennerås, Making Effective Use.
problem. In the Hungarian case, the Venice Commission had reviewed the country’s judicial reform twice. It had found fault with the political nature of judicial appointments and had argued for a stronger role of the National Judicial Council in personnel matters so that judges’ careers were largely controlled by judges. Moreover, the Venice Commission disapproved of the system in which all Hungarian judges were reviewed by the presidents of their courts, many of whom were themselves appointed in this political process. The Hungarian government made some minor changes in response to the Venice Commission report, but the Venice Commission assessed those changes and argued that they did not go far enough to guarantee independence of the judiciary. There were other specific recommendations in the two Venice Commission reports on the Hungarian judiciary that the Hungarian government never acted upon; the European Commission could start with those recommendations as a way of ensuring independence of the judiciary. Of course, the point of requiring reform would not be just to have the right structures on paper but to ensure the independence of the judiciary in daily practice, so a monitoring mission might be created to ensure that the reforms worked. Obviously having Venice Commission reports and other expert assessments of the problem would be helpful in designing what compliance with EU principles should look like. The general point, however, is that a finding of the CJEU that there has been a systemic violation should be followed by a plan for systemic compliance.

Some might object that the European Commission has no power to micromanage the detailed institutional arrangements of Member States, a very sensitive subject. The internal political structures of Member States are broadly protected by Article 4(2) TEU, which requires that the Union respect Member States’ “national identities, inherent in their fundamental structures, political and constitutional. . .”. But surely the constitutional arrangements of Member States have to be broadly compliant with the values listed in Article 2. Would there really be no remedy in EU law if a Member State government permitted its Prime Minister to fire any judge who sided with the EU against the government in a matter of EU law? Would there really be no remedy in EU law if a Member State government engaged in widespread

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73 Ibid. at para 53.
human rights violations while implementing EU law? If the answer is that “this is what Article 7 is for,” then that presupposes that legal violations have only political remedies. While ultimately, Article 7 is the only way to launch political sanctions like removing a Member State’s vote in European institutions, there is surely a place for legal sanctions to attempt to prevent a Member State’s violations from getting to this point. Giving the Commission the power to require that a Member State follow the recommendations of the Venice Commission, for example, would be one way to do that.

As this example illustrates, the point of a systemic infringement action is to bring the Member State into compliance with European principles in the end. Given this goal, the Commission should decide how to frame a systemic infringement action at the start by thinking ahead to what it would need to accomplish in the compliance phase in order to achieve that goal. The Commission should therefore include in the systemic infringement action the laws and practices that would be crucial to change in order to fix the systemic problem, if the CJEU confirms the systemic infringement. Challenging a broader set of laws, practices and outcomes would enable the Commission to fashion a remedy that would permit the key principles of the EU to be realized in practice. In fact, the systemic infringement action’s primary rationale is that it focuses attention on compliance with the principles underlying EU law rather than simply fixing one-off complaints with patches.

III. Suspending EU Funds as a New Approach to Fines

What if a state remains in systemic and persistent noncompliance in violation of a decision of the CJEU? In an ordinary infringement action, the Commission would go back to the CJEU for the assessment of a fine under Article 260(2) for general violations of CJEU decisions or Article 260(3) TFEU for failures to transpose directives. The same options would be open to the Commission in a systemic infringement procedure if the Member State did not engage in systemic compliance. But, I would argue, these cases should be accompanied by a new option for levying the fine. Instead of charging a fine to be paid from the Member State’s treasury, the Commission should instead seek to suspend payment of EU funds to the offending Member State in the amount of the fine.

Why seek fines at all? At the moment, the only sanction available under Article 260 TFEU is the payment of fines. But as the comprehensive study by Brian Jack has concluded, the threat of fines rarely results in the actual payment of fines, because states typically comply at the last minute before the payments must be made. But compliance is achieved only after substantial delays, regardless of whether the fines are charged per day or charged in a lump sum. Since the average time between an adverse judgment against a Member State in an

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76 Wennerås suggests that Article 260 TFEU may not be limited to enforcement only in Article 258 TFEU procedures, but argues that it might also be used with actions brought under Article 108(2) TFEU, Article 114(9) TFEU and Article 348(2) TFEU. Wennerås, Making Effective Use.

infringement procedure under Article 258 TFEU and the subsequent judgment about penalties under Article 260 TFEU is nine years: “In truth, the EU lacks an effective mechanism to prevent Member States from using penalty payments to ‘purchase’ continued noncompliance or indeed from simply ignoring both Court judgements.”

Revisions in the Lisbon Treaty were designed to streamline the Article 260 proceedings. Now, the Commission can ask for sanctions for failure to transpose directives directly under Article 260(3) TFEU and no longer needs to produce a separate reasoned opinion for the sanctions requested in other cases under Article 260(2) TFEU. Jack’s investigation shows that these adjustments worked: fines are being requested and granted faster now than before the Lisbon modifications. But Member States still drag their feet and stall recognition of the judgment – and then when Member States finally come into compliance, the sums they owe are completely forgiven. Jack concluded that available sanctions are not doing the work that they should because Member States suffer no penalty from delaying compliance for years and years. While this seems a persistent problem already, it is an even more serious problem with persistently and pervasively violating states because their non-compliance is a more substantial threat to the operation of the European Union as well as to the realization of rights for EU citizens. Some more effective sanction is needed in these extreme cases.

In March 2013, 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.

78 Ibid at 421.
79 Wennerås, Making Effective Use.
80 Jack, Effective Judicial Procedure.
81 In actions under Article 260(2) TFEU, fines are rarely if ever collected because there is usually some accommodation before the fines are due. See Dimitry Kochenov, ‘How to Turn Article 2 TEU into a Down-to-Earth Provision,’ Verfassungsblog, 8 December 2013, at http://www.verfassungsblog.de/how-to-turn-article-2-teu-into-a-down-to-earth-provision/.
In particular, they proposed that “as a last resort, the suspension of EU funding should be possible.”

This linkage of persistent and systemic noncompliance with the suspension of EU funding makes perfect sense. Withholding funds can act as a powerful motivator for a Member State to come into line with European principles, even more than the prospect of paying a fine in some distant future. If a Member State still refuses to comply with systemic infringement judgments once EU funds are withheld, it will be clear that the European Union cannot always make a Member State change its ways, but at least Europe will not continue to subsidize a Member State that flaunts the EU’s basic values.

Attaching suspension of EU funds to a judgment of noncompliance by the CJEU has the virtue of making such a sanction a multi-institutional process, something true of other serious EU sanctions. The usual Article 258 infringement procedure requires the CJEU to agree with the Commission before a Member State can be instructed to comply. The Excessive Deficit Procedure permits cutting Cohesion Funds for violation of fiscal rules, but requires ECOFIN to agree with the Commission before the funds are cut. And Article 7 requires both the Council and the Parliament before sanctions will issue. As a result, attaching EU funding cuts to a process initiated by the Commission that must first generate two adverse CJEU judgments (the initial finding of a violation and the subsequent finding of noncompliance) has the requisite safeguards against arbitrariness. Cutting EU funds should not simply be a matter for discretion of the Commission but should be built into an inter-institutional process like other EU sanctions.

The Commission already has in place a system for calculating fines under Article 260 TFEU and, in the case of the systemic noncompliance, it should use the same formula so that the freezing of EU funds is made proportionate to the seriousness of the violation of EU law. The only new twist would be that the Commission would then request that the fines be collected by deducting this amount from the money that the EU would otherwise pay to the offending Member State. Rather than waiting to exact a fine from a Member State while it

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84 Ibid.
85 Behavioral economics research has long shown that subjects will feel the loss of what they clearly expected more acutely than an equal sanction that is not immediate. For the classic source, see Daniel Kahneman and Amos Tversky, ‘Choices, Values, and Frames’ 39 Am. Psych. 341–350 (1984).
delays compliance, the Commission would be able to carry out sanctions immediately by suspending the payment of EU funds in the amount that would otherwise have been sought as a fine. This gets the incentives right: the persistently violating Member State would have to prove its compliance in order to release the money rather than being able to stall in violation until the fines are finally demanded. Suspending the payment of EU funds changes the baseline against which the State is acting and it would provide much greater incentives for early compliance. Right now, as Jack’s study shows, a state has nothing to lose when it waits as long as it can to comply – which is often years into decades.

If the Commission sought suspension of EU funds as a sanction, then the suspension should be timed to occur as soon as the CJEU issues an Article 260 TFEU judgment. It is a trickier problem to figure out when the sanctions should cease, as Wennerås notes. If the Commission wants to maintain sanctions because it feels that the Member State has not yet complied, while the Member State claims that it has, then this conflict must be resolved by the CJEU. But Wennerås’s worry that the Commission might be tempted to continue sanctions after a Member State has complied applies not just to cases where EU funds might be cut, but with equal force to determining when daily penalties assessed by the CJEU must cease. In both cases, the question is what happens to the sanctions while the CJEU is resolving the conflict between the Member State and the Commission. With fines, the question does not arise in practice because the fines are not collected until the end, if then. But with funding streams, the penalties could be ongoing until they are halted.

One possible solution is that, upon a credible showing of compliance to the CJEU in a proceeding like an “interim measures” case, the Member State could access these funds until a final judgment is made by the CJEU. Then, if the final ruling went against the Member State, it would have to pay the funds back. At that point, the problem already identified with Article 260 sanctions would appear – that Member States don’t pay while the non-compliance continues and then all fines are dismissed at the end. So perhaps the funds to be returned in cases like this should be further deducted from ongoing funding streams going forward. This is a technical issue to be resolved with this new sanctions mechanism, but nothing new in theory.

If a Member State is found to have violated its obligations in a systemic infringement procedure, full compliance will require serious changes and may take some time to accomplish. All the more reason why the status quo should be accompanied by incentives to change quickly.

88 Of course, Member States that are net payers into the system and that do not receive cohesion or other funds may not have EU accounts to freeze. Their violations would still have to be addressed in the existing system of fines.

89 Wennerås, Making Effective Use.


91 The rules of the CJEU already allow applications to suspend the operation of judgments in other cases pending a final hearing, but at present these rules do not cover cases brought under Article 258. Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 9.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013). Chapter X. An amendment to the rules would have to be made to permit interim measures to be available in these cases.
If the Member State faces an immediate freeze on funds from the EU, this will focus the government’s attention on compliance as a high priority. And once the Member State complies, it can be rewarded by the release of the funds that were suspended. In the end, the result will be the same as under the current system: the Member State pays nothing in the end when it finally complies. But the interim situation is quite different under the two systems. Under this proposal, the Member State bears the burden until compliance is assured, while under the current situation, the EU suffers from non-compliance for years.

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.

I believe that this change would not require Treaty change, or even secondary legislation. The language of Article 260 TFEU already contemplates a monetary penalty for violation of a CJEU decision under Article 258 TFEU without specifying how the fine should be paid. In particular, the language of Article 260(2) TFEU does not say that the fine must be paid from the treasury of the Member State to the EU. The precise language of Article 260(2) says, “If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.” It does not specify how the penalty shall be collected. It would seem a matter of interpretation of Treaty language to find that the money should be withheld from payments already committed from the EU to the Member State treasury rather than being paid from the Member State treasury to the EU. In both cases, the fine is the same, since money is fungible. The only difference is that the Commission could immediately create stronger incentives for compliance by suspending payment of EU funds to the Member State without waiting for the Member State to pay the EU.

If this seems an interpretation too far and the Commission wanted unquestioned legal permission, it could seek secondary legislation to make this option clear. 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).92 The same sort of secondary legislation could be proposed to deal with Member States that persistently refuse to comply with basic European values, allowing EU funding streams to be cut for infringement of basic EU values.

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 gradually released to enable the Member State to carry out this plan. The point, as with CJEU 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 EU principles.

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IV. Conclusion

The European Union is experiencing a crisis of values, as some Member States are openly flouting the basic principles of EU law. This might be seen as a political crisis to be addressed by EU political bodies invoking Article 7. But even if it represents a political crisis, it is also at the same time a legal crisis, as key provisions of EU law are being violated systematically without a meaningful attempt to address the violations. When violations are not neat and singular but plural and complex, the Commission needs to rise to the occasion and adapt the instruments at its disposal to meet the new challenges.

The systemic infringement procedure could provide a mechanism for the Commission to act together with the Court of Justice to ensure that persistently and pervasively EU-law-violating Member States meet their legal obligations. By identifying a pattern of Member State conduct as the subject of a single infringement action and demonstrating to the CJEU that the pattern constitutes a systemic violation of EU principles, the Commission could be given the tools to develop a program of systemic remedy. If a Member State can play cat and mouse with the Commission by changing its infringing practices just enough to meet the narrow tests of narrow decisions, or if the Commission fails to anticipate the remedies that would follow as it designs infringement actions in the first place, then the principles of EU law will turn to petty legalisms that are honored only on the surface. Something more needs to be done if we are to avoid a moral crisis in Europe. And in this chapter, I have tried to sketch a way to motivate the Commission and the Court to act by ensuring that the basic principles of EU law are honored in all Member States.