The Rule of Law or the Rule of Politics

An analysis of the measures taken by the EU towards Rule of Law breaches in Hungary and Poland.

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Re-examining the Foundations of EU Law
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Table of Contents

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The EU has in the past decade experienced rule of law backsliding in especially two of its Member States: Hungary and Poland. Since 2014, the EU has actively implemented several measures both of political and legal nature, to react to the backsliding in both States. The matter is still not resolved, as new measures have been implemented in 2020 and several essential judgements are pending as of 2021, with a potential of contributing to the EU's toolbox of measures against rule of law backsliding. The issue of preventing rule of law backsliding and breaches of rule of law is thus still increasingly relevant.

The goal of this study is three-folded: first, the author examines how the rule of law as a notion is understood in the Union context. Secondly, the author will analyses the available measures currently in the EU towards rule of law backsliding and even breaches. Thirdly, the author analyses what measures have been used in relation to Hungary and Poland, and whether they have contributed to prevention of further rule of law backsliding. The approach of this study is a legal dogmatic approach, but also implementing the approach of constitutionalism and integration of law.

The EU has been subject to a criticism for its action towards Member States experiencing rule of law backsliding and breaches of the rule of law. This criticism is not without foundation, as this study illustrates that the implemented measures and taken approaches have not resulted in the prevention of further backsliding in Hungary and Poland.

Key words: EU law, Rule of Law, Hungary, Poland, independence of the judiciary justice, effectiveness of EU measures, legal measure, political measure.

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Viimeisen vuosikymmenen aikana EU on kokenut oikeusvaltioperiaatteen taantumisen erityisesti kahdessa jäsenvaltioissaan: Unkarissa ja Puolassa. Vuodesta 2014 lähtien EU on toteuttanut aktiivisesti useita sekä poliittisia että oikeudellisia toimenpiteitä kummankin valtion taantumisen estämiseksi. Asiaa ei ole vieläkään ratkaistu, sillä uusia toimenpiteitä on pantu täytäntöön vuonna 2020 ja useita keskeisiä tuomioita on vireillä vielä vuonna 2021. Nämä keskeneräiset toimenpiteet voivat potentiaalisesti myötävaikuttaa EU:n oikeusvaltioperiaatteen taantumisen torjuntaa koskevaan välineistöön. Oikeusvaltioperiaatteesta luopuminen ja sitä vastaan rikkomisen estäminen ovat siis yhä ajankohtaisia asioita.

Tämän tutkimuksen tavoite on kolmiosainen: ensiksi siinä tutkitaan, miten oikeusvaltio käsitteenä ymmärretään Euroopan Unionissa. Toiseksi, siinä analysoidaan EU:ssa tällä hetkellä käytettävissä olevia toimenpiteitä tilanteissa, joissa oikeusvaltioperiaatteen noudattamisesta luovutaan tai sitä vastaan rikotaan. Kolmanneksi, tutkimuksessa analysoidaan käytettyjä toimenpiteitä Unkaria ja Puolaan vastaan sekä mikäli nämä ovat osaltaan estäneet oikeusvaltioperiaatteen kehityksen takapakkia. Työn metodi on pääosin oikeus-dogmaattinen lähestymistapa, mutta siinä käytetään myös perustuslaillisuuden ja lainsäädännön integroinnin lähestymistapaa.

EU:ta on kritisoitu toimista, jotka kohdistuvat jäsenvaltioihin, joissa oikeusvaltioperiaate on taantunut ja jotka rikkovat oikeusvaltioperiaatetta. Tämä kritiikki ei ole perusteetonta. Tämä tutkimus osoittaa, että toteutetut toimenpiteet ja käytettävät lähestymistavat eivät ole johtaneet Unkarissa ja Puolassa tapahtuvan taantumisen estämiseen.

Avainsanat: EU-oikeus, oikeusvaltioperiaate, Unkari, Puola, tuomareiden riippumattomuus, EU:n toimenpiteiden tehokkuus, poliittisia toimenpiteitä, oikeudellisia toimenpiteitä.

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Abbreviations

CoE	Council of Europe
CT	Polish Constitutional Court
ECJ	European Court of Justice, also referred to “the Court”
ECtHR	European Court of Human Rights
EC	European Commission
ESI	European Structural and Investment fund
EU	European Union
EP	European Parliament
GRECO	Group of States against Corruption
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
TFE	Treaty of the European Union
TFEU	Treaty of the Function of the European Union
PiS	Law and Justice Party in Poland
VC	Venice Commission

1. Introduction

1.1. A Community based on the Rule of Law

There is wide agreement that the rule of law is one of the key concepts of a contemporary legal order, alongside with democracy and human rights. These three together form a so-called holy trinity of constitutionalism.[1] They are considered to be part of liberal constitutionalism, thus representing foundational constitutional principles from which other principles and rules evolve.[2] The rule of law represent one of the most important political ideas of our time and is considered a precondition for a functioning constitutional democracy.[3] Reference to the concept is to be found in many international documents,[4] and is promoted by several international organisations such as the Council of Europe (CoE), Organization for Security and Co-operation in Europe (OSCE), the United Nations (UN), World Bank and the EU.[5] Furthermore, as the rule of law is an important and widespread constitutional ideal, the phrase can be found in more than a hundred constitutions around the world.[6]

The famous statement "*Community based on the rule of law"*[7] was made by the European Court of Justice (ECJ) in the *Les Verts* judgement in 1986. The reason for its fame is the fact that *Les Verts* was the first judgement to make a reference to the rule of law principle within the European Community. *Les Verts* clarified for the first time that the rule of law is one of the founding principles of the Community. The rule of law principle in the EU has been absent from the original treaties, and could be argued to have been taken for granted as a shared common value amongst the Member States.[8] Nowadays, the rule of law is considered a constitutional principle of the EU and plays an important role in the

[1] W Schroeder 2016, p. 171.
[2] C Barnard and S Peers 2014, p. 206.
[3] J Waldron 2008, p. 3.
[4] W Schroeder 2016, p. 171.
[5] idem.
[6] S Bisarya and W E Bulmer 2017, p. 123.
[7] Case 294/83 *Les Verts* ECLI:EU:C:1968:166, para. 23.
[8] K L Scheppele et al.2020, p. 3.

Union.[9] However, in recent years the EU institutions as well as legal scholars and the media have drawn attention to the backsliding of the rule of law.[10] Between the years 2014 and 2018 infringements of the rule of law occurred in several Member States,[11] in some more radically than in others. Amongst these infringement cases, those performed by Hungary and Poland are the most notorious ones.

The centre-right Alliance of Young Democrats (Fidesz) government in Hungary, since 2010, and the Law and Justice Party (PiS) government in Poland, since 2015, have adopted a series of laws that decrease judicial independence and erode the rule of law in general.[12] The erosion of the rule of law in both countries is part of a broader process of democratic backsliding. Both governments have centralised control over the judiciary and most of the media in order to build what Hungary's Prime Minister, Viktor Orbán, calls a 'illiberal democracy'.[13] The legislative reforms taking place in Hungary since 2012 and in Poland since 2016, have threatened the underlying EU consensus and created an ongoing crisis of the European values.[14]

The autocratic tendencies of these Member States' governments have led to the Commission, as guardians of the Treaties, to step up their game in protecting the values of the EU which are enshrined in Article 2 TEU.[15] There are even references, as a result of these two governments actions, to a 'rule of law crisis' in the EU.[16] The ongoing debate verifies that the rule of law is not automatically upheld within the Union, and that without constant efforts and maintenance the principles' existence is threatened.[17] The purpose of the rule of law is to protect citizens from arbitrariness and to guarantee legal certainty as

[9] W Schroede 2016, p. 171.
[10] C Sloca 2020, p. 1.
[11] M Bucholc 2019, p. 89.
[12] *See* D Kochenov and P Bárd 2018, RECONNECT Working paper No. 1.; J Rupnik 2012.
[13] Viktor Orbán's speech of 26 July 2014.
[14] idem. n. 12.
[15] Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'
[16] EU Law Live, Editorial Comment, 11 February 2020.
[17] C Geert and A Mills 2017, p. 2.

well as equal treatment before the law.[18] Therefore it is of utmost importance in a democratic and fair state.

It has been argued that the reason behind the challenges of the enforcement of the value system results from the cumulative effects of the rise of populist nationalism in Europe.[19] It has also been argued that the challenges are due to the contemporary nature of the EU, which is neither a community only based on economic interest nor a (supranational) federation that could effectively interfere with the domestic affairs of its Member States.[20] The challenging nature of the EU, has been argued of resulting in ineffective actions in ensuring that Member States comply with its values and principles.[21] Priority has always been given to the enforcement of the *acquis*[22] and not to the values. [23] Once a sovereign state is a Member State, the principle of mutual trust is applied and there is a presumption that all values and principles are shared, implemented, and enforced internally by the Member States.[24] Therefore, when the Community was initiated it was not assumed that there would be a need to develop effective mechanisms when it comes to enforcing the values. But it is this lack of effective mechanisms included in the early stages of the development of the Community, that has led to the current issues regarding the use of adequate tools to deal with ideological non-compliance in Member States.[25]

The illiberal agenda of the Hungarian and Polish governments prompted the rule of law crisis in the EU and led to numerous calls to activate the EU's instrument against domestic breaches of liberal democracy such as Article 7 of the Treaty on European Union (TEU). Article 7 TEU provides for the most serious sanction the EU can impose on a Member State in case of violations of its basic values laid down in Article 2 TEU; the suspension of the member state's voting rights in the Council.[26] Not only the Article 7 TEU has been activated, but several infringement procedures, implementation of recommendations and

[18] C Geert and A Mills 2017, p. 15.
[19] P Blokker 2019, p. 535.
[20] ibid., pp. 549–551.
[21] M Amichai and L Pech 2018, p. 246.
[22] The body of law accumulated by the European Union. Often shortened to *acquis*, that originates from the French language.
[23] M Amichai and L Pech 2018, p. 247.
[24] idem.
[25] T D Kochenov and P Bárd 2018, RECONNECT Working paper No. 1., p. 18.
[26] D Soyaltin-Colella 2020, p. 2.

conduction of political dialogues have also been used to address the rule of law backsliding occurring in Hungary and Poland. Some of these measures are purely legal tools while others are of more soft law nature and some of political nature.

The recent development within three years[27] demonstrates the relevance of this study's theme, as the situation is not resolved. The situation has evolved recently as the EU has taken new measures into use as the Union introduced the Rule of Law Conditionality Mechanism linked to the EU budget as of January 2021.[28] This Rule of Law Conditionality Mechanism has during the spring 2021 been brought to the European Court of Justice (ECJ) by both Poland and Hungary, as they contest the legality of the mechanism.[29] The outcome from this, is still to be confirmed. These events will be further discussed and analysed in this study. They do, however, illustrate how accurate and ongoing the EU institutions' measures against rule of law backsliding still are.

1.2. Purpose and scope of the study

The research question in this study is the following: have the measures taken by the EU towards Hungary and Poland between 2011 and 2021 prevented further breaches of the rule of law principle in these Member States? This study will outline what measures the EU has available to prevent rule of law breaches but also how these measures have been used.

In order to answer the research questions, one must first determine how the rule of law and its breaches are defined in the EU. Therefore, an outline of what the rule of law is will be demonstrated. One essential aspect of this study is thus the contextual the understanding of the rule of law. The aim of this study is to analyse the mechanism in

[27] L Spieker 2021, p. 435.
[28] Part of the Council of the European Union, Multiannual Financial Framework (MIF) 2021-2027 and Recovery package;Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.*See also* COM(2018) 324 final.
[29] Case 156/21; Action brough on 11 March 2021 – *Hungary v. European Parliament and Council of the European Union*; Case 157/21; Action brough on 11 March 2021 – Republic of *Poland v European Parliament and Council of the European Union*.

place to act on rule of law breaches within the EU. The study focuses on analysing the measures which the EU has currently available to react to rule of law backsliding.

In addition to defining the concepts, it is also analysed how these measures, and their use, have affected the rule of law backsliding in the respective Member States. The focus is on the rule of law infringements and backsliding occurring in Hungary and Poland between the years 2010 and 2021. The analysis considers both the measures the EU has taken to intervene in rule of law breaches in these Member States and ongoing and newly introduced mechanisms. This is done in order to analyse whether the measures taken by the EU have been successful or not.

The scope of the study is limited to focus on how the rule of law is understood in the EU in relation to rule of law breaches occurring in Hungary and Poland. Furthermore, this study focuses on four main aspects of the rule of law breaches and measures; the legal measures, the Article 7 TEU, the political measures and financial measures. The timeline is chosen based on the Fidesz party coming into power in 2010, and the Polish PiS party coming into power in 2015. Thus, the study takes into account the development in Hungary between 2010-2021 and in Poland between 2015-2021. The rule of law backsliding has been initiated in both states during this time and is thus the subject for review in this study. The end date for this study is in June 2021, as new developments with regards to safeguarding the rule of law in the EU has been taken until this date (and the process is still ongoing).

Several Member States have taken the rule of law self-evident and there are doubts concerning EU's ability to act against serious infringements of rule of law. Due to this doubt of the EU's actions, it is important to analyse the actions taken in order to prevent possible future rule of law breaches. This study will provided the reader with a holistic view of the rule of law within the EU, and compare the measures taken by the EU towards rule of law backsliding in Hungary and Poland, in order to provide the answer of whether the EU measures have succeeded or not.

1.3. Methodology and sources of law

This study is based on a legal dogmatic approach, which refers to the study of normative legal material.[30] The method's objective is to clarify the meaning and significance of the rule of law, proceeding from its own content. The legal dogmatic approach is the most common method used in legal writing,[31] as it focuses on analysing existing legal norms, which it will interpret and systematise.[32] As the existing legal actions will be analysed in this study, the methodology is suitable in order to understand whether the actions taken have had the desirable effect.

Another method suitable for this study is constitutionalism, which is considered a modern approach according to Cryer et al.[33] Constitutionalism represents a fairly new analysing tool and is originally developed from the discourse in international law.[34] It has been described of being present in the EU's integrations process, and includes democratic theories, which are of increasing relevance for legal scholars. EU constitutionalism has clear links with liberalism since the '*constitutional theory constructed for the EU'* has until recently largely been a form of liberal traditional constitutionalism linked to the notion of limited government.[35] Walker emphasises that the question of EU constitutionalism is a question of whether legal traditions can be translated to the EU from the state tradition.[36] The constitutional approach to EU legal scholarship is more than the institutional structure and mandate of international organisations and their founding documents. Constitutionalism examines the values and principles that an entity possesses or should possess.[37] The scholars, focusing on the constitutional approach, are interested in the possibilities of constitutional translation from Member States to the Union.[38] Since the rule of law, especially the understanding of it, is very much related to the European integration project, the constitutionalism method is also used in this study. The rule of

[30] R Cryer et al 2011, p. 15.
[31] A Petrov and A Zyranov 2018, p. 968.
[32] A Hirvonen 2011, p. 22.
[33] R Cryer et al 2011, pp. 43–59.
[34] ibid., p. 20.
[35] G De Búrca, 2003, p. 821.
[36] N Walker 1998, pp. 529–530.
[37] N Tsagouris 2007, p. 1.
[38] R Cryer et al 2011, p. 43.

law, as a set of values, is aiming into becoming implemented through the EU measures as the EU understands it in the Member States where rule of law backsliding occurs.

Another method used by legal scholars in relation to EU studies is EU integration. This method focuses on both the integration of law (legal integration) and integration through law (the roles of law in the processed of political integration).[39] The integration of law and through law attempts to provide explanatory account of changes in the social world and interdisciplinary theories have been used such as for example intergovernmentalism, functionalism, neo-functionalism, institutionalisms and constructivism.[40] As this study will considered both the legal and political measures taken, as part of the integration of the values systems, it follows the approach of integration through law.

This study uses multiple sources. It will use European Union legislation, official documents from the European Union, the European Commission, the European Parliament and from the Council. The study demonstrates many instances of case law, from the European Court of Justice (ECJ). The main cases, which will be analysed further, concern the infringements against the rule of law by Hungary and Poland. Other cases will be used in order to highlight the union's actions towards breaches of similar nature than the once occurring in Hungary and Poland. The study includes a wide range of literature, as well as the use of relevant (non-peer reviewed text) texts from leading EU scholars. The majority of the non-peer reviewed texts are published in websites such as Verfassungsblog[41] and EU Law Live[42]. Despite the content from these websites lacking peer-review, the texts are written by acknowledged legal scholars and are published in real time giving value to the text being relevant. These sources will be critically assessed, as they are not peer-reviewed and they cannot function as a primary source.

Concerning the rule of law in the EU, the amount of literature and relevant documents is tremendous. Hence, this study is limited to the use of the most recent articles by well-

[39] R Cryer et al 2011, p. 21.
[40] ibid., pp. 20–21.
[41] The Verfassungsblog is an academic blog published in German and English, which focuses on the constitutional law of Germany and Europe in general.
[42] EU Law Live produces news, analyses which are in -depth examinations of the law and Op-Eds being detailed opinions.

known scholars in order to limit the scope of literature. There are, however, a few exceptions, which are justified by their importance in the discussion.

1.4. Relation to other studies

Studying the rule of law or rule of law breaches in the EU is nothing new, quite the opposite. As it is a very richly researched field, scholars have been divided in their opinions and arguments regarding the breaches and measures taken by EU. Part of the problem in the author's point of view is that there is no unanimity over what the rule of law is, but neither about what a rule of law breach is. Thus, raising the question of whether the rule of law, as a principle, can exist without a common understanding of what it entails in the Union.

Evolvements regarding the rule of law has occurred on the EU level. The Commission published in 2019 a communication on Further Strengthening the Rule of Law in the Union[43], indicating that the previous communication from 2014,[44] was not sufficient. Furthermore, the ECJ has been actively defending the independence of the judiciary, not only in Poland and Hungary but also in other countries.[45] The independence of the judiciary is seen as one of the corner stones in the rule of law.[46]

The newly introduced Rule of Law Conditionality Mechanism has been linked to the budget as of December 2020, and is being argued of representing a breakthrough as it introduces a new measure to the EU's tools in preventing rule of law breaches.[47] Whether the Rule of Law Conditionality Mechanism will a breakthrough will be remained to be seen. This study clarifies whether the EU has had any success or not, also anticipating the future. In conclusion, this study analyses the newest measures, through a holistic view.

[43] COM(2019) 343 final.
[44] COM(2014) 158 final.
[45] *e.g.* Case 64/16, *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117 and Case 896/19 *Repubblika,* ECLI:EU.C:2021:311.
[46] Case 64/16, *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.
[47] T Tridimas 2020, p. XIV.

1.5. Outline of the study

The study consists of six chapters, all of which are subdivided into multiple sub-sections. The first chapter is the introduction which introduces the topic, the research questions as well as the outline and methods of the study. The second chapter continues to explain what the rule of law as a concept is, as well as providing a short history. The chapter also outlines the EU institutions' work in promoting the rule of law as well as defining who can take actions against breaches of the rule of law. This part of the study provides the reader with an understanding of the rule of law in the EU, but also highlights its complexity and the challenges it entails. The third chapter outlines what a breach in the context of the rule of law is, and what measures are available by the EU to prevent the breaches. The chapter will not go deeper into the breaches by Hungary and Poland, but rather present them briefly together with breaches in other Member States as well.

After three chapters of more general nature, the fourth chapter outlines the rule of law in Hungary and Poland and focuses on the rule of law measures taken against these states rule of law breaches. In this part, the research question is analysed in the light of the previous chapters. The fifth chapter further continues the analysis of the actions taken by the EU towards Hungary and Poland and provides answers to the research question. The final chapter contains concluding remarks, along with future prospects regarding the promotion and safeguarding of the rule of law.

2. The Rule of Law

2.1. Short history of the Rule of Law

The rule of law in the most general sense, is referred to as a power subject to the law.[48] The core of the notion is that the holders of the power are subjected to rules that equally apply to them and to the citizens. The idea of rule of law, is a result of a long historical process. Already in the seventeenth and eighteenth century, the importance of the relationship between the sovereignty and right was identified.[49] In the nineteenth and twentieth centuries the rule of law seemed to be thoroughly defined and realized. The rule of law is structured around opposites: rules vs. arbitrariness; limited power vs. absolute power.[50] Two main definitions regarding the rule of law has emerged among legal scholars; the 'thin' and the 'thick' version.[51] These will be briefly discussed further in this study. Worth mentioning in the historic context is that they both, the thin and thick version, contain different elements of the rule of law, thus representing different understandings of the rule of law as a concept. Furthermore, they demonstrate that the norm itself is multifaced.

Laws protecting the democratic values and freedoms have a clear purpose. In a state governed by the rule of law principle, everyone is equal before the law.[52] The phrase 'democratic state under the rule of law' refers to a state where citizens elect their own leaders and where the state governing itself is bound by legislation. Thus, legislation functions as a tool through which individual freedom is guaranteed against contraventions by the government or other citizens. This is possible when the legislature, the executive and the judiciary, are separate.[53] The separation of power was identified by Montesquieu in the *De l'espirit des lois* (The Spirit of the Laws), published in 1748, where he proposed a three-way division between the branches of governance.[54] These three branches of

[48] P Costa 2018, p. 135.
[49] ibid. p. 147.
[50] C May and A Winchester 2018, p. 10.
[51] D Kochenov and P Bárd 2018, RECONNECT Working paper No. 1, p. 3.
[52] C Geert and A Mills 2017, p. 11.
[53] ibid. p. 2.
[54] Montesquieu did not invent this notion as its origins are in the medieval parliaments. A common feature of the medieval parliamentarism was the representation of society through the

governance must stay in balance and monitor each other's actions in order to reduce the abuse of power. The balance of power and the monitoring are ongoing processes, and under the rule of law none of the three branches is superior to the other. Thus, the concept of the rule of law is based on the separation of powers.[55]

The triangle of power, law and rights is the core of the modern idea of the rule of law.[56] The full maturity of the rule of law doctrine is relatively recent, but its conceptual core is rooted in previous centuries. It all comes down to the contradiction between power and law. Power is conceived as the source of will exposed to the risk of partiality and arbitrariness, while law is represented as a set of rational norms.[57] Law relates therefore to reason and power with will.[58] The issue that the rule of law doctrine attempted to solve in the nineteenth and twentieth centuries was how to reach the dual goal of preserving sovereignty, and rescuing fundamental rights from the clutch of political decisions. The proposed solution by the rule of law doctrine was to leverage the judicial control of political decisions. It was argued that if the political power is a threat, the defence appears to rise from the judiciary.[59] Thus, the triangle of power provides for checks and balances in order to keep each branch in line.

Nowadays, the rule of law is a norm which has reached global recognition, and which is present in a constitutional state.[60] The rule of law has become a dominant model for modern constitutional law and for international organisations to regulate the exercise of public power.[61] Despite this, the rule of law is not indispensable, but rather a norm itself that has reached the status of a global common sense.[62] To conclude, the rule of law principle has a long history but despite this, it is still facing some challenges when attempts to define it are made.

'estates of the realm'. Furthermore, the separation of powers identified by Montesquieu has been argued to be a 'mixed' or 'balanced' constitution.

[55] C Geert and A Mills 2017, p. 14.
[56] P Costa 2018, p. 147.
[57] ibid. p. 145.
[58] ibid. p. 149.
[59] ibid. p. 148.
[60] C May and A Winchester 2018, p. 1.
[61] M Amichai and L Pech 2018, p. 237.
[62] W Schroeder 2016, p. 172.

2.2. The EU institutions and the Rule of Law

The European Court of Justice's statement of *A Community based on the rule of law*, and the rule of law's value as a principle in the EU value systems has been repeated by the ECJ in several cases.[63] The principle has since then been transformed into the Preamble and into Article 2 of the Treaty of the European Union (TEU), stating that *´the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States*'.[64] However, a clear definition for the rule of law is not provided by the Treaties. Instead it is referred to as the legal heritage of its Member States and the Conventions of the Council of Europe.[65] The rule of law is considered a notion upon which the EU is built, and on which the European integration is founded on, but also as a foundational value shared by all Member States.[66] The rule of law is thus not only part of the EU's constitutional profile, but also part of the Member States' constitutional profile. [67]

The concept of the rule of law has been present in the Member States for much longer in the form of domestic Constitutions. The most well-known concepts of rule of law is the French *L´Etait de droit* being the early pioneer of the idea of the rule of law followed by the German *Rechtsstaat*. Both the French and German definition are almost analogous to the principle of constitutional supremacy and the protection of human rights from public authorities.[68] The European understanding of the rule of law originates from French and German understanding but has been evolving mostly through the EU Courts' cases' jurisprudence. The rule of law nowadays, as referred by judges, is where institutions are subject to judicial review of the compatibility of their acts within the Treaties. Individuals

[63] *See* e.g. Case 583/11 P *Inuit Tapairiit Kanatami* ECLI:EU:C:2013:625, para 91: stating that the EU is 'a union based on the rule of law'; Joined cases 402/05 P and 415/05 P *Kadi and Al Barakaat* ECLI:EU:C:2008:461; Case 15/00 *EIB* ECLI:EU:C:2003:396, para. 75; Case 50/00 *Unión de Pequeños Agricultores* ECLI:EU:C:2002:462, para. 38-39; Case 229/05 P, *Kurdistan Workers' Party and Kurdistan National Congress* ECLI:EU:C:2007:32, para. 109.
[64] The creation of the EU by the Treaty on European Union in 1992, was the first treaty reference that explicitly references to the rule of law in the treaty language. The citated version is the amending Treaty in 2009, i.e. the Treaty of Lisbon.
[65] V van Hüllen and T Börzel 2015, p. 234.
[66] W Schroeder 2016, p. 172.
[67] A von Bogdandy and M Ioannidis 2014, p. 60.
[68] M Amichai and L Pech 2018, p. 237.

are in practice entitled to effective judicial protection as their right, which they have acquired from the Union's legal order.[69]

When considering the rule of law in the European context, there are four main areas where it is applied. Firstly, it is a value upon which the Union is explicitly founded upon, and as such it is present in the Member States' core values, becoming part of the EU's DNA as a constitutional principle.[70] Furthermore, it was a key part of the European integration in the 1980s as an internal,[71] constitutional principle within EU but also having an external role in the aftermath of the Cold War,[72] as the Community began to consider expansion of membership towards the post-Communist states.[73] Secondly, it is connected to the high level of mutual trust between the Member States and the EU institutions.[74] Thirdly, the rule of law has played, and continues to play, a key role in the current enlargement of Union membership.[75] Since 1993 the rule of law has been part of the Copenhagen accession criteria used for assessing the eligibility of the candidate country to join the European Union. The rule of law negotiation chapters, chapter 23 and 24 of the *acquis*, are at the heart of the European accession process. [76] Commission expects of candidate countries to fully comply with EU principles relating to the rule of law, judiciary, fundamental rights and the anti-corruption. Areas of focus is Chapter 23 of the accession negotiations are improving judicial independence, both conceptually and functionally, and strengthening impartiality, accountability, professionalism and efficiency of judiciary. [77]

Lastly, the rule of law plays a central role in the union's identity and activities in its external relations and self-understanding as a global actor.[78] It is a central objective of

[69] Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452.
[70] R Janse 2019, p. 344.
[71] M Amichai and L Pech 2018, p. 245.
[72] R Janse 2019, p. 342.
[73] M Amichai and L Pech, 2020, p. 246.
[74] idem.
[75] The breaches of rule of law does not only interplay between the EU and Hungary and Poland, but also with potential Member States such as Turkey, Montenegro and Albania in order for them of be eligible for EU membership.
[76] M Boskovic 2020, p. 330.
[77] idem.
[78] M Amichai and L Pech, 2020, p. 247.

international assistance strategies of state-building and conflict resolution as well as economic development. Therefore, it is present in the EU's Foreign Policy as an indicator of good governance.[79]

The European Commission, together with all other EU institutions is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of Union and making sure that EU law, values and principles are respected.[80] The so-called Venice Commission[81], is an advisory body of the Council of Europe composed of independent experts in the fields of constitutional law was created in 1990 after the fall of the Berlin wall, as there was an urgent need of constitutional assistance in Central and Eastern Europe due to the potential memberships.[82] It is not Venice Commission's mandate to proceed with rule of law assessments in given states on its own initiative, but rather upon request of the Commission to issue opinions related to the state.[83] The role and mission of the Venice Commission and of the European Commission are different but, as they possess the same values, including the rule of law, they do cooperate.[84] Examples of cooperation is the reference made by the Commission to the Venice Commission's Rule of Law Checklist from 2016[85], which was used as a benchmark to assess the Hungarian and Polish approach to the European rule of law.[86]

In 2014, the Commission presented 'A New EU Framework to Strengthen the Rule of Law in the European Union' (hereafter the Commission's 2014 Rule of Law

[79] S Bisarya and W E Bulmer 2017, p. 126.
[80] M Boskovic 2020, p. 330.
[81] The formal name: The European Commission for Democracy through Law, referred hereafter to the Venice Commission. The Venice Commission consist of members from also non- EU Member States: Including associated member, observers, special situation or cooperation. Basically all experts that are needed.
[82] M Leloip et al 2021, RECONNECT Working paper No. 1.
[83] W Recht 2018, p. 339.
[84] ibid., p. 343.
[85] European Commission for democracy through law Rule of law Checklist, Venice, 11-12 March 2016, par 28, p. 13; This was an attempted to clarify the dialogue around the meaning and definition of the rule of law by developing a Checklist as a tool for assessing the rule of law in a given state within the Union. The Checklist takes into account the constitutional and legal structures, the legislation in force and the existing case-law. Thus, the Checklist aims at enabling a transparent and equal assessment of the rule of law within the EU Member States.
[86] T Drinóczi 2021, p. 119.

Framework).[87] The Council proposed in the same year that a 'rule of law dialogue' would be held once a year between the Member States.[88] And the European Parliament has worked on a proposal for an EU Value Scoreboard[89] since year 2016. The promotion and strengthening of the rule of law within the EU is not only done through the European Commission, the Council of Europe (or in reality by Venice Commission) and the European Parliament but in several of its bodies. Notably the European Court of Human Rights (ECtHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judged of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, and the Commissioner for Human Rights.[90] This study focuses nevertheless on the actions taken foremost by the European Commission, the Council, the European Parliament and the ECJ.

The Commission's 2014 Rule of Law Framework is highly noteworthy for providing, for the first time, a public, comprehensive conceptualisation of the rule of law by an EU institution. This is not important only because there exists different legal traditions within Europe, but also because the founding Treaties themselves provide no such definition.[91] The 2014 Framework defines the rule of law as '*a constitutional principle and a vehicle for ensuring compliance with and respect for democracy and for fundamental rights*'.[92]

On July 17, 2019, a concrete action plan was further developed by the Commission aiming to strengthen the Union's capacity to promote and uphold the rule of law within the Union.[93] The action plan aims to promote a common rule of law culture, prevent issues with rule of law and provide effective responses. As a part of the action plan, the Commission established a Rule of Law review Cycle and called on the EU institutions for a coordinated approach. The annual Rule of Law Review Cycle mechanism, included

[87] COM(2014) 158 final.
[88] General Affairs Council, Brussels, 16 December 2014.
[89] European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Strasbourg, 9 February 2016.
[90] European Commission for democracy through law Rule of law Checklist, Venice, 11-12 March 2016, par 13, p. 9.
[91] M Amichai and L Pech 2018, p. 241.
[92] D Soyaltin-Colella 2020, p. 3.
[93] COM (2019) 343 final.

an annual Report, which would promote an ongoing dialogue between EU institution, member governments and stakeholders on the rule of law.[94] In April 2019, the Commission published its Communication on 'Further Strengthening the Rule of law within the Union',[95] which sets out three pillars for future actions: promotion, prevention and response. The most recent measure regarding the rule of law breaches within the EU, is the Rule of Law Conditionality Mechanism linked to the budget, which was announced on December 18, 2020.[96]

It is clear from the above, that efforts have been made by the institutions, mainly the Commission, to strengthen and clarify the rule of law within the EU. However, despite the ambition by the Commission in 2019 to further strengthen the rule of law, the Communication has been criticised of not delivering what it promised.[97] The literature on the rule of law backsliding, clearly indicates the absence of an essential point. This being the need to be 'crystal clear' on the nature of the problem at hand and to act accordingly.[98] The core problem to the rule of law backsliding, as argued by Dimitri Kochenov, is the systematic political choice this backsliding represents. The Commission is argued of having only piled up a number of recommendations for itself and others but failed to clarify the important matter: 'what is the essence of the EU's rule of law problem?". This crucial aspect is left unanswered in the 2019 Communication. Furthermore, the failure to answer the question clearly, undermines the clarity of the Commission's view of the remedies proposed.[99] Arguably, this critic is exactly of the kind that highlights the lack of proper action from the Commission. Whether the actions taken by the Commission and Member States have failed with regards to preventing further breaches within the EU Member States will be further analysed in this study.

[94] COM (2019) 343 final.
[95] idem.
[96] Regulation 2020/2092.
[97] D Kochenov 2019, p. 433.
[98] idem.
[99] D Kochenov 2019, p. 434.

2.3. Conceptual puzzle

There are many theories and opinions in the academic literature concerning the rule of law. It is viewed as a national, supranational, transnational or international concept, and as an ideal, a legal principle or a value.[100] Amongst the legal scholars there exists disagreements on the rule of law's definition and constituent elements, ranging from a 'thin' to a 'thick' version.[101] The thinner version of the rule of law as a concept focuses on the systemic quality of law and the government being bound to it. While the thicker version adds ideals about what rights the rule of law should guarantee and/or how law should be made.[102] As the respective names suggest, the thinner version considers a narrower view of the concept, while the thicker version encompasses additional elements.

There are strong arguments in favour of both thick and thin understandings of the rule of law as a concept.[103] The thick version, in comparison to the thin version of the rule of law, emphasises additional elements that are attached to the thin version. These elements are certain values (e.g. the law shall be just or "good") or it can demand that the law shall dictate the internal form of the dimension of power (e.g. to be organised democratically).[104] The values that form the thinner version to become thick, are usually viewed as liberal values.[105] It is argued that the advantages of a thin version of the rule of law are its measurability[106] and the possibility of it being applicable in diverse range of societies.[107] However, scholars favouring the thick notion of the concept argue that the thinner version is not capable of reflecting the characteristics of a particular (legal) cultural context.[108]

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[100] J Moller 2018, p. 45.
[101] T Drinóczi, and A Bień-Kacata 2021, p. 3.
[102] A Bedner 2018, p. 34.
[103] J Moller 2018, p. 46.
[104] T Drinóczi & A Bień-Kacata 2021, pp. 5–6.
[105] ibid. p. 5.
[106] *See* Moller 2018, pp. 21–33; A Jakab and E Bodnár 2021, pp. 116–117. Measurability in this context refers to the various Rule of Law indexes; Freedom in the World, World Justice, Project Rule of Law Index, Worldwide Governance Indicators Rule of Law Index. The measuring of a countries social and economic development has included a rule of law measurement.
[107] T Drinóczi, and A Bień-Kacata 2021, p. 6.
[108] idem.

The literature is rich on different approaches that elaborate on the thin and thick version of the rule of law, as scholars prefer different approaches to the concept.[109] Bisayara and Bulmer prefer the thin version, but still place the rule of law together with human rights, democracy, good governance and accountability. Thus, they broaden the substantive context of the thin version. They argue that this approach provides conceptual clarity, by keeping the thin definitions, but recognizing that the rule of law alone is not sufficient for the pursuit of freedom, justice or human flourishing.[110] According to von Bogdandy and Ioannidis, the rule of law represents a thinner version when distinguished from the respect of human dignity, freedom, democracy and equality.[111] On the contrary, Timea and Bien-Kacata argue that it should not be taken for granted that the rule of law is to be equal to human rights or democracy.[112] These scholars' arguments demonstrate the challenges in defining the concept, varying from the thin and thick understanding and everything in between.

In a strict and narrow context, the rule of law can exist, according to John Locke's words, wherever there is a 'known and standing law', an 'impartial judge' and an 'efficient execution'.[113] Locke's statement provides a thin definition of the rule of law, which does not examine the substantive content of the law or its provenance, origin or legitimacy. As such, the rule of law can be attractive to repressive or autocratic regimes.[114] It can enable them to protect particular interests, without presenting much of a barrier to the use of legal authority for corruption, repressive authority or anti-democratic behaviour.[115] This is the reason why the thin version is usually supported and used by certain (communist, illiberal, etc.) states,[116] as it is easier to comply with. The thick version is popular among social activists, various (international) organisations, and those who criticise existing

[109] *See* further Drinóczi T & Bień-Kacata A (eds), Rule of Law, common values and illiberal constitutionalism: Poland and Hungary within the European Union, London Routledge, Taylor & Francis Group (2021)
[110] S Bisarya and W E Bulmer 2017 p. 125.
[111] A von Bogdandy and M Ioannidis 2014, pp. 64–63.
[112] T Drinóczi and A Bień-Kacata 2021, p. 10. They furthermore argue that it can be concluded that that a particular human right, or some aspect of democracy may prevail if the principles and the core role of the rule of law in the legal system are taken seriously.
[113] S Bisarya and W E Bulmer 2017, p. 124.
[114] ibid. p.122.
[115] idem.
[116] Such as Hungary and Poland.

authoritarian regimes or states in democratic decay.[117] This demonstrates that autocrats can, based on the thin version of the rule of law, justify that their actions are following the thin version of the rule of law, and as such are complying with the principle.

When considering the teleological purpose of the rule of law the reason for the use of the rule of law is of importance. The rule of law is rarely pursued as an end result in itself but is valued for its contribution to other desired outcomes. The desired outcomes being good governance, and the capacity of the state to deliver good in terms of public services and development.[118] Thus, the choice of definition is not something that can be settled in a final way when dealing with an essentially contested concept such as the rule of law. Rather, it depends on the purpose of the specific context.[119]

Attempts have been made by the EU to concretise the meaning of rule of law,[120] through the adoption of descriptions, Checklists and explanations as described in previous sections. Indeed, the EU's conceptualisation of the rule of law is composed quite precisely of several constitutive principles that show similarities to Venice Commission's Rule of Law Checklist.[121] The European Commission specifically cites also international influence[122] in its 2014 Framework.[123] By doing so, the Commission aims to enhance the EU's role as a global rule of law promoter committed to liberal values of the international order.[124]

However, the use of the term outside the EU, or other global actors,[125] remains flexible and undetermined. This is illustrated in the popular rhetoric of the rule of law. The rule

[117] T Drinóczi and A Bień-Kacata, 2021, p. 10.
[118] S Bisarya and W E Bulmer 2017, p. 124.
[119] J Moller 2018, p. 32.
[120] C May and A Winchester 2018, p. 2.
[121] European Commission for democracy through law Council of Europe, Report on the rule of law, Venice, 25-26 March 2011.
[122] the European Commission benefited from the OSCE Multilateral Organizations Rule of Law Pledge 2005; OECD Equal Access to Justice, the Rule of Law report 2005; Council of Europe 'The Principle of the Rule of Law' Resolution 1594, 2007; European Commission for democracy through law Council of Europe, Report on the rule of law, Venice, 25-26 March 2011 and OSCE Decision No. 7/08 on further strengthening the rule of law in OSCE.
[123] COM(2014) 158 final, Annexes 1–2, p. 2.
[124] L Pech 2016, pp. 7–24.
[125] The UN amongst other International Organizations have attempted to clarify the meaning and purpose of the rule of law by adopting guidelines and recommendations. Se further C May and A Winchester, 2018.

of law is on one hand present in the political terminology, and frequently used in the media, political discourse, and debates. On the other hand, there is also a notable lack of discussion concerning the meaning or definition of the term outside the jurisprudential literature.[126] The result of the mismatch in the understanding and discussion about the interpretation of the rule of law is argued to make the definition of the rule of law thinner. The widespread rule of law interpretation may however depend on thicker implications for its rhetorical strength.[127] The lack of understanding of the broader concept can lead to the summarising of problem that are related to the rule of law. This does not foster a good starting point for debates. Thus, the understanding of the notion and concept of the rule of law is of essences when engaging in political dialogue.

The rule of law, despite the effort to conceptualise it, is still argued to remain an illusory concept. This was further highlighted by the Venice Commission, that concluded that the rule of law is indefinable.[128] Thus, naturally the rule of law breaches in the EU and the debates around them, have fuelled a debate around the terminology and understanding of the concept. Even though there is a common understanding amongst scholars that the rule of law is 'an umbrella principle'[129] for criteria regarding the legality of legislative acts and the exercise of administrative functions, there are debates regarding the practical meaning of this concept.[130] Therefore there is a lack of consensus of what the rule of law *in alles* stands for.[131]

Does the EU understanding of the rule of law represent a thin or thick version? The Venice Commission Checklist has been argued of embracing a more substantive understanding of the rule of law, as it fits the European or Western type of (liberal) constitutionalism in the EU.[132] Thus, the Venice Commissions Checklist represent a thicker understanding of the rule of law. In the Commission's attempt to offer a working

[126] C May and A Winchester 2018, p. 3.
[127] idem.
[128] European Commission for democracy through law Council of Europe, Report on the rule of law, Venice, 25-26 March 2011. p. 9.
[129] The rule of law requires the respect of legality, the equality of citizens, the legal certainty, the independence of the judiciary, the accountability of the decision-makers and the protection of human right.
[130] C Barnard and S Peers 2014, p. 206.
[131] W Schroeder 2016, p. 172.
[132] T Drinóczi 2021, p. 119.

definition of the notion of the rule of law in its 2014 Communication, the thicker version of the rule of law is also taken.[133] In the 2014 Communication six elements were identified: 1) Legality[134], 2) legal certainty, 3) prohibitions of arbitrariness of the executive powers, 4) independence and impartial courts, 5) effective judicial review and respect for fundamental rights and 6) equality before the law.[135] According to the Commission's 2014 Communications the identified elements of the rule of law concept stem from the constitutional traditions common to most European legal systems, thus defining the core meaning of the rule of law in the Union. [136]

The ability to contextualise the rule of law is a part of the problem the EU is facing with regards to rule of law breaches. The main argument presented in this chapter, is that the underlying implication of the discussion regarding the rule of law, originates from the fact that there is no easy definition of the rule of law. Despite the efforts made from the EU institutions' side, there are still debates about the actual meaning. As there is no ultimate, generally agreed definition of what the rule of law *in alles* is. Thus, to identify a breach, or a systematic breach of the rule of law also becomes a challenging exercise. What is clear, is that the rule of law is a context-related concept: the definition depends on the purpose of the outcome in question.

It is proposed that the European conceptual understanding of the rule of law represents a thick(er) understanding of the rule of law that has emerged throughout history as a common European heritage, values, and principles.[137] This is in line with the fact, that the European rule of law concept originates from the French and German understanding, which is analogous to the principles of constitutional supremacy and the protection of human right from the public authority. Hence, the compliance with the European rule of law by the Members States should not be restricted to the study of Article 2 TEU, but the

[133] European Commission for democracy through law Council of Europe, Report on the rule of law, Venice, 25-26 March 2011. para. 35. p. 9.
[134] Legality implies transparent, accountable, democratic and pluralistic elements for enacting law.
[135] European Commission for democracy through law Council of Europe, Report on the rule of law, Venice, 25-26 March 2011. p. 15–16.
[136] COM(2014) 158 final, p. 2.
[137] T Drinóczi and A Bień-Kacata 2021, p. 19.

general application of EU law as well.[138] For the purpose of this study, the understanding of the European rule of law is considered to represent the thick version of the rule of law. Furthermore, as the EU links democracy and human rights with rule of law, this illustrates the characteristics of the thicker notion. It is also clear that the rule of law requires the respect of legality, the equality of citizens, the legal certainty, the independence of the judiciary, the accountability of the decision-makers and the protection of human rights.[139]

[138] T Drinóczi and A Bień-Kacata 2021, p. 20.
[139] COM(2014) 158 final, p. 4: According to the European Commission the Rule of Law can be defined as "legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibi- tion of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law".

3. Rule of Law breaches and measures taken

3.1. What actions establish a Rule of Law breach?

In 2013 the EU Justice Commissioner, Vivian Reding, stated that in parallel with the financial crisis which the EU and its Member States have lived through since 2009, the Union has also been confronted on several occasion 'with a true rule of law crisis'.[140] The rule of law is considered to be threatened when a significant number of actors, in various sectors and Member States, fail to guarantee normative expectations to the point of creating a deficit in confidence in the law and in public institutions.[141] This threat was occurring, when Reding made her speech.

The rule of law backsliding raised attention after judicial reforms in Hungary[142] and Poland[143] where Governments have sought to reduce judicial independence and jeopardize checks and balances by limiting the power of their respective constitutional courts. [144] One of these incidents that Reding referred to was the 2011-12 campaign of Hungarian Prime Minister Viktor Orbán to overcome judicial opposition and constrain judicial independence by forcing 10 percent of Hungarian judges and public prosecutors into early retirement.[145] This event, together with one in France, where an expulsion in 2010 by the French Government of almost 1,000 members of Roman minority and the constitutional crisis in Romania, where the government refused to adhere to the judgements, triggered the Commission to adopt the Rule of Law Framework in March 2014.[146] These events demonstrated the beginning of instances where national authorities were consciously and systematically undermining key EU values such as the rule of law and thus, can be considered actions pointing towards a possible rule of law breach.[147] Despite the events in France and Romania, a rule of law breach in the EU context, is for

[140] Vice President of the European Commission and EU Justice Commissioner Viviane Reding's speech of 4 September 2013.
[141] Official Blog Union News, M I Costa, 4 June 2021.
[142] L Pech and K L Scheppele 2017, p. 8.
[143] I Wróblewska 2021, p.134.
[144] M Boskovic 2020, p. 331.
[145] M Amichai and L Pech 2021, p. 241.
[146] idem.
[147] *See* I Wróblewska 2021; T Drinóczi 2021.

most part considered to derive from the fact that that the independence of the judiciary is being threatened. This is the point of law that has been mostly debated amongst legal scholars.

The debate on the rule of law in the EU is mainly stemming from the ECJ judgements and its interpretation of general principles and primary EU law.[148] This is illustrated in the fact that the ECJ has been faced with multiple cases in the past three years concerning the protection of judicial independence, the rule of law and, more broadly, the Union's common values.[149] It was only in the last decade, after the adoption of Lisbon Treaty, that the EU got a legal ground to act in the area of criminal law and influence on the judiciary and legislation in the Member States in this specific area.[150] Judicial independence is now seen as a crucial element since national courts need to apply EU *acquis*[151] and uphold the rule of law within the EU.[152]

The term systematic threat is used widely to demonstrate when a rule of law breach is of such severe nature that it need to be addressed.[153] Another criticism directed towards the Commission, beside the fact that it has not defined the rule of law as a concept, is the inability to identify a clear definitions when it comes to isolated violations vis-à-vis systemic violations. [154] Thus, there exist an empty space which need to be filled regarding when a rule of law breach has occurred. The EU, as well as European scholars, have identified a clear breach of the rule of law in both Hungary and Poland. This breach, could

[148] F Marques 2021, p. 1.
[149] L Spieker 2021, p.435.
[150] P Craig 2013, p. 336.
[151] The EU *acquis* is the body of common rights and obligations that are binding on all EU countries, as EU Members. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; a) legislation adopted in application of the treaties and the case law of the Court of Justice of the EU;b)declarations and resolutions adopted by the EU; c) measures relating to the common foreign and security policy; d)measures relating to justice and home affairs; e)international agreements concluded by the EU and those concluded by the EU countries between themselves in the field of the EU's activities.Applicant countries are required to accept the acquis before they can join the EU. Derogations from the *acquis* are granted only in exceptional circumstances and are limited in scope. The acquis must be incorporated by applicant countries into their national legal order by the date of their accession to the EU and they are obliged to apply it from that date.
[152] K Lenaerts 2020, p. 30.
[153] A von Bogdandy and M Ioannidis 2014, p. 63.
[154] ibid. p. 64.

perhaps have been avoided, if the Commission would have provided for clear directions on when an action is of such that it can be classified as a breach and what action will be taken towards these breaches.[155]

The previous chapter, 2.3. Conceptual puzzle, demonstrated that even a thin version of the rule of law is, in essence, still rule of law. Meaning that autocratic regimes can justify their low rule of law threshold by adopting the thinner approach to the rule of law principle. The fact that there exists different interpretations of the concepts (both concerning the rule of law and a breach of the rule of law), indicates the vulnerability of the legal measures available being subject to political influence. Thus, in order to analyse how well the measures taken against the rule of law breaches have worked, we need to first understand what have initiated these measures, or the breaches leading up to them.

This chapter focused on demonstrating what actions aggregate a rule of law breach. However, as demonstrated, it has not always been clear when a breach can be established. It has been established in Hungary and Poland, after several years and mostly due to the efforts taken by the ECJ. Even though there exists a consensus regarding what the rule of law as a concept means on a general scale, the concept of systematic threat does not have a clear agreed consensus. The evaluation of whether there exists a systemic breach appears to be a *in casu* assessment.

3.2. Measures to intervene with Rule of Law breaches

Overall, the Member States have themselves been reasonably well equipped to protect the rule of law in their own state and well positioned normatively to promote it abroad.[156] From a judicial point of view, the values enshrined in article 2 TEU[157] cannot in itself be a cause of judicial action. This is due to the open-ended nature of the values laid down in Article 2 TEU, as such the rule of law lacks justiciability. Moreover, it has been argued

[155] A von Bogdandy and M Ioannidis 2014, pp. 65−66.
[156] M Amichai and L Pech 2018, p. 241.
[157] Article 2 TEU states that 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.'

by Kochenov and Pech that the article 2 TEU does not clearly fulfil the essential criteria for direct effect, as a Treaty provision must be precise, clear and unconditional to have a direct effect.[158] In procedural terms, this means that no legal proceedings against any EU state can be brought to this solely on legal basis, either before national or EU courts.[159] Kochenov and Pech describe this in the following quote : " *The rule of law ... is not a rule of law actionable before a court.*" [160] Thus, the EU has a limited set of legal tools to address systematic violations of the rule of law (as well as the other values enshrined in Article 2 TEU) at national level.[161]

The EU law relies upon provision of the established EU *acquis.* The EU *acquis* is not specifically designed or targeted at preserving fundamental rights, democracy and the rule of law. As such, the application of fundamental freedoms usually requires a cross-border element. Therefore, many Member States' areas do not come within their scope and thus, the fact remains that it will be extremely difficult to find a link to fundamental freedoms, including the rule of law, when the union's values are at stake.[162] In this sense, threats to the rule of law are not always depictable as fundamental rights violations.[163] This separation is also derived from the EU framework, as Article 2 TEU differentiates between 'democracy, … the rule of law *and* respect for human rights'.[164]

There are legal scholars who do however see potential in the direct effect of the article 2 TEU. If the Article 2 TEU has direct effect and it creates a directly applicable obligation for the Member States, it is not ensured that the ECJ has jurisdiction to assess and enforce Article 2 TEU compliance in the Member States.[165] Generally the Court's competence

[158] *See* Case 32/84 *Van Gend en Loos* ECLI:EU:C:1985:104; more recently Case 175/12 *Association de médiation sociale* ECLI:EU:C:2014:2, para. 32; P Craig, and G De Búrca 2015, p. 192.
[159] D Kochenov and L Pech, 2015, p. 520.
[160] ibid. p. 522.
[161] idem. n. 159.
[162] For such attempts, see the grounds on which the Commission brought its infringement proceedings against Hungary in chapter 4.3.1. of this Study. For further discussion of this, see M Dawson and E Muir 2013, pp. 1959-1979.
[163] This corresponds with the findings of the EU Agency for Fundamental Rights ("FRA"), which conducted an extensive study on the equivalence of Article 2 values and human rights enshrined in the Charter. According to this study, not every value has a fundamental rights counterpart. Both value-dimensions are only partially overlapping.
[164] *See* further analysis on this matter; L Spieker 2019, pp. 1182−1213.
[165] L Spieker 2019, p. 1201.

encompasses the interpretation and assessment of the law; Article 19(1)(2) TEU. As this includes Union law in all its shapers, forms and manifestations, it seems very likely that the Court has competence to interpret and assess Article 2 TEU as well.[166] This is also why the value matters before the Court, have been addressed so far in light of Article 19 TEU. Which will be demonstrated in the following chapter in more detail.

Before the Courts started to prevent the backsliding of the rule of law as of 2018, the Courts have developed the principle of the rule of law through its case law. After *Les Verts*, there are several cases which refer to the rule of law. In the case *Commission v. BEI,* the Court interpreted the rule of law in a purely procedural and judicial terms.[167] In the Case *UPA v. Council*[168] and later on in Case *Kadi v. Council and the European Commission*[169]*,* the Court shifted the focus towards a more substantive understanding of the rule of law, hence leaning towards the thick concept. Thus, moving towards the deeper understanding of the EU rule of law.[170] This has been further enhanced by e.g. Advocate General Karl Roemer when he pointed out that a modern state is founded on the rule of law and that this is the generally accepted model of governance.[171] These cases illustrate the development of the rule of law as a principle through the Courts case law, enhancing the principle as a general principles in EU law.

Besides the Courts judgements, in evolving the European understanding of the rule of law as a principle, the EU has both political and legal mechanisms to address challenges with rule of law in the Member States. The political mechanism is incorporated in the Article 7 of the TEU, representing in the authors opinion both a legal aspect and a political aspect,[172] while legal action may take the form of infringement proceeding in line with Article 258 TFEU.[173] Beside these legal, political and financial tools, there exists soft

[166] L Spieker 2019, p. 1201.
[167] Case 15/00 *EIB* ECLI:EU:C:2003:396, para. 75.
[168] Case 50/00 P *Unión de Pequeños Agricultores* ECLI:EU:C:2002:462, para. 38−39.
[169] Joined cases 402/05 P and 415/05 P *Yassin Abdullah Kadi and Al Barakaat* ECLI:EU:C:2008:461.
[170] M Vlajković 2020, p. 240.
[171] Advocate General Karl Roemer stated this in joined opinions in Case 9/56 and Case 10/56 on the 19 March 1958, point. 5.
[172] Legal in the sense that it is a Treaty provision that need formal activation procedures, political due to the nature of needed unanimity in the Council to active sanctions.
[173] M Boskovic 2020, p. 331.

policy instruments like the Commission Rule of law Framework[174] and recommendations and tools for assessments such as the Rule of Law Review Cycle. As of 2021, it also has financial mechanism to address rule of law breaches.

The following sub-sections (3.2.1.-3.3.4.) will assess the legal measures available, the Article 7 TEU, the political measures and financial measures available for the EU to act against rule of law backsliding and breaches. Under the legal measures the focus will be on infringement measures and case law. Article 7 TEU is divided into its own section, since it is assumingly one of the strongest tools the EU has towards breaches of the European values. The political measures covers soft policy instruments, recommendation, opinions and political dialogues. Finally, the newly introduced financial measure will be assessed separately.

3.2.1. Legal measures

Infringement procedures

For long the option for the Commission to intervene with rule of law breaches were the Commission's infringement powers laid down in Articles 258 and 260 TFEU and the so called 'nuclear-option' laid done in Article 7 TEU (this will be described in more detail in 3.2.2). Article 258 (2) TFEU[175] gives the Commission powers to litigate infringements committed by Member States, for failure to comply with Treaty obligations, as it allows the Commission to sue Member States if they fail to comply with EU law. [176] Article 260 (2) TFEU states that '*If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court*'. It is, however, not until recently that the Commission started

[174] L Spieker 2019, p. 1184.
[175] Article 258 TFEU: (1) If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
(2) If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.
[176] EU Law Live, D Krappitz and N Kirst, 29 May 2020.

to use the infringement procedure under Article 258 TFEU to litigate value infringements committed by the Member States.[177] The infringement actions include two procedural actions. First, the Commission shall deliver a reasoned opinion on which the state in question can respond, as outlined in Article 258(1) TFEU. If they do not comply, the Commission may take the action to court, as stated in Article 258(2) TFEU. The Commission has used both these possibilities (delivering opinions and taken the state to the ECJ) to intervene in rule of law backsliding in both Hungary and Poland.

Due to the lack of a clear direct effect of the Article 2 TEU, it cannot be relied upon by the Commission directly to initiate an infringement action under Article 258 TFEU.[178] Infringement actions cannot be brough against Member States regarding areas not governed by EU law or where the Member States violation of EU values is of political nature.[179] It can, however, be indirectly done through the application of applying a specific and direct provision of EU law. In addition, the Article 7 TEU procedure, represents another possibility to interfere with the breaches of EU values, since the Article 7 TEU refers explicitly to the values laid down in Article 2 TEU. As such, it may be argued that Article 2 comes within the *lex specialis* of Article 7 TEU.[180] Conclusively, it is possible for the Commission to pursue individual cases where national authorities breach other specific provision of EU law in infringement actions, which indirectly represent a breach of EU values. The other option is to activate the Article 7 procedure.

Case law

The Court is seeking to prevent and mitigate the backsliding of the rule of law in the EU. Within the EU, this is most visible through the judicial control, as it is the Court that has brought life to the values in Article 2 TEU.[181] In doing so, the ECJ is establishing EU standards on independence and accountability of judiciary.[182] The independence of the

[177] EU Law Live, D Krappitz and N Kirst, 29 May 2020.
[178] D Kochenov and L Pech 2015, p. 520.
[179] ibid. p. 519.
[180] ibid. p. 522.
[181] M Vlajković 2020, p. 240.
[182] M Boskovic 2020, p. 329.

judiciary in the Members States has been on the agenda in the ECJ since 2018. [183] Moreover, in accordance with the principle of the separation of power which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive. [184]

Although the organisation of justice in the Member States falls under the national competences, the Member States are required to comply with EU obligations under the EU law. In accordance with the Article 19(1) TEU the Member States are obliged to ensure that courts and tribunals within the meaning of EU law meet the requirements of the effective legal protection within the denotation of the Charter of Fundamental Rights of the European Union (Charter). Courts and tribunals can provide such protection only if sustaining their independence.[185] The independence of the judiciary is also essential to ensure the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU.[186]

In an emerging line of jurisprudence, the ECJ could be seen as resolving the uncertainties about the direct effect of Article 2 TEU by developing Article 2 TEU into a judicially applicable provision justifiable before the Court.[187] The seminal jurisprudence is the judgment by the Court in February 2018 in *Associaqgio Sindical dos Juizes Portugueses (ASJP).*[188] A Portuguese court asked the ECJ whether salary reduction for judges adopted in the context of and EU financial assistance program violated judicial independence.[189] In this case, the Court established that Member States' obligations to guarantee the judicial independence of *de facto* the whole national judiciary irrespective of any specific link to EU law. In the crucial passage of *ASJP,* the Court states that "*Article 19 TEU* **...** *gives concrete expression to the value of the rule of law stated in Article 2*".[190] According

[183] EU Law Live, N Kirst, 22 April 2021.
[184] *See* Case 452/16 PPU *Krzystof Marek Poltorak* ECLI:EU:C:2016:858, para. 35.
[185] M Boskovic 2020, p. 333.
[186] *See* Case 506/05 *Graham J. Wilson* ECLI:EU:C:2006:587, para. 50–53.
[187] L Spieker 2019, p. 1202.
[188] Case 64/16 *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.
[189] L Spieker 2021, p. 1202.
[190] Case 64/16 *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para. 32.; Similarly, *see* Case 619/18 R *European Commission v Republic of Poland* ECLI:EU:C:2019:575, para. 47 and para 43: "EU law that implements those values"; Opinion of Advocate General in Case 192/18 *European Commission v Republic of Poland*

to Spiekers, the Court opted for a combined approach, operationalising Article 2 TEU through a specific provision of EU law, the Article 19 TEU. Thus, Article 19 TEU operationalised the value of the rule of law (through an independent judiciary) enshrined in Article 2 TEU.[191] This allows to review and sanction any Member State action violating from Union's common values in judicial proceedings before the ECJ, irrespective of whether this action reveals any link to other EU law.[192] This aspect of the judgement represents a landmark decision for the interpretation of the Article 19(1) TEU by widening the scope of the Article's application, by not limiting it to only EU law.[193] The Courts judgement in *ASJP* was a way for the Court to react to the rule of law threats starting to emerge in several Member States.[194]

The Article 19 (2) TEU, as interpreted by the Court in *ASJP*, suggests that the compliance with the rule of law is not only a perquisition for the protection of other fundamental values listed in Article 2 TEU, but also a perquisition for upholding all rights and obligations deriving from the EU treaties.[195] In the case, the Court gave its interpretation of the rule of law in European a case that was not directly connected to clear instances of rule of law backsliding in Member States. Still, after this judgement, it is even more clear that Member States must respect European standards when they organise their judicial system. They may not change their judicial system in a way that is detrimental to the value of the rule of law as enshrined in Article 2 TEU and operationalised in Article 19(1) TEU.

ECLI:EU:C:2019:529, para. 71: "[T]he second subparagraph of Article 19(1) TEU, a specific manifestation on the foundational values reflected in Article 2 TEU"; Opinion of Advocate General Tanchev in joined cases Case 585/18, Case 624/18 and Case 625/18 *A.K.* ECLI:EU:C:2019:551, para. 77; Opinion of Advocate General Tanchev in joined cases Case 558/18 and Case 563/18 *Miasto Łowicz* ECLI:EU:C:2019:775, para. 92: "Article 19 TEU is a concrete manifestation of the rule of law, one of the fundamental values on which the European Union is founded under Article 2 TEU".; Where the value of the rule of law finds specific expression in Article 2 TEU, the same is true for the value of democracy and Article 10 TEU. This was recently affirmed by the ECJ in *Case 502/19 Oriola Junqueras Vies* ECLI:EU:C:2019:1115, para. 63.

[191] EU Law Live, D Krappitz and N Kirst, 29 May 2020.

[192] Case 64/16 *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para. 29.

[193] ibid. para. 39.

[194] A T Pérez 2020, p. 119.

[195] *See* joined cases Case 402/05 P and Case 415/05 P *Yassin Abdullah Kadi and Al Barakaat* ECLI:EU:C:2008:461, para. 303–304; K Lenaerts 2014, pp. 707−715.

In the case *LM PPU*[196] from the same year, 2018, the ECJ ruled that a systemic breach of judicial independence can lead to suspension of criminal judicial cooperation amongst national courts. The judgement resulted from a reference from an Irish court in questioning whether it was under a duty to enforce a European Arrest Warrant (EAW) issued by a Polish court.[197] The case demonstrates the lack of confidence in Poland's' justice system, as the Irish court referred to deficiencies regarding the execution of a fair trial in Poland. The case also illustrates the impact the rule of law has on legal security within the Union.[198] As legal security is one essential aspect of the rule of law, it does not allow for subjective nor arbitrary action by any authority.[199]

Adding to the case law concerning judicial independence, the ECJ has recently given, in April 2021, its verdict regarding a preliminary ruling from Malta concerning the appointment procedures for judges in the Maltese judiciary.[200] The national actions was initiated by an association called Repubblika, which alleged that the recently introduced changes to the Maltese legislation for the appointment of judges infringed the independence of the Maltese judiciary. Repubblika was specifically concerned about the power of the Maltese President to directly appoint judges.[201] The Court was asked to assess whether the Maltese system for the appointment of judges was in conformity with the principle of judicial independence, as enshrined in Article 19(1) TEU and Article 47 of the Charter.

In its analysis, the Court considered the applicability of Article 19(1) TEU and Article 47 of the Charter to the case.[202] The Court did apply a bond between the Treaty article and the Charter article and, therefore, it might seem increasingly likely that the concepts under Article 19 TEU and Article 47 of the Charter fully overlap. The Court furthermore specified the requirements of Article 19 TEU[203] by creating a three-step test to assess the Maltese procedure for the appointment of the judiciary. Following the reasoning in *ASJP*,

[196] Case 216/18 PPU *LM* ECLI:EU:C:2018:586.
[197] EU Law Live, Editorial Comment, 11 February 2020.
[198] M Wyrzykowiski 2019, p. 419.
[199] idem.
[200] Case 896/19 *Repubblika* ECLI:EU.C:2021:311.
[201] ibid. para. 73.
[202] ibid. para. 35–46.
[203] ibid. para. 47–59.

the Court confirmed that national courts applying European law are covered under the concept of 'court or tribunal' and, therefore, have to guarantee European standard of effective judicial protection. The *Repubblika* case thus fell under the broad scope of article 19(1) TEU. One significant takeaway from the case was the indirect connection that the Court established between the Article 19(1) TEU and Article 49 TEU, stating that once a Member State has entered the EU in accordance with Article 49 TEU, the same article requires that this member state may not backslide on the values of Article 2 TEU.[204]

The *Repubblika* judgement entails a crucial new way of enforcing the Union's core values and solving the so called, Copenhagen-Dilemma[205]; where Member States pass the Copenhagen Criteria, but do not fulfil them anymore as members of the Union.[206] The Court interpreted Article 49 TEU and 2 TEU as obliging the Member State to ensure the national non-regression in the field of EU values.[207] The non-regression principle may broaden the reach of EU rule of law obligations at the national level beyond the vital aspects of judicial independence activated via Article 19(1) TEU in *ASJP* and provide a new seminal approach to the Copenhagen dilemma. The non-regression principle is thus a sign of massive rethinking of the potential limits of EU competence.[208]

In the end the Court did not find the Maltese legislative changes for the appointment of judges to infringe the requirement of effective judicial protection that flows from Article 19(1) TEU.[209] Despite the outcome of the case, the Maltese ruling has an influence on the

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[204] Case 896/19 *Repubblika* ECLI:EU.C:2021:311.para. 60–63.; The case *Repubblika* linked Article 49 TEU with Article 2 TEU by creating a new principle of ´non-regression´ for the Union values. The principle of 'non-regression' flows directly from the combined application of Article 49 TEU and 2 TEU and could emerge as a solution to what has been branded as the 'Copenhagen dilemma' in the literature, i.e. the Union's lack of competence to deal with the Member States backsliding in the areas which, although outside the scope of conferral *sensu stricto*, used to eb at the core of the pre-accession adaptations required by the Union of all the newly-acceding stats.

[205] The Copenhagen Dilemma is a term used when referring to the Union's inability to enforce the founding values after the states accession. *See* Vice President of the European Commission and EU Justice Commissioner Viviane Reding's speech of 22 April 2013.

[206] M Leloip et al 2021, RECONNECT Working paper No. 1., p. 1.

[207] This principle of non-regression is assumed of playing an important role in shaping the future of the Union.

[208] *See* for further analysis by M Leloip et al 2021, RECONNECT Working paper No. 1..

[209] Case 896/19 *Repubblika* ECLI:EU.C:2021:311, para. 73.

ongoing rule of law backsliding in Hungary and Poland, due to the analysis made in connection to it. The case was significant for parallel proceedings regarding the executive enforcement on the judiciary in Poland.[210] While the case will have no consequences in Valletta, it may turn out to be a guidepost in the EU's fight over the rule of law.

The last three years have shown that the Court is more than willing to protect the common value basis against illiberal developments in the Member States. The judgment in *ASJP* especially represents an important stepping stone towards a strong 'union of values' – a judgement in line with *van Gen den Loos*[211], *Costa*[212], *ENEL*[213] and *Les Verts*.[214] The ECJ has made, and continues to make, significant steps towards the protection of the values stipulated in Article 2 TEU, with focus on the core elements of the rule of law protection.[215] The Court has since the *ASJP* made Article 2 TEU judicially applicable by operationalising it through specific provision of EU law without losing its unrestricted scope.[216] This interpretation has then been further applied in the *LM PPU* case as well as *Repubblika* in addition to the cases in Poland and Hungary which will be demonstrated further.

3.2.2. Article 7 TEU – the 'nuclear option'

The original tool enshrined in the Treaties to protect the values of Article 2 TEU is the Article 7 TEU procedure.[217] As such, it represents the most important mechanism that protects the EU's values in case of violation by Member States.[218] Originally the article

[210] Case 791/19 R *European Commission v. Republic of Poland* ECLI:EU:C:2020:277.; Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531.; Case 192/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:924.
[211] Case 32/84 *Van Gend en Loos* ECLI:EU:C:1985:104.
[212] Case 6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.
[213] Case 294/83 *Les Verts* ECLI:EU:C:1968:166.
[214] For this perception, *see* Koen Lenarts Keynote speech, 5 July 2019.
[215] Joined cases Case 585/18, Case 624/18 and Case 625/18 *A.K. v Krajowa Rada Sądownictwa*, and *CP and DO v Sąd Najwyższy* ECLI:EU:C:2019:982; *See* Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531.
[216] L Spieker 2019, p. 1213.
[217] D Soyaltin-Colella 2020, p. 6.
[218] idem.

was incorporated into the Treaty of Amsterdam (1997) as a democracy clause to protect the values on which the EU was built upon.[219] The Nice Treaty (2001) further amended Article 7 by adding a preventive measure: Article 7(1) for the situations in which there is a clear risk of serious breach by a Member State with the values laid down in Article 2 TEU.[220] The Article 7 TEU is referred to as the EU's 'nuclear option', and has long been assumed never to be activated as its mere existence should be enough to keep potential threats to the EU values and autocrats in check.[221]

The article was drafted due to fear arising from the so called 'Austrian Haider' affair.[222] In January 2000 Austria created EU history when a far-right party joined its government. This created fears for the future according to the European leaders, who at the time did not have the political tools to deal with it properly.[223] The drafters of the article also sought to insure a mechanism to prevent the post-communist members who had acceded in 2004 from backsliding towards authoritarianism.[224] The aim was thus to create a preventive mechanism focusing on warnings, and not on sanctions, in the spirit of building a European Constitution.[225] In this sense, the aim of the Article 7 can be seen as promoting the common European integration project.

The article contains two different procedures that could be described as the 'preventive' (Article 7 (1) TEU) and the 'corrective' (Article 7(2) TEU) stages. These procedures differ in the nature of the threat that they identify: the preventive stage concerns the 'clear risk of a serious breach' of the values in Article 2 TEU, whereas the corrective stage applies to the actual (i.e. serious and persistent) breach of these same values. [226] What is a 'clear risk', and what distinguishes it from a 'serious and persistent' one is not defined (with the exception that the second stage adds 'persistent'). This lack of definition grants

[219] P Van Elsuwege 2009, pp. 505−506.
[220] idem. n. 217.
[221] M Amichai and L Pech 2018, p. 237.
[222] R Uitz 2019b, p. 475.
[223] After the second world war there existed unwritten consensus regarding right wing parties not entering European governments. *See* C Leconte 2005, pp. 620–649.
[224] *See* W Sadurski 2010, pp. 385–426.
[225] idem. n. 222.
[226] *See* further; C Closa 2020, pp. 1–15.

a significant margin of discretion for actors to interpret situations.[227] Furthermore, sanctions in the proper sense only exist at the end of the second stage.

A proposal to invoke Article 7(1) can be brought forward by the European Parliament, the Commission or by one-third of the Member States. To be adopted, the proposal needs to receive the support of the four-fifth of Member States in the Council and of an absolute majority of members of the EP (MEPs), and two-thirds of the MEPs who take part in the vote.[228] When a unanimous European Council (after consent EP) decides that the breach is clear and consistent (according to Article 7(2) TEU), the preventive measures of the Article 7(1) are *accompanied* by certain sanctions such as e.g. the suspension of EU voting rights, as outlined in Article 7(3) TEU. The vote requires a qualified majority of the Council.[229] The procedural requirements in both determining the existence of a clear risk of a serious breach and to reach and preventing sanctions, are demanding. The unanimity requirement in the Council in order to adopt sanctions make it virtually impossible that the Council would ever reach such a position.[230] Furthermore, the Council is under no legal obligation to adopt sanctions even in a situation where it concludes that a Member State is in breach of Article 2 TEU values.[231] This aspect clearly demonstrates the predominantly political nature of Article 7 TEU.[232]

The scope of Article 7 TEU is not confined to the areas regulated by EU law, but allows the Union to act in the event of a breach in which member state act autonomously, i.e., in their own exclusive areas of competence.[233] The current case law of the ECJ has further clarified however that no private application could force the EU to trigger the application of article 7 TEU.[234] Even though Article 7 TEU can ultimately result in the suspension of

[227] C Closa 2020, p. 2.
[228] D Soyaltin-Colella 2020, p. 6.
[229] ibid. p. 7.
[230] idem.
[231] D Kochenov and L Pech 2015, p. 516.
[232] ibid. p. 513.
[233] ibid. p. 517.
[234] *See* Case T-337/03 *Luis Bertelli Gálvez v Commission* ECLI:EU:T:2004:106, para. 15: the Court held that the EU Treaties (and the entry into force of the Lisbon Treaty does not invalidate this conclusion) did not give it jurisdiction to determine whether the EU institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under what is now Article 2 TEU or to adjudicate on the lawfulness of acts adopted on the basis of what is now Article 7 TEU, save in relation to questions concerning the procedural

membership rights, the aim of this mechanism is political. The goal is to prevent punishing a Member State and to neutralise threats to the rule of law.[235] Due to this political aspect of the article, this is currently the mechanism that appears the least helpful in addressing contemporary threats to the rule of law.[236] Moreover, the Court does not have jurisdiction over the activation of Article 7 TEU, thus the enforcement of the values in article 2 TEU are expected to be resolved via the political procedure envisaged in Article 7(2) TEU.[237]

3.2.3. Political measures

Even though the Article 7(2) TEU is classified as a political tool, the article will not be discussed in this chapter. Since the Article 7 TEU, or the 'nuclear option' is considered an extreme procedure, it deserves a dedicated chapter. This chapter focuses on the soft policy tools used in order to pursue a political dialogue between the EU and the Member States alleged of breaching the rule of law. The political tools are used in order to prevent the initiation of the infringement procedures, and activation of the article 7 TEU.

In September 2013, the Commission President Barroso stated that there is a need for a better set of instruments, not just the alternative between the soft power of political persuasion and the so called nuclear option of Article 7 TEU.[238] In addition to this statement, the Commissions understood that there did not exist adequate mechanisms available for the EU to address systematic challenges and breaches to the rule of law within the Members States. Before the Commissions Rule of Law Framework from 2014, the only institution that seemed to be engaging in the rule of law in the European context was the ECJ.[239]

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stipulations contained in that article, which the Court may address only at the request of the member state concerned.
[235] R Uitz 2019a, p. 3.
[236] R Uitz 2019b, p. 475.
[237] M Vlajković 2020, p. 240.
[238] President of the European Commission José Manuel Durão Barroso's speech of 11 September 2013.
[239] idem. n. 237.

The Commission's Rule of Law Framework from 2014[240] was established as it was concluded that a tool was required at the EU level to deal with systematic threats to the rule of law in EU Member States. The objective of the 2014 Rule of Law Framework is to prevent the emerging threats to the rule of law to escalate to the point that the Commission has to trigger the Mechanism of Article 7 TEU.[241] Thus, functioning as a so-called 'pre-Article 7 mechanism', as it was developed with the aim of filling the space between the Commission's infringement powers laid down in Articles 258–260 TFEU, and the sanctioning option laid down in Article 7 TEU.[242] The 2014 Framework established a three-stage process; 1) Commission's assessment; 2) Commission's recommendations; 3) monitoring of the EU state's follow-up to the Commission's recommendations.[243] The Framework is a tool promoting political dialogue in the event of a threat of a systematic breach. It also confirmed the centrality of the rule of law as a European value and EU's increasing concern about systemic threats. [244]

As the 'voice of the member states', the Council developed its alternative way to deal with the systematic threats to the rule of law breaches by establishing the so-called Annual Rule of Law Dialogue in 2014.[245] The Rule of Law Dialogue is held once per Presidency and expected to reconcile existing differences among member states.[246] Yet, as became evident in the dialogue meetings, Member States have refrained from discussing the democracy and rule of law related problems. [247] Hence, the dialogue has been criticized of being a 'facade of action' in the absence of critical engagement with the crucial issues underlying the rule of law backsliding'.[248] Attempts have been made to develop a new approach to the Council's Rule of Law Dialogue in 2020,[249] by holding horizontal

[240] COM(2014) 158 final.
[241] Based on Article 7 TEU, if there is a determined risk of a serious breach of Article 2 TEU by a Member State, certain rights may be derived, including voting rights of the representative of the government of that Member State in the Council.
[242] D Soyaltin-Colella 2020, p. 6.
[243] idem. n. 240.
[244] D Soyaltin-Colella 2020, p. 3.
[245] Council of Europe, Presidency conclusions, 19 November 2019.
[246] *See* Council of Europe, 19 November 2019.; Council of the European Union, Rule of Law dialogue, Brussels, 13 May 2016.
[247] D Soyaltin-Colella 2020, p. 6.
[248] idem.
[249] The German Council Presidency introduced a new approach to the annual dialogue, which has been in places since 2014.

dialogues amongst ministers on general development around four pillars: justice system, the anti-corruption framework, media pluralism and other institutional issues like checks and balances.[250]

The Commission's Rule of Law Framework from 2014, despite not being as efficient as it was thought, added more steps prior to Article 7 TEU and broadened the Commission's power. [251] Whether this is a positive development can be argued, and perhaps show the EU's unwillingness to actually sanction Member States. During the drafting of the 2014 Framework, the Council was not satisfied with the Commission's proposed mechanism under the Framework, and thus proposed its own solution; the Rule of Law Dialogues, representing more of a 'dialogue among peers' instead of a EU-driven process.[252]

The Commission's Communication on Further strengthening the Rule of Law from 2019, as part of the Commissions Blueprint for Action,[253] further aims in answering the question of what the European understanding of the rule of law is.[254] The 2019 Communication paid more attention to the financial conditionality, and also aimed to be far from an EU Commission driven process, by involving not only Member States but engaging civil society's as well as Venice Commission and GRECO of the Council of Europe.[255] The Communication from 2019 has been argued of focusing on promoting reactions to rule of law breaches, which were needed by this stage, but instead it focused on the promotion

[250] Council of the EU, 13 October 2020.
[251] Three procedural staged involved: assessment, recommendation and follow-up by the Commission. If this dialogue is not satisfied, the Commission would then have the possibility – not obligation – to trigger the application of article 7 TEU. According to the Commission, the introduced framework is based on its current powers as provided for by existing EU Treaties, and would merely complement existing instruments, notably the Article 7 procedure and the infringement procedure laid down in Article 258 TFEU. However, this assessment is not unanimously shared. The Council's legal service, for example, expressed its opposition to the Commission's proposal alleging an unlawful power-grab by the Commissions.
[252] M Vlajković 2020, p. 246.
[253] Part of the Blueprint for actions, COM (2019) 343 final, draws heavily on the case law of the ECJ and the ECtHR as well as reports and opinions of the Council of Europe, including the VC and GRECO.
[254] COM (2019) 343 final., p. 1.
[255] ibid. p. 7.

of the rule of law as a principle.[256] Thus, instead of actually introducing new actions, it seems to repeat many aspects already known.

Part of the Commission Blueprint for Action from July 2019 is the annual Rule of Law Report,[257] which was for the first time published in September 2020.[258] This report is part of the Commission annual Rule of Law Review Cycle, aiming to promote ongoing dialogue between EU institution, member governments and stakeholders on the rule of law. The Report outlines Member State Specific assessments of significant development related to the rule of law within four pillars: the justice systems, the anti-corruption framework, media pluralism and other institutional issues relating to checks and balances.[259] These four areas were identified of particular importance for the rule of law in Member States. The Report also refers to the effects of the COVID-19 pandemic on the rule of law. However, the Report does not contain any recommendations.[260]

The aim of the new Rule of Law Report is to enlarge the existing EU toolbox in this area with a new preventive tool and to launch an inclusive debate and promote the rule of law culture across the EU. It will feed the annual debates on the rule of law in both EP and the Council of the European Union.[261] The report from 2020 has however been criticized of consisting of shortcomings regarding the report itself, and the fact that it does not consider the political context for the country in question. Daniel Hegedüs explains that '*the report is undermined by soft language, the wrong time frame, and decisions not to address systemic deficiencies of the rule of law in certain member states. This makes the comparative approach useless and even harmful*'.[262]

The 2021 Report is currently in the making. The effects of the reports in the future rule of law discussion are still to be confirmed. However, in the past, reports and opinions

[256] W Recht 2018, p. 335.
[257] The Rule of Law Report is part of the Commission Communication for 'Further Strengthening the Rule of Law in the EU'.
[258] European Commission, 2020 Rule of law report, 30 September 2020.
[259] idem.
[260] COM (2019) 343 final. pp. 1–13.
[261] *See e.g.* Verfassungsblog, L Pech et al, 28 September 2020.
[262] The German Marshall Fund of the United States, 1 October 2020.

have not seemed to stop rule of law backsliding, and their limited effect lies in their voluntary nature.

3.2.4. Financial measures

Within the new Multiannual Financial Framework (MFF) proposal 2021-2027, the Commission put forward a new mechanism aiming at ensuring the respect for the rule of law in relation to the future EU budget.[263] The Commission intends to strengthen the link between EU funding and the respect for the rule of law,[264] by linking the allocating of EU funds to the recipients' observance of the principles of the rule of law.[265] The Regulation 2020/2092[266] introduced a rule of law conditionality policy in order to protect the union's budget by introducing measures that would be directed towards one or several Member States with regards to their non-compliance of the rule of law.[267]

The new mechanism proposed as part of the MFF 2021-2027 is not as innovative as it may seem at first sight since it copies a concept adopted within the previous MFF (2014-2020). The previous MFF contained a similar measure linking effectiveness of European Structural and Investment (ESI) funds to sound economic governance.[268] Thus, it was possible to suspend, totally or partially, payments of structural funds towards Member States who violated the limits of 3% deficit (excessive budget deficits). [269]

The Regulation on a general regime of conditionality for the protection of the Union's budget (Regulation 2020/2092)[270] is an integral part of the 2021-2027 EU Budget package. It will complement existing tools, and form an additional layer of protection of

[263] COM(2018) 321 final.
[264] ibid. p. 4: The 'modern budget' is guided by the principles of prosperity, sustainability, solidarity and security, for a EU of 27.
[265] COM(2018) 324 final; based on Art. 322(1)(a) TFEU, and Art. 106a EAEC.
[266] Regulation 2020/2092.
[267] COM(2018) 324 final.
[268] Regulation (EU) No 1303/2013.
[269] M de Mesquita, 2018, p. 290.
[270] Regulation 2020/2092.

the EU budget.[271] The Regulation 2020/2092 is based on the Article 322(1)(a) TFEU[272] and requires appropriate measures to be taken where rule of law breaches affect, or a seriously risk affects, the principles of financial management or the protection of financial interest of the Union. The underlying rationale is that the respect of the rule of law is an essential precondition for compliance with the principle of financial management enshrined in Article 317 TFEU. Such management can only be ensured if national authorities act in accordance with the law, effectively pursue cases of fraud, corruption, and conflicts of interest, and that unlawful decisions are subject to review by an independent judiciary.[273] The Regulation does not provide for the imposition of fines but rather enables the suspension of payments due.[274]

For measures to be taken against a Member State under the Regulation 2020/2092 two conditions must be fulfilled. First, there must be a breach of the rule of law. According to the Regulation, which contains definitions of the rule of law which is derived from the European understanding of the rule of law (see chapter 2 above), the rule of law must be understood in conjunction with the other values enshrined in Article 2 TEU. Its wording that there must be 'breaches of the principles of the rule of law' is in plural, indicating that a single breach does not suffice.[275] The Regulation, however, does not appear to be excluding single breaches, since the aim of the Regulation covers single breaches.[276] In this regard, the wording of the Regulation is paradoxical.

A sufficient breach can be either a legislative or an administrative rule which opposes the rule of law.[277] Seriousness, frequency, and responses by the authorities in correcting errors are important factors while assessing whether a breach is sufficient enough to

[271] European Commission webpage, EU Budget.
[272] Article 322(1)(a) TFEU states: "1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations: (a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts".
[273] Preamble TFEU, recital's 7 and 8.
[274] T Tridimas 2020, p. XVIII.
[275] ibid. p. XIII.
[276] idem.
[277] ibid. p. XIV.

trigger this condition of the Regulation. Despite this, there is, however, no need to establish a pattern of breaches. [278]

The second condition that must be met in order to established a sufficient rule of law breach in accordance with the Regulation 2020/2092, states that the alleged breach must affect the financial management of the Union budget or the protection of the financial interest of the Union in a sufficiently direct way.[279] The Regulation thus aims in establishes a clearer connection between rule of law violations and the financial interest of the Union.[280] However, the second condition also indicates that the mere finding of a rule of law breach does not suffice to trigger this new mechanism.[281]

The procedural rules concerning the adoption of the measures in an event of a non-complaint Member State regarding the rule of law provides a central role to the Commission in assessing the breach, but the Council has the final decision power.[282] From an interinstitutional point of view the Council's relationship with the Commission and the consequences this relationship has on the latter's responsibilities, could be problematic.[283] However, a deeper analysis of this relationship is not the focus of this study, and will thus not be further analysed. One aspect yet worth mentioning, is the controversial point which this relationship has led to with regards to the Regulation 2020/2092, is the fact that the Council stated that it will not propose measures under the Regulation until the Commission has adopted guidelines on the application in close consultation with Member States.[284]

The reason for this being a controversial point, is the fact that the proposed mechanism with the MFI 2021-2027 does not established a formal link with the infringement procedures of Article 7 TEU related to EU values.[285] The Rule of Law Conditionality

[278] T Tridimas 2020, p. XIV.
[279] Article 4(1) of the Regulation.
[280] T Tridimas 2020, p. XIV.
[281] idem.
[282] ibid. p. XIX.
[283] C A P Hillon 2021, p. 280.
[284] COM(2018) 324 final.
[285] M J de Mesquita 2018, p. 291.: This furthermore contradicts the procedural rules set out in Regulation 1303/2013: According to Article 23(9a) of Regulation 1303/2013, the Commission *must* present to the Council a proposal to suspend, totally or partially, the commitments or payments in respect of programmes of a Member State whenever the Council decided, under

Mechanism bypasses the Article 7 TEU procedures as it does not prevent new decision on the establishment of a generalised deficiency as regards the rule of law to be taken by the Commission.[286] The Regulation does not establish a formal link with decision on the risk of violation of EU values (the declarative phase), nor with the decision on the risk of violation of EU values (the preventive phase) where the EU is at present regarding Poland and Hungary. No formal link is either established with the Rule of Law Framework from 2014 (opinions, recommendation made by the Commission towards Member States).[287] Thus gives the impression of these all instrument being independent, instead of working together, and the Conditionality Mechanism representing a parallel mechanism for sanctions foreseen in article 7 TEU towards a Member State infringing EU values. Thus, the Conditionality Mechanism, or Regulation 20/2092, creates a parallel procedure based on secondary law outside the framework of the Treaty-based political procedure for assessing a serious and persistent breach of the rule of law (and EU values in general). [288]

Article 126(8) TFUE, that necessary measures to correct the excessive deficit were not adopted, i.e. after several phases of the excessive deficit procedure have already been completed, including the declarative phase.According to the English version of Art. 23 ('Measures linking effectiveness of ESI Funds to sound economic governance') 'The Commission shall make a proposal to the Council to suspend part or all of the commitments or payments for the programmes of a Member State in the following cases: (a) where the Council decides in accordance with Article 126(11) TFEU that a Member State has not taken effective action to correct its excessive deficit'. Those measures can also be proposed and adopted in the cases foreseen in Art. 29(9b to e). See further Article 29(10 to 12) for procedure and ceilings and Annex III.

[286] M J de Mesquita 2018, p. 291.

[287] idem.

[288] ibid. p. 292.

4. The Rule of Law in Hungary and Poland

4.1.The shift of understanding of the Rule of Law in Hungary and Poland

Before moving on in the study to the actual breaches and measures taken in Hungary and Poland the following chapter will illustrate how the rule of law principles are perceived and how they have developed in Hungary and Poland. As the previous chapters have stated, there are discussion concerning the actual meaning of both what the rule of law as a concept entails, but also what a breach of the rule of law concretely is. This chapter will illustrate how Hungary and Poland understand the concept.

Hungary's equivalent to the rule of law, *jogállam,* has been influenced by the German legal traditions, which can be seen for example in that it is a literal translation of the German *Rechtsstaat*.[289] The amendments of the 1989-1990 Constitution, was the biggest changes made to the Constitution, as a result of the Communist regimes end. This version of the Constitution was influenced by Western European constitutions, especially the German Constitutional tradition. The constitutional foundations included liberal democracy and the establishment of a Constitutional Court as the main institution of constitutional review.[290] The presence of a Western European constitutional tradition could be argued of being one determinant making Hungary's transition towards an EU Member State[291] a smooth process that was assisted by the Constitutional Court of Hungary.[292] The ratification of the European Convention on Human Rights by Hungary in 1993 along with the accession to the EU in 2004, meant that numerous laws and regulations in the Hungarian legal system were re-enacted or amended in order to make them EU compliant.[293]

The Hungarian Constitutional Court, already in the beginning of its operations back in the year 1989 established that it perceives the rule of law in a thicker, or formal sense.[294]

[289] T Drinóczi 2021, p. 120.
[290] A Jakab and E Bodnár, 2020, p. 106.
[291] Hungary became a EU Member State in 2004.
[292] M Bánkuti et al 2013, pp. 241–242.
[293] A Jakab and E Bodnár 2021, p. 106.
[294] ibid p. 106; T Drinóczi 2021, pp. 126–127.

However, this perception changed due to the Constitutional amendments in 2011, establishing the Fundamental Law, which was the amended Constitution. Since 2012 the Hungarian Constitutional Court has taken a thinner approach towards the rule of law,[295] which is mainly due to the changes in power, procedures, and admissibility criteria, all imposed by the ruling party Fidesz since 2010.[296]

Like Hungary, Poland amended its constitution in 1989 after the Communist era.[297] Before 1989, the rule of law in Poland was defined by the term *praworządność*, which could be translated as 'lawfulness'. [298] This term has a close meaning to the principle of legality, i.e. the law addressed to organs of public authority must be obeyed.[299] The amendments to the Constitution after the Communist era, in 1989,referred to the concept of the German understanding of the rule of law, *Reichsstaat*. It also constitutionalised the principle of the democratic state of law.[300] The principle of the rule of law is currently set out in Article 2 of the Polish Constitution stating that '*The Republic of Poland shall be a democratic state ruled by law and implementing the principle of social justice'*.[301] Despite the Polish term *praworządność* not being equal to the term "rule of law", this term is used in translations to describe the rule of law in Poland. [302]

One characteristic (which does not only apply in Poland, but also in other post-communist Central and Eastern European states) is the fact the rule of law principle was formed mainly by rulings of the Constitutional Court. Thus, the elements and details characterising the concept, have been influenced by the consideration by the Polish Constitutional Tribunal.[303] The Polish Constitutional Tribunal perceives the rule of law in a substantive way, linking it to human rights. Even though the Polish Constitution

[295] T Drinóczi 2021, p. 129.
[296] ibid. p. 130.
[297] This amendment was called the December Amendment, amending the communist Constitution from 1952.
[298] For many decades 'lawfulness' had been used to legitimise socialism, which is why during the political transformation it has been rejected by many legal scholars as a concept of 'bad tradition'.
[299] The principle of legality is expressed in the current Article 7 of the Polish Constitution; 'The organs of public authority shall function on the basis of, and within the limits of, the law'.
[300] I Wróblewsk 2021, p. 134.
[301] Constitution of the Republic of Poland, 2 April 1997.
[302] idem. n. 300.
[303] I Wróblewsk 2021, p. 135.

refers to the rule of law equivalence, the Polish legal doctrine lacks a comprehensive analysis of the concept.[304] Neither have Polish constitutionalists formulated a definition of the term, but rather indicated certain elements that according to them define the concept.[305] Still, according to Wróblewska, the perception of the principle of the rule of law in Poland does not, when it comes to its core, differ from the understanding of the principle in other European states. [306]

The Communist era is argued of bringing both States closer to the Western understanding of the rule of law principle; connecting the principle to human rights and democracy and thus, representing a thicker view of the principle. However, due to the Constitutional amendments made recently in both States, the thinner version describes the current applicability of the state's rule of law principle. There has thus been an obvious shift in the perception and understanding of the rule of law in both Hungary and Poland. This shift begun when the Fidesz came into power in 2011 in Hungary, and when the PiS party in Poland came to power. Both parties in respective States have departed from the principle as the amendments both parties performed in the respective States, led to politicizing the constitution and the judiciary and thus, hurting the separation of power, that is needed to guarantee the rule of law. This shift is in line with the facts in chapter 2.3. Conceptual Puzzle, stating that autocrats use the thin version of the rule of law and, as such, are able to justify their compliance with the rule of law.

[304] I Wróblewska 2021, p. 134.
[305] ibid. p. 137.
[306] ibid. p. 133.

4.2. Breaches of the Rule of Law in in Hungary and Poland

After the elections of 2010 bringing Victor Orbán's Fidesz party into power, a set of reforms were introduced in Hungary.[307] The reforms introduced by the new political authority in 2010 raised concerns across Europe concerning the respect of fundamental rights, democracy and the rule of law.[308] The Fundamental Law, which is the Hungarian equivalent to a Constitution in force since 2011, has been amended five times since. The changes concerned limiting constitutional review, breaking the continuity in the jurisprudence of the Constitutional Court[309] and imposing restrictions on the exercise of the right to vote and to the freedom of expression.[310] The Fidesz government lowered the retirement age for judges and hence exchanged judges in favour of the government's agenda. The government also introduced various legislations reducing the accountability and legal oversight of numerous government institutions and regulatory bodies (most notably the Central Bank and Data Protection Ombudsman), restricting the freedom of the press and causing disruption to the electoral system.[311] Another important step to delegitimize the judiciary was the persecution of judges and prosecutors through disciplinary procedures.[312] Moreover the creation of a new disciplinary procedures[313] and oversight body for judges has dramatically increased political oversight of the judiciary.[314]

The amendments to the Hungarian Fundamental Law were motivated by the government's decision to refuse to comply with unfavourable decision by the Hungarian

[307] M Dawson and E Muir 2013, p. 1961.
[308] ibid. p. 1962.
[309] The Constitutional Court represents an important balancing and stabilising institution in the Hungarian political system.
[310] N Chronowski and M Varju 2016, p. 278.
[311] D Soyaltin-Colella 2020, p. 4.
[312] Official Blog Union News, J I Matos, 18 November 2019.
[313] *See* Official Blog Union News, J I Matos, 18 November 2019: In 2019 both Hungary and Poland crossed a 'forbidden' boundary, when in a decision of the Acting President of the Budapest-Capital Regional Court initiated disciplinary proceedings against Judge Csaba Vasvári for referring questions to the ECJ under Article 267 of the Treaty on the Functioning of the European Union. Thus targeting the preliminary ruling proceeding. If the intrusion is materialized on punishing the use of a mechanism devoted to uphold the EU law – the reference for a preliminary ruling by a EU court – the violation of the most basic standards for Rule of Law could not be more manifest.
[314] M Boskovic 2020, p. 331

Constitutional Court,[315] hence the power of the Constitutional Court was diminished when it comes to scrutinising the government's proposals.[316] It is precisely this issue that resulted in the debate about breaches of the rule of law in the Hungary.[317] In 2012, the European Commission criticised the Hungarian Fundamental Law's entry into force, as it '*questions the existence of a legally stable environment based on the rule of law including respect of media freedom, democratic principles and fundamental rights*'.[318] The Venice Commission also expressed its concerns on numerous aspects of the reforms made to the Fundamental law in the last years.[319] It has also delivered opinions on a number of serious matters for which the Parliamentary Assembly of the Council took the initiative.[320] The European Parliament Rapporteur Sargentiini presented in 2018 a report stating that '*there is a systemic threat to democracy, the rule of law and fundamental rights in Hungary*'. [321]

After winning the general election in 2015, the right-wing Law and Justice Party (PiS) in Poland began to implement a programme of reforms called 'The Good Change'. The main reforms made were regarding the judiciary of the Polish Constitutional Tribunal, resulting in many controversial changes of personnel, amongst i.e. allowing quasi-judges[322] to adjudicate.[323] The legislative reforms to the Constitutional Tribunal forced more than 30% of the judiciary into early retirement and interrupted the constitutionally-guaranteed six-year term of office of the First President of the Supreme Courts. At the beginning of 2020 the PiS government approved a law known as "Muzzle Law", introducing new types of disciplinary offences for judges, targeting the requests for a preliminary ruling submitted to the ECJ and the Polish Supreme Court regarding the status of judges

[315] N Chronowski and M Varju, 2016, p. 281.
[316] D Soyaltin-Colella 2020, p. 4.
[317] M Boskovic 2020, p. 332.
[318] European Commission, Press release, 11 January 2012.
[319] An overview of all opinions on the situation in Hungary is available at: http://www.venice.coe.int/webforms/documents/?country=17&year=all.
[320] S*ee generally* Opinion by the European Commission for democracy through law, Opinion, Venice, 15-15 June and the Opinion by European Commission for democracy through law, Opinion, Venice, 17-18 June.
[321] idem. n. 316.
[322] These quasi-judges have taken the place of the judges elected by the previous Parliament, although the latter have not completed their term of office.
[323] I Wróblewska 2021, p. 146.

appointed with the participation of the new National Council.[324] Since 2015, the PiS has made the following steps towards the judicial independence: 1) disabling the Constitutional Tribunal, 2) merging the position of the Ministry of Justice and Attorney General, 3) modifying the system of training and appointment of new judges, including the reintroduced of a position of a lower court judge/evaluator, previously deemed unconstitutional, 4) changing the law on common courts, increasing the influence of Minster of Justice, 5) taking control of the National Council of the Judiciary in charge of safeguarding the independence of courts and judges, 6) taking control of the Supreme Court.[325] These moves, however, were not merely legislative as they were accompanied by an intensive media campaign against magistrates.[326]

The reforms initiated in 2015 in Poland, set in motion a process of the politiation of the Judicial Council, that was in charge of appointing judges as its new judiciary was appointed by the Parliament instead of the Judicial Council.[327] These reforms and amendments indicated a takeover of the constitutional order by changing it though ordinary legislation.[328] The reforms have furthermore lead to the majority in Polish legal circles to strongly believe that the Constitutional Tribunal is now a completely politicised body, a subordinate to the Government.[329] These changes violate the basic elements of the rule of law, and what the principle stands for.[330] In a formal report from December 2017, the European Commission claimed that there is 'a clear risk of a serious breach of the rule of law in Poland'.[331]

Governing political parties in Poland and Hungary[332] started rejecting the model of liberal democracy and attacking checks and balances of the political process. Parties such as

[324] EUOBSERVER, 20 August 2019.
[325] The Atlantic, 28 January 2020.
[326] idem.
[327] M Wyrzykowiski, 2019, p. 417.
[328] ibid. p. 418.
[329] See Lech Morawiks speech, 9 May 2017. Morawik was one of the quasi-judges of the Constitutional Tribunal. In his speech, he was asked to answer a question about whether he represents the Tribunal or the current Government, he explained that he represents both institutions.
[330] idem. n. 327.
[331] European Commission, Press release, 20 December 2017.
[332] S*ee e.g.* Viktor Orbán's speech of 26 July 2014.

Fidesz and PiS are seen as especially threatening as they are not only 'performing' populism as a matter of political style,[333] which would be no novelty, but actually reshaping the constitutional setting of their countries and undermining the project of the EU as a space of freedom granted by law.[334] In the wording of EU institutions, the behaviour of these parties constitutes a systemic threat to the rule of law. [335] The parties appeal to the people, and argue that the rule of law model promoted by the EU is overly formalistic and undermines the democratic principle that all decision-making power derives from the nation.[336] In the eyes of Orbán and Kaczynski (PiS party leader), the European model of the rule of law limits the popular mandate and prevents governments from regulating the economy, thus allowing global capital and foreign-funded actors to interfere in domestic political life.[337]

Politicians in both Hungary and Poland have in their populist statements emphasised the idea of the welfare of the nation as a value standing above the law, even above the Constitution.[338] These actions confirm the departure from the liberal-democratic system[339] towards illiberal constitutionalism.[340] Both governments have been said of dismantling the rule of law and fundamental rights, and as such both Hungary and Poland currently represent the sharpest decline in democracy in Central and Eastern Europe.[341] When states like Hungary and Poland fail to demonstrate liberal attributes and weaken their former constitutionalism[342] along with their constraints on the public power, they are called (modern) authoritarian or anti-democratic regimes. [343]

[333] *See* B Moffit 2018, pp. 1−10.
[334] W Recht 2018, p. 339.
[335] ibid. p. 334.
[336] ibid. p. 339.
[337] Viktor Orbán's speech of 26 July 2014.
[338] I Wróblewska 2021, p. 138.
[339] idem.
[340] T Drinóczi and A Bień-Kacata 2021, p. 21.
[341] Illiberal constitutionalism refers to the fact that democratically elected leaders misuse their power. Illiberal constitutionalism remodels the entire liberal constitutional system within the European community which represents the Westerns ideal of legal and democratic development.
[342] Constitutionalism is understood in its simplest form as constraints on public power. *See furhter* L Cianetti et al 2018, pp. 243–256.
[343] T Drinóczi and A Bień-Kacata 2021, p. 4.

In 2020 MEPs in the European Parliament[344] expressed serious concerns about the rule of law in Hungary and Poland. The expressed concerns by the European Parliament demonstrate well the areas that are threatened in respective countries. The concerns in Hungary were on judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees. In Poland, concerns rose from the perceived threats to the judiciary.[345] For a rule of law breach to be established, there needs to be a systematic nature of the breaches, indicating that several persistent incidents are needed to meet a rule of law breach. As Wróblewska states, a rule of law breach origins from systemic changes towards politicising the constitution.[346] This systemic change in the political sphere, ambushing the constitution has been present in both Hungary and Poland. This has eventually led to the establishment of a breach of the rule of law in both states.

It is important to note, that the absence of the rule of law makes the Constitutions symbolic and aspirational political documents. In the worst case however, the constitution itself becomes hypocritical.[347] The characteristic that both Hungary and Poland represent is the attempt to undermine the Constitution, through the exercise of ad hoc amendment and compliment to the Constitutions through ordinary legislation.[348] Furthermore, they undermine the independence of the judiciary through reforms culminating into preferable outcomes of the judicial setup up as preferred by the ruling party.[349] These actions result in the undermining of the rule of law in both States.

[344] European Parliament, News, 16 January 2020.
[345] idem.
[346] I Wróblewska 2021, p. 138.
[347] S Bisarya and W E Bulmer 2017, p. 124.
[348] T Drinóczi and A Bień-Kacata 2021, p. 5.
[349] ibid. p. 3.

4.3. The measures taken towards Hungary and Poland

The responses the EU has taken towards the rule of law breaches can be summarised into the following actions: 1.) the infringement procedure (and ECJ judgements), 2.) the activation of Article 7 TEU and 3.) Rule of Law Framework. The Court has, furthermore, developed the EU's toolbox when it comes to the application and enforcement of the rule of law. The initial measures taken towards rule of law breaches in Hungary and Poland by the EU and the Council of Europe have been the opinions established by the Venice Commission.[350] In the following subchapters it will be analysed in further detail how the taken measures have affected the rule of law backsliding and breaches in Hungary and Poland.

4.3.1. Legal measures taken

Infringement procedures

In 2012, the Commission initiated three infringement proceedings against Hungary regarding 1.) the Hungarian legislation which lowered the retirement age for judges[351] resulting in early dismissal of 247 judges, 2.) the independence of Hungary's new data protection supervisory authority and 3.) the independence of the Hungarian National Bank.[352] Since then several other infringement actions have been brought up in regard to migration law reforms and even due to Hungary voting against the EU's position in UN Commission on Narcotic Drug in 2021.[353]

[350] W Recht 2018, p. 334.
[351] The lowering of the retirement age also targeted prosecutors and notaries.
[352] European Commission, Press release, 17 January 2012.
[353] European Commission, Infringement decision, 18 February 2021: The Commission launched infringement actions against Hungary based on the following: Law on foreign-funded NGOs (13.7.2027), Non-compliance with the obligation under 2015 council Decision (14 June 2017), concerning Asylum Law (10.12.2015), over telecom taxes (14.3.2011), Higher education law (13.7.2017).

The first infringement action brought by the Commission to the Court was C-286/12 *Commission v Hungary*[354] concerning the retirement age of Hungarian judges and was eventually deemed age discrimination under Directive 200/78/EC as it was disproportional in light of the stated objective of the measure. The Court ruled that Hungary had violated EU's anti-age-discrimination law.[355] However, the effect of the judgement, stating that the Hungarian actions were discriminatory, were minor. By the time of the judgement, Hungary had already replaced many of its 274 judges with party loyalists.[356] The Hungarian government offered two options to retiring judges; either compensation or reinstatement. Since most took the compensation, Orbán achieved his goal while complying with the ECJ's ruling, even though this was not the intention of the judgement.[357]

The infringement action based on the independence of the data protection authority was brought to the Court as case C-288/12 *Commission v. Hungary*.[358] In this case, the Commission obtained from the Court a declaration of non-conformity with directive 96/45/EC on data protection. The data protection office had been abolished and a new one established, with a newly appointed Fidesz party director as its head. Given the fact that remedies of breach of EU law are determined by national law, the government is not obliged to reinstate the dismissed person either.[359] Thus, by settling with the complaining party, the government complies, formally, with the judgment.[360]

In these infringement actions the Commission tried to tackle the problematic Hungarian measures through EU's secondary law. In the infringement actions towards Hungary, the Commission relied on the EU principle of non-discrimination on the ground of age to challenges the Hungarian legislation regarding the compulsory retirement of judges.[361] This also means that the Commission has limited choices in bringing the Hungarian

[354] Case 288/12 *European Commission v Hun*gary ECLI:EU:C:2014:237.
[355] M Dawson and E Muir 2013, p. 18.
[356] N Neuwahl and C Kovacs 2021, p. 27.
[357] idem.
[358] Case 288/12 *European Commission v Hun*gary ECLI:EU:C:2014:237.
[359] *See* Case 14/83 *Von Colson v Land Nordhein-Westfalen* ECLI:EU:C:1984:153, on equal treatment on women.
[360] idem. n. 356.
[361] The forcing of early retirement of Hungarian judges was treated as age discrimination under Councils Directive 2000/78/EC in Case 286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

dispute in terms with Article 2 TEU, which has been an issue throughout the actions taken by the EU towards rule of law breaches in Hungary.[362] Dawson and Muir argues that it is highly unlikely to alter the substance of the problem in Hungary through these kind of infringement procedures, even though the infringement actions themselves would be successful.[363] The reason for this is their reliance on secondary legislation, as this is a limited possibility.[364] The Hungarian example above illustrates that the approach of infringement procedures against the judicial reforms leads to a superficial and sometimes even an unsuccessful result from the EU's point of view.[365] In the end, not really contributing to any long lasting change which would make a difference.

In 2017[366] and 2018[367] the Commission launched two infringement procedures against Poland on 1.) the law on ordinary courts and 2.) and the law of the Supreme Courts concerning the retirement age of the Supreme Court judges.[368] These infringement actions were both referred by the Commission to the ECJ.[369] The Court in both cases confirmed the Commission's position and in the 2018 infringement case the Court also ordered interim measures to stop the implementation of the Polish law on the Supreme Court.[370] These infringements against Poland were activated as the Rule of Law Framework dialogue ended up in a political deadlock in June 2018.[371] However, the started infringement procedure did not pause the rule of law dialogue within the Rule of Law Framework with the Polish government.[372]

In April 2019[373], a third infringement action was initiated by the Commission on the grounds that the new disciplinary regime[374] undermines the judicia independence of

[362] M Schmidt, and P Bogdanowicz 2018, p. 28.
[363] M Dawson and E Muir 2013, p. 18.
[364] L Spieker 2019, p. 7.
[365] idem.
[366] European Commission, Press release, 29 July 2017.
[367] European Commission, Press release, 2 July 20118.
[368] D Kochenov and P Bárd 2018, RECONNECT Working paper No. 1., page 18.
[369] European Commission, Press release, 20 December 2017; European Commission, Press release, 24 September 2018.
[370] European Commission, Press release, 29 April 2020.
[371] EUCRIM, 8 September 2019, p. 80.
[372] idem.
[373] European Commission, Press release, 3 April 2019.
[374] Commission decided on 14 January 20210 on the basis of the preliminary ruling of the ECJ in the case of Miasto Łowicz (C-558/18) concerning the Disciplinary Chamber and the

Polish judges from political control.[375] In October 2019[376] the Commission referred this case to the Court. The Court ruled in 2020[377] that Poland must immediately suspend the application of the national provision on the powers of the Disciplinary Chamber of the Supreme Court. This is an order, of applicative nature, until the Court has rendered its final judgment in the infringement procedure, and a result of the Commission[378] asking the Court to impose interim measures on Poland.[379]

The latest infringement action launched by the Commission occurred in April 2020 regarding the new law (the Muzzle law) on the judiciary in Poland in force as of February 2020.[380] The Muzzle law, as stated by the Commission, undermines the judicial independence of Polish judges and is incompatible with the primacy of EU law.[381] The Commission still awaits the Polish reactions on the reasoned opinion sent by the Commission.[382]

In comparison to Hungary, the Court in the Polish case has had a better opportunity of linking Article 2 TEU together with the Article 19 TEU, thus establishing to some extent a direct link to the EU values. Legal scholars have, however, criticized the Commission's initiated infringement actions towards Hungary and Poland due to the limited scope of the Commission's legal challenges. The infringement actions have been argued of not imposing effective remedies that would have prevented further undermining of the independence and impartiality of the Hungarian and Polish judicial systems.[383] Pech and Scheppel have argued that the Commission has failed to address the government's

subsequent ruling of the Polish Supreme Court of 5 December, in which is stated that the Disciplinary Chamber is not independent court within the meaning of EU law and national law. The Commission decided to request the ECJ to order interim measure on Poland, ordering it to suspend the functioning of the Supreme Court. According to the Commission, such a Disciplinary Chamber creates 'a risk of irreparable damage for Polish judges' and it increases 'the chilling effect on the Polish judiciary'.

[375] European Commission, Press release, 10 October 2019.
[376] idem.
[377] Order of the Court in Case 791/19 R *Commission v Poland* ECLI:EU.C:2021:311.
[378] European Commission, Press corner, 14 January 2020.
[379] European Commission, Press release, 29 April 2020.
[380] idem.
[381] idem.
[382] European Commission, Infringement decision, 30 October 2020.
[383] D Kochenov and L Pech 2015, p. 520.

systemic violations of the Rule of Law.[384] Furthermore, the infringement procedure is not designed to be used in the situations where a pattern of systemic breaches of EU values and ideologically motivated, chronic non-compliance are at play.[385] Despite the critique towards the infringement action, it can be argued that the actions brought towards Poland have had some effects. Whether this has led to any changes or a decrease in the rule of law backsliding will be illustrated further on in the study.

As demonstrated in this chapter, multiple infringement actions have been brought against Hungary and Poland. With regards to Hungary the activated infringement actions concerns more specific provision of EU secondary law. In Poland, the infringement proceeding have focused more on judicial independence. Reading the Commission newest infringement procedures press releases, both Hungary and Poland are still very much present in them. Not always directly with regards to a breach of the rule of law, but what these press releases demonstrate is the growing concerns of the unwillingness to comply with EU law on a more general level. This illustrates that the taken actions with regards to infringement procedures, have resulted in only a minor change: there still exists unwillingness from the Hungarian and Polish government to comply with the EU law.

Case law

Despite the Cases C-286/12 and C-288/12, launched as a result of the infringement procedure brought by the Court towards Hungary in 2013, not being able to refer directly to the EU values, the Case C-78/18 *Commission V. Hungary*[386] established a link to the EU values. The case was brought to the ECJ also as an infringement action by the Commission. The case concerned the Hungarian law from 2017 on transparency of organisations receiving financial support from abroad[387]: targeting civil society and

[384] L Pech and K L Scheppele 2017, p. 4.
[385] D Kochenov and P Bárd 2018, RECONNECT Working paper No. 1, .p. 18.
[386] Case 78/18 *Commission v. Hungary* ECLI:EU:C:2020:476.
[387] The Commission finds that certain provisions in the law indirectly discriminating and disproportionately restricting donations from abroad to civil society organisations infringe the free move ment of capital. In addition, the Commission pleads violation of the right to freedom of association and the right to private life and personal data enshrined in the Charter, read in conjunction with the TEU provisions.

NGO's receiving funds from abroad and placing them under heavy regulatory burden. [388] The Court's judgement from June 2020 constitutes an important contribution to the Courts possibility to protect the EU values from an institutional perspective.[389] The Court included analyses of the crucial development on the freedom of capital and establishment, protection of personal data and the freedom of association. Despite the case not considering *per se* the rule of law, it is an important development in enhancing in a general sense the EU values in Article 2 TEU, and especially fundamental rights as protected by the Charter.[390]

In another infringement action proceeding, Case C-66/18,[391] concerned the Hungarian government's amendments to the law on Higher Education not complying with EU and WTO law. A new rule was introduced requiring foreign universities to operate in their country of origin if they want to offer higher education in Hungary. The law was seen as a move against Hungarian-born US businessman *George Soros* – an opponent of Viktor Orbán– because his funded Budapest-based Central European University was the only active foreign higher education institution in Hungary that did not meet the new requirements.[392] According to AG Kokott, the new rules are discriminatory and disproportionate; they infringe the freedom of establishment, the Services Directive, the Charter of Fundamental Rights, and the national treatment rule of the General Agreement on Trade in Services (GATS).[393] As the case law demonstrated with regards to action brought against Hungary, is the lack of the rule of law *per se*. Instead, the Court have needed to in a broader sense deal with the Hungarian non-compliance with the EU principles.[394]

[388] European Commission, Infringement decision, 18 February 2021.
[389] M Schmidt, and P Bogdanowicz 2018, p. 28.
[390] idem.
[391] Case 66/18 *Commission v. Hungary* ECLI:EU:C:2020:792.
[392] T Drinóczi and A Bień-Kacata 2021, p. 18.
[393] Opinion of Advocate General Kokott in Case 66/18 Case 66/18 *Commission v. Hungary* ECLI:EU:C:2020:172. point. 86-91.
[394] The Case 718/17 *Commission v. Hungary* ECLI:EU:C:2019:917. concerned treatments of migrants, in Case 78/18 *Commission v. Hungary* ECLI:EU:C:2020:476., the matter concerned the 'anti-NGO' law, and in case 66/18 *Commission v. Hungary* ECLI:EU:C:2020:792, it examined the Hungarian educational law. The fact that none of the three cases refers to Article 2 TEU is sometimes explained by the fact that in political practice, the Commission has little choice: 'framing the Hungarian dispute in terms of market freedoms may aid the Commission

It is clear, that regarding the rule of law and judicial independence, the ECJ has been most actively involved regarding the development occurring in Poland. Since the 2018, there are several judgements by the Court regarding the independence of the judiciary in Poland and further cases pending. In 2018, the Court delivered its judgment in the *ASJP* case concerning Portuguese judges salaries' as stated in chapter 3, the *ASJP* case represents the seminal judgement regarding the Member States obligations to guarantee judicial independence.[395] The ECJ used this new competence established in *ASJP*, triggering of Article 19 TEU despite the Member State court not actually adjudicating a matter of EU law, to declare that the Polish judiciary reform would infringe upon the principle of effective judicial protection in EU law.

In 2019, the ECJ delivered it's judgment in *Commission v. Poland* (Independence of the Supreme Court, C-619/19), which further densified the principle of judicial independence established in *ASJP*.[396] In this case, the Court incorporated the principle of irremovability of judges being of fundamental guarantees of the independence. The ECJ concluded that the forced early retirement is not compliance with the principle of irremovability[397] and the standard that judges may remain in post until expiration of the mandate or reaching age.[398]

politically by bringing the legal dispute onto terrain where the role of the EU is more firmly defined – and thus avoiding the prospect of the Commission's agenda in other areas being upset. *See* Dawson and Muir 2013, p.1970.

[395] Case 64/16 *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para. 32. Similarly, *see* Case 619/18 R *European Commission v Republic of Poland* ECLI:EU:C:2019:575, para. 47 and para. 43: EU law that implements those values; Opinion of Advocate General Tanchev in Case 192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:529, in point. 71: the second subparagraph of Article 19(1) TEU, a specific manifestation on the foundational values reflected in Article 2 TEU;Opinion of Advocate General Tanchev in joined cases Case 585/18, Case 624/18 and Case 625/18 *A.K.* ECLI:EU:C:2019:551 at para. 77; Advocate General Tanchev in Case 558/18 and Case 563/18 *Miasto Łowicz* ECLI:EU:C:2019:775 at para 92: Article 19 TEU is a concrete manifestation of the rule of law, one of the fundamental values on which the European Union is founded under Article 2 TEU.

[396] Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531, para. 36: That requirement concerns not only the way in which an individual case is conducted, but also the way in which the justice system is organised. The consequence of a national measure affecting, in general, the independence of the national courts is that an effective legal remedy is no longer guaranteed, inter alia when those courts apply or interpret EU law.

[397] ibid. para. 72.

[398] ibid. para. 76.

However, the Court in *Commission v. Poland* (Independence of the Supreme Court, C-619/19), did not provide any guidelines how to achieve principles of irremovability nor indicate institutional measures. The Court only included the possibility that exception of the irremovability would be '*warranted by legitimate and compelling ground, subject to the principle of proportionality*'.[399] Instead of providing general guidelines applicable to any future situation, the Court decided based on the assessment whether the national measures that lowered the retirement age for active judges could be justified, and found that the chosen measure was not suitable to improve age balance among senior members of the Supreme Court and standardise the general retirement age.[400]

The Court has continued to assess rules governing judicial independence in the joint cases *A.K and Others* ***v*** *Krajowa Rada Sadownictwa"*[401]. The Court, however, failed to clearly state whether the Disciplinary Chamber and National Council of Judiciary in Poland are bodies independent from the executive and legislative powers and left the final decision to the referring court. The Court did provide the referring court with elements for assessment, including external and internal aspects of independence.[402] This principle was further developed in *Commission v. Poland* (Independence of Ordinary Courts C-192/18)[403] in November 2019. The Court analysed and declared, contrary to EU law, regarding the power granted to the Minister of Justice of deciding whether or not to authorise judges to continue to carry out their duty.[404]

In the joint cases C-558/18 and C-563/18,[405] the Court confirmed the wide scope of article 19 TEU but limited the procedural admissibility of requests for preliminary rulings. It was considered that in the specific case the question did not concern '*an interpretation of*

[399] Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531, para. 72.
[400] ibid. para. 90.
[401] Joined cases Case 585/18, Case 624/18 and Case 625/18 *A.K.* ECLI:EU:C:2019:982.
[402] ibid. para. 121-122: The external element requires the court to exercise its functions wholly autonomously, without without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decision. The internal element is linked to the impartiality and ensures equal distance maintained from the parties to the proceedings and their respective interest with regards to the subject matter of those proceedings.
[403] Case 192/18 *European Commission v. Republic of Poland* EU:C:2019:924.
[404] ibid. para. 124.
[405] Joined cases Case 558/18 and 563/18 *Miasto Lowicz* ECLI:EU:C:2020:234.

EU law which meets an objective need to the resolutions of those disputes, bur are of general nature'[406] and was therefore declared inadmissible. Spieker argues that this judgment is a step backwards in the Court casework so far on the judicial independence. The real consequences of the judgment are still to be seen, as the restriction may have effects on various requests still pending before the ECJ.[407] More recently in the case *A.B e o*.[408] the Court, again reaffirmed that Member States are required to comply with EU law when exercising their competence, in particular that relating to the enactment of national rules governing the process of appointment judges.[409] Although leaving the assessment of the existence of breach of EU law in the concrete case to the referring court, the Court leaves no doubt about the conclusion it makes of the situation in Poland.[410]

There are currently also a pending case before the Court concerning Poland and judicial independence; *Commission v. Poland*[411] (Régime disciplinaries des juges C-791/19 R). In this case the Court addressed directly the matter of disciplinary proceedings, clearly stating that the disciplinary regimes to which judges are subject to fall under the scope of Member States' obligations to respect judicial independence under EU law and that the previous actions taken by Polish authorities were sufficient to issue interim measures suspending the activity of the Disciplinary Chamber of the Supreme Court, whose independence raised serious concerns.[412]

Despite the situation in Poland regarding the independence of the judges not being solved, the jurisprudential solutions provided by the COurt have been successful as many Polish courts have and continue to submit references concerning the Polish reforms curtailing

[406] Joined cases Case 558/18 and 563/18 *Miasto Lowicz* ECLI:EU:C:2020:234, para. 53.
[407] Verfassungsblog D Spieker, 26 March 2021.
[408] Case 824/18 *A.B. and others v Krajowa Rada Sądownictwa* ECLI:EU:C:2021:153
[409] ibid. para. 79.
[410] Verfassungsblog D Spieker, 26 March 2021.
[411] Case 791/19 R *European Commission v. Republic of Poland* ECLI:EU:C:2020:277.
[412] For an analysis of this judgment and its shortcomings, *see* legal opinion by L. Pech, 27 November 2010.

the judiciary.[413] After interim measures were ordered by the Court,[414] the Polish government immediately reversed some parts of its reform.[415] This shows that governments in backsliding Member States, especially in Poland, remain responsive to the ECJ's decisions.[416] This is a success for the rule of law debate in the EU, demonstrating the power that the Court has in enhancing the value and being able to through the independence of the judiciary requirement in Article 19 TEU, enforcing the rule of law value. So far the Article 19 TEU has been read in conjunction with Article 47 of the Charter. This raises the question of whether the Article 19 TEU can be imposed solely without reference to Article 47 of the Charter in the future.

4.3.2. Article 7 TEU procedure initiated

The Article 7 procedure was triggered for the first time against Poland in December 2017 by the European Commission after the dialogue based on the Rule of Law Framework leading to no results.[417] The Polish government had acted unwilling to address the Commission's recommendation regarding the safeguarding to the rule of law and thus the Commission activated the Article 7 TEU procedure.[418] In July 2020 the Members of the European Parliament (MEPs) expressed their concern that the situation in Poland had

[413] On the Polish retirement ages for judges, *see* the references in Case 522/18 *Zakiad Ubezpieczen Spolecznych*; Case 688/18 *BP v Uniparts SARL;* on the new Polish disciplinary chamber and the influence of the President of Republic and the Minister of Justice on its composition, see Joined cases Case 585/18, Case 624/18 and Case 625/18 *A.K.* ECLI:EU:C:2019:982; on the references in cases C 537/18 order from the Court and Case 824/18 *A.B.* ECLI:EU:C:2021:153.C; on disciplinary measures against ordinary judges *see* Joined cases Case 558/18 and 563/18 *Miasto Lowicz* ECLI:EU:C:2020:234. and Case 623/18 *Prokuratura Rejonowa* ECLI:EU:C:2020:800. *See* also references submitted in order from the Court in and Case 508/19 *M.F v J. M joined parties Prokurator Generaln* ECLI:EU:C:2021:290. and Case 487/19 *W.Z.* ECLI:EU:C:2021:289.
[414] *See* the orders of October 19 and December 2017, 2018 in Case 619/18 *Commission v. Poland* ECLI:EU:C:2019:531.
[415] On November 21, 2018 the Polish Parliament passed an act reinstating the previous retirement age for judges, *see* Press Release, PREZYDENT The Official website of the President of the Republic of Poland, 17 December 2018.
[416] L Spieker 2019, p. 1186.
[417] A Grzelak 2021, p. 210–213; S Majkowska-Szulc 2021, p. 178–182.
[418] European Commission, Press release, 26 July 2017.; European Commission, Press release, 20 December 2017.

seriously deteriorated since Article 7(1) TEU was triggered.[419] The MEPs argued that despite the hearings held with the Polish government in the Council as part of the Article 7 TEU procedure, infringement procedure had still been launched by the Commission against Poland. This would indicate that there would be no change as a result of the Article 7 TEU procedures activation.

The MEPs' expressed concerns resulted in the EP approving a draft report citing overwhelming evidence of rule of law breaches in Poland as regards the functioning of the legislative and electoral system, the independence of the judiciary and the rights of judges and protection of fundamental rights.[420] The EP states in its position that the facts and trends mentioned in the report represents a systemic threat to the values of Article 2 TEU. Furthermore, the EP calls for the Council and Commission to refrain from a narrow interpretation of the principle of the rule of law and use the Article 7(1) TEU procedure to its full potential.[421]

Since 2012, the European Parliament had raised concerns regarding the legislative amendment occurring in Hungary and threatened to activate Article 7 TEU since.[422] It still took the EP six years to actually activate the Article 7 TEU, as the article procedure was triggered in September 2018.[423] The concerns by the EP resulting in the activation of the Article 7 TEU was mainly due to judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees. When the EP activated the article, it was the first time that the Parliament called on the Council of the EU to act against a Member State to prevent a systemic threat to the Union's founding values.[424]

As a result of the EP triggering the Article 7 TEU, Hungary challenged the resolution on the ground of an infringement of Article 354 TFEU (regarding the voting procedure for activating Article 7 TEU) and that the President of the EP did not consult the Committee on Constitutional affairs on the issue, thereby infringing the principle of legal certainty,

[419] EU Law Live, News, 15 July 2020.
[420] European Parliament, News, 16 July 2020.
[421] idem.
[422] *See* generally W Balkans 2021, pp. 481–488.
[423] European Parliament resolution, 16 January 2020.
[424] EUCRIM, 8 September 2019.

thus making the action inadmissible. In June 2021 the ECJ delivered its judgement in *Hungary v. European Parliament*[425] dismissing the action for annulment brough by Hungary against EP regarding the resolution triggering the Article 7 TEU procedures. The judgement reinforces the supranational protection of the rule of law by ensuring that a reasoned proposal of the EP under Article 7(1) TEU is amendable to judicial review. [426] In this respect, the case acts as a logical continuation of the rule of law tradition laid down in the seminal judgement *Les Verts*[427] that strengthens the position of the principle in the constitutional framework of the EU.

The Court furthermore interpreted Article 268 TFEU concerning the Courts review of legality of legislative act of the EP (and other EU institutions). The interpretation of Article 268 TFEU, provided by the Court, is exceptionally crucial for enhancement of the procedural facet of the rule of law on EU level.[428] This strengthens once again the fact that the EU is based on the rule of law, and establishes a complete system of legal remedies and procedures designed to enable the ECJ to review the legality of act of the EU institutions.[429] The Court also highlighted an essential role of the EP in the proceedings under Article 7 TEU, indicating that a reasoned proposal of the EP constitutes an act that reflect a definite positions of the EU institutions and procedures and an immediate binding legal effect from the time of its adoptions. As such, that act is amenable to judicial review under Article 263 TFEU. [430]

The activation of Article 7(2) procedure of imposing sanctions requires the European Council to act by unanimity implying that national governments can veto a decision taken

[425] Case 650/18 *Hungary v European Parliament* ECLI:EU:C:2021:426.
[426] idem. n. 433.
[427] Case 294/83 *Les Verts* ECLI:EU:C:1968:166.
[428] Case 650/18 *Hungary v European Parliament* ECLI:EU:C:2021:426, para. 34.
[429] *See* Les Verts C-294/83, Rosneft C-72/15, ECH and Others v Trasta Komerchanka and Others Joined cases C-663/17 P, C-665/17 and C-669/17 P, as this is in line with the Courts ruling in these cases; Case 650/18 *Hungary v European Parliament* ECLI:EU:C:2021:426, para. 34.: The Court came to the conclusion that Article 269 TFEU is to be interpreted narrowly (para 31-34), ensuring that the acts, referred to in Article 269 TFEU, would be amendable to limited judicial review under this Article, whereas other acts, adopted in the course of proceedings of Article 7 TEU, could be possibly subject to judicial review under Article 263 TFEU.
[430] Case 650/18 *Hungary v European Parliament* ECLI:EU:C:2021:426, para. 41-49.

by the supranational EU institutions.[431] Consequently, the decision to implement the Article 7 sanctioning procedure against Hungary and Poland has stalled at the Council level. [432] There is a possibility to take disciplinary procedures resulting in Hungary and Poland losing their voting right in the EU but so far they have not been realised. One reason for this is the fact that the voting requirement of unanimity under Article 7(2) TEU seems politically unachievable at this point. [433] Since Poland and Hungary are watching each other's backs, the Council finds itself in a deadlock situation regarding the unanimity requirement.[434] Sanctions have thus not been imposed until this day within the Article 7 TEU procedure. The Article 7 TEU procedures are thus still ongoing, and the EP has called the Council to resume the ongoing procedure against Hungary, which was put on hold due to the outbreak of the coronavirus. [435]

Despite the success for the EU in the case *Hungary v. European* Parliament, the Article 7 TEU for the time being is the mechanism that appears least helpful in addressing genuine contemporary threats to the rule of law. [436] The ruling will not move the Article 7 TEU proceedings forward due to the process being currently blocked at the Council. Moreover, the institutional design of Article 7 TEU constructs a non-jurisdictional sanctions mechanism depending finally on national governments willingness to enforce it and assume its costs.[437] The institutional set up of the EP, Commission and Council, has led to a lesser sanctioning activity that its supranational features may anticipate. [438] Despite the EP and Commission activating the Article 7 TEU, the lack of sanctions is due to the governments' tendency to suppress action within the Council.[439] This does not only illustrate the article's political nature but also, as have been demonstrated in the case of Poland and Hungary, ineffective use as no sanctions were ever imposed. Conclusively

[431] L Pech and K L Scheppele 2017, p. 30.
[432] D Soyaltin-Colella 2020, 7.
[433] ibid. p. 6.
[434] *See e.g.* Viktor Orbán's speech of 22 July 2017; "we must make it perfectly clear that a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people".
[435] European Parliament, Press Releases, 14 May 2020.
[436] R Uitz, 2019b, p. 475.
[437] C Closa 2020, p. 12.
[438] ibid. p. 12.
[439] idem.

can be stated, in line with the EP's resolutions[440], that the situation in both Hungary and Poland has deteriorated after the triggering of Article 7 TEU and did not lead to aimed results.

4.3.3. Political measures taken

What is eminent from the actions taken by the EU against rule of law backsliding in Hungary and Poland is that the European Parliament has been actively engaged in a dialogue with the States and issuing resolutions. The Commission has also been enhancing primarily soft policy tools to react to political change in Hungary and Poland.[441] The Commissions role is not surprising as a Treaty system for the protection of fundamental rights and thus the rule of law as well has a very narrowly focused defined policy against the protection of fundamental rights, as have been demonstrated above.[442]

One of the soft policy instruments activated by the Commission against Poland in 2016 was the rule of law Framework from 2014. The goal was to promote political dialogue in the event of a systemic breach of the rule of law. When the Commission established the Rule of Law Framework in 2014, there were hopes among the EU and amongst legal scholars, for making a change.[443] The Framework procedure was never, however, activated against Hungary. The Framework did not result in the desired outcome with Poland as the unwillingness to comply by the Polish government led to the activation of article 7 TEU.[444] Thus, The Framework procedure has been subject to a lot criticism, especially amongst legal scholars.[445] Despite the criticism against the Rule of Law Framework, it has played a major role in the evaluation of rule of law breaches as the Framework has made it easier to evaluate the extent of breaches in Member States since it provides a comprehensive concept defining indications for a rule of law breach.[446] More

[440] European Parliament resolution of 16 January 2020, p. 3.
[441] M Dawson and E Muir 2013, p. 1975
[442] idem.
[443] D Kochenov and L Pech 2015, p. 532.
[444] ibid. p. 532.
[445] ibid. p. 530.
[446] ibid. p. 537.

importantly, the Framework provided a legal base for the debate on the rule of law crisis, depoliticised the issue and located it in a more global framework.[447]

Since 2011, the Commission has expressed their concerns for media freedom and pluralism in Hungary.[448] In January 2012, the College of Commissioners also expressed its concerns regarding the general situation in Hungary.[449] Although it did not explicitly target the constitutional changes, the College sent a clear warning by initiating the first steps of an infringement procedure against the backdrop of '*doubt on respect for democratic principles and values*' in Hungary.[450] As the study demonstrated above, the constitutional changes did not end, and the situation in Hungary can be argued of even getting worse.

The Venice Commission has actively been issuing opinions regarding the legislative amendments occurring in Hungary and Poland. Two opinions regarding the Polish governments amendments,[451] and 11 opinions concerning changes in Hungarian public law since 2010.[452] The Venice Commission opinions are of great value when it comes to assessing the validity of e.g. the procedure for the appointment of judges. As Advocate General Bobek stated in his opinion in *Republikka*, "*as a matter of EU law, those reports are … a useful source of information*".[453] The Venice Commission's analysis is still essentially a political one and reflects recommendations,[454] thus having limited effect when it comes to implementation of concrete actions.

[447] A Magen 2016, p. 9.
[448] Letter from Neelie Kroes, to Tibor Navracsics of 21 January 2011.
[449] European Commission, Press release, 17 January 2012. See generally European Commission for democracy through law, Opinion, Venice, 17-18 June 2011; European Parliament resolution of 5 July 2011.
[450] European Commission, Press release, 17 January 2012.
[451] European Commission for democracy through law, Opinion, Venice, 11-12 March 2016.
[452] *See* Case 286/12 *Commission v Hungary* ECLI:EU:C:2012:687 and Case 288/12 *Commission v. Hungary* ECLI:EU:C:2014:237. In addition The European Parliament has hosted regular debates on democracy and the rule of law in Hungary. The Commission Communication from 2019 on 'A New EU Framework to Strengthen the Rule of Law' was inspired, in part, by Hungarian developments.
[453] Opinion of Advocate Bobek in cases Case 83/19, Case 291/19 and Case 355/19, point 170.
[454] ibid. point 88. and point 92.

Another new mechanism introduced by the Commission regarding addressing the rule of law in the Member States is the Rule of Law Report.[455] The Rule of Law Report completed in 2020, has been criticised with regards to Hungary and Poland for underestimating the most problematic developments.[456] It has been argued that the report fails to recognise the nature of threat to the rule of law in the EU, as it does not recognize the systemic assault on the rule of law taking place, especially in Hungary and Poland. [457] The Report speaks of 'concerns' and 'risks' to the rule of law in instances where it has already been 'destroyed'. Furthermore, the report refers to controversial 'reforms', when describing actually assaults on the rule of law.[458] In addition to being criticised of not recognising rule of law backsliding, the Report neither offered recommendations for sanctioning or remedying the problems when identified.[459] Thus, it seems that the report is once again becoming one more 'piece of paper' the Commission can refer to without actually leading to any actions. This seems to have been the Commission's approach for most of the identified backsliding cases in Hungary and Poland: address the rule of law backsliding through soft policy instrument, opinions and recommendations, without taking a concrete stand on subsequent actions.

Since the Commission's activation of the Rule of Law Framework against Poland in 2016, much have happened, especially considering the development in case law.[460] Yet, Poland has become during this five year period, 2016-2021, the first EU Member State made liable to pay penalty of at least 100 000 € per day by the ECJ in November 2017 if it should infringe Court orders.[461] Poland is also the first Member State to see its self-described "judicial reforms" provisionally suspended by the ECJ via two interim orders in 2018[462] and the first EU Member State to be found to have failed to fulfil its Treaty obligations under the second subparagraph pf Article 19(1) TEU twice in a row in

[455] European Commission, 2020 Rule of law report, 30 September 2020.
[456] L Pech et al 2021, p. 2
[457] ibid. p.5.
[458] European Commission, 2020 Rule of law report, 30 September 2020.
[459] idem.
[460] idem. n. 456.
[461] Case 441/17 R *European Commission v Republic of Poland* ECLI:EU:C:2018:255. For further analysis of the Case, see T T Koncewicz 2020, p. 457−476.
[462] Case 619/18 R *European Commission v Republic of Poland* ECLI:EU:C:2019:575.

2019.[463] Furthermore, it is to be the first EU Member State to see a new (allegedly judicial) body suspended by the ECJ in April 2020 as its continuing functioning was likely to cause serious and irreparable damage to the EU legal order due to its prima facie lack of independence.[464]

The used soft policy instruments and political dialogues by the Commission have been argued of failing to address the systemic non-compliance occurring in both Hungary and Poland. The failure to comply with the European rule of law requirements, in terms of value and political ideal, is systematic, politically induced, supported and widespread in the legal system. In this regard, soft policy opinions and recommendations put forward by the EU (the Commission and Venice Commission) has not been able to resist the rule of law backsliding.

4.3.4. Financial measures taken

The newly introduced Rule of Law Conditionality mechanism part of the Multiannual Financial Framework (MFF) of 2021-2027 was adopted in the Council's meeting in December 2020.[465] When the Council in December adopted the Regulation 2020/2092, there was tension weeks before the adoption, as the uncertainty regarding Hungary's and

[463] Case 619/18, *Commission v Poland* EU:C:2019:531 and Case 192/18, *Commission v Poland* EU:C:2019:924.
[464] Case 791/19 R, *Commission v Poland* EU:C:2020:277.
[465] Draft Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget – Adoption of the Council's position at first reading and of the statement of the Council's reasons; 14018/20, Brussels, 14 December 2020.

Poland's veto threats[466] against the regulation. [467] Even though Hungary and Poland are States which would benefit the most from the MFF in general, they were displeased with the proposal due to the Regulation 2020/2092 protecting the Union budget from rule of law breaches.[468]

The Regulation 2020/2092 is quite obviously a reaction to the concerns regarding rule of law backsliding, and the unsuccessful process of both the Rule of law Framework and the Article 7 TEU against Hungary and Poland.[469] Thus, the EU aims with this Regulation, to adopt another (more effective) tool in their toolbox in the fight against rule of law breaches in Member States.[470] When the Rule of law Conditionality Mechanism, Regulation 2020/2092 was adopted, the Council expressed in their conclusion that the Regulation, and foremost the Rule of law conditionality 'constitute an *appropriate and lasting response*' to the rule of law backsliding.[471] At least the Council appears to have high hopes on the effects the Regulation could potentially have in the case of the activation of the conditionality mechanism on the rule of law backsliding in Member States.

Both Hungary and Poland are aware of the fact that the adoption and proposal of the Regulation 2020/2092 is intended towards the States rule of law backsliding.[472] Thus, it was no surprise that Hungary and Poland were about to use their veto power in the Council December meeting. However, they did not in the end veto the proposal, but

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[466] The Polish Prime minister Mateusz Morawiecki and the Head of the Hungarian Government Viktor Orbán issued a joint declaration on the 26th November 2020 announcing that they have decided to align their positions against the envisaged rule of law-conditionality mechanism linked to the EU budget, thereby reaffirming their threat to veto the adoption of the EU's Multiannual Financial Framework (MFF) and the EU's coronavirus recovery plan as a whole. Both leaders insisted that they will only support these initiative is there is a substantial modification to the rule of law mechanisms. Which would prevent EU funds being transferred to countries breaching the EU's fundamental principles; *See* Government of Poland, News, 26 November 2020.
[467] C A P Hillon 2021, p. 267.
[468] idem.
[469] ibid. p. 280.
[470] COM(2018) 324 final.
[471] Draft Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget – Adoption of the Council's position at first reading and of the statement of the Council's reasons; 14018/20, Brussels, 14 Dec. 2020.
[472] EU Law Live, News, 19 February 2021.

instead, they have activated an action for annulment against the Conditionality Mechanism of the Regulation 2020/2092 in March 2021.[473] Hungary and Poland argue, that the new Rule of Law Conditionality Mechanism circumvents the Treaty as it applies vague definitions and ambiguous terms without clear criteria on which the sanctions can be based on. Furthermore, the States argue that the Mechanism does not contain procedural guarantees.[474] Conclusively, it is now up to the Court to assess the Conditionality Mechanisms' legality.

It can be argued that Hungary and Poland are not totally off with regards to the lack of clear definitions and clear criteria when it comes to the application of the Rule of Law Conditionality Mechanism. This is due to the fact, that the Council, upon the adoption of the Regulation 2020/2092, required the Commission to adopt guidelines on how to apply the Regulation and the mechanism, including methodology for its assessment. However, the adoption of guidelines for the application of the Regulation is not a *sine qua non*.[475] The Commission has been working on these guidelines during the spring 2021, and was meant to have them ready by the summer 2021, in order for the Regulation to function in its full capacity. [476] However, as Hungary and Poland issued an annulment against the Conditionality Mechanism, the guidelines will be finalised only after the Courts judgement.[477]

In addition to the annulment action brought forward by Hungary and Poland, the European Parliament voted on a resolution on the 9th of June 2021 threatening to bring the Commission before the Court due to inaction over the Rule of Law Conditionality Mechanism. The mechanism has been in place since the 1st of January 2021 but has not yet been triggered by the Commission over breaches of the rule of law that affect the EU's budget.[478] MEPs have already in March provided the Commission with a warning urging

[473] Case 156/21; Action brough on 11 March 2021 – *Hungary v. European Parliament and Council of the European Union*; Case 157/21; Action brough on 11 March 2021 – Republic of *Poland v European Parliament and Council of the European Union*.
[474] EU Law Live, News, 19 February 2021.
[475] T Tridimas 2020, p. XVII.
[476] C A P Hillon 2021, p. 276.
[477] The Brussels Times, 12 June 2021.
[478] idem.

the Commission to activate the rule of law mechanism without delay.[479] As the Commission did not meet this deadline, the EP voted on a resolution on the 9 June. The Commission has however stated, that '*the mechanism can be applied retroactively and no case will be lost*'.[480] Furthermore, as stated, the action for annulment of the Rule of Law Conditionality Mechanism activated by Hungary and Poland against the Commission needs to be finalized first by the Court, in order to finalise the guidelines.[481] For the moment, it is thus not yet possible to state how the matter will be resolved, how the guidelines will be formulated and whether the Court will judge in favour of Hungary and Poland or the Commission. The outcome of the Courts judgement will, however, have a big impact on the continuity of this saga.

The Rule of Law Conditionality Mechanism linked to the budget is still in its first steps. The Mechanism could be argued of providing the EU with more concrete sanctioning powers, as they can suspend fiscal means. However, whether the Mechanism will be able to connect the rule of law violations to a budgetary matter is yet to be put up to test. It seems that even though the Council adopted the whole package, it relied on the Commission to sort out the details. And currently the Commission is relying on the Court to deal with the case and even pushing the procedure forward. Arguably, all three institutions try to address the rule of law backsliding but seem to be afraid of actually providing concrete results and actions. This highlights the existing political anxiety between the institutions, that is unnecessary as they should focus on working as one against the common 'enemy': rule of law backsliding.

[479] European Parliament, News, 11 March 2021.
[480] idem. n. 477.
[481] EU Law Live, A Dimitrovs, 11 December 2020.

4.4. Analysis of the measures taken

The above section demonstrates that the safeguard of the rule of law in the EU has both legal and political elements. This section has outlined that there has been a mixture of both legal and political approaches from the EU's side concerning the rule of law backsliding in Hungary and Poland. Another aspect which is illustrated is the fragmented response from the EU's side towards rule of law backsliding and breaches. There is not a clear set of rules and procedures as the EU's measures towards especially Hungary demonstrate: the actions differ compared to Hungary and Poland, while the issue is, in essence, the same. Despite the rule of law being a visible principle with numerous references within the EU, the concrete implementation of the rule of law in the EU still possesses a number of challenges.[482] The development of different measures together with the fact that some of the measures have been inefficient up to the point that they cannot be used in their full capacity, such as the Article 7 TEU, have made scholars argue that the EU's response to the backsliding is fragmented.[483]

The infringement action was initially a purely legal tool and has generated substantial results and led to several judgments in which the ECJ has declared large parts of the Polish reform of the judiciary as incompatible with the value of the rule of law in the EU legal order.[484] Scholars and commentators have complimented this new line of case law of the ECJ but have also urged the Commission to intensify the use of Article 258 TFEU (infringement actions) to protect the values of Article 2 TEU.[485]

The judgement in *ASJP*[486] and *Commission v. Poland*[487] represents important steps towards a strong union of values. With the *ASJP* the Court achieved to breathe life into the Union's common values and paved the way to their judicial application in the EU's value crisis. The Court's stand in *ASJP* could be understood as making Article 2 TEU judicially applicable by operationalising it through specific provision of EU law (Article

[482] W Schroeder 2016, p. 172.
[483] M Vlajković 2020, p. 246.
[484] Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531.
[485] *See* O De Shutte, Report by the Open Society European Policy Institute, October 2021.
[486] Case 64/16 *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.
[487] Case 619/18 R *European Commission v Republic of Poland* ECLI:EU:C:2019:575.; Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531.

19 TEU and Article 47 of the Charter) without losing its unrestricted scope.[488] Due to this, technically any Member State's act can be scrutinized under the Article 2 TEU. In the end, judicial proceedings are only one part of the solutions regarding solving the issue of breaches towards the rule of law. Despite this, there is still uncertainty whether Article 19 TEU actually has a direct effect. Up to this point, the Court has addressed the violation together with Article 47 of the Charter. This was also the case in *ASJP*[489]*, Repubblika*[490] and the Polish cases[491]. The Court has made it particularly clear that to compel judicial decisions through disciplinary procedures, hierarchical instructions or (in)formal pressures emanated from political appointed bodies obedient to the momentary ruling Government are violating the founding Treaties of European Union. [492]

The activation of the Article 7 (1) TEU especially against Poland has been argued of being long overdue.[493] The same could also be stated for Hungary. The article 7 TEU activation against Poland and Hungary highlights the existence of tension between intergovernmental and supranational agencies within the EU.[494] Moreover, the fact that no sanctions were imposed also enhances the article's political character. The fact that they are political in nature, results furthermore in the procedure being slow as it is unable to react quickly.[495] Up to this point, the Article 7 TEU has not had the wanted effect, as sanctions were never imposed.

As previously stated, the rule of law is not part of the EU *acquis*, thus it needs to be interpreted with a cross-border elements. The Hungarian example shows that relying on secondary legislation is of rather limited utility as well. The infringement procedures against the judicial reforms in Hungary (reduction of retirement age of judges) demonstrate this.[496] The Commission based the procedure on non-compliance with

[488] L Spieker 2019, p. 1213.
[489] Case 64/16 *Associayao Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.
[490] Case 896/19 *Repubblika* ECLI:EU.C:2021:311.
[491] Case 192/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:924.; Case 619/18 R *European Commission v Republic of Poland* ECLI:EU:C:2019:575.;
Case 619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531.
[492] UNIO EU Law Journal, 19 November 2019.
[493] M Vlajković 2020, p. 246.
[494] D Soyaltin-Colella 2020, p. 7.
[495] idem. n. 493.
[496] *See* Case 286/12 *Commission v. Hungary* ECLI:EU:C:2012:687.

Directive 2000/78 on age discrimination. Although the case was to some extent a legal success, its practical implications were limited. Instead of reinstating the judges, the government offered judges compensation, resulting in the change of judges eventually but without being discriminatory. Thus, it was no surprise that the Hungarian government was able to avoid restoring many judges to their prior position while still complying with the Court's verdict.[497]

It is eminent that both Hungary and Poland have used the law as an instrument for pursuing ad hoc goals of those in the power. The EU has, as demonstrated above, reacted to these legislative amendments. Already the number of the scope of the judgment that the ECJ was called to issue in just three years show how fundamental the matter of the rule of law is for the whole of EU legal order and how much it has recently been challenged. [498] Despite the Venice Commission's opinions, Commission's reports and Rule of Law Framework directed both towards Hungary and Poland the EU institutions have struggled to identify the most efficient legal and political tools with which to react.[499] The Hungarian situation overall illustrates the extent to which EU intervention for the protection of EU fundamental rights and the rule of law may heavily depend on the scope and strength of a wide range of EU policies.[500] Despite these actions taken by the EU, it has not been enough to prevent future rule of law backsliding, as there are still cases pending[501] with regards to the development of the safeguard of the rule of law.

The EU as an institution noticed that their actions up till 2019 had not been successful and resorted to another option: possibility of withholding finance in the event of a rule of law breach threat. Leading to the adopted Rule of Law Conditionality Mechanism, Regulation 2020/2092. The Regulation has been argued of representing a 'quick fix' to the problem at hand.[502] Criticism has been raised concerning the Mechanism, stating that

[497] For a comprehensive account *see* G Halmai 2017, pp. 267−284.
[498] F Marques 2021, p. 10.
[499] M Dawson and E Muir 2013, p. 1962.
[500] ibid. p. 1978.
[501] Pending preliminary ruling cases concerning the independences of judges in Poland, published in the Official Journal on the 17th February 2020: Case 763/19 *D.S. v S.P., A.P., D.K., Sz. w K.*.; Case 764/19 *C. S.A. v Administrator in the insolvency of I.T. in liquidation*.; Case 765/19 *M.Ś., I.Ś. v R.B.P. Spółka Akcyjna.*
[502] C A P Hillon 2021, p. 279.

it had potential to enhance the intergovernmental cooperation outside the Treaty framework. Since this solution would have been time consuming, the adoption by the Council in December 2020 is argued of being a short-term fix.[503] Since the rule of law backsliding in Hungary and Poland is not a short-term problem, more time could arguable have been put into finding a better solution. The other Member States and EU institutions may have missed a golden opportunity to confront the two rebellious governments. The Rule of Law Conditionality Mechanism addresses the issue of breaches of the EU rule of law, but the Mechanism leaves the question of what is the best way to actually address the rule of law backsliding unanswered.

[503] C A P Hillon 2021, p. 279.

5. Further analysis of the effectiveness of the Rule of Law measures

5.1. Rule of Law or Rule of Politics?

The current political situation in Poland and Hungary have contributed to a growing sense that the common values of the European policy are being radically challenged.[504] Jean Monnet, one of the EU's founding fathers, was once reputed to have said: '*If I were to do it again from scratch, I would start with culture*.[505] The fact that the Union was built on economic integration, is one of the reason why the Union is struggling with the legal cultures between the Members States. The Union has grown since its founding days, which has contributed to a wide variety of different cultures and understandings. This is visible in the rule of law debate where there is a clear distinction between Western and Eastern understandings. The political success of the European enlargement policy seemed to underestimate the importance of the common understanding of the legal and political meaning of not only the rule of law, but the other values enshrined in Article 2 TEU. [506]

It is clear, that the (Western) European states and the European Union have adopted a distinct kind of constitutionalism, which entails a particular understanding of the rule of law.[507] The thinner implementation of the rule of law currently being applied in Hungary and Poland is argued of not being enough.[508] Both states are very close to being authoritarian regimes, but are not yet there as they are still members of the European Union. However, the application of the rule of law in its thinnest sense implies still that the European rule of law is judicially enforced though EU law.[509] Some legal scholars argue that the political powers of Hungary and Poland cannot be disciplined and the sooner this is realised by the Union the better. This would most likely result to the

[504] W Recht 2018, p. 334.
[505] The Economist, 31 March 2021.
[506] T Drinóczi, and A Bień-Kacała 2021, p. 35.
[507] ibid. p. 36.
[508] T Drinóczi 2021, p. 130.
[509] When considering the compliance rate of the rule of law amongst the current 27 Member States of the EU (EU27), both Hungary and Poland actually position themselves as average performers amongst the EU27. EU law, as a matter of fact, imposes a particular political, but rather weak, legal constraints on the Hungarian political leadership. *See* T Drinóczi and A Bień-Kacata 2021, p. 36.

withdrawal from the Union by the States, in order for the EU to promote better the universality of the principles of the rule of law.[510] On the other hand, the fact that these States are still part of the Union imposes a particular political constraint on the Hungarian and Polish political leadership.[511] Moreover, the fact that compliance with the values cannot be secured because of ideological differences between the actors (which led to the Article 7 TEU procedures against both states) does not mean (yet) that the particular Member States do not comply with EU law at all. This feature of the European rule of law is proposed to be called illiberal legality.[512] Furthermore, the (in)actions of the European Council and the Council of the Europe demonstrated a reluctance towards applying sanctions against Member States because of its ideological affection with Western Europeans. Instead of supranational guarantees for internal democratic governance, it supported the enforcement of dialogue-based mechanisms at the intergovernmental level to tackle the rule of law crisis.[513]

The rule of law is part of the separation of power. And through the separation of power, no one has the last word, not even political leaders.[514] When looking at the rule of law, and how the EU has reacted towards the rule of law breaches and backsliding in Hungary and Poland, it is obvious that politics have played a big role. Corsten further elaborates on the fact that political leaders do not have the final word in the context of the rule of law and that it is a misconception that it is the politicians who make the final decisions.[515] However, in Hungary and Poland, politics have played an essential role in 'adjusting' the law to be in line with ad hoc political desires. Thus, the Hungarian and Polish examples contradict Corsten's idea. The EU is, however, aiming through its measures against rule of law backsliding to react to these political changes occurring in both States as this study demonstrates.

The situation in Hungary and Poland is a clear case of political actors trying to divert attention from a political deadlock they were unable to solve. This is referred to the

[510] T Drinóczi, and A Bień-Kacała 2021, p. 235.
[511] ibid. p. 36.
[512] idem.
[513] D Soyaltin-Colella 2020, p. 3.
[514] C Geert and A Mills 2017, p. 15.
[515] idem.

'judicialization of politics'. The polarization of the political debate leads to deadlocks in the dialogues, which tend to end up in the use of the judiciary.[516] Leading to the judicialization of politics when actors are unable to reach a political decision. The outcome is that any decision taken by the ECJ (or by any other EU institution for that matter) will be presented either as a victory or a defeat by all the sides in conflict and the Court will be accused of having taken a political decision. [517]

Keeping the debate at a judicial level allows the Court to strengthen the principle of the rule of law, even when diverting from what could turn out to be political traps. This is what we have witnessed in judgement like *A.K.* (Independence of the Disciplinary Chamber of the Supreme Courts), *Miasto Lowicz* or *Openbaar Ministerie* (Independece de l'autorité judiciaire d´émission).[518] In all three judgements, the Court has said far more than the strict final decisions seem to reveal, pointing ways forward without putting itself in a delicate positions but at the same time allowing national courts to play their role in the frontline of protection of EU law. And this was only possible because cases were brough by national judges and the debate was kept at a purely judicial and principle-based level.[519]

In the rule of law saga within the Union, there is further political tension present within the EU institutions themselves. There are arguments put forwards by scholars blaming the Council of invading the sphere of competence of the Commission when imposing an obligation of non-action regarding the Rule of Law Conditionality Mechanism linked to the budget until the completion of the guidelines on the ways it will apply the Regulation on rule of law.[520] However, due to the pending case before the Court relating to the legality of the Regulation Mechanisms, the guidelines will be finalized only after the judgment of the ECJ in an action for annulment with regards to the Regulation.

[516] T Drinóczi and A Bień-Kacała 2021, p. 235.
[517] Public condemnation (naming and shaming) of courts is a common way of delegitimising them, and this is not new to Poland's authorities; *See* T Squatrito 2019, p. 313.
[518] F Marques 2021, p.11.
[519] ibid. p.12.
[520] ibid. p.10.

Both political tension and judicial tension exist in the ongoing debate and actions taken against Hungary and Poland by the EU. The unanimity requirement in the Council in order to activate the Article 7(3) TEU as well as the soft policy tools such as the Venice Commission opinions, the Rule of Law Framework and EP resolution and opinions are considered political measures again rule of law backsliding. As this study has demonstrated, the political tools have not de facto been able to lessen the already ongoing rule of law backsliding. As Lenaerts put it: in the absence of a clear and determined action from political actors, the Court has had to step in.[521] This has been the case in EU's measures against Hungary and Poland as the previous chapters demonstrate. Considering that the response by the EU have been both political and legal can be argued of imposing challenges to the coordination of actions. It should be ensured that the actions taken by the EU institution is of systematic application. Currently, the Article 7 TEU procedure was never finished properly due to sanction never being imposed. Moreover, the Article 7 TEU procedure did not stop the Rule of Law Framework dialogue with Poland and the EP as well as the Venice Commission still issued resolution and opinions[522] the measures taken have been both complementing and contradicting each other.

[521] K Lenaerts 2020, 31.
[522] *See* the latest opinion on Hungary: European Commission for democracy through law, Venice and online, 2-3 July 2021.

5.2. Have the measures taken prevented further Rule of Law breaches in Hungary and Poland?

When considering the areas where the EU regards the rule of law, it is obvious that the current rule of law balance and check system has failed as the situation in Hungary and Poland demonstrates.[523] Poland and Hungary were both part of the Union (at that time the Community) efforts to promote rule of law in the aftermath of the Communist area, and passed the Copenhagen Criteria. In the origin of these States EU Membership, concerns were raised due to the fact that some membership candidates in the aftermath of the post-Communist area were considered not committing to the EU values.[524] These concerns have recently been demonstrated to be true. Moreover, the rule of law backsliding phenomena is becoming a trend in other Member States as well.[525] Faced with reports of the Venice Commission, EU institutional actor have struggled to identify the most efficient legal and political tools with which to react.[526]

Autocrats, as well as aspiring autocrats such as Orbán and Kaczyński will not take reports, recommendations and opinions seriously. [527] When the emphasis is on political dialogue instead of legal remedies, it signals a weakness to aspiring or actual autocrats.[528] As a response, they will use delays to accelerate their assaults on the rule of law.[529] Thus, it can be argued that the political dialogues, recommendations and opinions only pore fuel to the fire. One example of this fuel being poured to the fire is the fact that Hungary and Poland are contesting the Rule of Law Conditionality Mechanism legality, expressing their dissatisfaction with the Mechanism through legal means.

Despite numerous reports and resolutions, several infringement proceedings and decisions of the Court and the activation of the Article 7 procedure TEU, the transformation of the judiciary into relays of political power has continued and

[523] M Amichai and L Pech, 2020, p. 246.
[524] idem.
[525] T Drinóczi and A Bień-Kacata 2021, p. 235 ; The breaches of rule of law does not only interplay between the EU and Hungary and Poland, but with other Member States as well, Romania, Slovakia, Slovenia.
[526] M Dawson and E Muir 2013, p. 1962.
[527] EU Law Live, D Krappitz and N Kirst, 29 May 2020.
[528] idem.
[529] idem.

accelerated since the PiS party in Poland won a new term in 2019.[530] Even though the Commission's efforts looking for solutions helped to detach the rule of law crisis from politics and provided a legalistic base to the issue, the rule of law backsliding is still ongoing in Poland. Which the pending cases currently before the Court illustrates.[531] The Polish case is a clear example of how the global context allowed populists to grab power turned into an open strategy intended to directly delegitimise the judiciary.[532] It is now clear that the Polish authorities are ready to take the final step in the complete delegitimation of the judiciary: the mass dismissal of judges and their replacement by government-friendly agents. [533]

The ECJ's decisions have shaped the EU judicial standards and will provide stronger arguments to the European Commission in the process of European integrations and assessment of progress in judicial reforms.[534] It was through requests of preliminary rulings that the ECJ was allowed and had to develop the basic principles of its jurisprudence on the rule of law, thus opening the door to subsequent moves by the Commission in infringement procedures. It was a juridical, not political, dialogue that triggered one of the most important developments we have witnessed in the strengthening of the EU in recent years.[535] The Article 2 TEU has now indirectly become judicially reviewable provision, thus providing a novel remedy that walks together with the political

[530] OKO Press, 22 December 2020.
[531]Pending preliminary ruling cases concerning the independences of judges in Poland, published in the Official Journal on the 17th February 2020: Case 763/19 *D.S. v S.P., A.P., D.K., Sz. w K.*.; Case 764/19 *C. S.A. v Administrator in the insolvency of I.T. in liquidation*.; Case 765/19 *M.Ś., I.Ś. v R.B.P. Spółka Akcyjna.* The referring court asked the ECJ two questions in the interpretation of article 19(1), Article 2, Article 4(3) and Article 6(3) of the TEU in conjunction with article 47 of the Charter.
[532] F Marques 2021, p.7.
[533] On 22 December 2020, PiS Chairman Jarosław Kaczynski directly accused the courts of being "politically dependent on the opposition" and "politicised". He announced that the government will soon introduce a reform not only of procedures, but also "to some extent—there are full grounds for this in the Constitution—a replacement of judges. There cannot be corporatisation of the state apparatus in Poland. The judiciary as a corporation is today practically outside the State. *See* OKO Press, 22 December 2020.
[534] M Boskovic 2020, p. 332.
[535] F Marques 2021, p.10.

enforcement tool of Article 7 TEU which was originally conceived to keep courts away from situation of serious breach of the values of EU.[536]

Since the 2021-2027 Multi Financial Framework's adoption of December 2020, the authorities in Budapest and Warsaw seem to have doubled down on their hostile agenda; the persecution of judges has continued[537], assaulting free media[538] but also further undermining democracy and triggering international concern.[539] In light of these recent developments, it is obvious that the Commission and the Court's recent decisions have not humbled the Polish and the Hungarian governments nor their ruling parties. [540] Morjin even suggests, based on the hearing held on 22 September 2020 on cases C-487/19[541] and C-508/19[542] that Poland challenges the notion of rule of law and attempts to change its (European) understanding.[543] In these cases, rather than putting forward argument on the non-applicability of EU law, the Polish government tried to justify its action before the court, clearly stating its conformity with the principle of the rule of law with the EU legal order.[544] The reshaping of the understanding of the rule of law in the EU context is in line with recent news that Poland and Hungary plan to establish a 'Rule of Law Institute' to assess how the rule of law is being upheld across the EU. In the words of the Hungarian Foreign Minister, '*the aim of this institute of comparative law would be that we should not be taken for fools'*.[545] These actions from Hungary's and Poland's side demonstrate their populist nature by making the arguments in favour for them. If they will be able to reshape the understanding of the notion, it will make the judicial and political dialogue between the States and EU even more difficult. This is why it is problematic that the EU

[536] EU Law Live, Editorial Comment, 11 February 2020.
[537] RL Rule of Law blog, 25 February 2021.
[538] *See* Project Syndicate, 16 February 2021; RL Rule of Law blog, 23 February 2021; Reuters, 29 April 2021.
[539] The Hungarian media Freedom received attention from abroad. *See* U.S. Department of State, Press Statement 10 February 2021; Financial Times, 16 February 2021.
[540] EU Law Live, Editorial Comment, 11 February 2020.
[541] Case 487/19 *W.Z.* ECLI:EU:C:2021:289. pending.
[542] Case 508/19 *M.F. v J.M* ECLI:EU:C:2021:290. pending
[543] Verfassungsblog, J Morjin 24 September 2020.
[544] As Prof. Morijn puts it, the argumentation of the Polish government before the ECJ "felt like a craving for acknowledgment in Luxembourg and elsewhere that what is openly pursued in Poland is not only legal but also legitimate as a matter of Union law".
[545] POLITICO, 29 September 2020.

does not have a clear definition of what the rule of law actually is and what breaches reaches the threshold of 'systemic threat'.

Despite the non-compliance and the systematic rule of law value infringements by the public legislative and regulatory powers, EU law is still applied daily both in Polish and Hungarian ordinary courts.[546] This can be seen as a win for the EU but for how long this will be upheld is questionable. In June 2021, Hungary passed a bill banning LGBTQI+ references for minors.[547] This got quickly a statement by the Commission where President Von der Leyen stated that the '*Hungarian bill is a shame'* and the Commission will send a letter to express the legal concerns before the bill enters into force.[548] The adoption of this law in Hungary would be breaching the EU values of being free and allowing people to love whoever they want. So far, the steps taken towards Hungary by the EU have proved insufficient to halt or reverse this downward trend. [549] The actions of the respective governments in Hungary and Poland during the COVID-19 pandemic[550] started the next chapter in the 'value crisis' in the EU. [551] However, without serious external pressure there is little chance that this process will change in the near future. Moreover, even if the constitutional system is restored, the rebuilding of the legal culture that surrounds the constitutional system will be a long and challenging process.[552]

The EU institutions have been argued of having failed in two ways when it comes to handling the rule of law breaches in Hungary and Poland. [553] Firstly, in achieving a common understanding as to what the rule of law represents. Secondly, in enforcing this

[546] T Drinóczi and A Bień-Kacata*,* 2021, p. 25.
[547] EURACTIVE, 24 June 2021.
[548] Statement by the European Commission President, 23 June 2021.
[549] A Jakob and E Bodnár 2020, p. 117.
[550] DW News, 30 March 2020.; After the outbreak of covid- the Hungarian government passed on the 30st of March 2021 the "State of emergency extension" bill, giving the Hungarian government the right to pass special executive laws in response to the coronavirus outbreak. The main issue with the law, was the fact that the state of emergency was for an indefinite term, and hence there existed fear of inappropriate restrictions on the freedom of press and freedom of expression. Concerns were also raised regarding the rule of law, and the erosion of it in Hungary. The Polish Government initially avoided enacting the state of emergency to ensure the re-election of the incumbent Polish President.
[551] EU Law Live, D Krappitz and N Kirst, 29 May 2020.
[552] A Jakob and E Bodnár 2020, p. 117.
[553] M Vlajković 2020, p. 246.

open-ended value against national authorities.[554] The Commission's responds especially, have been criticised of being 'better late than never' which is not an institutional response that solves matters. Instead, there is a need for solutions which are rapidly adopted to regain trust.[555] Even when it was past the due time to react, the Commission, as a responder, included procedures that envisaged *ex-post* involvement and depended on the political will. This could have been avoided according to Vlajković, if the Commission had not been silent about the core problem: the lack of uniform understanding of what the EU rule of law represents. [556]

The EU, which is built on certain principles, still has two Member States that keep disrespecting those principles.[557] Their leaders act like children, and both Hungary and Poland have been slowly sliding from their previous constitutional democracy statuses to authoritarianism, although not having reached it yet. The uniqueness of the Hungarian and Polish illiberal constitutionalism rest on these phenomena.[558] The EU thus faces the following dilemma: either it tolerates these regimes, thereby implicitly condoning their violations of the basic values, or it sanctions them.[559] The EU has so far addressed this disjunction using soft and partial mechanisms.[560] No real sanctioning mechanism has been activated, and moreover, the rule of law backsliding is still continuing in these Member States.

[554] M Vlajković 2020, p. 245.
[555] ibid. p. 247.
[556] idem.
[557] T Drinóczi and A Bień-Kacata 2021, p. 21.
[558] ibid. p. 22.
[559] C Closa 2020, p. 1.
[560] ibid. p. 2.

5.3. The need for a systematic approach

Despite ten years of EU attempts to tackle rule of law violations in Hungary and Poland, illiberal regimes inside the EU have become more consolidated. As Scheppel et al. state, the EU has been losing through winnings.[561] Thus, more creative work needs to be done to enforce the values of Article 2 TEU more effectively. Scheppel et al. propose turning the EU into a militant democracy which would be able to defend its basic principles.[562] However, this seems very unlikely to occur as it would go against the founding values of the Community being build based on peace. Furthermore, they articulate that the infringement actions, both under Article 258 and 259 TFEU, could be adopted as instruments for enforcing EU values by building a set of specific violations into a single general infringement actions. [563] Currently, the focus in the infringement procedures have been in challenging the validity of certain isolated national laws and are thus unlikely to alter the substantive problem, even if successful.[564] If used more systematically, there is greater potential in the infringement actions. The result of the increased amount of infringement procedures are the improving in scope of the legal basic and procedural guarantees which are essential to secure the effective protection of the EU values.[565] Thus, Scheppel et al. see potential in the infringement actions if these procedures would be further developed. There thus exist current tools which possess potential in strengthening the EU integration and securing the EU values.

According to scholars Amichai and Pech, the EU is still lacking a clear distinguishment of the rule of law from the fundamental values listen in Article 2 TEU. [566] There has not been attempts to explain in detail how the rule of law enables the proper functioning of either democracy or human rights. This has not been done by the Commission nor by the

[561] K L Scheppele et al 2020, p. 3.
[562] ibid. p. 1.
[563] ibid. p. 5.
[564] Hungary has been found in violation of EU anti-age discrimination law in Case 286/12 *European Commission v Hungary* ECLI:EU:C:2012:687; The infringement action based on the independence of the data protection authority is Case 288/12 *European Commission v Hun*gary ECLI:EU:C:2014:237.
[565] K L Scheppele et al 2020, p. 121.
[566] M Amichai and L Pech 2018, p. 244.

remaining institutions.[567] It is problematic as the instigation of an Article 7 TEU procedure is dependent upon a clear risk of serious and persistent breach of the values referred to in Article 2 TEU, not to the rule of law *per se.*[568] Another weaknesses of the EU's rule of law mechanism includes the lack of transparency concerning its key stages, the interlocking of political and legal steps that the process involves and also the fact that it appears to result in an endless dialogues between EU institutions and national governments that is meant to be conducted in the spirit of sincere cooperation.[569]

One aspect that is neither clarified in the Union's legal sphere, is regarding consequences for non-compliance by Member States. This has never been addressed by the Court, even though the *Repubblika* case came close to this being analysed by the Advocate General Hogan in his opinion delivered in December 2020.[570] The Advocate General in his opinion draw the conclusion following the *AK* judgment[571] (and earlier case law) that EU law (neither ECHR) imposes any fixed, prior form of institutional guarantees designed to ensure the independent of judges.[572] However, in the final judgement, the Court left this question unanswered as it was not necessary due the outcome of the Maltese judicial appointment being in line with Article 19(1) TEU and the Article 47 of the Charter.[573] The Court was bound by the question of the appointment law and not about infringements. Thus, how the law may or may not be used in administrative practice was not an issue as the question was asked in a way that was not an infringement case. The answer to the question, what consequences it has when the judiciary is not considered independent in a Member State or what happens when a State does not comply, would help in the situation with Poland and Hungary. It can be argued that the Court is heading towards a clearer

[567] M Amichai and L Pech 2018, p. 246.
[568] ibid. p. 250.
[569] R Uitz 2019b, p. 476.
[570] *See* Opinion of Advocate General Hogan delivered on 17 December 2020 in Case C-896/19, point. 96−104.
[571] Joined cases Case 585/18, Case 624/18 and Case 625/18 *A.K. v Krajowa Rada Sądownictwa*, and *CP and DO v Sąd Najwyższy* ECLI:EU:C:2019:982.
[572] Opinion of Advocate General Hogan delivered on 17 December 2020 in Case C-896/19, point. 70: An important aspect are that judges must be free from any relationship of subordination or hierarchical control by either the executive or the legislature, and second, judges must enjoy actual guarantees designed to shield them from such external pressure.
[573] Case 896/19 *Repubblika* ECLI:EU.C:2021:311, para. 74.

system and shaping criteria for this but there is still work to be done.[574] Moreover, the Court is in the end limited in its capacity since, especially in preliminary rulings, they have to provide the requested court with their interpretation of the EU law on a specific matter. These matters are case by case evaluations and never getting the final answer to the proceeding.

Bogdandy et al. have stated that the Court should not substitute for the European institution in their lack of efficient response in respect of the rule of law. [575] As President of the ECJ, Koen Lenaerts stated that '*The Court of Justice does not seek to redesign national judiciaries*', but it limits itself in examining whether national courts and national rules are in accordance with the aforementioned principles.[576] Countering the attacks against the rule of law through court action will not stop the crisis from spreading. The attack on judicial independence (or academic freedom, as is also the case in Hungary) is only one step in an ambitious populist strategy.[577] Thus, regarding the effect of the Courts judgement, it is yet limited and cannot substitute for the European institutions need to have effective measures at hand when it comes to non-compliant Member States. Currently, the Court has still to some extent been the one substituting for the lack of effective action from the Commission, Council and EP. However, in order to solve the matter of rule of law backsliding, all four institutions need to have their clear role and task.

One crucial point in this saga at this point is however the trigger of the new Rule of Law Conditionality Mechanism procedure to the present systemic threat of rule of law.[578] As there is no clear definition of what constitutes a 'systemic threat' in the EU context, this will be a challenging task. The Conditionality Mechanism could however still play a useful role if combined with other available measures such as together with a request for interim measures and penalty payment to prevent further rule of law backsliding. The Conditionality Mechanism has potential but it needs to be assessed together with other

[574] L Spieker 2021, p. 435.
[575] A von Bogdandy et al 2018, pp. 983-996; Case 216/18 PPU *Minister for Justice and Equality v LM* ECLI:EU:C:2018:586.
[576] *See* K Lenaerts 2020, pp. 29−34.
[577] EU Law Live, Editorial Comment, 11 February 2020.
[578] D Kochenov and L Pech 2015, p. 532.

possible mechanism to be fully successful.[579] The true success of the introduced Conditionality Mechanism is still, however, up for test.

Complex crises require complex solutions as this is both a political and legal crisis.[580] Securing the rule of law is a more ambitious task that requires education by all involved parties and sound political and judicial infrastructure for which EU law actually provides limited competence. There are already available tools to be used, such as the infringement procedure, which are possible to be less political in nature compared to the activation of Article 7 TEU. [581] But there has to be a will and understanding of the use of them in order for them to succeed.[582] Due to the currently fragmented, and even messy, respond by the EU, there is a need for more systematic approaches. Since the issue possesses both legal and political tools, the measures activated need to consider them both when put into action. They need to cooperate and function together, rather than create fragmentation and vagueness around the actions. As the COVID-19 crisis has showed us, we need to adapt to a new normal. The enshrined values in article 2 TEU represent general principles in the EU law hierarchy, thus being dynamic and need to be adaptable to new challenges.[583] A new normal would need to correspond to the dynamic nature of the values.

[579] C A P Hillon 2021, p. 282.
[580] K L Scheppele et al 2020, p. 119
[581] ibid. p. 121.
[582] idem.
[583] C Barnard and S Peers 2014, p. 224.

6. The European solution

6.1. Conclusion

The rule of law is a principle that connects the EU Member States. It ensures that nobody is above the law and guarantees justice in Europe embracing a common judicial sphere based on the mutual trust. Due to this mutual trust a deficiency regarding the rule of law in one Member State has a negative impact on the functioning of the EU in a broader sense. It has become clear that strengthening the rule of law has been on the EU agenda for several years. The rule of law has made a remarkable development in the EU from the first mentioning in *Les Verts* in 1968 as it is now a prominent constitutional cornerstone. Despite the remarkable development the situation in Hungary and Poland has confirmed that the measures provided in the Treaties are not sufficient to effectively counteract certain risks or infringement of the rule of law that may occur in the Member States. The judicial protection mechanisms are not enough and thus there is a need to continue the proceedings with political mechanism. The political measures have, however, been less effective than the judicial ones.

The main measures the EU has taken towards rule of law backsliding and breaches towards Hungary and Poland has been the following: the Court's judgement based on the Commission infringement actions, Rule of Law Framework from 2014, the European Parliament's resolutions, the Venice Commissions opinions, the Council's dialogue from 2016 and the Commission Rule of Law Report from 2021. The Commission has been the most engaged actor in relation to Rule of Law breaches. It has launched a significant number of infringement procedures, created and activated the 2014 Framework for the Rule of Law and in 2017 it finally activated Article 7 against Poland. The literature, however, unanimously concurs in its criticism of the Commission's lack of assertive action. The Commission's initiatives, aimed at ensuring the respect of the rule of law before the Article 7 procedures launched, however as the Article 7 TEU was initiated in the end towards both States, demonstrate the inefficient result of these measures. It can be argued, that due to the efforts of the Court, there has been more success with regards to the Polish case compared to the Hungarian situation. Regarding Hungary's rule of law backsliding, there is much more fragmentation regarding the measures taken, as the Rule

of Law Framework was never initiated, and it was the European Parliament who initiated the Article 7 TEU procedures.

The Court has, in particular, been actively involved in developing the jurisprudence with regards to the independence of the judiciary which is strongly linked to the rule of law. The Court's response can be swift and work to some extent, but it should not be the only way to go. This demonstrates that the judicial protection of EU values, is a more reliable method in contrast to the political mechanisms.[584] Especially since the political method usually involves back and forward dialogue with various EU institutions, which is argued of being useless and only strengthening the populists at the national level.[585] The ECJ is heading, slowly, towards the provision of a system of setting the criteria for an infringement. Still, systematic violation, when confirmed by the ECJ, has to be met with a plan of systematic compliance.[586] This is also one piece of the puzzle needed in order to protect the rule of law and also the other EU values. This is a good start, but a lot needs to be done, for example regarding actions towards non-compliant member states.

The objective of this thesis has been to answer the question whether measures taken by the EU towards Hungary and Poland prevented further breaches of the rule of law principle in these Member States. This study demonstrates that the measures the EU has taken towards the rule of law breaches in Hungary and Poland has not prevented further breaches and backsliding. The answer is thus negative. There is a political aspect, resulting in the ineffective use of the sanctioning measures being implemented towards the Hungary and Poland. Politics is the art of the possible. This is eminent both in the actions taken by Hungary and Poland, but to some extent even the action taken by the EU. And the genuinely efficient tool in the EU toolbox, based on this study, is the judgements of the Court. A lot has happened, and a lot will happening on this front. But whether this will be enough, without implementing even further instruments the future can only tell.

[584] Verfassungsblog, P Blokker 5 December 2013.
[585] K L Scheppele et al 2020, p. 119.
[586] ibid. p. 120.

6.2. Future prospects

Even though the EU's actions against Hungary and Poland not begin a success the EU institutions have learned from their mistakes. This is illustrated in the new methodology which will be applied to the enlargement policy that applies currently to the accession negotiations with Montenegro and Serbia. [587] These negotiations focus strongly on the area of fundamental rights and the rule of law, democracy, and administrative reforms amongst other things[588] in order to not make the same mistake as with Hungary and Poland.

The Hungarian and Polish problem has resulted in that the rule of law is discussed widely today. Already this is a positive direction as there is a need for unanimity in the understanding of the rule of law in order to solve it. The fact that the discussions are taking place both on the EU level, in Member States, in the international community and among legal scholars could be argued of being a positive development in this saga. The values enshrined in the Article 2 TEU was before taken for granted, but that is no longer the case. Which giver potential to concretizes the values in the current legal debate.

In light of the *ASJP*, the Court judgement in the Polish cases and *Repubblika*, the Courts' efforts in these cases is welcomed as the ECJ is now presenting concrete examples of these external pressures that, in the end, endanger judicial independence on a way that clearly contradict the EU law. The *Repubblika* case demonstrates that big changes can stem from small things. A seemingly straightforward case from the smallest EU Member State has provided a grand opening for a new and potentially truly far-reaching development in remedying the flaw in the design of the values enforcement in the EU, potentially able to tackle the shortcoming building to the design and enforcement of the pre-accession political conditionality in the areas of democracy and the rule of law. [589]

The Article 19(1)[590] TEU holds great promise for expansion in the future, potentially enabling the enforcement of Article 47 of the Charter on every domestic court. Not only

[587] Council of the EU, Press release, 11 May 2021.
[588] idem.
[589] M Leloip et al 2021, RECONNECT Working paper No. 1., p. 19
[590] Especially the second subparagraph: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

concerning judicial independence but opening the door for application of all the rights contained in the Charter to Member States. Such a move would make the Charter enforceable irrespective of whether the States are implementing the EU law or not.[591] Thus representing a major transformation of the EU constitutional model. Conclusively, the second subparagraph of Article 19(1) TEU has become an instrument for judges to defend their independence against threats coming from the respective national governments or parliament. It still remains to be seen how far the Court is ready to take the article 19(1) in terms of both its content and scope. The question remains whether the Article 19 TEU can have direct effect. This would be suitable for a future study, along with a deeper analysis of the case law concerning the judicial independence overall.

There are also question marks regarding whether the newly introduced Rule of Law Conditionality Mechanism linked to the Budget will work. Both potential and criticism is seen in the Regulations Mechanism. The Court ruling in the case brought forward by Hungary and Poland will be crucial in moving forwards with the mechanism, as the future guidelines will depend on this. What is clear, is that the EU has created multiple tools for its use, but they should be used more systematically and in a more organised way together.

What is clear, based on this study and considering the future prospects is the fact that everybody involved in these discussions, should fully understand the notion of the rule of law and what it entails. It applies for the EU institution, the Member States, the media and the legal scholars. Furthermore, a more comprehensive understanding of transdisciplinary studies would be needed as well. There needs to be an understanding of not only the political and legal aspect, but also the historical context these Member States have been through and the social context they live in currently. This is the key to understanding the global, international and European context we live in today. Instead of trying to create the prefect Member State, the EU should embrace to understand better the existing values and cultures existing in Member State.

[591] A T Pérez 2020, p. 119.