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Samo Bardutzky[*]

A Constitutionalist Critique of the Objective Character of the Infringement Proceedings and a Case for a "Constitutional Defence": A Lesson from the Non-Implementation of the Data Retention Directive

1. Introduction

This article is inspired by the events that unfolded within the adjudication of the Data Retention Directive. Not solely in the procedures of judicial review of the Directive in the national constitutional courts and subsequently before the Court of Justice of the European Union (CJEU), but also the infringement proceedings that were either initiated or were considered by the European Commission for reason of non-implementation of the Directive. Hence, the article begins with an account of the Data Retention Directive before the courts.

The central problem the article addresses is the thought that it is unacceptable that a Member State would have to bear the burden of a financial punishment for the reason that its judges or legislators, exercising their constitutional powers, upheld the constitution and did not allow for the legislative solutions of the Data Retention Directive to become or remain part of their national legal system.

The article purports to deconstruct this unbearable thought. To do that, it discusses the reason why the CJEU cannot accept the claim of the state that it did not comply with the obligations stemming from the Directive due to national constitutional constraints. The reason is what the doctrine typically refers to as the "objective character" of

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the infringement proceedings. In continuation, the article draws on the work of Jonas Tallberg on ensuring Member State compliance in the EU. It demonstrates why the usual approaches do not suffice to explain the situation such as the infringement proceedings started due to the non-implementation of the Data Retention Directive.

Accordingly, the article proceeds with a demand for a place for the subjects of EU law within the infringement proceedings. However, before "subjectivising" the system of compliance in the EU (at least in the small segment that triggers constitutional conflicts as in the case of the Data Retention Directive), the concept of "subject of EU law" has to be revisited. With a more critical understanding of subjects of EU law, the unbearableness of the situation discussed can be explained.

In the final section of this article, a proposal is introduced for a "constitutional defence", with some of the issues revolving around this potential tool briefly discussed.

2. Data Retention Directive before the Courts

The 2006 Data Retention Directive[1] imposed on providers of publicly available electronic communications services and of public communications networks a duty to retain traffic and location data for six months up to two years for the purpose of the investigation, detection, and prosecution of serious crime. This, in the political climate of fear and war against terror, was a shift from data protection principles settled in the EU until then.[2]

The EU legislation and the implementing measures adopted by the Member States triggered constitutional challenges and questions of conformity with fundamental rights in several jurisdictions. Constitutional courts of Germany, Austria, Romania, Czech Republic and Slovenia were seized with applications questioning the conformity of data retention as envisaged by the Directive with the national constitutions, as was the Supreme Court of Ireland. Concerns were voiced in the Constitutional Committee of the Swedish parliament, resulting in a delay of implementation.[3] The Constitutional Court of Romania declared the implementing measure to be unconstitutional on 8 October 2009.[4] On 2 March 2010, the German legislation on electronic communication and the relevant provisions of the criminal code were annulled by the Federal

[1] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, pp. 54–63.

[2] Feiler, The Legality of the Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection (2010).

[3] Jonasson, Data retention may become delayed, URL: http://www.stockholmnews.com/more.aspx?NID=6737.

[4] Constitutional Court of Romania, Decision No 12581 of 8 October 2009, published in the Romanian Official Monitor No 789 from 23 November 2009, available in an unofficial English translation

Constitutional Court.[5] The Czech Constitutional Court annulled the implementing domestic legislation in a judgment of 22 March 2011.[6] The proceedings brought in the Irish and Austrian courts lead to a referral to the CJEU and consequently an annulment of the problematic Directive.[7]

The reaction of the "guardian of the Treaties", the European Commission, to the non-implementation of the Directive was to initiate (or initiate the preparations for) infringement proceedings under the TFEU.[8] The infringement proceeding against Romania was stopped after the Romanian parliament adopted data retention legislation for the second time—after the initial attempts were quashed by the constitutional court.[9] Sweden was fined EUR 3 million by the CJEU.[10] The case against Germany, where the respondent state stated that it adopted implementing legislation, but it was annulled by the constitutional court was dropped after the Data Retention Directive was annulled by the CJEU.[11]

Austria was found in breach of its obligations under EU law for not transposing the Directive on 29 July 2010. Austria pleaded unsuccessfully that the delay was due to the heavy criticism concerning the encroachment upon fundamental rights by the Data Retention Directive, which, expressed in the political discussion prevented the legislative process.[12] After the CJEU judgment, Austria adopted implementing legislation, which

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at: https://www.asktheeu.org/en/request/21/response/153/attach/5/Wissenbach%20Annex%202.pdf.

5 Federal Constitutional Court of Germany, Judgment of First Senate of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08.

6 Constitutional Court of the Czech Republic, Judgment of 22 March 2011, Pl. ÚS 24/10.

7 Judgment of 8 April 2014, *Digital Rights Ireland and Seitlinger and Others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

8 Access Info Europe, a non-governmental organization promoting civil liberties in the field of information law, requested from the European Commission (Directorate-General on Home Affairs) access to preliminary legal assessments and correspondence infringement proceedings related to the non-implementation of the data retention directive. The Secretariat General of the Commission confirmed the finding of the Directorate General that practically all of the documents requested by Access Info Europe are relevant to the ongoing investigation and as such not available to the public. - Day, Confirmatory application for access to a document under Regulation 1049/2001 - Gestdem 2011/5894, URL: https://www.asktheeu.org/en/request/21/response/153/attach/3/Wissenbach%20EN%20final.pdf.

9 EC drops case against Romania as data retention law passes, URL: http://www.telecompaper.com/news/ec-drops-case-against-romania-as-data-retention-law-passes--926708.

10 Judgment of 30 May 2013, *Commission v Sweden*, C270/11, ECLI:EU:C:2013:339.

11 Action in case C-329/12 *Commission v Germany* was brought on 11 July 2012 and removed from the docket by order of the President of the Court on 5 June 2014.

12 Judgment of 29 July 2010, *Commission v Austria*, C-189/09, ECLI:EU:C:2010:455.

was contested before the Austrian Constitutional Court by several thousand applicants (and the regional government of Carinthia).[13]

The Austrian Constitutional Court was one of the two referring courts (the other being the High Court of Ireland) in the proceedings before the CJEU that brought to the nullity of the Directive in C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others*.

3. Judicial Enforcement of EU Law

Judicial enforcement of EU law, more precisely, of non-implemented directives, takes place both on a centralised and a decentralised level.[14] The decentralised elements are, first, the enforcement of EU law by way of giving direct effect to the norms of EU directives that have not been implemented in procedures before the Member States courts (*Van Duyn*). In case this happens, the otherwise applicable domestic law is misapplied and the case resolved by applying the directive. Second, in case a directive is insufficiently precise for the court to give it direct effect, recourse to liability of the Member State based on the *Francovich* case law may be available.

The centralised elements are the two judicial stages of the infringement proceedings. In Article 258 TFEU procedure, the CJEU can be seized by the Commission that will attempt to prove that the Member State is in breach of EU law whereas non-implementation of EU is a classic example of such a breach. Should the Member State not respond to a finding of breach by the CJEU, pronounced in the Article 258 procedure, the Commission further has recourse, under Article 260, to ask the CJEU to order pecuniary sanctions.

Very importantly, the finding of the Court in the Article 258 procedure can be used by the *Francovich* plaintiff who before the Member State court claims damages from the Member State to compensate the damages that occurred as the directive was not implemented. Hence, there is an important link between the two procedures as the Article 258 procedure is capable of supplying a finding of illegality to the *Francovich* type procedure before the CJEU.

The present inquiry discusses the fact that the consequences of a finding of a breach in the Article 258 procedure can be twofold: first, the Member State can be ordered to pay a fine into the EU budget by the CJEU. And second, the Member State can be ordered by a Member State court to pay damages to the natural or legal person that was aggrieved by the non-implementation.

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[13] Case C-594/12, Seitlinger – Austrian and EU data retention law, URL: http://eulawradar.com/case-c-59412-seitlinger-austrian-and-eu-data-retention-law/.

[14] I draw here on a dichotomy laid down by Carol Harlow and Richard Rawlings in Harlow, Rawlings, Accountability and Law Enforcement: the Centralised EU Infringement Procedure, (2006).

4. The Objective Character of the Infringement Proceeding

The doctrine of EU law ascribes an "objective character" to the infringement proceedings.[15] The text of the Treaty charges the Commission and the Court solely with the adjudication of the question of whether "a Member State has failed to fulfil an obligation under the Treaties" and nothing more. Or, in Arnull's words, "whether, objectively speaking, the situation in the defendant state is consistent with the requirements of Community law."[16] "Subjective factors invoked to justify the Member State's conduct or omission" cannot be taken into account, nor can the question of whether the infringement was an intentional act of the Member State.[17] The perception of the procedure as an "objective" one leads to inadmissibility of defences potentially invoked by the Member State. The Member State cannot rely on administrative, practical or financial difficulties that it sees as the reason for non-conformity.[18] On the other hand, at least in theory, the CJEU is prepared to accept a *vis maior* defence as for example when Italy pleaded that it failed to fulfil its duty to compile statistical data due to a bomb attack.[19] Very importantly for this discussion, the objective character of the infringement procedure also means that the central government that represents the Member State before the CJEU cannot "blame" other entities of public authorities or branches of government for the fact that there is inconsistency with EU law in the legal system of the Member State.[20] While the focus of our discussion is primarily on courts, there is more case law available showing us how the inability of the executive branch to influence the decision-making in other parts of the government cannot trump the objective nature of the issue central to the infringement proceeding. Belgium failed with its argument that the law was drafted and proposed but simply not passed by the Belgian Parliament, which had meanwhile been dissolved.[21] Belgium and Austria have both submitted to the CJEU that the responsibility for the implementation of a directive, pursuant to their constitutional order, lies with a subnational entity—and failed.[22]

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15 Lenaerts et al., op. cit., p. 128. Prete, Smulders, The Coming of Age of Infringement Proceedings (2010), p. 13.

16 Arnull, The European Union and its Court of Justice (2006), p. 44.

17 Lenaerts et al., op. cit., p. 128.

18 Judgment of 5 July 1990, *Commission v Belgium*, C-42/89, ECLI:EU:C:1990:285, para. 24.

19 Judgment of 11 July 1985, *Commission v Italy*, C-101/84, ECLI:EU:C:1985:330. However, the Court found that Italy had enough time to remedy the consequences of the attack and could be expected to fulfil its obligations under EU law.

20 Or, indeed, private parties that the central government control. Douglas-Scott, Constitutional Law of the European Union (2002), pp. 411–413.

21 Judgment of 5 May 1970, *Commission v Belgium*, C-77/69, ECLI:EU:C:1970:34, para. 13.

22 In Judgment of 6 July 2000, *Commission v Belgium*, C-236/99, ECLI:EU:C:2000:374, para. 21, Belgium argued that "the difficulties created by the process of institutional reform which it has had

There is another reason behind the CJEU's refusal to accept the defence based on the actions or omissions of the branches of the government other than the executive. In the words of the doctrine, the term "Member State" means "the entity under international law which acceded to the Treaties". This reading supports the view according to which "any act or failure to act by any agency of the state or constitutionally independent bodies or institutions which are to be regarded as public bodies" can lead to a Member State liability.[23] This is a distinct public international law optic through which the CJEU perceives the Member States.[24]

We must expressly point out the following. Although the objective character of infringement proceedings stems from the text of Article 258 directing the CJEU to establish whether EU law was breached or not (and nothing more), the objective character as if by association, engulfs the subsequent sanctioning procedure under Article 260 TFEU as well.

5. The Reasons for Infringement

While the CJEU and the scholars of EU law emphasise the irrelevance of the reasons why there has been a breach of EU law for the outcome of the Article 258 procedure before the CJEU, research has nevertheless demonstrated that the broader picture of enforcement of EU law distinguishes the different scenarios of non-implementation and that the Commission adapts its approach to the Member State depending thereon.

In Jonas Tallberg's account of the sources of non-compliance in the EU, a distinction was created between preference-driven non-compliance on the one hand and capacity-driven non-compliance on the other hand. A state may possess the power to comply with EU law, but decide not to as a political or economic preference. Importantly, this

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to carry out over the last 30 years in order to preserve the unity of the State and the fundamental principles of a State founded upon the rule of law constitute exceptional circumstances which explain and justify the problems experienced by the Brussels-Capital Region. Those circumstances constitute a case of *force majeure*, since they give rise to exceptional difficulties which are beyond the control of the Kingdom of Belgium." In Judgment of 16 December 2004, *Commission v Austria*, C-358/03, ECLI:EU:C:2004:824, the respondent government stated that "Austrian constitutional law precludes the Federal State from adopting transposition measures in the place of a Land and that only censure by the Court confers the power on the Federal State to undertake the transposition."

[23] Lenaerts et al., op. cit., p. 148. Douglas-Scott came to the same conclusion (in Douglas-Scott, Constitutional Law of the European Union (2002), p. 412): "The Court's position seems to be that the actual defendant is the state and not the government, and that the legislature is just as much a brank of the state as the government. The same goes for regional […] authorities… the justification seems to be based on principles of international law, in which the states are the relevant actors…"

[24] See, for example, the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts, Article 4.

can often be traced back to the influence of interest groups. In 1996, Commission found that Member State governments are not unlikely to postpone the implementation of EU law to protect the domestic industry just a little longer. At the same time, the delays or difficulties in ensuring compliance may stem from precisely the same reasons that prevent domestic, non-EU related legislation from being adopted. It may be the constitutional arrangements that cause the protraction, the idiosyncrasies in the political system, or the incompetence of the bureaucracy that can prevent the government from implementation against its best intentions.[25] Along those lines, the system of compliance in the European Union, as seen by Tallberg, is a composite of two—often described as conflicting—approaches: enforcement and management. In this dichotomy, enforcement is a coercive strategy of monitoring and sanctions stemming from the incentive structure. The higher the likelihood of an infringement being detected and the higher the sanctions, the less incentive there is for the state to break its commitments.[26] In the EU, this works both on the centralised level, first and foremost in the form of judicial infringement proceedings and the risk of financial penalty that they carry, as well as on the decentralised level, with the possibility of state liability for breach of EU law under the *Francovich* case law.[27] The management approach to compliance, on the other hand, sees the primary reason for non-compliance in capacity limitations and rule ambiguity rather than in "wilful disobedience". Hence, advocates of the management approach favour "capacity building, rule interpretation and transparency" over coercive enforcement. Importantly, management theorists recognise political capacity limitations, such as when the central government is unable to command compliance from other public entities.[28] The management approach to compliance in the EU is best illustrated by the establishment of funds that on the one hand finance the adjustment to EU policy in the Member State and on the other hand support closing the "knowledge gaps" in national bureaucracies and judicial branches. Also, it is common for the EU to negotiate transitional periods during which the Member State can gradually adapt to EU policy.[29] Tallberg's persuasive thesis is that the high level of compliance of Member States with obligations under EU law is achieved precisely by combining the two approaches into the "management-enforcement ladder".[30] Varju adopts a similar understanding of compliance in EU law when discussing rights and safeguards of Member States in infringement proceedings. The rights that pertain to a Member State play a more "shielding role" when the process of ensuring compliance

25 Tallberg, Paths to Compliance: Enforcement, Management and the European Union (2002), pp. 623 ff.

26 Ibid., p. 611.

27 Ibid., pp. 614 ff.

28 Ibid., p. 613.

29 Ibid., p. 615.

30 Ibid., p. 632.

moves to the phases more adversary, when it is clear that the particular Member State's view will be difficult to reconcile with that of the Commission. Before that, the position of the Member State is shaped in a way that enables a co-operative relationship between the parties in improving the Member State's compliance record.[31]

6. The Unsettling Place for National Constitutions and the Rights they Protect in the EU's System of Ensuring Compliance

As persuasive as Tallberg's account may be for the day-to-day operation of EU law and its enforcement, it also appears unable to capture the situation of constitutional conflicts of the kind described at the beginning of the present inquiry. In other words, the "management–enforcement" account may have been written from a position where a "Data Retention Directive" was unimaginable. Discussing *in abstracto* a directive that is problematic from the viewpoint of the fundamental rights enshrined in a Member State constitution, a claim can be made that neither the enforcement approach nor the management approach makes much sense.

According to the premise of the enforcement approach to compliance that we have sketched above, the possibility of a pecuniary punishment for non-implementation of a directive is expected to create an incentive for the Member State to implement it. That is, an incentive is created for the government of the State to comply, as it will otherwise have to account to the electorate for the financial disadvantage. At the same time, an incentive is created indirectly for the electorate that will, via taxes, have to finance the penalty. Then the tax-paying electorate will exert pressure on their representatives to comply with EU law. In what Tallberg calls preference-driven instances of non-compliances, it is easy to imagine a persuasive hypothetical example for this logic. Let us say that the implementation of a particular directive was delayed because of lobbying by a branch of industry that was afraid of competitors from other EU Members. The delay represented a clear economic benefit to the industry—at least in the short term. It might have gone unnoticed by the electorate if it was not for the unpleasant consequence—a fine. At the next election, the electorate is expected to punish the government that is responsible for the financial disadvantage.

This logic, translated to our scenario of a delay due to constitutional review, is unbearable. It borders on grotesque to imagine that financial sanctions would be used to influence the choice of the voters that would lead to a more restrictive protection of the human rights enshrined in constitutions of their respective states—be it via electing a constitutional legislature that would rewrite the bill of rights or by voting for candidates

[31] Varju, The Shaping of Infringement Procedures in European Union Law: The Rights and Safeguards of the Defendant Member State (2012).

that promise to curtail the powers of constitutional review or, in 1930s slang, to "pack the court" with judges less enthusiastic about personal freedoms.[32]

At the same time, our scenario seems to elude largely the notion of capacity limitations that are the cause of non-compliance and the subsequent capacity building, rule interpretation and transparency approach to ensuring compliance. In the context of the Member State responsibility for non-compliance traceable back to local or regional authorities, an argument has been made for the Commission to deal directly with the region concerned with violating EU law.[33] A similar proposal for the Commission to engage directly with constitutional courts in "persuading" them not to obstruct the compliance of the Member State with EU law, of course, would immediately raise countless concerns and, hopefully, sufficient doubt as to the management approach to compliance in resolving our scenario.

Nevertheless, while for the CJEU and its students, the infringement proceedings retain their objective character, Tallberg's account indicates that—to the contrary—it is precisely the coercive limb of the approach to compliance in EU law that takes into account political preferences or rather is built upon the idea that sanctions can modify the political preferences of a particular Member State. And a Member State should in fact here be written with an asterisk as it is nothing more than a shorthand for the multitude of political actors within it.

In a textbook example such as the one above, the enforcement approach, as explained by Tallberg, makes sense. It highlights the benefits of non-compliance for the particular interests (e.g. the owners, the employees and the stakeholders of the industry enjoying the protection of the Member State) and contrasts them with the general interest of the collective of the taxpayers that will bear the burden of the financial penalty.

The problem occurs when we try to apply this logic to a situation where a Member State has failed to fulfil its obligation under EU law in a timely fashion because of a judicial review procedure before a national constitutional court (or similar procedures designed to uphold the constitution). On the one side of the contrasted interests, we again have the collective of the taxpayers, incentivised towards holding the government and parliament accountable for the financial loss incurred. But what is on the other side? How are the government and parliament expected to act to placate the taxpaying electorate? Commence the procedure of constitutional revision of the fundamental rights clauses, aiming to erase them, "soften the language", or puncture them with exceptions

[32] Lenaerts, explains the public international law optic through which a Member State is observed in the context of infringement proceedings and which leads to the finding of the State to be in breach even if the infringement was committed by a sub-entity with the "Community-law duty [of the Member State] to construct its constitutional structure in such a way as to avoid this evil". Surely, protection of fundamental rights enshrined in the constitutions through independent constitutional courts cannot be seen as the evil that needs to be avoided.

[33] Douglas-Scott, Constitutional Law of the European Union (2002), p. 412.

covering the legislative projects of the EU? Or, alternatively, strive to moderate the overzealous guardians of the constitution? By changing procedural law, narrowing the access to judicial review, eliminating the competences or the powers of the constitutional court? Pleading to find more "reasonable", "integration-friendly" successors to the incumbent judges in the future?

These "proposals" are more likely to be found in the handbooks of the representatives of Europe's recent wave of illiberal politicians than in what we normally imagine the rationale of EU law to be. They are intolerable thoughts, and there is no doubt that they are profoundly troubling to constitutional lawyers. But how does a fidel application of the widely accepted doctrine of the objective character of the infringement proceedings lead to a result that is so egregious? The problematic nature of the objective theory needs to be deconstructed to find an answer to this question.

The use of the word objective to describe the character of the infringement proceedings merits further explanation. It is not only that it expresses the complete disregard for the actions of the subject held responsible. It is also objective in that it shuts its eyes from the complex nature of the subjects of EU law.

7. A Reframing of the Subjects of EU Law

The definition or rather the redefinition of the subjects of EU law is the building block of the constitutional transformation of the EU and its law that was undertaken by the CJEU in the 1960s. Expressly in *Van Gend en Loos*, the CJEU not only established that EU law was a new legal order of international law, but also that its subjects were—in contrast with the classic doctrine of subjects in international law—not only the Member States but also the Member States' citizens.[34]

The brief reasoning in support of the constitutional transformation in *Van Gend en Loos* would indicate that the judicial widening of the circle of subjects of EU law takes place based on the understanding of the subject of a legal system as someone who bears rights and duties, invokes them in judicial and administrative proceedings ("legal vigilante", "private attorney general"), and is in addition called upon to participate in the making of the rules that will be applicable to his or her legal relationships.

Since the *Van Gend en Loos* transformation in the world of subjects of EU law, a lot has changed. The expansion of the competences of the EU, the ever-profounder penetration of EU law into everyday life, and importantly, the participation of the EU's law and institutions in the traditionally state-exercised repressive functions within the area of freedom, security and justice, should all be recalled. By enacting rules that apply to an immigrant about to be returned involuntarily, or creating an instrument such as the European

[34] For a critique, see Weiler, *Van Gend en Loos*: The individual as subject and object and the dilemma of European legitimacy (2014).

Arrest Warrant, where the logic of "legal vigilante" is entirely inapplicable, the circle of subjects of EU law can no longer be limited to either citizens of the Member States, nor can it only encompass those who consciously make use of the rights accorded to them under EU law to empower themselves in a legal conflict with one of the Member States.

The transformations that the EU and its law have undergone call for a critical revisiting of how we perceive the subjects of EU law. It has been suggested that instead of a concept based on legal and political agency, a concept of subject is adopted instead or besides inspired by Althusser's interpellation of a subject.[35] One is made a subject of the law in the instance when a police officer yells at them at the street. Legal systems constitute their subjects by beforehand ascribing identity to them. The individual performs specific actions, foreseen by the law and he or she is recognised as a subject through them.[36] In that sense, a person without any right of residence in a Member State is a subject of its law through the interpellation, through the sanctions envisaged for his actions or mere existence in a particular space, but it is interpellated and recognised as a subject both by national law, the code of administrative procedures and immigration legislation enacted by the national parliament, as well as by EU law, e.g. by the Return Directive. The revisiting of the idea of subject permits us to imagine how different legal systems can impose conflicting claims on the same person or group of persons.

Marco Dani based his observations on Nikolas Rose's work on the understanding of subjectivity as inseparable from the regulatory pressures exerted by the governments. In the context of EU law, Dani has drawn attention to the conflicting regulatory forces exerted upon a person who is simultaneously a constitutional subject as far as their national constitution is concerned and an economic subject as far as EU law (in particular the fundamental freedoms) is concerned.[37]

The example we observe in the infringement proceedings related to the Data Retention Directive is somewhat different, more specific than the broader narrative depicted by Dani. The critical concepts of subjectivity, nevertheless, are applicable. But what intermediary conclusions can be developed based on the observations made through the lens of a critical understanding of subject of EU law?

At the very least, it can be concluded that as long as two legal systems with competing claims over the same subject wish to retain their dedication to human dignity, political agency and sphere of personal autonomy of all the affected subjects, they need to refrain from pressuring those same conflicted subjects into activities within the political process that would lead to the erosion of the values mentioned. As we have shown, a tangible pressure in the form of financial penalties cannot be understood otherwise than being

35 Bardutzky, Fahey: Subjects and Objects of EU Law: exploring a research platform (2017), p. 6.

36 Ibid., p. 8.

37 Dani, The Subjectification of the Citizen in European Public Law, EUI Department of Law Research Paper No. LAW 2015/02 (2015).

directed precisely toward a reduction of the achievements of constitutional/liberal democracy.

Little is left but to inquire whether tools can be conjured up to deobjectivise the infringement proceedings in cases where the non-implementation by a Member State is directly caused by constitutional constraints. A possible solution proposed in the concluding section of this account is the introduction of what I have chosen to call a "constitutional defence".

8. A Proposal for a "Constitutional Defence"

As a working definition, a constitutional defence can be described as a procedural right of a Member State in the Article 260 TFEU proceedings to argue that the implementation of a directive failed due to a finding of incompatibility with the national constitution by an organ and in a procedure for the review of constitutionality by Member State law. I propose that this defence should be admitted by the CJEU in the procedure for the imposition of financial penalty after the Article 258 procedure had already been concluded and a violation of obligation under EU law had been established.

To reiterate, a constitutional defence does not prevent the CJEU from finding that the particular Member State is in breach of EU law for reason of non-implementation of the directive. The remit of the proposed constitutional defence is to prevent the CJEU from imposing pecuniary sanctions on the Member State.

Importantly, there is a link between an Article 258 finding of breach and state liability under the *Humblet/Francovich* jurisprudence where the persons who have suffered damages due to non-implementation of a directive can claim compensation in a Member State court. It is not excluded that a constitutional defence, as conjured up in this article, would also not play a role in the subsequent liability procedures. It is, of course, true that the threat of financial burden to the complex subject of EU and national constitutional law is also present in case of threatening liability claims to the non-compliant state. However, it is also true that whenever the upholding of constitutional rights causes measurable harm to a third person, the state should in principle be prepared to compensate those individuals or legal persons who bear the burden of a living constitution.

Unfortunately, the episode with the judicial review of the Data Retention Directive came shortly before the time when the EU was confronted with what was possibly the most direct rejection of the declared (Article 2 TEU) values of the EU by a leader of a Member State, Hungary's Prime Minister Viktor Orbán. Conflicts between Orbán's government and the European Commission regarding the independence of Hungarian judges and other independent institutions, limiting the free movement of Hungarian graduates and, perhaps most visibly, over the response to the arrival of the refugees in 2015 and 2016 have led the Hungarian government to start passing its project of cre-

ating an "illiberal democracy" as an expression of the nation's constitutional identity.[38] Will it then not be possible for illiberal democrats of the present or the future to enact constitutional amendments trampling the rights of minorities, overruling international human rights law, striping the disobedient judges of their mandate etc.?

The rationale behind making a case for the constitutional defence is not to provide the Member States with an avenue along which they can erode the common values of the constitutional tradition. Neither is the rationale of the case that is made in the present article to permit that the CJEU would be forced to accept arguments that go against the Article 2 TEU values. Accordingly, it is clear that a constitutional defence as proposed here is admissible only under the condition that the protection of the provision of the national constitution in question does not undermine the classic constitutional values and principles as enshrined in Article 2 TEU.

Nevertheless, it remains open whether a constitutional defence—one that fulfils the condition laid down in the preceding paragraph—would be an absolute trump card or there would still be a weighing exercise where the CJEU would try to strike a balance between a pressing need for compliance on the one hand and the national constitutional constraints on the other. The latter option would represent a compromise on account of efficient safeguarding of the rights enshrined in the national constitutions, and as such, it has advantages as well as disadvantages. An advantage is that would surely prevent any kind of "tactical abuse" that a mischievous Member State might attempt. However, it might end up watering down the entire concept of constitutional defence should the CJEU follow the almost unquestioned preference for unity and efficiency of EU law characteristic of its adjudication style.

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Samo Bardutzky

Ustavnopravna kritika objektivnega značaja postopkov za ugotavljanje kršitev in argument ustavne obrambe: lekcija iz neimplementacije t. i. Direktive o hrambi podatkov

Avtor v članku raziskuje posledice implementacije Direktive 2006/24/ES, ki je urejala obvezno hrambo prometnih podatkov. Osrednji problem je vprašanje, ali naj države članice finančno bremenimo zato, ker zaradi ustavnopravnih pomislekov niso prenesle rešitev v direktivi. V primeru obvezne hrambe prometnih podatkov je ta problem še posebej zaostren, saj so se ustavnopravni očitki, ki so se oblikovali v nekaterih državah članicah, izkazali za utemeljene. Kljub pomislekom je bila Evropska komisija pri skrbi za prenos direktive dosledna. Avtor predstavi značilnosti sodnega postopka zaradi kršitve prava EU ob neimplementaciji direktive in njegovo objektivnost, ki onemogoča učinkovito uveljavljanje pravnih, finančnih ali praktičnih ovir pri implementaciji. Kot rešitev avtor ponuja vzpostavitev tako imenovane »ustavne« obrambe, ki bi preprečevala finančne sankcije ob neimplementaciji direktive, hkrati pa ohranila dolžnost držav članic, da spoštujejo pravni red EU.

Ključne besede: prometni podatki, hramba, Direktiva 2006/24/ES, kršitev prava EU, denarna kazen.

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Samo Bardutzky

A Constitutionalist Critique of the Objective Character of the Infringement Proceedings and a Case for a "Constitutional Defence": A Lesson from the Non-implementation of the Data Retention Directive

The article explores the implications of the (non)implementation of Directive 2006/24/EC, which regulated the compulsory retention of traffic data. The central problem is whether the Member States should suffer financial burdens because they have not implemented the directive due to constitutional concerns. In the case of mandatory retention of traffic data, this problem is especially severe, as the constitutional objection that has been developed in some Member States have proved to be justified. Despite the concerns, the Commission was consistent in ensuring the implementation of the Directive. The article presents the characteristics of the court procedure for violation of EU law in the event of non-implementation of a directive and its objective nature, which prevents the Member States from arguing legal, financial or practical obstacles to implementation. In cases where obstacles are of constitutional nature, the author proposes the creation of a constitutional defence, which would prevent the imposition of financial sanctions in the event of non-implementation of the directive, while preserving the duty of the Member States to comply with the *acquis*.

Keywords: traffic data, retention, Directive 2006/24/EC, infringement of EU law, fine.