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Review article

THE POTENTIAL OF ARTICLE 259 TFEU AS A TOOL FOR UPHOLDING THE MUTUAL TRUST IN THE EU

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ABSTRACT

The principle of mutual trust, whose fundamental importance is recognized by the CJEU, is not mentioned in the Treaties, but nonetheless, it plays an essential role for the EU integration process and has become a structural principle of the EU law. In addition to its role as a basis for a large set of EU rules in the areas such as the internal market and the area of freedom, security and justice, this principle is also closely related to the EU founding values including the rule of law. Having in mind that is not a "blind trust" but an assumption, it is applied through ensuring compliance with the Union law for which both the Member States and the European Commission share responsibility, inter alia, by means of the infringement procedure.

Under Article 259 TFEU, Member States are also entitled to bring a direct action against another Member State for an alleged infringement of an obligation under the Treaties. However, it is extremely rare for a Member State to take action upon the Article 259 TFEU and its potential remains untapped till now.

This contribution aims to answer why do Member States are inactive in terms of invoking the infringement procedure. It argues that infringement procedure initiated by a Member State against another Member State should not be perceived as a violation of the mutual trust be-

tween them but as a tool to uphold the mutual trust and to protect the Union's founding values, including the rule of law.

Keywords: *Article 259 TFEU, Court of Justice of the EU, Member States' direct actions, mutual trust*

1. INTRODUCTION

"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, justice, solidarity and equality between women and men prevail", states Article 2 TEU.[1] The key values on which the European Union (EU) is based are "not only a political and symbolic statement" - it has concrete legal effects[2] and Member States presume the adherence to the values from the pre-accession to the full membership.

The institutions of the Union that are tasked with the preservation of the values have not been effective so far in guaranteeing European values because of a lack of political will as demonstrated.[3] Most commentators have argued that only political mechanisms can be used to enforce the values of Article 2 TEU and legal mechanisms although available, have not been used sufficiently.

The effective enforcement of values of Article 2 TEU can be demonstrated with two infringement actions both under Article 258 and 259 TFEU. These articles can be applied as instruments for enforcing EU values and the Court of Justice of the EU (CJEU) may call for systemic compliance, where the Member State may be asked to undo the effects in order to preserve the values indicated in Article 2. Under the Treaties, infringement procedures can be initiated by two parties: either by the European Commission under the Article 258 TFEU or by Member States under Article 259 TFEU to bring the actions of the Member States into line with EU law and its values.

What should be done today when the EU is experiencing a crisis of values? 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

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1 Art. 2 TEU (Lisbon)

2 Piris, J. C., *The Lisbon Treaty,* Cambridge University Press, Cambridge, 2010, p. 71

3 Scheppele, K. L.; Kochenov, D.; Grabowska-Moroz, B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Vol. 39, 2020, p. 6, [https://doi.org/10.1093/yel/yeaa012]

the rise of nationalist and far-right parties across the EU, Member States' 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. At the same time while the EU poses an effective system of judicial protection, there are scholars that claim that there are insufficiencies in the system of values' protection. Although much can be done without treaties change, effective involvement of the institutions is difficult due to the high thresholds for the activation of existing provisions, as well as the different nature of response required by values violations compared with the *acquis* violations.

The paper explores the potential of the Article 259 TFEU from few different perspectives. First, it analyses the principle of mutual trust in the EU that embodies the essential imperatives of the European construct: unity, diversity and equality between Member States as an inevitably connected tool for the integration process in the Union. This principle, although not mentioned in the Treaties, has an important role in structural harmonization of the EU legislation, ensuring compliance with the Union law, including the EU values. The second part of the paper refers to the Article 259 TFEU and analyzes the potential reasons for its rare usage by the Member States of the EU i.e., why the number of direct actions of a Member State against another Member State for an alleged infringement of an obligation under the Treaties is extremely low.

Finally, the authors argue that the infringement procedure under the Article 259 TFEU cannot be perceived as a violation of the mutual trust between Member States, but as a tool to protect the fundamental values of the Union, including the rule of law. In this light, the authors conclude that the duty of guardianship of the Treaties should not be only left to the European Commission, but the Member States should have more proactive role in overcoming the systemic deficiency and rule of law violations of the non-compliant Member States.

2. PRINCIPLE OF MUTUAL TRUST AND (REINFORCING OF) THE EUROPEAN INTEGRATION

Although the notion of mutual trust is not mentioned in the Treaties, it has become a genuine "light motive" of discourses on EU integration. In order to better understand the principle of mutual trust one should first look up for its origins. Academics and scholars working in the field of the European integration claim that this principle is inevitably connected with the intergovernmental theory.

Namely, the main actors in intergovernmentalism are nation states, particularly national governments. Intergovernmentalism was initially conceived in the realist

tradition in which nation states are considered the principal actors and that states are treated as "black boxes" (unitary actors). There were no references to an intrinsic interest in cooperation, but an understanding that anarchy is the prevailing state of affairs within which states operate. The main mechanisms are bargaining and safeguarding national interests in the international arena. From the 1990s, intergovernmentalism has been developed further and the micro foundations of the theory were further spelled out. In this development, national interests started to play a stronger role in intergovernmentalism. State preferences were more clearly theorized to be based on domestic preferences, which in turn could be based on economic actors or other foundations.[4]

In this manner we can go further and connect the principle of mutual trust with the Andrew Moravcsik theory of liberal intergovernmentalism. Moravcsik labeled his approach to liberal intergovernmentalism because he drew on "domestic" forces and economic interests to inform what might be state preferences. At the same time, his work was also in line with the realist theories of international relations as it assumed that states (national governments and representatives of national governments) are the main players and that they ultimately are unitary actors.[5]

Being primarily related to the economic integration, the principle of mutual trust appeared at an early stage of European integration, in the area of mutual recognition of diplomas and professional qualifications and in the field of free movement of goods.[6] It was developed in the context of the internal market, in particular in situations where (detailed) harmonization could not be reached or was considered undesirable. As a principle, it imposes to the Member States to presume, to a certain extent, the compatibility of different national "legal solutions", or in other words to "trust" acts issued by other Member States, or legal practices or situations tolerated in their territory. Being an attractive tool for integration by allowing the opening-up of the different national legal orders[7], mutual trust also served as a foundation of the principle of mutual recognition in the field of judicial cooperation in civil matters. Mutual recognition as a method of cooperation, whereby a decision of one Member State is more or less automatically accepted in another Member State and obtains legal force, presumes, in turn, trust in the sense that the rules of the first Member

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4 Verdun, A., *Intergovernmentalism: Old, Liberal, and New,* Oxford Research Encyclopedia, Politics, 2020, p. 4, [https://doi.org/10.1093/acrefore/9780190228637.013.1489]

5 *Ibid.,* p. 7

6 Rizcallah, C., *The Principle of Mutual Trust in EU Law in the Face of a Crisis of Values,* 2021, available at: [https://eapil.org/2021/02/22/the-principle-of-mutual-trust-in-eu-law-in-the-face-of-a-crisis-of-values/#:~:text=The%20principle%20of%20mutual%20trust%20is%20indeed%20presented%20as%20being,168)], Accessed 29 March 2022

7 *Ibid.*

State are adequate, that they offer equal or equivalent protection and that they are applied correctly. As the CJEU held in its judgment in *NS* case[8] "the raison d'être of the European Union and the creation of an area of freedom, security and justice are based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights".

As a matter of fact, the principle of mutual trust plays an essential role for EU integration as it embodies the essential imperatives of the European construct: unity, diversity and equality between Member States. Moreover, it can be drawn in line with the intergovernmentalists' approach - despite the safeguarding of national substantive and procedural diversities, the principle of mutual trust makes it possible to unify the national legal orders, which remain distinct and equal.

Fundamental importance of the principle of mutual trust has been recognized by the usual "engine of the European integration" – the CJEU. In Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR)[9], the Court emphasized that "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained". Although the principle of mutual trust is mainly related to the Single Market and the Area of Freedom, Justice and Security, it reaches beyond the area of *acquis* enforcement. In *Trade Agency* case[10], for instance, the question arose whether a court of a Member State in which enforcement is sought can refuse enforcement of a default judgment without any statement of reasons. In the specific circumstances of the case, it had to be assessed whether the judgment at issue infringed the right to a fair trial, as laid down in Article 47 of the Charter of Fundamental Rights of the EU. Having in mind that the right to a fair trial is considered as an element of the EU rule of law concept, it is obvious that upholding the mutual trust in the EU is inevitably related to the founding values protection, including the rule of law and human rights.

The same "link" can be spotted in the *Zarraga* case[11], where the Court held that the authorities of the executing Member State were not entitled to verify whether

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8 Joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department, and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, par. 83

9 Opinion of the Court 2/13 of 18 December 2014, Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, ECLI:EU:C:2014:2454, par. 191

10 Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2012] ECLI:EU:C:2012:531, par. 51

11 Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247, paras. 46 and 70

the court which issued the judgment requiring the return of the child had respected the child's right to be heard, as provided for by the Regulation. This decision was brought on the basis of the principle of mutual trust as it requires the national authorities to consider "that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognized at EU level, in particular, in the Charter of Fundamental Rights".[12]

In that context, on a very general level, the principle of mutual trust means that one Member State can be confident that other Member States respect and ensure an equivalent level of certain common values, in particular the principles of freedom, democracy, respect for human rights and the rule of law. Therefore, the principle of mutual trust is indeed described as being "based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU".[13] However, the major challenges faced by the Union and the Member States in economic, security and migration matters have indeed revealed deep divisions as to the meaning of European integration and the values on which it is based, which lead to the existence of widespread and persistent failures causing a rule of law backsliding in a few Member States.[14] This situation increases the likelihood that national legal solutions are incompatible with democratic values and the rule of law.

The existence of the "crisis of values" amplifies the risks towards upholding the mutual trust in the EU. On the other hand, the next phase of the European integration has to be the "integration through the rule of law', as the further development of this process must be based on a secure and solid ground, reaffirming the Union as a community of values.[15] In that manner, if we turn the story upside down, mechanisms for protecting the rule of law and EU values in general, can contribute to upholding the mutual trust between the Member States that ultimately, will result in reinforcing the European integration process. Given the central role of Member States in the light of the intergovernmentalism, it is the direct state action that can play a crucial role for ensuring compliance with the Union law, including the EU values, and thus enhance the mutual trust among the Member States.

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12 *Ibid.*, par. 70

13 Opinion of the Court 2/13 of 18 December 2014, *op. cit.*, note 9, par. 168

14 Rizcallah, C., *loc. cit.*, note 6

15 Lenaerts, K., *New Horizons for the Rule of Law within the EU*, German Law Journal, Vol. 21, No. 1, 2020, pp. 29-34

3. ARTICLE 259 TFEU – AN ENEMY WITHIN OR A SECRET FRIEND

One may ask himself how do we connect the principle of mutual trust with the Article 259 TFEU and are not the both opposed one to another? On the first glance when someone reads the provisions under Article 259 TFEU stating that: "A Member State which considers that another Member State has failed to fulfill an obligation under the Treaties may bring the matter before the CJEU to the fore"[16] can assume that this is provision of an article for building a "mistrust" in the Union. How can we better explain the possibility of one Member State to call on responsibility to another Member State before the Court of Justice? Furthermore, if the few cases[17] brought before the CJEU under the provisions of the Article 259 TFEU are analyzed, one can also not state the opposite.

The number of actions of Member States against other Member States are very rare and can be considered as having "merely channeling national political interest and thus of small, if not quite non-existent, EU law value".[18] The fact that Article 259 TFEU is not frequently used is indicated by only eight cases in the history of the EU initiating an infringement procedure by one Member State against another. There are only six judgements delivered for the following cases in front of the CJEU:

1. *France v United Kingdom*, C-141/78, October 1979: Fisheries dispute;
2. *Belgium v Spain*, C-388/95, May 2000: Designation of origin of wine;
3. *Spain v UK*, C-145/04, September 2006: Eligibility to vote in EP elections in Gibraltar;
4. *Hungary v Slovakia*, C-364/10, October 2012: Refusal to allow entry to President of Hungary;
5. *Austria v Germany*, C-591/17, June 2019: Passenger car vignette;
6. *Slovenia v Croatia*, C-457/18, concerning a maritime border dispute, and two cases have been withdrawn.[19]

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16 Art. 259(1) TFEU (Lisbon)

17 Case 141/78 *France v UK* [1979] ECR 2923; Case C-388/95 *Belgium v Spain* [2000] ECR I-3123; Case C-145/04 *Spain v UK* [2006] ECR I-7917; Case C-364/10 *Hungary v Slovakia* [2012] ECLI:EU:C:2012:630

18 Kochenov, D., *Biting Intergovernmentalism: the case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool*, Jean Monnet Working Paper, NYU Law School, No. 11, 2015, p. 10

19 Nicolaides, P., *Member State v Member State" and other peculiarities of EU Law*, 2019, [https://www.maastrichtuniversity.nl/blog/2019/06/"member-state-v-member-state"-and-other-peculiarities-eu-law], Accessed 3 April 2022

On the other hand, between 2002 and 2018, the Court of Justice ruled in 1418 cases of infringement brought by the Commission and found against Member States in 1285 cases, with 91% success rate of the Commission. Most of the cases brought under Article 259 are ones with political dimension connected to the bilateral disputes between the Member States which the Commission has refused to get involved in.[20]

In one of the cases brought before the Court of Justice (*Hungary v. Slovakia*) Hungary invoked free movement of persons law to argue that Slovakia's refusal to let the Hungarian President cross the border to be present at the unveiling of a statute of Saint Stephan, the founder of the Hungarian state, on the very sensitive anniversary of the invasion of Czechoslovakia by Warsaw pact troops (including Hungarians) in 1968 - was in violation of the EU law. However, the background of this case was not to protect the free movements of people because it was obvious that the Hungarian president was unwelcome in Slovakia. The purpose of Hungary was purely political and the State used the provisions under the Article 259 of the TFEU in order to achieve political justice. Or with other words in the context of *acquis* enforcement, Article 259 TFEU was deployed by *de facto* abusive Member States seeking to reap political benefit by instrumentalizing an allegation of non-compliance with the *acquis*, not supported by the Commission.

The reasons for limited usage of Article 259 can be found in few grounds. Some authors claim that Article 259 TFEU has been rarely used due to the EU mechanisms in preventing direct confrontation between Member States. The Commission's central role in the commencement of infringement procedures, therefore, contributes significantly to the preservation of friendly relations between Member States by preventing their direct confrontation. Good neighborly relations within the EU are thus largely maintained through the advanced mechanisms for the settlement of disputes between Member States.[21]

Additionally, through the prism of the intergovernmentalism theory Member States refrain from using the Article 259 TFEU in order not to be perceived as the enemy within. However, the EU law enforcement including EU values is of utmost importance for the shared interests of the Member States and Article 259 TFEU has full potential to become effective instrument for achieving this goal. Member States can use this article for initiating actions in areas that are not ad-

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[20] As Kochenov notes in *Gazeta Prawna,* 2020, according to Íñiguez, G., *The Enemy Within? Article 259 And The Union's Intergovernmentalism,* 2020, [https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr], Accessed 7 April 2022

[21] Basheska, E., *Good European Neighbours - The Turów Case, Interim Measures in Inter-State Cases, and the Rule of Law*, 2021, [https://verfassungsblog.de/good-european-neighbours/], Accessed 6 April 2022

dressed by the Commission in order to safeguard the EU fundamental values and EU law. Nevertheless, the potential of Article 259 TFEU has been rarely used so far.

Other authors consider that Member States are inactive in terms of invoking the infringement procedure because they rely on the European Commission as a "Guardian of the Treaties". In this case, the Commission is not obliged to start an infringement procedure as European integration process is based primarily on the transfer of sovereignty of the Member States *vis a vis* the EU. In that manner, the infringement proceedings depend neither on political support from the Member States, nor on the cooperation of domestic courts. The attitude is that EU law related issues are responsibility of the EU itself.

In the case of the Article 259 TFEU the Commission is expected to deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. Many of the claims brought by Member States are halted at this stage, and taken up by the Commission instead – thus reaching the Court as "traditional" Article 258 proceedings, rather than as disputes between two Member States. This explains the residual nature of cases actually brought under Article 259 itself.[22] If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.[23]

On the other side we have scholars who claim that Article 259 TFEU actually helps us avoid the conceptual skepticism regarding allowing the EU to grow its enforcement powers out of proportion in comparison with the scope of conferral. Virtually all such criticism focuses on the potential harmfulness of extending the EU's action in the area of values in the current climate of the EU's design and functioning – all the said need to enforce the values notwithstanding. The way Article 259 TFEU works, however, puts the Member States themselves – not the Union and its institutions – into the spotlight. This means that when an action by a Member State which is related to the adherence to the values expressed in Article 2 TEU by some other Member State is brought directly to the Court of Justice, it is obviously the Member State bringing the action which acts as the guardian of values in the first place, not an institution of the Union. This potentially diminishes the arguably problematic aspects related to an overly broad interpretation of the legal effects of Article 2 TEU.[24]

[22] Íñiguez, C., *loc. cit.*, note 20

[23] Arts. 259(3)(4) TFEU (Lisbon)

[24] Kochenov, D., *op. cit.*, note 18, p. 9

Most importantly, while the very structure of the law enforcement provisions in the EU seems to beg the conclusion that Article 259 TFEU enjoys a rather auxiliary place in the grand scheme, with the institutions taking over the task of *acquis* enforcement from the individual Member States, the same does not seem to be entirely true in the values enforcement context. Since the values declared in Article 2 TEU are shared between the EU and its Member States' legal orders, it is impossible to claim that the institutions of the Union are the key actors primarily responsible for their enforcement. On the contrary, in the context of the complete interdependence of the Union and its Member States in general Article 2 TEU compliance throughout the Union, the Member States should by definition be allowed to play a much greater role here compared to the ordinary context of *acquis* enforcement.[25]

The infringement procedures must only be based on the EU law. The actions based on Article 259 TFEU should "supply the much-needed momentum to push the Commission to take a somewhat more active stance on the matter. It could thus be combined with the deployment of other measures available in the EU's values' enforcement palette, such as the pre-Article 7 procedure for instance".[26]

Some scholars may argue that the real protection of the Union values is under the Article 7 TEU procedure and there is no need to look up for further protection of the values under the Article 259. On the contrary, the protection given under Article 7 is conditioned and it has to be on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.[27] The procedure is organized in two distinct parts and by setting a main role for the Council and the European Council, it is the Member States that must take a decision. So given like this, the values' enforcement is crucially political and relies to a great degree on the will of the individual Member States, even if channeled via the institutions. Therefore, Article 7 TEU represents the intergovernmentalists' turn. The procedure foreseen in Article 7 TEU cannot, under any circumstances, be considered an operational or even suitable instrument to ensure the rule of law in the Member States of the EU and the observance of the values

25 *Ibid*.

26 Kochenov, D., *op. cit.*, note 18, p. 17

27 Art. 7 TEU (Lisbon)

enshrined in Article 2 TEU. In order to be operational, it has to be modified and sharpened - lower thresholds for triggering the Article 7 mechanisms have to be provided.

Direct actions under this article may lead towards enforcement of EU fundamental values and core principles of the Member States. The benefits of deploying Article 259 TFEU as opposed to other Treaty provisions are as following "the Article requires *national* as opposed to the EU-level institutional action, which solves the issue of the high thresholds for using the other mechanisms and also respects the federal sensitivities, by limiting the possibility of supranational power-grabs under the pretext of values enforcement."[28] This powerful instrument can lead towards a state where the Member States by they own capacities can address the Court for enforcement of values on which the Union is based. The potential effectiveness of this instrument lies in its capacity to empower Member States, acting together with the CJEU to solve problems without relying on the capacity of the institutions of the EU themselves. This will lead towards more effective action on EU level, avoiding the necessary thresholds of institutional levels and avoiding the robust institutional mechanisms of the EU institutions themselves, and empowering the Member States instead.

4. MEMBER STATES' ACTIONS TO BREAK THE IMPASSE

The insertion of values in the Treaties represents the intention to introduce their status to binding EU law. One of the weakest elements in the legal-political edifice of today's EU is ensuring that the Member States' governments are faithful to the basic principles of democracy, protection of fundamental rights, and the rule of law.[29] The existence of serious violations of the fundamental values, the rule of law in particular, in an increasing number of Member States on the one hand, and deterioration of the situation on the other hand, caused the "crisis of values" that the EU currently faces.[30] The rule of law crisis not only undermines EU political integration, but it also endangers the protection of Treaty freedoms and fundamental rights at the core of EU law and threatens the very essence of the European project since it concerns the fundamental values upon which the Union is built and which

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28 *Ibid*.

29 Scheppele *et al.*, *op. cit.*, note 3, p. 4

30 In its 2021 Rule of Law Report as a comprehensive assessment of developments affecting the rule of law across EU Member States, the European Commission expressed concerns with regard to Poland and Hungary, where the situation has only further deteriorated. Several mechanisms for upholding the rule of law have been already activated, including launching infringement procedures. See Bogdandy, A.; Ioannidis, M., *Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done*, Common Market Law Review, Vol. 59, No. 1, 2014, pp. 59-96

are spelled out in Article 2 TEU. Hence, despite ten years of EU attempts at reining in rule of law violations and even as backsliding Member States have lost cases at the CJEU, illiberal regimes inside the EU have become more consolidated: the EU has been losing through winning.[31]

The most illustrative example of the interconnection between mutual trust and the rule of law is the case of Member States refusal to execute European Arrest Warrants (EAWs) with regard to the Polish requests for suspects' extradition. Last in the row, Amsterdam Court in 2021 decided in such manner, due to the fear that "there is a danger that the judges in Poland who have to rule on the criminal case of the accused person will not be able to do so freely, partly because of the risk of disciplinary proceedings".[32] This judicial action followed more broad public discussion in the Netherlands on the situation in Poland over accusations on backsliding in rule of law standards. Hence, in December 2020, the Dutch House of Representatives (the Tweede Kamer) adopted a resolution compelling the government to bring Poland before the CJEU. In light of the Commission's failure to enforce the Courts' previous judgment, the Tweede Kamer noted, and of the "serious threats" faced by the Polish judiciary, the Dutch government should take the lead, and ensure the protection of rule of law across the Union.[33]

Prior to this, the Rechtbank Amsterdam (the central court instance that decides on the execution of all incoming EAWs in the Netherlands) took leading decisions on 16 August 2018[34] and 4 October 2018[35], by which surrenders to Poland were suspended for the time being. Moreover, Netherlands' Court made a reference for urgent preliminary ruling, asking the CJEU whether the existence of evidence of systemic or generalized deficiencies concerning judicial independence in Poland or of an increase in those deficiencies does not in itself justify the judicial authorities of the other Member States refusing to execute any European arrest warrant issued by a Polish judicial authority.[36] The Rechbank Amsterdam decided to refer the cases to CJEU as a follow-up to its judgment in *Aranyosi and Căldăraru* – L.M.

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31 Scheppele *et al.*, *op. cit.*, note 3, p. 42

32 Statement by the Rechtbank Amsterdam, 10 February 2021, [https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/IRK-ziet-af-van-overlevering-Poolse-verdachte.aspx], Accessed 7 April 2022

33 TVP World, Lower House Speaker addresses Dutch counterpart over rule of law, 8 December 2020, [https://polandin.com/51233330/lower-house-speaker-addresses-dutch-counterpartafter-resolution-calling-for-suing-poland], Accessed 7 April 2022

34 Rechtbank Amsterdam, 16 August 2018, ECLI:NL:RBAMS:2018:5925

35 Rechtbank Amsterdam, 4 October 2018, ECLI:NL:RBAMS:2018:7032

36 Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P/Openbaar Ministerie* [2020] ECLI:EU:C:2020:1033

case[37] which was delivered against the backdrop of the reforms of the Polish judicial system, seeking clarification of the used approach in the light of the recent developments involving deterioration of Poland's rule of law.

Analysis on the main parameters of these decisions shows that CJEU's approach includes a certain amount of leeway for interpretation by the national authorities examining the execution of EAWs from countries in which shadows lie over the rule of law.[38] In other words, the Court of Justice provided an exception to the principle of mutual recognition, which underpins the system of judicial cooperation in criminal matters. The issues of the *L.M.* case law had their reflections in the decisions made by the German courts[39] while similar doubts were also raised by a Spanish court[40]. This situation reveals lack of trust among the EU national courts on the basis of the rule of law violations. The scope of the exception to the principle of mutual trust based on rule of law considerations developed under the *L.M.* judgment has been further extended in other fields of judicial cooperation, namely in the competition law as the *Sped-Pro*[41] case showed.

Another example of Member States' (re)action over the rule of law crisis occurred even in an "early" phase, with the letter of foreign ministers[42] signed by Denmark, Finland, Germany and the Netherlands calling for cutting funds to values-vio-

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37 Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] ECLI:EU:C:2018:586. CJEU reaffirmed its view that such a refusal is possible only following a two-step examination: having assessed in a general manner whether there is objective evidence of a risk of breach of the right to a fair trial, on account of systemic or generalized deficiencies concerning the independence of the issuing Member State's judiciary, the executing judicial authority must then determine to what extent such deficiencies are liable to have an actual impact on the situation of the person concerned if he or she is surrendered to the judicial authorities of that Member State

38 Wahl, T., *Refusal of European Arrest Warrants Due to Fair Trial Infringements Review of the CJEU's Judgment in "LM" by National Courts in Europe*, EUCRIM, No. 4, 2020, p. 328, [https://doi.org/10.30709/eucrim-2020-026]

39 Rechtsprechung OLG (Oberlandesgericht or the Higher Regional Court) Karlsruhe, 07 January 2019 - Ausl 301 AR 95/18; Rechtsprechung OLG Karlsruhe, 17 February 2020 - Ausl 301 AR 156/19; Rechtsprechung OLG Karlsruhe, 27 November 2020 - Ausl 301 AR 104/19;. Federal Constitutional Court (BVerfG), Order of 15 December 2015, 2 BvR 2735/14, an English summary is provided by the press release, available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html], Accessed 7 April 2022

40 TPV World, Spanish court demands answers on judicial independence, 2 October 2018, available at: [https://tvpworld.com/39285995/spanish-court-demands-answers-on-judicial-independence], Accessed 7 April 2022

41 Case T-791/19, *Sped-Pro v Commission* [2022] ECLI:EU:T:2022:67

42 Letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the Commission, referred in the Speech: The EU and the Rule of Law – What next? by the Vice-President of the European Commission, EU Justice Commissioner Viviane Reding, 4 September 2013, available at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_67], Accessed 17 May 2022

lating Member States invoked by the autocracy elements that started to emerge in Hungary. This was a clear expression of the Member States' consideration that the EU's capacity for action in the domain of values must be upgraded in order to be timely and effective and that some of them were willing to step up as strong defenders of the rule of law and values enforcement in the EU.

Taken measures can also be observed in line with the Article 4(3) TEU which imposes certain "duty of loyalty"[43] towards the EU stating that "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties". Hence, protection of the very existence of the EU as a rule-of-law-based regime is certainly one in that direction. Such approach can also be argued in the light of the intergovernmentalism as the main theory on which this paper is based. In intergovernmentalist theorizing, institutional actors operating within supranational organizations play a minor, facilitative role at best, instead, Member States shape and steer the course of European integration, which also explains the usually moderate speed of the European project.[44]

It is evident that rule of law violations have effects that spill over the national borders, thus it is in the compliant Member States' interests to protect themselves and their own citizens against potential abuse of their rights when they are subject to jurisdictions affected by rule of law backsliding.[45]After all, in the context of the liberal intergovernmentalism, European integration, meaning the treaty amending decisions, have resulted from interstate bargaining on the basis of domestically determined preferences.[46] Having in mind that EU founding values are stipulated in the treaties, they are mutually agreed on the basis of the domestic interests in the first place.

Hence, new avenues for rule of law protection have to be explored in the light of the dominant intergovernmentalist approach in which the Commission is no longer the sole or even the prime driver of the European integration process. In the above mentioned offbeat case - *Sped Pro*, CJEU ruled that before rejecting a complaint on the grounds that the competition authority of a Member State is

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43 Schepelle *et al.*, *op. cit.*, note 3, p. 42

44 As in Smeets, S.; Zaun, N., *What is intergovernmental about the EU's '(new) intergovernmentalist' turn? Evidence from the Eurozone and asylum crises*, West European Politics, Vol. 44, No. 4, 2021, pp. 852-872, [doi: 10.1080/01402382.2020.1792203]

45 Editorial, *Enforcing the Rule of Law in the EU. In the Name of Whom?* European Papers, Vol. 1, No. 3, 2016, pp. 771–776

46 Moravcsik, A., *Preferences, Power and Institutions in 21st-Century Europe*, Journal of Common Market Studies, Vol. 56, No. 7, 2018, p. 1649

"better placed", the Commission must examine, in a concrete and precise manner, the indications provided by the complainant evidencing generalized and systemic deficiencies in the rule of law of that Member State. What is more interesting about this case is that it was filed by a Polish company as an action for annulment of Commission's rejection of prior complaint against PKP Cargo, a company controlled by the Polish State.[47] In that manner, it was basically a request from a domestic actor to be protected by the Commission against its own State on issues which are part of the more broad fight against the so-called "rule of law backsliding" and showed how these (formerly) abstract values may become justiciable in concrete filed of EU law where the EU institutions and Member States are called upon to cooperate on the basis of the mutual trust principle.[48]

In the light of this fight against the rule of law crisis that is endangering the very essence of EU integration, European Commission cannot be left alone with the duty of guardianship of the Treaties, particularly when there are clear signs of being not enough proactive and effective in handling the problem. In the third infringement ruling by the CJEU in relation to Poland's rule of law breakdown – *Disciplinary regime for judges* case[49], initiated on the basis of the "standard" Article 258 TFEU, five Member States intervened – Belgium, Denmark, the Netherlands, Sweden, and Finland. As it was stated, the intervention was made not in support of the Commission in order to attack Poland but rather to underscore the spirit of openness, mutual trust and exchange of best practices.[50]

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47 On 4 November 2016, Sped-Pro, a Polish operator in the freight sector, filed a complaint with the European Commission against PKP Cargo, a company controlled by the Polish State. Sped-Pro alleged that PKP Cargo had abused its dominant position on the market for rail freight in Poland by refusing to conclude a cooperation contract at market conditions. By decision of 12 August 2019 (AT.40459), the Commission rejected the complaint pursuant to Art. 7(2) of Regulation 773/2004, on the basis that the Polish competition authority was better placed to examine it according to the criteria set out in the Notice on cooperation within the Network of Competition Authorities. On 15 November 2019, Sped-Pro filed an action for annulment of the Commission's decision, arguing, *inter alia*, that the Commission was better placed to examine the complaint, given the systemic and generalized deficiencies in the rule of law in Poland, which affected the independence of the Polish competition authority and courts. See Lamo Perez, D., *Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the "L.M. Doctrine" to Cooperation Between Competition Authorities (Sped-Pro, T-791/19),* Kluwer Competition Law Blog, 2022, [http://competitionlawblog.kluwercompetitionlaw.com/2022/03/01/mutual-trust-and-rule-of-law-considerations-in-eu-competition-law-the-general-court-extends-the-l-m-doctrine-to-cooperation-between-competition-authorities-sped-pro-t-791-19/], Accessed 7 April 2022

48 *Ibid*.

49 Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)* [2021] ECLI:EU:C:2021:596

50 Rule of Law, *5 Member States support the European Commission in Case 791/19: What they said*, 2020, [https://ruleoflaw.pl/5-member-states-support-the-european-commission-in-case-791-19-what-they-said/], Accessed 7 April 2022

The Member States' actions to break the impasse are not a power-grab by the Commission, but efforts to take the enforcement of founding values upon which they have agreed, into their own hands when confronted by reluctance in the Union institutions – a version of the intergovernmentalism named by Kochenov as "biting intergovernmentalism".[51] Given that a fundamentally different role needs to be played by the Member States in the enforcement of values, next step in that regard should be activating the direct infringement action under Article 259 TFEU as an immediately deployable mechanism. The potential importance of Article 259 TFEU rises to a great extent: in a context where self-help is traditionally prohibited, this provision acquires crucial importance if the institutions use their discretion either to be silent on a matter of concrete violations – proposing some ephemeral procedures for future use notwithstanding – or winning irrelevant cases which have no bearing on the actual state of the rule of law in the non-compliant Member States.

Having in mind the Commission's approach applied so far, it is based on tackling separate cases of rule of law violations without being able to address the systemic deficiency in the non-compliant Member States. One of the often cited example in that regard is the case on age discrimination grounds against Hungary[52], where the retirement age for the judges was significantly reduced as part of the national government's "strategy" to undermine the independence of the judiciary, but it was ruled as unjustified age discrimination and thus a violation of the EU anti-discrimination *acquis,* failing to drive (non)compliance with the rule of law as a fundamental value of Article 2 TEU. Although the Commission won this case, this intervention was considered as ineffective[53] since the violation was remedied through a compensation of the retired judges but did not get to the very essence of the problem and the actual background of this case that refers to making space for appointing "ideologically compatible" judges.

Hence, several influential scholars[54] have proposed violations of the rule of law to be tackled in a "systemic infringement action" and developed such "technique" which would allow gathering together numerous examples that Article 2 TEU is

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51 Kochenov, D., *op. cit.*, note 18, p. 17

52 Case C-286/12, *European Commission v Hungary* [2012] ECLI:EU:C:2012:687

53 For an analysis see Scheppele, K. L., *Making Infringement Procedures More Effective,* Verfassungsblog, 2020, [https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/], Accessed 7 April 2022

54 *Ibid.*; Kochenov, D., *op. cit.*, note 18, p. 1; Bárd, P.; Śledzińska, A. S., *Rule of law infringement procedures: A proposal to extend the EUs rule of law toolbox*, CEPS Papers in Liberty and Security in Europe, No. 9, 2019, p. 2, available at: [https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf], Accessed 7 April 2022

being seriously violated in a Member State, arguing 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 such as the rule of law. However, the Commission is obviously indecisive to take such step under the Article 258 TFEU so it is a high time for the Member States to challenge the rule of law systemic deficiency through its "twin" Article 259 TFEU.

5. CONCLUSIONS

Article 259 TFEU is best suited for bringing infringement actions against Member States which fail to respect to the values and principles that are core foundations of the European Union. The infringement procedure under the Article 259 TFEU cannot be perceived as a violation of the mutual trust between Member States. In fact, Article 259 TFEU is an essential tool for preservation of the fundamental values of the EU that are not only of symbolic nature, but their violation produces certain legal implications. These values include the rule of law as a core principle in the EU, and adherence to these values is expected by all Member States, from the stage of pre-accession, until their full membership.

The exceptionally low number of actions of Member States against other Member States shows that the legal mechanisms, although available, have not been used sufficiently and political mechanisms have overtaken their place. Even the institutions of the Union that are expected to preserve the European values have not been efficient enough on this matter. So far, Article 259 TFEU has been used as a tool for channeling predominantly national political interests and the guardianship of the Treaties in the context of protection of fundamental values of the Union, including the rule of law, has been left to the European Commission.

However, this duty can be easily overtaken by the Member States of the EU if they present more proactive role and use Article 259 TFEU for actions against another Member States. This horizontal approach in resolving issues between Member States regarding preservation of values can be used as a mechanism for overarching the disputes with regard to values and principles of the Union, without additional institutional interference.

Such assertiveness by the Member States should not be considered as "invoking a scandal" but as fulfilling the duty to uphold the principle of mutual trust in light of the Article 4(3) TEU and to safeguard the EU's constitutional architecture that is increasingly fragile. Gaining assurance that such shortcomings with regard to the rule of law can be resolved would ultimately strengthen the trust between the Member States. In other words, also approached from the perspective of the global

systemic assessment of the provisions aimed at ensuring compliance, Article 259 TFEU acquires a new life, the one of much greater importance – in the context of values' enforcement as opposed to simply guaranteeing *acquis* compliance.

Another advantage of the usage of Article 259 TFEU is the fact that it can be immediately used by any Member State of the Union and even in case of institutional obstacles the Member States can call upon the CJEU to resolve the issue and protect the values of the EU. The EU law enforcement including EU values is of utmost importance for the shared interests of the Member States and Article 259 TFEU has full potential to become effective instrument for achieving this goal.

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