

## Meijers Committee

standing committee of experts on international immigration,  
refugee and criminal law

### CM1909 Opinion of the Meijers Committee on interstate procedures and the rule of law

06 November 2019

#### 1. Introduction

The Meijers Committee applauds the efforts undertaken in the previous terms of the European Commission and European Parliament to protect the rule of law in the European Union. The European Commission initiated the rule of law procedure of Article 7 TEU in respect of Poland. The European Parliament initiated the same procedure in respect of Hungary. Further, the Commission launched multiple successful infringement procedures that were closely related to the rule of law against both Poland and Hungary. In one such procedure, Poland was recently found to have acted in violation of its duty to ensure an effective and independent judiciary (Case C-619/18, judgment of 24 June 2019).

The Meijers Committee hopes that the newly installed Commission and Parliament will pursue the protection of the rule of law in the EU with equal rigor. Our Committee also calls on the Member States, however, to take serious their own responsibility to protect human rights and democracy in fellow Member States. Crucially, all EU Member States are empowered to bring interstate complaints under both the European Convention on Human Rights (Art. 33 ECHR) and the EU Treaties (Art. 259 TFEU). Although interstate procedures before both the European Court of Human Rights and the Court of Justice of the EU are rare, they deserve serious consideration in the current political context for the following reasons:

- In view of the de facto veto power of a single Member State, it is highly unlikely that the European Council will determine the existence of a serious and persistent breach of EU values in Hungary or Poland in the meaning of Art. 7 TEU;
- The postwar European legal order is premised on the idea that the protection of democracy and human rights is no internal affair of States but a collective responsibility;
- A failure to stop disrespect for essential EU values in some Member States on *inter alia* the independence of the judiciary, the freedom of the press and academic liberty enhances the risk that similar affronts to Union values take root in other Member States;
- The rule of law is not subject to political bargaining: although it is the essential frame for political competition, the concept itself is par excellence judicial and therefore justiciable;
- The effective functioning of the single market and intra-EU cooperation in the fields of – among others – criminal and migration law presume respect for the rule of law; the rights of all Member States and all EU citizens are therefore directly affected by systematic rule of law deficiencies;

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- The EU is based on the idea of mutual trust, which means that decisions of the authorities of one Member State – be they economic affecting the single market or legal in the field of justice and home affairs co-operation – conform to EU rules and standards. When the rule of law no longer prevails in a Member State, mutual trust may no longer be maintained, which stifles the functioning of the EU;
- Interstate procedures would lend support and legitimacy to democratic and human rights reform in the relevant Member States.

This note sets out in detail what additional value an interstate procedure against Poland or Hungary would have next to the pending procedures against violation of EU rule of law norms. Although our Committee does not wish to rule out interstate complaints before the European Court of Human Rights, the focus of this note is on the competence of Member States to bring another Member State before the Court of Justice of the European Union for failure to fulfil an obligation under the Treaties (Art. 259 TFEU).

The note explains how an interstate procedure may assist in preventing a further erosion of the rule of law in the EU, to return to full compliance with EU rule of law norms and how it would provide external support and legitimacy for the activities of persons and organisations in Poland and Hungary, such as judges and human rights NGOs who fight for restoration of the rule of law. The aim of an interstate procedure would not be to change the current political regime in Poland or Hungary or to end their membership of the EU.

The note first gives an overview of the past and current rule of law proceedings against Poland and Hungary. It next discusses the law and practice of interstate procedures. It continues by reviewing the legal and political arguments pro and contra the use of such a procedure.

We conclude that the protection of democracy and fundamental rights is too fundamental an issue for the Member States to leave to the discretion of the Commission and the uncertain prospects of the Article 7 TEU procedure. Member States are both empowered and responsible to take legal action against another Member State of their own volition and should preferably do so in a coalition of like-minded Member States.

## 2. Actions relating to rule of law in Poland

i. **Article 7 TFEU Procedure.** In December 2017 the European Commission adopted a reasoned proposal pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the Member State's judiciary (COM(2017)835).

ii. **First infringement procedure** concerning the Polish Law on Ordinary Courts Organisation, concerning the lowering of the retirement age was lodged with the CJEU on 15 March 2018 (Case C-192/18). The hearing was held on 8 April 2019. On 20 Jun 2019 AG Tanchev concluded that Poland

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failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU (ECLI:EU:C:2019:529).

iii. **Second infringement procedure** concerning the Polish Law on Supreme Court (lowering retirement ages of judges of that court; infringement number 20172121). The Commission send a formal notice of non-compliance on 2 July 2018 and a reasoned opinion on 14 August 2018. Referral to the CJEU on 2 October 2018 (case C-619/18). On 15 October 2018 at the request of the European Commission the Vice-President of the Court issued interim measures under Article 279 TFEU requiring Poland to suspend the application of certain provisions of the disputed law (ECLI:EU:C:2018:852). On 15 November 2018 the President of the Court ordered that the case shall be determined under the expedited procedure (Article 23a of the Court's Statute) (ECLI:EU:C:2018:910). On 18 December 2018 the interim measures were extended by order of the Grand Chamber of the Court until the judgement of the Court in this case ( ECLI:EU:C:2018:1021). Hungary was granted leave to intervene in support of Poland for the oral phase of the procedure. The hearing was held on 12 February 2019 at which the Commission, Poland and Hungary presented oral argument. On 11 April 2019 the AG Tanchev concluded that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU (ECLI:EU:C:2019:325). By judgement of 24 June 2019, the Grand Chamber declared, for the very first time, that a Member State had failed to fulfil its obligations under the second paragraph of Article 19(1) TEU by violating both the principles of the irremovability of judges and judicial independence (ECLI:EU:C:2019:531).

iv. **Third infringement procedure** concerning a new disciplinary regime for Polish judges that allows them to be subjected to investigations on the basis of the content of their judicial decisions. A formal notice of non-compliance was issued by the Commission to Poland on 3 April 2019 (press release IP/19/1957; infringement number 20192076); and Poland was referred to the Court on 10 October 2019 (press release IP/19/6033).

v. **Requests by Polish courts for preliminary rulings.** AG Tanchev in his conclusion in case C-619/18 notes that several other cases relating to the reform of the Polish judiciary are pending before the Court on the basis of requests for preliminary rulings submitted by the Polish Supreme Court (C-522/18, C-537/18, C-585/18, C-624/18 and C-625/18), the Polish Supreme Administrative Court (C-824/18) and Polish lower courts (C-558/18, C-563/18 and C-623/18). On 27 June 2019 AG Tanchev presented his opinion in three of those cases (C-585/18, C-624/18 and C-625/18; (ECLI:EU:C:2019:551).

vi. In response to a request for a preliminary ruling of **Ireland's High Court** concerning an European arrest warrant issued by a Polish authority, the CJEU on 25 July 2018 found that a Member State, before surrendering a criminal suspect to Poland and in view of the systemic concerns over Poland's judiciary, must first verify whether the extradition will not create a real risk that the person concerned will be subjected to an unfair trial (case C-216/18PPU).

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### 3. Actions relating to rule of law in Hungary

i. **Article 7 TFEU Procedure.** On 12 September 2018, European Parliament adopted a reasoned proposal pursuant to Article 7(1) TEU, inviting the Council to determine whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU (P8 TA-0340/2018). The resolution, based on a report prepared by Dutch MEP Sargentini, noted twelve systematic human rights concerns, **including the functioning of the constitutional and electoral system, the independence of the judiciary and the freedom of expression.** On 17 October 2018, Hungary brought an action against European Parliament for annulment of the resolution, arguing the violation of procedural rules leading to its adoption (Case C-650/18).

ii. **Completed infringement procedures.** In January 2012, the European Commission launched multiple accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary. In April 2012, the Commission discontinued the procedure relating to the central bank, after Hungary committed to take into account the Commission's legal concerns and to amend its national legislation. But it referred Hungary to the CJEU in the cases concerning the independence of the data protection authority and the retirement age of judges, prosecutors and public notaries (Case C-288/12 and Case C-286/12). In November 2012, the CJEU ruled that the abrupt and radical lowering of the retirement age for judges, prosecutors and notaries in Hungary violates EU equal treatment rules under Directive 2000/78/EC. The European Commission formally closed the proceedings in November 2013, after Hungary had adopted a new law which provided for a more gradual reduction of the retirement age and allowed the reinstatement of judges and prosecutors who had been forced to retire. In April 2014, the CJEU ruled (Case C-288/12) that the abrupt termination the Hungarian Data Protection Commissioner's term in office by the government constitutes an infringement of the independence of the Hungarian Data Protection Authority and was in breach of EU law.

#### iii. Pending infringement procedures

- **In July 2017**, the European Commission decided to send a letter of formal notice to Hungary for its new law on foreign-funded NGOs. The Hungarian law obliges certain categories of NGOs to register and label themselves in all their publications, websites and press material as "organisations supported from abroad", and to report specific information about the funding they receive from abroad to the Hungarian authorities. In December 2017, after a reasoned opinion issued on 4 October, it referred Hungary to the Court (Case C-78/18), arguing violations of Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union. In this case Sweden intervened in support of the Commission (ECLI:EU:C:2018:790).

- **In July 2018**, the European Commission initiated infringement procedures against Hungary concerning new Hungarian legislation which criminalizes activities that support asylum and residence applications and further restricts the right to request asylum (the "Stop Soros" law). It issued a reasoned opinion in January 2019, considering that the majority of the concerns raised had not been addressed (complaint no 20182247). Also, in July 2018, the Commission stepped up its infringement procedures against Hungary that were started in 2015 concerning its asylum laws, formally bringing

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the case before the CJEU (Case C-808/18). The case concerns non-compliance with EU asylum and return legislation (Asylum procedures directive, reception conditions directive, return directive).

- A further infringement procedure against Hungary in the sphere of the rule of law concerns its amended Higher Education Law on the ground that the law disproportionately restricts EU and non-EU universities in their operations. The amendment effectively forced the Central European University out of Hungary. The Commission brought the case before the CJEU on 7 December 2017 (Case C-66/18).

#### **4. Procedural rules in interstate cases (Article 259 TFEU)**

Article 259 TFEU provides that a Member State which considers that another Member State has failed to fulfil its obligations under the Treaties may bring the matter before the EU Court of Justice after having brought the matter first before the Commission. The Commission shall give the State concerned the opportunity to submit its case and its observations on the other party's case both orally and in writing and issue a reasoned opinion. Once the opinion is issued or if three months have elapsed since the Commission was notified, the matter may be brought before the Court. After a short pre-litigation phase in which the Commission may act as conciliator or an umpire or as a forum for making the arguments of the parties clear, the complaining Member State is free to start its case to the Court. Notification of the other Member State is not necessary. Often the issue will have been raised already in bilateral exchanges. The interstate procedure reflects the idea that not only the EU institutions but also the Member States are interested in ensuring compliance with the Treaties and EU law by their peers (Butler 2017: 183; Kochenov 2017: 20).

A Member State does not have to demonstrate any special harm or a specific legal interest to bring a case under Article 259 TFEU. The burden of proof that the other Member State failed to fulfil its obligations under the Treaties lies with the applicant Member State(s), in the same way as it lies with the Commission in infringement cases under Article 258 TFEU (Butler 2017: 189). The Commission and other Member States may intervene in support of one of the two sides (Dashwood & White 1989: 409). The Court of Justice may order any necessary interim measures on the basis of Article 279 TFEU (CJEU 30 May 2006, C-459/03, Commission v. Ireland, point 138). The judgement of the Court in an interstate case has the same effect as the judgements in infringement cases initiated by the Commission (Article 260 TFEU). The text of Article 259 TFEU allows multiple Member States to bring an interstate case before the Court against another Member State.

#### **5. Practice of interstate cases before the CJEU**

In the history of European integration only eight interstate cases have reached the Court on the basis of Article 259 TFEU or its predecessors Article 89 ECSC, Article 170 EEC and Article 227 EC. Five of those cases have been decided by the Court. Two were settled out of court. One case is still pending:

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Slovenia v. Croatia (case C-457/18 on the Bay of Piran).<sup>1</sup> The two settled cases were between Belgium and France based on Article 89 ECSC and between Ireland and France (case 58/77). The latter case was settled after France cancelled the contested import restrictions. The five cases that were decided by the Court of Justice are:

- **France v. United Kingdom** (case C-141/78), judgement of 14 October 1979 on a UK unilateral fishery protection measure; infringement (ECLI:EU:C:1979:225)
- **Belgium v. Spain** (case C-388/95), judgement of 16 May 2000 on a Spanish regulation on the designation of origin of wine (justifiable restriction); no infringement (ECLI:EU:C:2000:244)
- **Spain v. UK** (case C-145/04), judgement of 12 September 2006 on voting rights of Commonwealth citizens in Gibraltar, no infringement (ECLI:EU:C:2006:543)
- **Hungary v. Slovakia** (case C-364/10), judgement of 16 October 2012: Slovakia denies entry to Hungarian president, no infringement (ECLI:EU:C:2012:630).

**Austria v. Germany** (case C-591/17), judgement of 18 June 2019: on the discriminatory German tax relief on the motor vehicle tax; infringement (ECLI:EU:C:2019:504).

The Commission issued a reasoned opinion in four of these cases. No opinion was issued in the recent case Austria v Germany. In the other cases the Commission intervened in support of one of the parties: in France v UK it supported the French position, in Belgium v Spain it sided with Spain, in Spain v UK it supported the UK, and in Hungary v Slovakia the Commission supported Slovakia. In three of the five cases decided, the Court held that EU law had not been infringed. In each of these cases the Commission had sided with the Member State whose position prevailed. In the case Belgium v Spain four Member States intervened in support of the Belgium, whilst the Commission sided with Spain, the Member State which prevailed. At least three judgements concerned highly political issues in the Member States concerned: voting rights in (and implicitly sovereignty over) Gibraltar, the Hungarian president claiming his free movement right in order to attend a celebration by the ethnic Hungarian minority in Slovakia against the will of the Slovakian government and the German highway tax relief was subject of intense political debate over many years. All five interstate cases on the basis of Article 259 TFEU were brought by States whose financial, economic or political interests were directly affected by the acts of the other Member State.

### 6. Why are interstate cases rare?

Interstate cases before the CJEU are rare. The main reasons are the availability of non-judicial, diplomatic or administrative fora for solving disputes inside and outside the EU, and of two more attractive alternative ways of bringing an issue or defend a position before the Court of Justice: the infringement procedure brought by the Commission under Article 258 or the preliminary reference by a national court under Article 267 TFEU. When a Member State considers that another Member State does not comply with its obligations, the former will, generally, prefer to ask the Commission

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<sup>1</sup> The other case between Austria and Germany, C-648/15 which was decided by CJEU 12 December 2017 is not included here, because the case related to a bilateral treaty on avoidance of dual taxation. The case was based on Article 273 TFEU and did not concern obligation under the Treaties.

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to use its power to start an infringement procedure. The subject of the interstate case between Hungary and Slovakia had first been raised by Hungary in a letter asking the Commission about its position on this issue. Secondly, Hungary requested the Commission to start an infringement procedure against Slovakia. When the Commission did not comply with that request, Hungary started its interstate case (points 12-20 of the judgement). If the issue is raised by a national court in a request for a preliminary ruling, the interested Member State(s) can make their position clear before the Court both in writing and at the hearing. Both alternatives are more attractive because the Member States avoids the possible reproach of an unfriendly or hostile act since the case is initiated by the Commission or by a national court and those initiators have to do the hard work of preparing the case for the Court.

It is argued that “strong legal integration through EU institutions and the political means of resolving disputes” are the main reasons for the low number of interstate cases. Interstate cases would “go against the very nature and custom of an integration project like the EU” (Butler 2017: 202). But this reasoning becomes less convincing in situations where a Member State systematically violates the central values, the nature and customs of the EU.

### 7. Alternative outside the EU: interstate complaint before the ECtHR

In cases where the behaviour of a Member State not only violates EU law but also violates a human right guaranteed in the ECHR, bringing an interstate case against that Member State before the ECtHR under Article 33 ECHR could serve as a potential alternative for an interstate case before the EU Court of Justice. The first interstate case between two EU Member States (Slovenia v Croatia) has been pending since 2016 before the ECtHR (complaint no. 54155/16). Slovenia alleges multiple violations of Article 6(1) ECHR in a series of cases brought by a Slovenian bank before Croatian courts against debtors in Croatia. This case was referred to Grand Chamber of the ECtHR in December 2018. The hearing of this case was held on 12 June 2019

Since 1956 almost 25 interstate cases have been brought before the ECtHR until June 2019. Several of those cases are between the same state parties relating to similar issues. Only four cases since 1956 resulted in a judgement of ECtHR. Most of the early cases ended with a report by the European Commission of Human Rights. Ten out of the eleven interstate cases brought before the ECtHR after 2000 are against the Russian Federation. Of these ten cases against Russia only the first one was decided by the Court on 31 January 2019, more than eleven years after the complaint was filed by Georgia (complaint no. 13255/07).

Three early interstate cases are relevant for the subject of this note: the cases brought in 1967 by Denmark, Norway, Sweden and the Netherlands against Greece (complaints nos. 3321-3323/67 and 3344/67), by the same three Scandinavian countries against Greece in 1970 (no. 4448/70) and the case by same four states and France against Turkey brought in 1982 (complaints nos. 9940-9944/82). All three cases concerned large scale serious human rights violations by the military regimes in power in Greece and Turkey at that time (Leckie 1988:289ff). The 164 pages report of the European Commission of Human Rights of 5 November 1969 in the first case against Greece documented the



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large-scale violations of eight human rights guaranteed in the ECHR. The report prompted a discussion on the suspension of the Greek membership of the Council of Europe in the Committee of Ministers and the withdrawal by Greece from the Council of Europe in December 1969. The interstate cases contributed to the restoration of democracy in Greece (Leckie 1988: 292), if only by the support and legitimation it provided for the activities of Greek citizens and organisations aiming at restoration of democracy and the rule of law in the country. After the return to democracy in 1974 a street in Athens was named after Max van der Stoep who as a Member of the Parliamentary Assembly wrote the regular reports on the human rights situation in Greece which played a central role in these cases. He later served as Minister of Foreign Affairs of the Netherlands and as the OSCE High Commissioner on National Minorities (Leuprecht 2011). The procedure against Turkey resulted in a friendly settlement between Turkey and the applicant governments in which Turkey pledged to conform its internal law and practice with Article 3 ECHR. That settlement was criticized for it prevented the Commission or Court from indicating which particular Turkish practices amounted to torture or other human rights violations (Leckie 1988; Kamminga: 1994).

Bringing an interstate case in Strasbourg has two advantages over the interstate complaint in Luxembourg. First, it allows for complaints on human rights violations not falling in the scope of EU law. For example, the infringement procedure against Hungary for its law on foreign-funded NGOs could only be brought before the CJEU because the Commission argues the law to be in violation of the EU principle of free movement of capital. It may not always be possible to establish that Member State activity jeopardizing the rule of law is actually in the scope of EU law. Second, the procedural rules of the ECtHR offer room for the Council of Europe Commissioner for Human Rights and for competent human rights organisations to participate as *amicus curiae* and provide additional information to the Court.

On the other hand, the excessive length of the recent interstate cases in Strasbourg (seven to eleven years) may make an interstate application before that Court an unattractive alternative. Even though the ECtHR may prioritize inter-state complaints, prior uncertainty about the length of proceedings is a clear disadvantage. In Luxembourg the judgements in the three most recent interstate cases were delivered slightly more than two years after the case was brought before the CJEU. Another disadvantage of a complaint before the ECtHR is that there is no pre-litigation phase promoting a friendly settlement. Further, the procedure cannot benefit from a prior reasoned opinion issued by the European Commission.

### 8. Possible disadvantages of an interstate complaint before the CJEU

In order to facilitate a political assessment on whether the launch of an interstate procedure for failure to respect the rule of law is opportune, we list the possible disadvantages in bold. The counter argument is presented between square brackets.

- **It may be considered an unfriendly or hostile act by the respondent Member State and provoke "tit-for-tat litigation, with accused states and their allies bring retaliatory enforcement actions against their accusers" (Blauberger & Kelemen 2017:332).**



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[This kind of retaliation is less likely if more Member State bring the action and the action is about systematic violation of the rule of law. Moreover, threats of economic counter-measures may not materialize because they would hurt the economy of the threatening State as well. Ultimately, respect for the rule of law will contribute to economic prosperity.]

- **It may create complications in the pending procedure under Article 7 TEU in the General Council.**

[The pending Article 7 procedures against Poland will not produce a clear sanction, because Hungary will most probably veto a decision to impose sanctions on Poland. The same reasoning applies to the procedure against Hungary. Moreover, an interstate case may support the Article 7 procedure making it more visible.]

- **It may have unforeseen undesirable effects on pending infringement cases brought by the Commission and requests for a preliminary ruling on the same issue.**

[Bringing an interstate complaint will require coordination with the Commission. The Court may have to choose which case it will give priority in time. The CJEU often makes similar choices whether or not to give priority to an infringement case or a reference by a national court on the same issue.]

- **A Member State could also intervene in pending infringement procedures in support of the Commission or participate in the pending references. The Member State leaves the thrust of the work to the Commission.**

[Participation in a pending or future case could be an alternative form of action or could be combined with bringing an interstate case. There is no certainty that the Commission will bring rule of law infringement proceedings.]

- **If one or more Member States bring an interstate case this may create the impression that there is no consensus among Member States opposing the respondent Member State.**

[Consensus in the Council on sanctions under Article 7 TEU is unlikely anyway.]

- **The burden of proof will require Member States to perform extensive activities in collecting and presenting reliable information on the violations of EU law.**

[Opposing or turning around a major political development will always require a lot of serious effort. It could be possible to share the burden between Member States and cooperate with the Commission. Further, many objective, intergovernmental reports on the functioning of the rule of law in Hungary and Poland are available and witnesses to testify abound.]

- **The European Commission should have the lead of EU activities in support of restoration of the rule of law in a Member State.**

[A leading position of the Commission does not exclude concurring activities of Member States. Member States have their own interest (and responsibility) in the rule of law being restored in Poland and Hungary.]

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- **Restoration of the rule of law in a Member State is a political issue which can only be achieved by political not by judicial means.**  
[There is no sharp, predefined distinction between political and legal or judicial issues. Any judicial dispute may develop into a political issue or the other way round. Cases in defence of essential elements of the rule of law in Poland are already before the CJEU. The choice for the legal route is intended to convey the non-political character of insisting on the return to a fulfilment of treaty obligations and respect for principles of the rule of law that bind all contracting member states.]
- **Interstate actions risk depoliticizing a political conflict and politicizing the Court of Justice which could undermine its legitimacy and authority (Blauberger & Kelemen 2017:331).** [Until today actions under Article 259 did not threaten, they rather increased the legitimacy and the authority of the Court. The Polish government did comply with the interim measures ordered by the Court in the case C-619/18. Poland or Hungary could use other channels to advance their political agenda. Instead their governments choose to employ the method of breaching treaty obligations and the rule of law.]

### 9. Possible advantages of an interstate complaint before the CJEU

We also list the advantages of an interstate complaint (bold) and the counter arguments (between brackets).

- **An interstate complaint raises the visibility of the dispute. It makes the central importance of common values for all Member States and the cooperation within the EU more clear to a wider public.**  
[This visibility raises the risk of negative effects if the case would be lost. High visibility inside the states on the receiving end may lead to decreasing trust in and perceived legitimacy of the EU, potentially exacerbating the potential benefits of external intervention via the legal route. This underlines the need for serious and careful preparation.]
- **An interstate procedure will function as clear sign of external support and legitimization of citizens and organisation active for the defence and restoration of the rule of law in Poland and Hungary.**  
[Involvement of other states may be perceived as hostile intervention and contribute to nationalist resentment. The involvement of a European court confirms the idea of a European super state that only listens to Western leftist elites instead of ordinary hard-working Poles and Hungarians]
- **An interstate case makes visible that other Member States have a clear and legitimate interest in the full compliance with the rule of law in other Member States.**

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[It may be perceived as an encroachment of foreign powers on reforms of “purely” national institutional arrangements. They are only interested in promoting liberal values that will increase immigration and endanger family values.]

- **The political weight of an infringement case brought by one or more Member States is greater than of the infringement case brought by the Commission, because in the media and among the general public the Commission is often presented as a technical and bureaucratic institution. Halting democratic backsliding requires highly visible pronouncements and actions of governments and leading politicians of other Member States.**

[When the consensus as to what constitutes democratic vigour or backsliding is narrow, member state interventions may quickly become construed as serving these’ states narrow national interests or agendas, i.e. be rhetorically dismissed as partial and biased.]

- **In bringing a case, a list of precise violations of specific norms of EU law has to be prepared, possibly with assistance of relevant human rights organisations and national associations of lawyers and judges. This information can be made public.**

[Human rights organisations have typically already been discredited in Polish and Hungarian public media. Their involvement will strengthen the impression that instituting member states are “in these NGOs’ pockets”.]

- **An interstate procedure against Poland or Hungary may function as a warning for political parties in other Member States, such as Austria, the Czech Republic, Italy and Romania.** [An interstate procedure may contribute to further polarization and division in the EU. It’s better to aim for a friendly settlement.]
- **An interstate procedure will make visible that the EU is a “self-contained, peaceful regime”. It will illustrate the importance of central values and the current disagreement on what central values of the EU implies and mean in practice.** [It is a high-stakes game: failure to effect real change might demonstrate the opposite about the EU.]
- **Democratic backsliding and serious problems with the rule of law practice in a Member State should be solved with all available rule of law instruments of EU law.**

### 10. Which violations should be enforced: general EU values or concrete norms in the EU acquis?

Member States are free to bring an action under Article 259 if they have serious ground to believe that another Member fails “to fulfil an obligation under the Treaties”. This covers any obligation under secondary and primary EU law, including the obligations under the EU Charter. Member States are free to use or not to use their powers under Article 259.

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Rather than asking the Court to be an arbiter in the academic debate whether infringement cases under Article 258 and Article 259 can be brought for violation of the general EU values codified in Article 3 TEU or only for concrete norms of primary and secondary EU law, Member States, according to the Meijers Committee, should use the Article 259 action to counter systematic violations of essential rules for the functioning of the EU. We give two examples of issues where an Article 259 action would be appropriate. Firstly, Article 47(2) EU Charter guarantees everyone the right to a fair trial before an independent and impartial tribunal. According to Article 19(1) TEU, Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. If in a Member States a series of legislative or policy rules are introduced which seriously hamper the independence of the judiciary in that state, this is not only incompatible with Article 47(2) of the Charter, but it has serious negative consequences for the functioning of the internal market, for the criminal and police cooperation between Member States, for the recognition of judgements of the courts of that state under the Brussels ILP regulations or the decisions to surrender a person under an European arrest warrant issued by that state. When the national rules and practices of a Member State no longer guarantee the independence of the judiciary, the basis for the central principle of mutual trust between the authorities of the Member States disappears. This situation justifies an action by one or more Member States under Article 259 TFEU. This also applies to the second example, the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence (Article 20(2)(b) TFEU and Articles 39 and 40 EU Charter). Free and fair elections presuppose among others freedom of expression and information and freedom and pluralism of the media guaranteed in Article 11 EU Charter. If as a consequence of a series of legislative measures and administrative practices the freedom and pluralism of the media is no longer guaranteed in a Member States, this Member State no longer fulfil its obligations under the Treaties and this violation is capable of being decided by the Court of Justice in an action brought under Article 259 TFEU.

### **11. Conclusion**

In the opinion of the Meijers Committee, the interstate procedure of Article 259 TFEU has clear additional value over the existing actions undertaken against Hungary and Poland in the sphere of the rule of law. As transpires from the history of interstate procedures before the ECtHR and from the overview of arguments and counterarguments presented in sections 8 and 9 of this note, Member States should not be afraid to use all legal means at their disposal to protect democracy and the rule law in Europe. Especially if launched by a coalition of Member States, the risks of political and other damages incurred by those Member States is small, while the potential for beneficial legal as well as political impact in the addressed Member States is real. Our Committee sees no principled reason why such proceedings should not be brought immediately. Member States should not wait for the outcome or the formal or de facto discontinuation of Article 7 TEU procedures against Poland and Hungary. Member States should act now.

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