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by Dimitry Kochenov

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The *Acquis* and Its Principles: The Enforcement of the ‘Law’ versus the Enforcement of ‘Values’ in the European Union

*Dimitry Kochenov**

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This book chapter emphasizes the importance of rethinking the approach to the enforcement of EU values as listed in Article 2 TEU. The on-going disregard of the key values of the Union in Hungary and Poland, illustrates with utmost clarity the Union’s helplessness in ensuring reliable and timely enforcement of the core of its law, as reflected in the key principles of democracy and the Rule of Law, which the Treaty of Lisbon has most misleadingly rebranded as ‘values’. Besides articulating the legal nature of Article 2 principles and providing a brief overview of the role played by the key principles of Article 2 in the context of EU law’s evolution, the focus turns to the gap in the general EU law enforcement literature which tends to focus on the technical issues while ignoring the bigger picture, and, finally, a critical survey of the key approaches to the enforcement of the principles of Article 2, which the Union could rely on in bridging the enforcement gap and bringing its defiant Member States to compliance.

1. Values and Principles in Article 2 TEU

Let us start with a disclaimer. Although it is universally accepted that ‘moral and political values are central to the public law enterprise’,¹ while the EU Treaty speaks in Article 2 TEU about the ‘values’ of the Union, it is absolutely clear that what is meant by ‘values’ in this context is actually ‘principles’ – fundamental principles – of EU law. This was the actual wording before the Lisbon revision of the relevant Treaty provision.² Through the enforcement of the ‘values’ of

* Chair in EU Constitutional Law, Groningen; Visiting Professor, College of Europe, Natolin. I am grateful to Tamás Györfi, Giulio Itzcovich, András Jakab and Kim Lane Scheppele for useful comments and engagement with the earlier drafts of this text.

¹ P Cane, ‘Theory and Values in Public Law’, in P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003), 3, 4.

² Art 6 EC. Compare F Dorssemont, ‘Values and Objectives’, in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart 2012), 45. For a principled legal-theoretical criticism of the introduction of

Article 2 TEU in the context of EU law, a reference is thus made to something more important than a set of vague extravagant proclamations, unlike what ‘values’ would sometimes imply in other constitutional contexts. Contrary to a classical understanding, where values, in the words of Pierre Schlag, are like little divinities, replacing theological arguments in now-secular law,³ EU values, at least some of them, seem to be quite different in legal nature. A clear distinction should thus be made between Article 2 TEU values on the one hand, and the familiar national-level aspirational provisions on the other, such as, say, the ‘Repubblica [...] fondata sul lavoro’ of the Italian constitution, or ‘the Most Holy Trinity’ of the Irish.

The elements of Article 2 TEU, including democracy, the Rule of Law and the protection of fundamental rights, go as deep as ‘the very foundations of [EU] legal order’.⁴ Indeed, ‘Principles’ would be the established way of referring to the foundational enforceable and legally meaningful assumptions informing every aspect of the functioning of a given legal system, such as democracy and the Rule of Law.⁵ It is thus necessary to see beyond the dual confusion introduced by the Treaty of Lisbon.⁶ The first confusion, as already stated, is terminological. Should the above not be convincing, a basic consistency argument would do: given that the Rule of Law in one example is clearly a ‘principle’ in the Charter of Fundamental Rights, which has the force of primary law of the EU, locating it among the ‘values’ in TEU is clearly a mistake. Moreover, it has always been recognised as a principle, at least since the oft-cited ECJ decision in *Les Verts*.⁷ The second confusion is theoretical: legal scholarship knows clear differences between values (which are very roughly, desirable ideals) and principles (which are, again very roughly, binding rules).⁸ It is not among my intentions in this chapter to engage with the extensive and beautiful literature on both, as my goals are much more practical and down-to-earth and are thus far removed from the jurisprudential realm. This basic distinction is clear

values into the text of the Treaties, see J Lacroix, ‘Does Europe Need Common Values?’ (2009) 8 *European Journal of Political Theory* 141.

³ P Schlag, ‘Values’ (1994) 6 *YJLH* 219, 225.

⁴ For a crisp analysis of this concept, see N Lavranos, ‘Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles’, in F Fontanelli, G Martinico and P Carozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa Law 2010), 119.

⁵ See, for the core contributions, ML Fernández Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International 1999); also U Everling, ‘The European Union as a Federal Association of States and Citizens’, in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/CH Beck 2010), 701; M Zuleeg, ‘The Advantages of the European Constitution’, in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/CH Beck 2010), 763, at 772–779. The EU Institutions’ own accounts of what is meant by the Rule of Law beyond the tautology of ‘being bound by law’ present a most diverse account, which found expression in the EU’s external action: L Pech, ‘Promoting the Rule of Law Abroad’, in D Kochenov and F Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order* (CUP 2013) 108.

⁶ For an analysis, see L Pech, ‘“A Union Founded on the Rule of Law”: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *EUConst* 359.

⁷ Case 294/83 *Partie Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, 23. See also Opinion 1/91 *EEA Agreement* [1991] ECR 6097.

⁸ My mundane view of principles for the purpose of this distinction is informed in part by A Jakab, ‘Concept and Function of Principles’, in M Borowski (ed), *On the Nature of Legal Principles* (Steiner 2009), 145 (and the literature cited therein).

without a legal-philosophical digression. Regrettably, however, in the context of the Lisbon Treaty this misclassification results in an apparent synonymisation of the two.

It is clear, however, as Laurent Pech has persuasively argued, that the unfortunate wording of Article 2 TEU does not deprive the Rule of Law of the legal value of a core legal principle in the context of EU law.⁹ The same obviously applies to democracy and the protection of fundamental rights.¹⁰ Human rights in the EU are not ‘the Most Holy Trinity’. We should thus be very careful when taking the Treaty’s own categorisations at face value: the wording on the crucial issue of principles is misleading. In this sense, I will argue that the distinction made by Giulio Itzcovich elsewhere in this volume between ‘the government by laws and the government by values’ does not fit the context of the EU’s Article 2 TEU as neatly as one would expect.¹¹ Knowing this, it is much easier to argue and be persuasive that the values of Article 2 TEU should not be excluded from the core conversation about the enforcement of EU law. As this chapter will demonstrate, indeed, the failure to enforce the values of the Union will most likely result in the undermining of the core *acquis* going to the heart of EU law and is not solely confined to the internal market.

2. Enforcement of values and the structure of the argument

Article 2 TEU is quite special in the sense that it can be enforced via Article 7 TEU – a purely political procedure far removed from the classical *acquis*-enforcement approaches to be found elsewhere in the Treaties.¹² Whether the values are actually part of the *acquis* of the Union and whether the Union possesses the general competence to intervene in the ‘value’ as opposed to the ‘*acquis*’ domains are questions which some, surprisingly, still seem to consider open.¹³ In other words: is Article 7 TEU the only way to enforce Article 2 TEU or not? Numerous arguments

⁹ L Pech (n 6).

¹⁰ Cf. E Sharpston, ‘Citizenship and Fundamental Rights – Pandora’s Box or a Natural Step towards Maturity?’, in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System* (Hart 2012).

¹¹ It should be noted that Itzcovich’s critique of governing by values, when the latter are understood not to refer simply to the principles of the law, is solid and convincing: G Itzcovich, ‘On the Legal Enforcement of Values: The Importance of the Constitutional Context’, in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017). On a similar critique in the realm of private law, see eg MW Hesselink, ‘Private Law and the European Constitutionalisation of Values’ *Amsterdam Law School Research Paper* No 2016-26.

¹² See LFM Besselink, ‘The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives’, in Jakab and Kochenov (eds) (n 11); B Bugarič, ‘Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism’, in C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (CUP 2016); W Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider’ (2010) 16 *Columbia Journal of European Law* 385.

¹³ The Council Legal Service’s take on this matter is the most extreme example of how restrictively the values are approached: the Commission was suspected of breaching the principle of conferral based on its declared readiness to serve its Treaty-assigned role in the context of Art 7 TEU in a transparent and orderly manner via a so-called ‘Rule of Law Mechanism’ (European Commission, ‘A New EU Framework to Strengthen the Rule of Law’, Strasbourg, 11 March 2014, COM(2014) 158 final); Council of the European Union, Opinion of the Legal Service 10296/14, of 14 May 2014, esp. para 28. For analysis and critique, see, D Kochenov and L Pech, ‘Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality’ (2015) 11 *EUConst* 512.

for¹⁴ and against¹⁵ a permissive approach to the enforcement of EU values by for instance applying Articles 258, 260 TFEU and other enforcement procedures¹⁶ to the domain of Article 2 TEU are well documented.¹⁷ In the face of this perceived uncertainty, the general caution of including Article 2 TEU among the provisions of the Treaties to be enforced by the EU institutions via the classical procedures going beyond the exceptional – and hitherto dormant – Article 7 TEU¹⁸ persist, notwithstanding the fact that the clearly enforceable nature of Article 2 TEU is widely acknowledged.¹⁹ Considering the nature of the values of Article 2 TEU, which are in fact the principles of EU law, confining their enforcement to Article 7 TEU would seem too narrow a reading, a conclusion which has come to be the prevalent view in the literature today – from Christophe Hillion to Kim Lane Sheppele.²⁰ The Commission also agrees, expressly listing standard enforcement procedures as useful tools of Rule of Law enforcement in its pre-Article 7 procedure.²¹

Consequently, pretty much all the discussion of the enforcement of EU law has until very recently been ignoring a crucially important element of the puzzle of the effectiveness of EU law: values. Unlike in the case of the *acquis sensu stricto*, the high level of the Member States' compliance with the values of Article 2 TEU has been simply presumed, thus seemingly not requiring the opening of the Pandora's box of the values enforcement debate.²² The literature has been focusing instead on the transposition of the Directives and compliance with Court decisions among other aspects of the complex enforcement landscape²³ – an established tradition which numerous chapters in this volume equally follow.²⁴

¹⁴ C Closa, 'Reinforcing the Rule of Law: Normative Arguments, Institutional Proposals and Procedural Limitations', in Closa and Kochenov (n 12).

¹⁵ JHH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law', in Closa and Kochenov (n 12); J Cornides, 'The European Union: Rule of Law or Rule of Judges?' (2013) *EJIL Analysis* (blog) <www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/> accessed 5 June 2016.

¹⁶ Such as Art 259 TFEU, for instance: D Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *The Hague Journal of the Rule of Law* 153.

¹⁷ Eg A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *CMLRev* 59.

¹⁸ For the criticism of the deployment by the Commission of the 'Pre-Article 7 Procedure' against Poland in January 2016 – the only example of a move by an EU institution which could result in the invocation of Art 7 TEU to date, see D Kochenov and L Pech, 'Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation' (2016) 54 *Journal of Common Market Studies* forthcoming.

¹⁹ Most notably by J-C Piris, *The Lisbon Treaty* (CUP 2010) 71; C Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in Closa and Kochenov (n 12).

²⁰ Hillion (n 19); KL Scheppele, 'The Case for Systemic Infringement Actions', in Closa and Kochenov (n 12).

²¹ See, COM(2014) 158 final.

²² For notable recent exceptions, see J-W Müller, 'A Democracy Commission of One's Own, or: What It Would Take for the EU to Safeguard Liberal Democracy in Its Member States', in Jakab and Kochenov (eds) (n 11); A von Bogdandy, C Antpöhler and M Ioannidis, 'Protecting EU Values: Reverse *Solange* and a Systemic Deficiency Committee', in Jakab and Kochenov (eds) (n 11); Besselink (n 12); von Bogdandy and Ioannidis (n 18); contributions to Closa and Kochenov (n 13).

²³ The two main types of non-compliance this literature has been traditionally outlining since Francis Snyder's seminal contribution, which included failure to comply with the judgments of the ECJ and failure to transpose Directives in a timely and correct fashion, do not touch upon the essence of the key problem the EU is facing today: non-compliance with values. F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes,

Such an exclusive focus of the *acquis* is only justifiable if the presumptions of adherence to Article 2 TEU are correct and reflect the actual state of the Union and the Member States.²⁵ Increasingly voluminous evidence is emerging, however, that such presumptions could actually be baseless,²⁶ which makes ensuring that the values are complied with an issue of key importance. The box has to be open, after all. Indeed, should compliance with values not be made real throughout the EU, insisting on the enforcement of the *acquis* can produce profoundly adversarial effects, actually resulting in undermining the Rule of Law, instead of bringing about positive outcomes.²⁷ Bieber and Maiani are thus absolutely right to point out that ‘the assumption of compliance must be sustainable, and credible means and procedures to detect and terminate breaches must be in place’²⁸ – this is precisely what the EU has to ensure in the nearest future.

The goal of this chapter is to problematise the current lack of focus on compliance with the values in the general EU law enforcement literature, notwithstanding the emergence of a notable body of work which considers the problems posed by the lack of working mechanisms of the enforcement of values in detail. Echoing the conviction clearly held by the authors of the value-enforcement proposals, which this chapter presents and discusses – and thus joining a chorus of (still) largely dissenting voices in the sea of key EU law enforcement literature – the chapter argues that the enforcement of values should occupy a key place in the story of the enforcement of EU law. To this end, in addition to providing an overview of the role played by the values of EU law and tracing some of the history of values-aware thinking in EU law (3.), the chapter surveys the key approaches to the enforcement of values proposed by scholars (4.),²⁹ followed by a critical analysis of the implications of not taking the outstanding values enforcement problem seriously (5.).

Tools and Techniques’ 56 (1993) *MLR* 19; L Conant, ‘Compliance and What EU Member States Make of It’, in M Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012), 1 (for a great contemporary overview from the traditional perspective). Compare D Piqani, ‘The Role of National Constitutional Courts in Issues of Compliance’, in Cremona (n 23) 132; J Tallberg, ‘Paths to Compliance: Enforcement, Management, and the European Union’ (2002) 56 *International Organisation* 609.

²⁴ See, to a different degree, LW Gormley, ‘Infringement Proceedings’, in Jakab and Kochenov (eds) (n 11); P Wennerås, ‘Making Effective Use of Article 260 TFEU’, in Jakab and Kochenov (eds) (n 11); and N Reich, ‘*Francovich* Enforcement Analyzed and Illustrated by German (and English) Law’, in Jakab and Kochenov (eds) (n 11).

²⁵ D Kochenov, ‘The EU and the Rule of Law – Naïveté or a Grand Design?’, in M Adams et al, *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2016); R Bieber and F Maiani, ‘Enhancing Centralized Enforcement of EU Law: Pandora’s Toolbox?’ (2014) 51 *CMLRev* 1057.

²⁶ A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart 2015);

²⁷ D Kochenov, ‘EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?’ (2015) 34 *Yearbook of European Law* 51.

²⁸ Bieber and Maiani (n 26). See also, R Bieber and F Maiani, ‘Sans solidarité point d’Union européenne’ (2012) 48 *RTDeur* 265; von Bogdandy and Ioannidis (n 18); Closa (n 14).

²⁹ In doing this, the chapter draws of the analysis I included in the report co-authored for the European Parliament: P Bárd et al, ‘An EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights: Assessing the Need and Possibilities for the Establishment of an EU Scoreboard on Democracy, the Rule of Law and Fundamental Rights’, European Parliament Research Paper PE 579328 (Brussels, 2016).

3. The values in the context of the *acquis*

The EU received its core values at its inception. Achieving peace and prosperity, the immediate goals of the Union still with us since the times of the Schuman declaration, had a strong implied liberty component. Dictatorships and any countries which were not ‘free’ were not welcome to join the Union.³⁰ Notwithstanding the fact that democracy and the Rule of Law were not part of the black letter law of the Communities for a long time, both have clearly been regarded as important unwritten principles, eventually getting codified thanks to the pre-accession strategy in the context of the preparation of the ‘big-bang’ enlargement to the East of the continent.³¹ It is this process, alongside the political initiatives of the institutions and the *obiter dicta* in the case law of the Court of Justice which resulted in the distillation of the core elements of the principle of the Rule of Law and other ‘values’ in the context of EU constitutionalism.³²

The founding fathers of the Union were not as naïve as they might seem today, notwithstanding the fact that dealing with the actual adherence to the values has traditionally been approached as a national, not a supranational concern. The membership of the Union as such, with all the perceived constraints it brings, was supposed to guarantee compliance with the basic values through the day-to-day operation of the emerging *droit de l’intégration*.³³ Clearly, for a long time the Union itself posed a more serious threat to the values of the Member States than the Member States’ own political and eventually legal problems did, as attested to by the *Solange* saga, for instance:³⁴ the Union had to reinvent itself under pressure from the Member States to take human rights into account,³⁵ only to re-emerge as an organisation vaguely compatible with some key principles of modern constitutionalism.³⁶ This was a huge step forward compared with the assumptions informing the early case law of the ECJ, including that human rights are none of the Union’s concern.³⁷ Characteristically, no Treaty change was required, since the core functioning of the Union was in danger.³⁸ Not a single Member State revolted against the idea of the Union taking human rights on board – which undoubtedly

³⁰ D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008), chapters 1 and 2.

³¹ For the whole story, see *ibid*.

³² Pech (n 6). On the analysis of this distillation process and its outcomes, see, D Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ (2009) 2 *Erasmus Law Review* 5.

³³ P Pescatore, *Le droit de l’intégration. Emergence d’un phénomène nouveau dans les relations internationales selon l’expérience des Communautés Européennes* (AW Sijthoff 1972).

³⁴ FC Mayer, ‘Multilevel Constitutional Jurisdiction’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/CH Beck 2010), 400, 410–420.

³⁵ B de Witte, ‘The Past and Future of the European Court of Justice in the Protection of Human Rights’ in P Alston (ed), *The EU and Human Rights* (OUP 1999); JHH Weiler and NJS Lockhart, ‘“Taking Rights Seriously” Seriously’ (I and II) (1995) 32 *CMLRev* 579.

³⁶ As a result, human rights now make an important part of EU law, even though human rights protection is such is generally viewed as lying outside of the scope of EU law: a rare activity of the EU coming without a proper competence to act.

³⁷ Case 1/58 *Stork v High Authority*, EU:C:1959:4 [1959] ECR (English Special Edition) 17.

³⁸ Cf. On the possibility of a ‘Cassandra scenario’ of inter-court dialogue: M Kumm, ‘Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice and the Fate of the European Market Order of Bananas’ (1999) 36 *CMLRev* 360.

amounted to a profound reinterpretation if not the *de facto* rewriting of the Treaties. The Rule of Law – even if a slightly tautological one³⁹ – followed suit, only to be joined by an official story of democracy, after the paper dust of the democratic deficit debate settled somewhat.⁴⁰

a. *Ad hoc* articulation of values in the pre-accession context

There was a traditional difference, however, in how the Union would treat its founding members as opposed to the Member States joining later. Perusal of the literature of the day demonstrates that there were burning concerns with the *new* Member States' ability to undermine the Union through either a failure to adhere to the basic principles of democracy and the Rule of Law, or through entering the Union only to dismantle or undermine what has been created from within. Both would amount to an assault on EU values. The realisation of these two dangers resulted in the gradual articulation of EU customary law on enlargement, which would only allow democratic states adhering to the Rule of Law to accede long before these requirements made it into the text of the Treaties.⁴¹ Applications from totalitarian states, like Franco's Spain or the Kingdom of Morocco, were either politely turned down or left without any consideration. These rejections, alongside the academic doctrine of the time,⁴² were the first articulations of the shared values the Union and the Member States are built upon besides the formulation of the initial invitation preceding the creation of the Union, which was addressed to 'free European states', freedom being interpreted in the literature as a requirement of adherence to democracy and the Rule of Law coupled with a capitalist economy.⁴³ These essential foundations gradually came to play the role of vital principles of EU law and ended up recognised as such in the primary law of the Union.

The two different potential value-problems which became acute in the enlargement context are still with us today. The first, which was already being discussed in the literature before the accession of the UK, concerned a new democratic Member State undermining the integration project from within. The second, which is as old as the first, concerned a non-democratic state not abiding by the Rule of Law, undermining the Union by failing to adhere to its basic (then unwritten) principles. The Union had to deal with both in the context of the application and evolution of its pre-accession policy. The core approach chosen in this context was an *ex ante* one: targeting the likely problems before the accession of the new Member States to the Union. The insufficiency of this approach is now clear in the context of both problems it

³⁹ G Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in a Two-Level System', in Closa and Kochenov (n 12).

⁴⁰ For the official democracy story, see K Lenaerts and J Gutiérrez-Fons, 'EU Citizenship: Hopes and Fears' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

⁴¹ Kochenov (n 30) chapter 1.

⁴² Eg, P Soldatos and G Vandersanden, 'L'admission dans la CEE – Essai d'interprétation juridique' (1968) *Cahiers de droit européen* 628; J-P Puissochet, *The Enlargement of the European Communities. A Commentary on the Treaty and the Acts Concerning the Accession of Denmark, Ireland and the United Kingdom* (AW Sijthoff 1975).

⁴³ Soldatos and Vandersanden (n 43).

aimed to solve. This insufficiency is attested to by the uncooperative behaviour of some Member States and the backsliding of others, no matter how seriously both had been scrutinised by the Union before they became part of it.

The nascent *ex post* approach, first tried *ad hoc* in Austria⁴⁴ and now articulated in Article 7 TEU and the pre-Article 7 procedure recently launched against Poland,⁴⁵ has been criticised in the literature for its political rather than legal essence and the difficulty of its deployment, requiring reinforcement of the *ex post* approach and upgrading the tools to defend Article 2 TEU compliance in the EU's arsenal.

b. A democratic Member State undermining the Union from within

The first problem out of the two outlined above is still acute, not caught sufficiently by the duty of loyalty. The UK 'vetoing' the banking union package at the height of the euro-crisis or the undermining of EU policies in the neighbourhood by Greece are clear reminders of this fact.⁴⁶ For an open-minded observer this is not a problem at all, potentially merely pointing instead towards the existence of political space in the precise articulation of EU law. Surely, EU law – even the four freedoms – can roll back, if not entirely, then in part, to reflect the political will of the Member States. It is clear, however, that it was precisely this political space of negotiation and renegotiation which the founding *Herren der Verträge* were aiming to eliminate.⁴⁷ Given that the *acquis* is largely about the rigidity of the objectives of integration and the sanctification of the internal market, the elements of which are not open for reconsideration,⁴⁸ it was only logical that scholars proposed seeking binding commitments from the incoming Member States concerning the need to uphold the goals of integration. Judge Pescatore was among the proponents of the idea:

Aux nouveaux venus, [...] il faut demander non seulement de définir leur position à l'égard des objectifs d'ores et déjà définis et consacrés par des engagements fermes. Il faut les interroger aussi sur leurs intentions en ce qui concerne les chances d'une évolution ultérieure vers l'union politique.⁴⁹

⁴⁴ See the chapter by K Lachmayer 'Questioning the Basic Values – Austria and Jörg Haider', in Jakab and Kochenov (eds) (n 11); Sadurski (n 12).

⁴⁵ Kochenov and Pech (n 18).

⁴⁶ E Basheska and D Kochenov, 'Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation' (2015) 39 *Southeastern Europe* 392.

⁴⁷ These efforts crystallised in the formulation of the first principle of EU enlargement law: the prohibition to renegotiate or permanently alter the existing *acquis*. This principle resulted in the rejection of the first UK application for membership. For a detailed analysis, see Kochenov (n 30).

⁴⁸ G Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart 2015); G Peebles, "'A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law and Social Inquiry* 581, 605.

⁴⁹ Pescatore (n 33) 29. See also Puissochet (n 42) x.

Given the core of what EU economic integration stands for, including perfecting the internal market edifice and the sacred commandments of the four freedoms, concerns about the key objective of the internal market are as valid today as they were in the seventies.⁵⁰ It is clear that David Cameron's 'renegotiation' is exactly what Pescatore, Puissechet and others were worried about;⁵¹ Brexit, however, is not, as long as it does not damage the EU's *acquis*.⁵²

The first problem has thus not yet been solved so far, but we are still in the shadow of the proposed solutions to it: it seems that the internal market cannot be changed, not only not through renegotiation (a theoretical possibility of an overwhelming and radical overhaul of the Union aside) but also not democratically,⁵³ and is not necessarily an apolitical force of the good,⁵⁴ which poses a serious qualification in any text characterising the EU as such as a democracy, particularly in the age of austerity.⁵⁵ The Union thus emerges as a democracy of means, not a democracy of ends.

c. Member States' backsliding undermining the Union

Solving the second problem equally met with challenges. Most importantly, these concerned the insufficient adherence of some Member States to the core principles of the Union. Attempts to solve this problem are of fundamental importance to us, as they triggered the very formal inclusion of values in the Treaty text, thus giving unwritten principles a clear textual articulation in what is now Article 2 TEU.⁵⁶ The early nineties marked a time when the hitherto unwritten principles of enlargement law – the basic values the candidate countries were supposed to adhere

⁵⁰ For a grand overview, see C Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP 2013).

⁵¹ C O'Brien, 'Cameron's Renegotiation and the Burying of the Balance of Competences Review' (2014) <<http://ukandeu.ac.uk/camérons-renegotiation-and-the-burying-of-the-balance-of-competencies-review/> accessed 5 June 2016.

⁵² See A Łazowski, 'Inside but out? The United Kingdom and the European Union', in Jakab and Kochenov (eds) (n 11).

⁵³ Davies (n 48); A Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 ELJ 142.

⁵⁴ P Allott, 'European Governance and the Re-branding of Democracy' (2002) 27 ELRev 60; C O'Brien, 'I Trade Therefore I Am: Legal Personhood in the European Union' (2013) 50 CMLRev 1643; P Caro de Sousa, 'Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) 20 ELJ 499. C Joerges and M Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?' in G de Búrca, C Kilpatrick and J Scott (eds), *Critical Perspectives on Global Governance. Liber Amicorum David M. Trubek* (Hart 2014) 297; M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 ELJ 572; D Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe', in L Azoulay, E Patatut and D Barbou des Places (eds), *Ideas of the Person and Personhood in European Union Law* (Hart 2016).

⁵⁵ A Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal* 453.

⁵⁶ Indeed, this could be characterised as one of the key legacies of EU enlargements in the field of EU constitutionalism. See W Sadurski, *Constitutionalism and Enlargement of Europe* (OUP 2012).

to – came to be distilled in writing.⁵⁷ Crucially, they came to be applied both in the external (pre-accession) and the internal context of EU law.

Following the decision to enlarge to the East of the continent of 1993, the European Union formulated the Copenhagen Criteria for the candidate countries to fulfil, including democracy, the Rule of Law, the protection of human rights and respect for and protection of minorities.⁵⁸ The general wording of the criteria, coupled with the *de facto* elimination of any *ratione materiae* constraints on the set of issues the EU could examine in the context of the required pre-accession adaptation of the candidate countries' constitutional structure and operation resulted in a reinterpretation of the international agreements then in force to produce values-compliance and, even more importantly for us, produced a whole cottage industry within the European Commission which ultimately released thousands of pages of reports assessing *all* the areas of law in the candidate countries to ensure that these complied with EU demands.⁵⁹ This corpus of documents allowed the Commission to formulate the essential components of the values which were then made binding on the candidate countries.⁶⁰ It is based on this corpus that we know that they had to adhere to democracy, the Rule of Law and human rights protection, as well as what each of these elements implied in practice.⁶¹ Although the Commission's engagement was a resounding failure in that it stopped far short of shaping any sufficiently general and clear rules which would govern the EU's pre-accession engagement with democracy and the Rule of Law, and were marked by inconsistent, self-contradictory, oblivious and inconsequential application of its own newly-created rules,⁶² the values were now definitely part of positive *koiné* of EU law and entered the Treaties as such. Indeed, this is probably the core effect of the Eastern Enlargement for the constitutional essence of the Union.⁶³

Upon joining the Union, the *carte blanche* the Union endowed itself with in the course of enlargement preparation was bound to expire. The morning when the candidate countries woke up as Member States, the majority of the pre-accession constraints⁶⁴ on how they should shape their statehood, from civil service law to the training and appointment rules for the judiciary, as well as the number of readings particular bills should receive in Parliament were gone, along

⁵⁷ D Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law' (2004) 8 *European Integration online Papers* 1.

⁵⁸ The criteria read as follows:

'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union'.

See C Hillion, 'The Copenhagen Criteria and Their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart 2004).

⁵⁹ For analyses, see M Maresceau, 'Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE' in J Raux, *Le droit de l'Union européenne en principes: Liber amicorum en l'honneur de Jean Raux* (LGDJ 2006) 69; Kochenov (n 30).

⁶⁰ Kochenov (n 30).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Sadurski (n 56).

⁶⁴ See Kochenov (n 30) for a detailed analysis.

apparently with the EU's ability to intervene directly should serious Rule of Law/democracy backsliding occur.

Following this change in the EU's role, the need to come up with effective means to deal with the backsliding Member States became only more acute – and not merely with regard to the new Member States. Moreover, from a theoretical possibility backsliding turned into an acute reality in a number of the Member States. Given that the presumption that the values of Article 2 TEU do not form a part of ordinary *acquis*, remained popular, the core instrument left for the solution of the problem to hand is Article 7 TEU, which contains a procedure not limited to violations of the *acquis*. Much has been written about this instrument and scholars and the institutions seem to agree that triggering it is excessively difficult, while its purely political nature and with no role left for the ECJ to play potentially undermines the effectiveness of Article 2 TEU and the practical legal significance of the values shared between the EU and the Member States. The agreement is so clear that the Commission actually inaugurated a 'pre-Article 7 Procedure'⁶⁵ to overcome some of the shortcomings of the instrument. The Procedure's activation against Poland, boasting of no results demonstrates with clarity that the procedure is not a game-changer in the value-enforcement debate.⁶⁶

d. Deep-rooted vulnerabilities of the Union in the domain of values

The Union's vulnerabilities when it comes to safeguarding its values are of a fundamental nature and pose a very serious threat to the success of the whole integration project. Given the perceived novel nature of the threat – as adherence to the values of Article 2 TEU had simply been taken for granted before recent years marked by the 'backsliding' of several Member States⁶⁷ – simply falling back on the old time-tested approaches is not an option: academic literature had until recently focused exclusively on the Union's *own* adherence to the Rule of Law⁶⁸ and the candidate countries' record in this area, assuming that any, indeed, *all* serious Rule of Law deficiencies within each EU Member State would be dealt with by the relevant national authorities. The problems we are currently facing were thus largely unforeseen in 'a Community based on the rule of law',⁶⁹ all the instruments described above notwithstanding. Academics and policymakers have however quickly caught up with the issue of 'Rule of Law backsliding' in the EU and formulated an array of proposals of how to deal with the outstanding problems.

⁶⁵ European Commission (n 13).

⁶⁶ See Kochenov and Pech (n 18).

⁶⁷ The term was coined by Jan-Werner Müller: J-W Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' (2013) *Working Paper* No 3 (Washington DC: Transatlantic Academy).

⁶⁸ See, most importantly, L Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* No 04/09 (NYU Law School), 2009; Fernández Esteban (n 5).

⁶⁹ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

4. The core proposals to ensure that values are enforced alongside the *acquis*

The majority of proposals focus on institutional action, either within the context of the Union, or with the involvement of outside actors and institutions. In addition to the legally-articulated ways there is of course always a possibility of *ad hoc* actions, akin to the kind which marked the EU's involvement in Austrian politics fifteen years ago in reaction to the building of a governing coalition in that state, which involved FPÖ, an extreme right nationalist party, which was still unusual in the political context of the time, but now looks to some degree like a strange exaggeration.⁷⁰ The legality of such *ad hoc* actions, especially in the presence of specific Treaty provisions aiming at achieving the same effects, is of dubious nature, given the abundance of procedures in the Treaties designed specifically to deal with the situation at hand, including, but not limited to the two procedures of Article 7 TEU.⁷¹

In this vast sea of academic proposals, seven stand out in particular. They offer contrasting visions and due to the complexity of the problems we confront, none appears sufficient on its own to solve these problems, but they nonetheless offer EU policymakers plenty of food for thought. Most importantly, there is enormous potential to deploy different elements of these proposals in combination. While the majority among them attempts to offer short-term solutions and are thus deployable immediately (at least according to their creators), several unquestionably require Treaty change, which is clearly an unfeasible option in the current legal-political climate.

The emphasis on the actual *enforcement* of values is present in the proposals to a varying degree, since not all of them come equipped with a fine-tuned sanctioning mechanism in addition to the possibility to use the existing instruments, such as the shaming of the backsliding Member State, the suspension of the participation of that state in the Union institutions via Article 7 TEU or, alternatively, recourse to the financial penalties via Article 260 TFEU: all much criticised in the literature and for very good reasons.⁷²

The key proposals briefly discussed below include the following:

- a. Systemic infringement procedure;
- b. Biting intergovernmentalism;
- c. Reverse *Solange*;
- d. The Copenhagen Commission;
- e. The 'exit card';
- f. Peer-review and 'Horizontal *Solange*';

⁷⁰ GN Toggenburg, 'La crisi austriaca: delicati equilibri sospesi tra molte dimensioni' (2001) 2 *Diritto pubblico comparato ed europeo* 735; Lachmayer (n 44).

⁷¹ See, for meticulous analyses, Hillion (n 19); Besselink (n 12).

⁷² Eg Wennerås (n 24); M Smith, 'The Evolution of Infringement and Sanction Procedures. Of Pilots, Diversions, Collisions, and Circling', in A Arnall and D Chalmers (eds), *The Oxford Handbook of European Law* (OUP 2015), 350; B Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?' (2013) 19 *ELJ* 420; P Wennerås, 'Sanctions against Member States under Article 260 TFEU: Alive, but not Kicking?' (2012) 49 *CMLRev* 145; M Smith, 'Inter-institutional Dialogue and the Establishment of Enforcement Norms: A decade of Financial Penalties under Article 228 EC (now Article 260 TFEU)' (2010) 16 *European Public Law* 547.

g. Outsourcing monitoring and enforcement to non-EU institutions.

a. Systemic infringement procedure

Kim Lane Scheppele's 'systemic infringement procedure' proposal deserves to be examined first.⁷³ In a nutshell, this proposal aims to ensure the most effective use of existing infringement procedures, which have been deployed relatively successfully by the Commission in the context of the enforcement of EU law since the founding of the Communities. The proposal makes a sound attempt to address the shortcomings of the existing EU law enforcement machinery aiming to upgrade its ability to deal with any potential and actual serious breaches of EU values. This is done in two fundamental steps, covering both the procedure for identifying the breach of values and the enforcement of compliance.

Firstly, Scheppele suggests enabling the bundling up of infringements so as to empower the Commission to present a whole infringement package to the Court of Justice, rather than pursuing single instances of non-compliance on a case-by-case basis. The crucial underlying assumption in this approach is that pursuing numerous infringements simultaneously amounts to more than just the sum of its parts, as it should enable the Commission to present a clear picture of systemic non-compliance as regards Article 2 TEU. In this way – especially if Article 2 TEU is coupled with the duty of loyalty laid down in Article 4(3) TEU,⁷⁴ the Court could for instance hold that the Rule of Law has been breached by a Member State on the basis of multiple single breaches of EU law bundled together and submitted by the Commission in one go. Even more, multiple individual breaches might even not be required, as long as a complex pattern of developments described in the case testifies to a violation of EU's values. While it is often assumed that Article 2 TEU lacks justiciability, combining it with Article 4 TEU could potentially solve this problem, with jurisdiction stemming from the overwhelming demonstration of the seriousness of breach. Moreover, this 'bundling approach' would not in fact be entirely new, although it has only been used so far with respect to a systemic breach of the EU *acquis*,⁷⁵ even if involving a provision of the Charter of Fundamental Rights on at least one occasion.⁷⁶ Scheppele's proposal should therefore be commended for offering a creative route to enforcing Article 2 TEU on the basis of an existing and well-tried procedure by merely altering the mode and scope of its application by stepping from dwelling strictly in the field of the *acquis* of the Union into the area of values.

The second part of Scheppele's proposal is just as important and is designed to deal with the limited effectiveness of financial sanctions as a tool to ensure compliance. The proposal is

⁷³ Scheppele (n 20).

⁷⁴ 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union [...]'

⁷⁵ Eg Case C-494/01 *Commission v Ireland (Irish Waste)* [2005] ECR I-3331.

⁷⁶ <http://europa.eu/rapid/press-release_IP-15-6228_en.htm> accessed 5 June 2015.

simple: rather than imposing financial sanctions, the EU should seek to subtract any EU funds that the relevant Member State is entitled to receive. Although some secondary legislation would likely be needed to make this part of the proposal a reality,⁷⁷ it is definitely an approach to be considered very seriously. While the effectiveness of this change may not work with respect to countries which do not depend on EU funds, it may well be effective with respect to Member States particularly dependent on EU funds, such as Hungary. While both elements of the proposal are legally solid, its weakest point is the second part, not the first. Given that sanctions are usually particularly ineffective in bringing about regime change, any country which is not merely becoming autocratic, but is *already* there is most unlikely to change its ways under financial pressure.⁷⁸ This problem is generally applicable to virtually all the proposals for consideration below, however: not much can be done with money against an autocratic government which is particularly nasty and absolutely determined. Some other tools should be found. There is a second important weak spot, however: the Commission's approach to reading Article 258 TFEU and applying this instrument seems to be hostile to taking EU values into account when bringing a case. This resulted in a number of missed opportunities – the judicial retirement case with regard to Hungary, which was a glorified loss in terms of the Rule of Law, rather than a win, being one of the examples of this.⁷⁹ The proposal, however legally sound, is unlikely to be employed in practice, unless the Commission changes its counterproductive and artificially narrow approach to the scope of Article 258 TFEU and the enforcement of values more generally.

b. Biting intergovernmentalism

'Biting intergovernmentalism'⁸⁰ builds on the idea of utilising the systemic infringement procedure explained above, but offers a potentially more sensitive way to deploy the procedure, while not expecting the Commission to change its ways. In this sense, biting intergovernmentalism is deployable immediately. The core idea consists in bringing systemic infringement cases based on Article 259 TFEU, rather than Article 258 TFEU. The former provision allows the Member States themselves to bring their Treaty-violating peers to Court. The presumption behind the provision is that all the members of the Union are equally interested – just like the institutions – in ensuring sustained compliance with the Treaties by their peers.

⁷⁷ A certain change in the ECJ's approach to the calculation of penalties under Article 260 TFEU, in particular the criterion of the 'ability to pay', could also be in need of some reconsideration, but is unlikely to form an overwhelming obstacle to the implementation of the proposal: D Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed' (2014) 33 *Polish Yearbook of International Law* 145.

⁷⁸ N Tocci, *Can the EU Promote Democracy and Human Rights through the ENP? The Case for Refocusing on the Rule of Law* in M Cremona and G Meloni (eds), *The European Neighbourhood Policy: A Framework for Modernisation?*, EUI Working Paper LAW 2007/21, 29. See also Kochenov (n 77) 168.

⁷⁹ See for an analysis, Z Szente, 'Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them', in Jakab and Kochenov (eds) (n 11).

⁸⁰ Kochenov (n 16).

Importantly, no demonstration of direct concern is needed to meet the standing requirements: the mere fact of a breach of EU law is sufficient.⁸¹

Under Article 258 TFEU the Commission enjoys absolute discretion in bringing Article 258 TFEU cases.⁸² Given that the Commission might choose at any moment not to bring a case even where there is a clear breach, or, which would be even more counterproductive in the context of values enforcement, to bring a case based merely on the violation of the rules of the *acquis sensu stricto*, getting twenty-seven additional potential litigators on board is hugely important. True, the Commission is the first point of contact for a Member State bringing a case under Article 259 TFEU – the provision even allows the Commission to take over. What is crucial in this context, however, is that the Member State is not bound by the Commission’s exercise of discretion. This concerns both the Commission’s decision *not* to take over the case and the Commission’s selection of arguments on the basis of which to proceed once the case has been taken over. In both instances the Member State concerned with the failure to abide by the Treaties evident from the state of affairs in one (or more) of its peers is free to bring the latter to Court construing the case as it sees fit.⁸³

This is the first great advantage of the biting intergovernmentalism proposal over a simple systemic infringement action brought by the Commission: the Commission’s limited reading of the scope of infringement proceedings cannot deprive biting intergovernmentalism of its effectiveness, making the deployment of systemic infringement proposal straightforward and available immediately.

There is a second advantage, however: the Union is constantly criticised for ‘creeping competences’ and ‘power grabs’, allowing Member States which fail to comply with the values of Article 2 TEU to mis-represent the Commission’s systemic infringement action under Article 258 TFEU as a blunt attempt to violate Member State sovereignty by a power-hungry Union. The same argument is difficult to make when another Member State is bringing a systemic infringement action, which gives the biting intergovernmentalism proposal a political edge. With regard to the actual enforcement of values once a non-compliant Member State has been found in breach under Article 259 TFEU, the standard procedure financial sanctioning procedure will then need to be applied.

⁸¹ This is the case since Art 259 – just like 258 TFEU – is not intended to protect the claimants’ rights. Rather, the provisions aim to ensure general compliance with EU law: eg Case C-431/92 *Commission v Germany* [1995] ECR I-2189, para 21. Compare L Prete and B Smulders, ‘The Coming of Age of Infringement Proceedings’ (2010) 47 CMLRev 9, 13.

⁸² Eg Opinion of AG Tizzano in Joined cases C-466 and 476/98 *Commission v UK et al* [2002] ECR I-9741, para 30. Compare Prete and Smulders (n 81) 14.

⁸³ See eg Case 141/78 *France v UK* [1979] ECR 2923. For an overview of relevant practice, see eg Prete and Smulders (n 81) 27 (and the references cited therein).

c. ‘Reverse *Solange*’

One of the most widely discussed proposals is based on AG Poiares Maduro’s Opinion in *Centro Europa 7*, and was popularised by Armin von Bogdandy.⁸⁴ Similarly to the two proposals discussed above, the existing law and institutional structure of the Union are relied upon to address the Rule of Law crises in the EU, and no Treaty change is therefore required. The core idea focuses on grave violations of fundamental rights. Once the seriousness of rights violations in a given Member State is particularly grave, this allows the Union courts (including that same Member State’s courts in their capacity as enforcers of EU law) to intervene. The gravity of the violation would create jurisdiction.⁸⁵

This proposal is known as ‘Reverse *Solange*’ as it purports to espouse the logic of the *Bundesverfassungsgericht (BVerfG)* in the *Solange I* and *Solange II* cases.⁸⁶ In these two cases, the *BVerfG* reserved to itself the final say on matters of EU law in situations where EU law could threaten the core of human rights protection established by the German Basic Law. Although the *BVerfG* has never actually acted on its threat, its *Solange* jurisprudence led the Court of Justice to reconsider its earlier stance (in *Stork*) regarding human rights protection in the early 1960s and hold that respect for human rights is one of the key conditions governing the lawfulness of EU acts.

The essence of Armin von Bogdandy’s proposal is to ‘reverse’ the *Solange* approach by allowing the Court of Justice to move within the domain of the national law with a view of protecting EU values. The authors of the proposal presume that such a jurisdictional move would only be possible in truly exceptional cases of systemic non-compliance, suggesting that in a situation where human rights would be systemically violated in a ‘captured’ Member State, national courts should be empowered to make a preliminary reference under Article 267 TFEU in order to invite the Court of Justice to consider the legality of national actions in the light of Article 2 TEU, which the Court is not currently entitled to do.

While normatively defensible, this proposal however suffers from several shortcomings, as it emerges as most probably unworkable both in theory and in practice. Most importantly, it does not even address the key issues related to the lack of compliance with Article 2 TEU in some Member States. This is due firstly to the proposal’s heavy reliance on national courts, whereas the judiciary is normally the first institution which illiberal forces would seek to capture, as the Hungarian example itself shows. Tellingly, Poland followed suit very closely, as

⁸⁴ Opinion of the Advocate General, Case C-380/05 *Centro Europa 7* [2007] ECR I-349, para 14 *et seq.* For an academic articulation, see A von Bogdandy et al, ‘Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 CMLRev 489; A von Bogdandy et al, ‘A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* Doctrine’, in von Bogdandy and Sonnevend (n 26); von Bogdandy, Antpöhler and Ioannidis (n 22). For criticism, see eg J Croon Gestefeld, ‘Reverse *Solange* – European Citizenship as a Detour on the Route to Fundamental Rights Protection against National Infringements’, in Kochenov (ed) (n 40); Kochenov (n 77).

⁸⁵ In this sense the proposal is in line with the case law of the Court of Justice, which finds jurisdiction based on the gravity of consequences caused by the deprivation of rights, eg D Kochenov, ‘A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe’ (2011) 18 CJEL 56.

⁸⁶ BVerfGE 37, 271 (1974); BVerfGE 73, 378 (1986); BVerfGE 89, 155 (1993).

obstructing the work of the Constitutional Tribunal was among the priorities of the new government. If national courts are packed and decapitated,⁸⁷ one can hardly expect them to play any effective role in promoting Article 2 TEU compliance in the captured state of which they are part.

More importantly, however, the requirement of systemic non-compliance makes the implementation of the proposal practically impossible: the threshold is simply too high.⁸⁸ Ultimately, the presumption that the logic of trying not to give up *existing* jurisdiction – the original driver behind the *BVerfG*'s *Solange* – and the logic behind claiming *new* powers by the ECJ – which is the driver behind the Reverse *Solange* proposal – are comparable, seems to underplay significantly the fundamental differences between the two.⁸⁹ As a consequence, the so-called 'reverse *Solange*' seems misnamed.

The last point of criticism to put forward would be that not all backsliding in Rule of Law terms implies grave and persistent human rights violations. Quite the contrary seems to be true: a well-executed dismantlement of the Rule of Law and the constitutional checks and balances can happen – or at least go through crucial initial stages – without bald violations of human rights.⁹⁰ Once the main jurisdictional argument made in Reverse *Solange* is considered outside of its rights context, however, it is very similar in essence to the one employed in the context of the systemic infringements proposal: the graveness of violation as such combined with their demonstrable character allows for intervention. For the reasons above, however, it is abundantly clear that systemic infringement procedures – either via Article 258 TFEU, or Article 259 TFEU – are overwhelmingly preferable to Reverse *Solange*: they are not limited in their deployment to human rights, the thresholds are more manageable and formulated more clearly, and they do not rely on the national institutions in the backsliding Member States.

The problem of enforcement *sensu stricto* is as acute with reverse *Solange* as with other proposals discussed: it comes down to Article 260 TFEU again, the effectiveness of which is not beyond doubt.

d. The Copenhagen Commission

None of the proposals mentioned above suggested the creation of a new EU body, unlike Jan-Werner Müller's, which refers to a 'Copenhagen Commission' he proposes creating. This new body would ensure regular monitoring and the enforcement of compliance of current EU

⁸⁷ Eg ECtHR *Baka v Hungary*.

⁸⁸ The example used in the proposal itself is 'the refusal to abide by the decision of the European Court of Human Rights': von Bogdandy et al 'Reverse *Solange*' (n 84) 513.

⁸⁹ See Kochenov, 'On Policing Article 2 TEU Compliance' (n 77).

⁹⁰ C Closa, D Kochenov and JHH Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (2014) RSCAS EUI Working Paper 2014/25.

Member States with Article 2 TEU. This proposal does not therefore, unlike the previous proposals, rely on existing law and structures.⁹¹

The creation of a special Copenhagen Commission is potentially very attractive, as it would be an important step towards establishing a ‘swift and independent monitoring mechanism and an early-warning system’, which the Tavares Report also wanted to see in place.⁹² The new institution would build on the Copenhagen criteria idea, going back to the 1993 European Council in Copenhagen, which established the political conditions for membership of the Union, including the respect for democracy, the Rule of Law and the protection of fundamental rights, which had to be complied with by all the countries willing to join.

Unlike the previously examined proposals, which are mostly related to mending the holes in the EU’s Article 2 TEU enforcement by relying on the existing tools already in place, the creation of a special organ with a new mechanism would clearly amount to a systemic mid to long-term solution, which is no doubt preferable, as it would potentially allow turning the EU into a full-fledged militant democracy.⁹³ To this end, it is possible for instance, also to involve the Fundamental Rights Agency of the Union more in the matters of Article 2 TEU compliance, which will most likely require only the amendment of some secondary legislation.⁹⁴

The proposal is however of a long-term nature, thus potentially unable to address immediate challenges, as the creation of any new EU body of this nature would no doubt require the approval, as well as full participation, of the Member State already experiencing problems with Article 2 TEU compliance. Moreover, questions remain as to the desirability of further complicating the institutional structure of the Union, as well as, fundamentally, the mechanics of the actual *enforcement* of the decisions of the Copenhagen Commission.

e. The ‘Exit Card’

A more radical proposal still, which would definitely require Treaty change, has been advanced by Carlos Closa.⁹⁵ It suggests the introduction of a provision akin to Article 8 of the Statute of the Council of Europe and a number of other international organisations,⁹⁶ on the basis of which

⁹¹ Müller (n 22); J-W Müller, ‘Why the EU Needs a Democracy and Rule of Law Watchdog’ (2015) 2 *Aspen Review* <www.aspeninstitute.cz/en/article/2-2015-why-the-eu-needs-a-democracy-and-rule-of-law-watchdog/> accessed 5 June 2016.

⁹² Proposing a new mechanism to enforce Article 2 TEU effectively. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), commonly referred to by the name of its Rapporteur ‘the Tavares Report’ <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0315&language=EN&ring=A7-2013-0229> accessed 5 June 2016.

⁹³ J-W Müller, ‘The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States’ (2014) 165 *Revista de Estudios Políticos* 141.

⁹⁴ GN Toggenburg and J Grimheden, ‘The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers’, in Closa and Kochenov (n 12).

⁹⁵ Closa, Kochenov, Weiler (n 90)

⁹⁶ For a meticulous assessment, see C Closa, ‘The Protection of Democracy in Regional and International Organizations’, in Jakab and Kochenov (n 11).

the EU could force a chronically non-compliant EU Member State out.⁹⁷ Such a new provision would complement Article 50 TEU, which currently permits voluntary withdrawal from the Union.⁹⁸ As outlined by Closa,⁹⁹ the idea is not to start throwing countries out of the Union, but to ensure an additional level of credibility for the sanctions which the EU can adopt on the basis of either Article 7 TEU or Article 260 TFEU.

The option to force an EU country out would be even more radical than the so-called ‘nuclear option’ laid down in Article 7 TEU and which, as previously noted, has never been used. It may be that the sheer possibility of being ‘kicked out’ of the EU would be of stronger persuasive value for the non-compliant Member State in question than the mere possibility of losing voting rights in Council.¹⁰⁰ The crucial problem with this proposal is that it can only be deployed in the long-term and unquestionably requires Treaty change. Moreover, such a proposal will have truly far-reaching implications for the concept of EU citizenship.¹⁰¹ Viewed from the citizens’ standpoint, ejecting a Member State facing severe troubles in the field of the Rule of Law and human rights could potentially demonstrate the Union’s inability to guarantee actual Article 2 TEU compliance and protect the citizens of the ‘captured’ state. Building upon the presumption that this option would enter the Treaties on the assumption that it is never to be used, like the Council of Europe’s own Article 8 of the Statute, adding the possibility of ejecting a Member State is definitely helpful, as it will dispel the unfortunate sense that Article 7 TEU is the last resort measure and should thus not be made effective use of. Enriching EU law with a Member State ejection option is thus likely to be a positive development, notwithstanding the fact that, strictly speaking, it will not help solve the problems of the non-compliant Member State.

f. Peer-Review and Horizontal *Solange*

Peer-review and ‘Horizontal *Solange*’ options are profoundly interconnected as, similarly to the biting intergovernmentalism proposal, they attempt to involve the Member States, not the Union institutions, as much as possible in solving a Rule of Law crisis. Unlike biting intergovernmentalism, however, the deployment of these two options is either potentially inconsequential (peer-review) or potentially too costly in terms of ensuring the proper functioning of the law of the Union (horizontal *Solange*). One could be branded as a ‘positive’ version of the other.

The positive proposal was made by Ernst Hirsch Ballin and a team of researchers in the Netherlands and focuses on mutual peer-review of the Member States’ compliance with the Rule

⁹⁷ Compare to É Lambert Abdelgawad, ‘The Enforcement of ECtHR Judgments’, in Jakab and Kochenov (n 11).

⁹⁸ For analyses, see P Nicolaidis, ‘Withdrawal from the European Union: A Typology of Effects’ (2013) 20 MJ 209; A Łazowski, ‘Withdrawal from the European Union and Alternatives to Membership’ (2012) 37 EL Rev 523.

⁹⁹ See, Closa, Kochenov, Weiler (n 90).

¹⁰⁰ What Article 7 TEU provides in terms of sanctions.

¹⁰¹ D Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon’ (2013) 62 ICLQ 97.

of Law,¹⁰² to the degree the Council pays heed to this proposal.¹⁰³ Peer review would allow the EU to avoid a number of problems at the core of all the other proposals under review: namely, it would not require any clear definition of the scope of EU law and the *acquis*, since peer review would be done based on agreements between the Member States outside of the framework of EU law. Although there is an obvious problem with detaching Article 2 TEU compliance from the EU legal system, the peer-review solution could be implemented swiftly. Moreover, the EU's organs could no doubt help by providing necessary information – the Fundamental Rights Agency is the first which springs to mind in this regard.¹⁰⁴ The obvious drawback of the proposal is the presumption that naming and shaming works, while we know from experience that it often does not, which explains for instance the inclusion of Article 260 TFEU into the Treaties: initially the Court did not have a legal ability to fine non-compliant Member States. The Treaties were amended in the face of the reality that Member States failing to comply with EU law would ignore Court decisions calling on them to respect the law.¹⁰⁵ It is indeed difficult to expect fundamental change from an illiberal national government as a result of other governments stating that *tout n'est pas rose* there. The problem of enforcement persists.

The 'negative' proposal allows the Member States rather than the EU to enforce sanctions against a non-compliant government by *de facto* disapplying EU law in bilateral relations with the 'guilty' state. This approach, recently analysed by Iris Canor, has been branded 'Horizontal *Solange*'.¹⁰⁶ Although the idea is not new, such treatment of non-compliant Member States profoundly undermines the very foundations of EU law, which is *not* based on reciprocity.¹⁰⁷ It strikes therefore at the core of the *acquis* and is thus unattractive for both normative and pragmatic reasons. In essence, it has the potential to throw the EU's internal market into chaos by opening up a Pandora's box of mutual accusations and immediate retaliation by the Member States – precisely what the EU has been so successful in outlawing over so many decades. Should the value enforcement problem not be addressed effectively by other means, however, Horizontal *Solange* is bound to be considered seriously by Member States disturbed by the democratic and Rule of Law backsliding of their peers.

¹⁰² See the Report prepared by Ernst Hirsch Ballin et al for the Adviesraad Internationale Vraagstukken (AIV): AIV, 'The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation' (2014) *Report No 87*, 35. See also E Hirsch Ballin, 'Mutual Trust: The Virtue of Reciprocity Strengthening the Acceptance of the Rule of Law through Peer Review', in Closa and Kochenov (n 12).

¹⁰³ Council of the EU, Press Release No 16936/14, 3362nd Council meeting, General Affairs (Brussels, 16 December 2014) 20–21. For a critical analysis, see P Oliver and J Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54 *JCMS* (forthcoming).

¹⁰⁴ Toggenburg and Grimheden (n 94).

¹⁰⁵ K Lenaerts, I Maselis and K Gutman (JT Nowak (ed)), *EU Procedural Law* (OUP 2013).

¹⁰⁶ I Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Closer *Distrust* among the Peoples of Europe"' (2013) 50 *CMLRev* 383.

¹⁰⁷ Joined cases 90 and 91/63 *Commission v. Belgium and Luxembourg* [1964] ECR 626.

a. *'Outsourcing' the Monitoring/Enforcement of EU Values*

The President of the Venice Commission, Gianni Buquicchio, put another noteworthy proposal forward.¹⁰⁸ He suggested that the EU should avail of the expertise of his institution. The Venice Commission, which is not an EU organ, belonging to the Council of Europe system instead, has built up a solid reputation on the issues of the Rule of Law both in the context of its protection and promotion in EU countries and elsewhere in Europe.¹⁰⁹ All the Member States are represented in it.

The Venice Commission proposal did not come as a surprise to those interested in the enforcement of EU values, as this body of legal experts has traditionally played an important role in ensuring compliance with the Rule of Law in current EU Member States.¹¹⁰ Given the established tradition of fruitful cooperation between the EU and the Venice Commission, which is already a reality, deepening the relations between the two offered a promising path. Buquicchio's offer does however raise two fundamental problems for the EU: one of a practical nature, the other of a normative nature.

From a practical perspective, we must note that the Venice Commission, although it obviously possesses an impressive track-record and admirable expertise, cannot boast any enforcement machinery to ensure Article 2 TEU compliance where it is most needed. In other words, outsourcing Rule of Law questions to the Council of Europe would not solve the key issue: how to guarantee actual change in the non-compliant Member States?

From a normative perspective, it is important to stress that Article 2 TEU established the core values on which both the Union and the Member States are built. Outsourcing Article 2 TEU issues thus potentially amounts to sending a signal of the EU's inability to deliver on its core promise. For this reason alone, taking up the kind offer from the Venice Commission would seem to be inappropriate as it would most likely further undermine the EU's authority in this fundamental area. In the light of the Venice Commission's inability to enforce compliance with the Rule of Law standards it formulates, taking up the offer, in addition to being inappropriate, would also be of little use.

5. Complexities behind the simple solutions: concluding remarks

When the *acquis* functions well in a situation where not all the Member States of the EU are in full compliance with the foundational values of the Union, the 'proper functioning of EU law' can even be dangerous, since the presumption of mutual trust which EU law forces on the Member States will make building firewalls between states failing to comply with the values of democracy and the Rule of Law and the fully values-compliant Member States virtually

¹⁰⁸ See his speech at the Assizes de la Justice (2014). K Tuori, 'From Copenhagen to Venice', in Closa and Kochenov (n 12).

¹⁰⁹ See, esp., European Commission for Democracy through Law (The Venice Commission), *Report on the Rule of Law*, Strasbourg, CDL-AD (2011)003rev., 4 April 2011. J Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law', in von Bogdandy and Sonnevend (n 26).

¹¹⁰ See eg its important opinions on Hungary <www.venice.coe.int/WebForms/documents/by_opinion.aspx> accessed 5 June 2016.

impossible, even if the ‘reverse *Solange*’ logic might in the end be a necessary response to the outstanding challenges coming from the blatantly non-compliant Member States. Numerous convincing arguments have been cited in favour of EU intervention in the domain of values.¹¹¹ It is clear, however, that such intervention cannot take the tested *acquis*-inspired route pretending that a meticulous policing of the *acquis* will solve the values problems. It will not. Indeed, the enforcement of values is a different matter compared with the enforcement of the *acquis sensu stricto* – a crucial difference for which both the design and the day-to-day practice of functioning of EU law is to blame.¹¹²

The majority of the enforcement literature falls short of tackling the core compliance problems in the EU today, since while the overwhelming focus is on the *acquis*, the values of the Union are virtually never taken into account. Even the most innovative accounts of enforcement, presenting justice in the EU as a service, for instance,¹¹³ do not pay sufficient attention to the need to ensure that the basic values of Article 2 TEU are adhered to. Viewed against the lacunae in the literature on enforcement, all the values’ enforcement proposals set out above, however realistic each of them can actually be, demonstrate a fundamentally important break with the dangerously short-sighted tradition approaching the issues of enforcement in the context of EU law solely with the Union *acquis* in mind. Poland, Hungary and indeed potentially any other Member State in the future, could serve as vivid illustrations of the fact that the currently dominant approach to the enforcement of EU law in the literature is counterproductive. A different approach, akin to Jan-Werner Müller’s conceptualisation of the EU’s possible future as a militant democracy, is absolutely indispensable at this stage.

The natural goal of the most important enforcement work at this point is then necessarily directly related to extending the debate about the essence of the law and the practice of ensuring compliance beyond the ambit of the *acquis* to the sphere of values. Only a system able to react to a Member State’s constitutional departures from Article 2 TEU can aspire to acquire a real constitutional nature. Indeed, any enforcement of compliance not taking the values into account can be harmful, acting on the presumption of the existence of a particular type of constitutionalism¹¹⁴ in all the Member States without inquiring whether this is indeed the case.¹¹⁵

Should this premise be accepted as valid – and numerous examples from the backsliding Member States seem to require us to accept it as such – new challenges arise. This is true even notwithstanding the view of the ‘values’ of Article 2 TEU as ‘principles’ of EU law defended in the disclaimer opening this chapter. Bringing the values closer to the *acquis* does not solve the core problem of EU law related to its value-enforcement re-articulation, which this paper advocates, and as the new trend in the literature it documents makes apparent. Indeed, viewed in the context of values enforcement, compliance cannot simply mean the ‘correspondence of

¹¹¹ Eg Closa (n 14).

¹¹² Kochenov (n 25).

¹¹³ A Wechsler and B Tripković, ‘Enforcement in Europe as a Market of Justice’, in H-W Micklitz and A Wechsler (eds), *The Transformation of Enforcement* (Hart 2015).

¹¹⁴ V Perju, ‘Proportionality and Freedom – An Essay on Method in Constitutional Law’ (2012) 1 *Global Constitutionalism* 334.

¹¹⁵ Kochenov (n 27).

behaviour with legal rules’, as Benedict Kingsbury has rightly claimed, and should connect with the meaning of justice espoused by the legal system in question.¹¹⁶ Should we agree with Kingsbury, a vision of justice going beyond simple compliance with the *acquis* and accepting in full the pre-set objective of the internal market is indispensable for the EU,¹¹⁷ in order to move the compliance debate in the direction of values. This is true no matter which specific enforcement technique the EU is to choose. We also have to admit that private enforcement, however glorified in the EU, has not been overwhelmingly effective.¹¹⁸ Building a legal system with an overwhelming reliance on the narrative of its depoliticised goodness and entrusting the policing of compliance to private actors does not work well anymore: we are not only aware of the (values) compliance problems. The narrative of the ‘goodness’ of the Union also does not work as smoothly to justify the law and explain why compliance is necessary.¹¹⁹ Worse still, the EU also comes to be viewed as a potent generator of injustice and a vehicle of oppression.¹²⁰ The realisation of the importance of these dynamics triggered a new critical trend in the literature, focusing on the contexts of justice and injustice in the EU.¹²¹ The justice debate in the Union is ongoing and the approaches to justice differ,¹²² as the criticism of the current state of affairs from the justice perspective becomes harsher every day.

It seems logical in this context that connecting the internal aspirations of the EU legal system with the idea of justice is not a luxury problem: the EU is facing the justice dilemma in the context of the democratic and Rule of Law backsliding of the Member States, for which it was entirely unprepared. It is this backsliding, not so much the justice debates *per se*, which makes adherence to the classical *acquis*-centred approach to enforcement and compliance impossible, requiring the rethinking of the jurisdictional boundaries of the Union and of the enforcement tools the Union should have at its disposal, as well as the modalities of the deployment of such tools. The trouble is, the dominant narrative of the ‘apolitical’ process of the construction of the internal market cannot possibly justify the EU’s actions in the sphere of

¹¹⁶ Professor Kingsbury’s claim, although made in the context of a discussion of compliance in International Law, clearly applies to the EU’s legal context too. See B Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1998) 19 *Michigan Journal of International Law* 345, 346.

¹¹⁷ A Williams presented a crystal-clear description of the limitations of the EU’s values landscape, where compliance with the *acquis* seems to be prone to take the upper hand without any deeper considerations: A Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29 OJLS 549.

¹¹⁸ See eg M Broberg, ‘Preliminary References as a Means for Enforcing EU Law’, in Jakab and Kochenov (eds) (n 11) and Reich (n 24); T Lock, ‘Is Private Enforcement of EU Law through State Liability a Myth?’ (2012) 49 CMLRev 1675, esp 1699; M Dougan, ‘The Vicissitudes of Life on Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011), 407.

¹¹⁹ Cf. JHH Weiler, ‘The Schuman Declaration as a Manifesto of Political Messianism’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012).

¹²⁰ S Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’ in Kochenov, de Búrca and Williams (n 49) 51; C O’Brien, ‘*Civis capitalist sum*: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) CMLRev, forthcoming.

¹²¹ ‘Editorial comments: The Critical Turn in EU Legal Studies’ (2015) 52 CMLRev 881 (and the literature cited therein).

¹²² Eg the debate in Kochenov, de Búrca and Williams (n 49); A Williams, *The Ethos of Europe* (CUP 2009); F de Witte, *Justice in the EU* (OUP 2015).

values, requiring the Union to come up with much more convincing and realistic justifications for the *acquis*.