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Content and Role of the Rule of Law Mechanism in the EU Legal Order

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List of Abbreviations

AG Advocate General

Art. Article

ASJP Associação Sindical dos Juízes Portugueses

CEE Central Eastern Europe

CEU Central European University

CFSP Common Foreign and Security Policy

CJEU Court of Justice of the European Union

CoE Council of Europe

CVM Cooperation and Verification Mechanism

EAW European Arrest Warrant

ECHR European Convention on Human Rights

ECR European Conservatives and Reformists (Party)

ECtHR European Court of Human Rights

EEA European Economic Area

EFRIS EU Fundamental Rights Information System

EMU Economic and Monetary Union

ENCJ European Network of Councils for the Judiciary

EP European Parliament

EPP European People's Party

EU European Union

FRA Fundamental Rights Agency

GATS General Agreement on Trade in Services

IGC Inter – governmental Conference

MEP Member of the European Parliament

MFF Multiannual Financial Framework

MS(s) Member State(s)

NCJ National Council for the Judiciary

NGEU New Generation EU Fund

NGO Non-Governmental Organisation

OSCE Organization for Security and Co-operation in Europe

PM Prime Minister

RQMV Reverse Qualified Majority Voting

TEU Treaty of the European Union

TFEU Treaty on the Functioning of the European Union

UN United Nations

UNHCR United Nations High Commissioner for Refugees

WTO World Trade Organization

"Laws are like spiders webs

which, if anything small falls into them they ensnare it,

but large things break through and escape"

Plutarch Parallel Lives "Solon", bk. 5, sect. 2

Abstract

This dissertation attempts to determine what the rule of law means in the context of EU law and how it is implemented throughout the Union. It takes a genealogical approach to establish the roots behind the 'transplantation' of this legal concept in the EU and aims at making a clear distinction between the branches of the mechanism the Union has developed in order to create a coherent rule of law 'line' in all expressions of its legal order. This distinction is based on the perception that there exists a stricto sensu rule of law mechanism, in which the original intention of the Member States is found in Article 7 TEU and the relevant soft law instruments developed to accompany it, and a lato sensu rule of law mechanism which includes the legal means that the Treaties provided for pressuring Member States to abide by the rules of the Union and specifically the infringement procedure of Article 258 of the Treaty on the Functioning of the European Union. Their difference is mostly based on the width of the notions, since Article 7 TEU is directed towards specifically violations of EU values and therefore of the rule of law, while Article 258 TFEU is a procedure targeting all types of violations of EU law, including secondary law. It focuses on this duality and on the implementation of the different procedures, their effectiveness and the underlying contrast between the sovereignty of the MSs and the administrative powers of the EU.

Introduction

The legal concept of the Rule of Law (Rechtsstaat) firstly came up in the late 18th - early 19th century in German legal theory. It was defined by its contrast to: a) despotism, a system in which the will of the sovereign generates obligations for all members of society and it is actually equivalent to public authority and b) to the police state (Polizeistaat) where there is no difference between general rules (laws) and coincidental, conditional and local decisions of public authority (administrative measures) as far as their effect is concerned[1]. As a result, in a state governed by the rule of law, the imperative aspect of public authority is the "will" of the law and not of the sovereign, its acts are valid only if they are provided by law and there is a difference in value and effect between general rules, laws, which are acts of sovereignty per se and individual decisions of public authority[2].

In the second half of the 19th century, there was an evolution of the rule of law, which contained institutional protection of citizens against public authority. As the state is subject to the rule of law, it is bound to respect the rights of the individual, which are prior and superior to those of the state[3]. The protection was to be provided by judicial institutions thus the problem of administrative courts emerged[4]. For some the creation and use of administrative courts was an imperative feature of the rule of law while for others and specifically for English scholars they could not be part of the rule of law as they descend from executive power hence they could not judge impartially. Subsequently, citizens should turn to ordinary justice for a remedy against arbitrary state acts[5]. Albert Van Dicey, one of the jurists who shared the view that administrative justice cannot be part of the rule of law was also the first in the English legal literature to define it in his 'Introduction to the Study of the Law of the Constitution (1885)'as the supremacy of law against arbitrary decisions and acts of the government[6].

On the other hand, the French état de droit had an approach based on the validity of the choices of the parliament and thus gave an almost sacred character to the laws adopted by it (influenced by Rousseau) which could not be reviewed by a judge[7]. This remained a structural scheme for the French state until the Fifth French Republic (1958-now) during which the Conseil Constitutionnel gave binding legal force to the Declaration of the Rights of Man and the Preambles of the Constitution in order to protect the fundamental rights, which were infringed by statutory law[8].

The German Rechtsstaat was a term primarily used to describe organized living in a community where all its members are protected and free to exercise their powers[9]. At the end of the

[1] Foucault, M. 2012. *The Birth of Biopolitics: Lectures at the College de France (1978—1979)* Athens: Plethron pp. 160-161
[2] Ibid.
[3] Letourneur, M. and Drago, R. 1958. "The Rule of Law as Understood in France", *The American Journal Of Comparative Law*. Vol. 7 No. 2: p 147
[4] Foucault, M. 2012. *The Birth of Biopolitics: Lectures at the College de France (1978—1979)* Athens: Plethron. p. 162
[5] Ibid. pp. 162-163
[6] Pech, L. 2003. Rule of law in France. In: Peenerboom, R. *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the U.S.* London: Routledge. p. 79
[7] Ibid. p. 85
[8] Ibid. p. 89-92
[9] A definition provided by German jurist Robert Van Mohl

19th century, the term changed to a notion closer to the principle of legality according to which both the legislative and executive power's actions must have a basis in the law for them to be valid[10]. For such an action to be lawful, it would also have to be made by the competent authority in the proper manner, reflecting the separation of powers, which is encompassed in the rule of law.

Another important component to the rule of law is legal certainty. This principle concerns the characteristics of the law and the containment of the legislative power. In a broad sense, it demands that laws are clear and specific enough so that they can guide a citizen's life[11]. According to Joseph Raz, a law, which produces legal certainty and therefore abides by the rule of law, must be stable, not retrospective, guided by clear general rules and interpreted by an independent judge to whom access is available and not by a law enforcement instrument (whose discretion should be limited by the need to protect the purpose of the legal rule)[12].

However, all the aforementioned principles and characteristics of the rule of law are formal prerequisites and not substantial, meaning they are not concerned with the content of the law. Therefore, a law produced within the limits of the competence of the legislative institution, which is sufficiently clear and stable, is not necessarily just. Ronald Dworkin presented a perception, which merged the formal lines that run through the rule of law with substantive justice on a rights-based approach[13]. Similarly, Lord Bingham included the element of "fairness" in the rule of law as a tool of limiting state powers through essential principles like equality[14].

It is interesting to note that the substantive element of the rule of law, which demands protection for fundamental rights forms part of political discourse and has gradually become a component of what is widely perceived as democratic governance despite it being a legal notion and principle[15]. This perhaps is because it is also perceived at many levels, as a value, if values are to be understood as a figure of a societal model and not entirely as a legal structural tool.

This is partially reflected in the mechanisms the European Union has employed to guarantee the functioning of the rule of law in its MSs. As it shall be demonstrated below, the enforceability of EU values has been a debated topic, considering that the core mechanism of Article 7 of the Treaty of the European Union, which obligates MS to comply with the values depicted in Article 2 TEU (including the rule of law) is a highly political mechanism, whereas when other legal EU tools are used there emerges some doubt as to how could the Court of Justice of the European Union implement values.

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[10] Craig, P. 2019. Definition and Conceptualisation of the Rule of Law and the Role of Judicial Independence therein. In: Craig, P et al. *Rule of Law in Europe Perspectives from Practitioners and Academics*. European Judicial Training Network. Available at: https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/ p. 1

[11] Craig, P. 2019. Definition and Conceptualisation of the Rule of Law and the Role of Judicial Independence therein. In: Craig, P et al. *Rule of Law in Europe Perspectives from Practitioners and Academics*. European Judicial Training Network. available at: https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/ p. 3

[12] Ibid.

[13] Ibid. p. 8

[14] Ibid.

[15] Pech, L. 2009. *The Rule of Law as a Constitutional Principle of the European Union*. Jean Monnet Working Paper 04/09. Available at: https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/ p. 17

Viewing the rule of law as a tool based on the law to contain the powers of the government in a democratic polity, one could assume that this concept is very much related to that of the state or rather the nation-state; it does after all originate in the constitutional traditions of the MSs. This is also verified by the translation of the term in other languages like the aforementioned German and French versions, which contain the notion of the state. However, considering that this concept only refers to sovereign states is far from the legal reality as the term concerns the sources of law and has a wide normative meaning transcending into the supranational sphere, and in this case the European Union[16].

The principal EU goal of economic integration can be historically traced in the need to rebuild post World War II Europe[17]. At the same time, closer political cooperation and legal integration among European states was imperative in avoiding totalitarianism and impeding the Soviet expansion[18]. Nevertheless, the rule of law as a legal principle and a governance theme was not at the center of the economic order of the primary Community objectives of a Common Market and market freedoms[19]. Therefore, the Treaty of Rome did not include any rule of law terminology, even though the Member States establishing the Communities had principally agreed on principles of the rule of law, which were necessary for the viability of the European project[20].

However, the importance of the rule of law as a guiding principle in the EU has been there since the beginning. In his speech in 1962 at the University of Padua Walter Hallstein[21] defined the then European Economic Community as a Community of law because it "was not created by military power or political pressure, but owed its existence to a constitutive legal act"[22]. Accordingly, the Commission and the Council are not only granted powers by the Treaties but they are restricted by them through the European Court of Justice, which observes the legality of the acts of those institutions[23]. Therefore, the source of the legality in the EU system is in the founding treaties and in their constitutional character, which was gradually and steadily established[24] but most importantly, it can be found in its attributed power and the principle of conferral[25]. On a similar note, in its 1979 Judgment in the Granaria Case, the CJEU made a reference to the rule of law, in the context of the judicial review of EU acts according to today's Art. 263 TFEU (previously Art. 173 EEC) claiming that the EU is based on the rule of law; hence the exercise of its supranational authority is bound by

[16] Palombella, G. 2016. Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two-Level System, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p. 44

[17] de Búrca, G. 2018. "Is EU Supranational Governance a Challenge to Liberal Constitutionalism?", *The University of Chicago Law Review*. Vol. 85, No. 2: p. 337

[18] Ibid.

[19] Schroeder, W. 2016. The European Union and the Rule of Law – State of Affairs and Ways of Strengthening, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 8

[20] Ibid.

[21] First President of the European Commission from 1958 to 1967

[22] Von Danwitz, T. 2016. The Rule of Law in the Recent Jurisprudence of the ECJ, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 156

[23] Ibid.

[24] See CJEU's decisions in *Les Verts* and *Kadi and Al Barakaat*

[25] Craig, P. 2019. Definition and Conceptualisation of the Rule of Law and the Role of Judicial Independence therein. In: Craig, P et al. *Rule of Law in Europe Perspectives from Practitioners and Academics.* European Judicial Training Network. available at: https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/ p. 1

law[26]. The access to courts was probably the first common value which came through the jurisprudence of the CJEU and established a background for the rule of law to emerge as a common value[27].

A few years later, in the Les Verts vs European Parliament Judgment, the then European Community was again described as a Community of law[28]. The reasons behind the Court's choice of words can be traced primarily in its reluctance to implicate the translations of the term in other languages which are based on the notion of the state (like the aforementioned ones) and therefore avoid the discourse on a European superstate and secondly in its attempt to initiate an autonomous reading of the term in the EU legal order[29]. The admissibility issues in this case were more interesting than its substance. It concerned the nature of the legal acts adopted by the European Parliament and their ability to be the subject matter of an annulment proceeding. At that point in time, Article 173 EEC expressly provided for the annulment of acts adopted by the Council and the Commission[30]. The applicant, a French association known as Les Verts - Parti écologiste argued that the measures adopted by the European Parliament were in fact a scheme for reimbursement of election campaign expenses for which there was no legal basis in the Treaties[31]. On the contrary, according Article 7(2) of the 1976 Act concerning the election of the representatives of the Assembly by direct universal suffrage, the regulation of this matter remains within the competence of the national legislator[32]. In a similar vein, they argued that in the event that the Court found the case inadmissible, there would be a denial of justice[33].

Much like the Solange saga this case forced the EU to better define its organization and approach the constitutional model[34]. As a result, the Court used the rule of law concept and taking into consideration the general scheme of the Treaty and its spirit, it pursued a purposive interpretation of article 173 EEC, which evidently could no longer correspond to the powers vested in the European Parliament, by interpreting it as allowing the annulment of acts adopted by the Parliament. In this context the CJEU viewed the treaty as a "basic constitutional charter" which "established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality

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[26] CJEU Case 101/78, Judgment of the Court of 13.02.1979, *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten,* ECLI:EU:C:1979:38, para. 5

[27] Konstantinides, T. 2017. *The Rule of Law in the European Union; The Internal Dimension*. Portland: Hart Publishing, p. 66

[28] Communauté de droit in the french text

[29] Pech, L. 2009. *The Rule of Law as a Constitutional Principle of the European Union*. Jean Monnet Working Paper 04/09. Available at: https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/ p. 11

[30] ARTICLE 173 La Cour de Justice contrôle la légalité des actes du Conseil et de la Commission, autres que les recommandations ou avis. A cet effet, elle est compétente pour se prononcer sur les recours pour incompétence, violation des formes substantielles, violation du présent Traité ou de toute règle de droit relative à son application, ou détournement de pouvoir, formés par un État membre, le Conseil ou la Commission.

[31] CJEU Case 294/83, Judgment of the Court 23.04.1986, *Parti écologiste 'Les Verts' v. European Parliament,* ECLI:EU:C:1986:166, para. 40

[32] ibid.

[33] ibid. para. 21

[34] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at : https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 24

of measures adopted by the institutions" allowing for natural and legal persons to be protected[35]. This understanding of the rule of law by the Court seems to focus specifically on the principle of legality and the principle of judicial protection. However, it must be noted that the rule of law in the EU as it has evolved is not limited to these otherwise central principles.

At a Treaty level the rule of law was first mentioned as a principle in the Amsterdam Treaty and later on as a value in the Lisbon Treaty, perhaps signifying a change in its normative effects. Values are generally considered to be meta legal terms having both an ethical and legal nature. Nevertheless, the rule of law as well as the other values of Article 2 TEU are part of the primary written law of the Union and can be operable if specified through legal tools. In addition, there seems to be a distinction between the values of the first sentence of Article 2 (the rule of law, democracy, protection of minorities equality and dignity) and the second (non-discrimination, tolerance, justice, solidarity and equality between men and women), which includes the presumed societal values of the EU, a distinction which is mirrored in the term "legally relevant values" of Article 7 TEU which provides for a sanctions mechanism for MSs deviating from the EU core system[36]. Furthermore, one needs to mention that these values and specifically the rule of law as a value constitute a basis which provides legitimacy to the EU vis a vis its international counterparts. What is more, the constitutionalisation of the rule of law in the Treaty of Lisbon as a common value among MSs, was special in the sense that MSs were able to use a term originating in national constitutional law in order to describe a binding obligation under EU law[37]

It becomes evident through the jurisprudence of the CJEU that the evolution of the EU is directed towards constitutionalisation. The declarations of primacy of EU law, its direct effect and the protection of fundamental rights through the tool of general principles have left their mark in the evolving legal structure of the Union. This is a factor which distinguishes the EU in the field of international law, making it a sui generis public authority[38]. The Kadi and Al Barakaat Judgment came to verify this statement. The CJEU pointed out the role of the rule of law as a restricting principle of EU law as far as its MSs and institutions are concerned when their actions are not meeting the requirements of the Treaty, which is viewed as a constitutional charter, even when these actions are part of international obligations[39]. This is evidence of the formulation of the rule of law within the EU legal order, in a way that it does not limit itself to a procedural surface but rather chooses to include what is conceived as substantive rule of law.

The rule of law has thus become a founding principle of the EU, even if to become a rule of law abiding quasi-federal supranational authority was not a primary aim of the European Community.

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[35] CJEU Case 294/83, Judgment of the Court 23.04.1986, *Parti écologiste 'Les Verts' v. European Parliament,* ECLI:EU:C:1986:166, para. 23

[36] Schroeder, W. 2016. The European Union and the Rule of Law – State of Affairs and Ways of Strengthening, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 13

[37] Konstantinides, T. 2017. *The Rule of Law in the European Union; The Internal Dimension*. Portland: Hart Publishing, p. 67

[38] Schroeder, W. 2016. The European Union and the Rule of Law – State of Affairs and Ways of Strengthening, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 7

[39] CJEU Joined Cases C-402/05 P and C-415/05 P, Judgment of the Court 03.09.2008, *Kadi and Al Barakaat International Foundation v Council and Commission,* ECLI:EU:C:2008:46, paras. 81, 281, 285, 316

Nevertheless, it became a reality built through time as the political union[40] became stronger and this was revealed in the CJEU's jurisprudence. The EU has thus created a multifaceted mechanism to oversee the compliance of its MSs to this principle. However, one would wonder why the EU should be bothered with the "internal matters" of each MSs. It is important to note that the ongoing integration process within the Union has led to a deep mutual interdependence between its MSs and the MSs and the EU[41]. The EU has an obligation to protect the interests of its citizens and prevent their collision with an illiberal MS in the Union, while MSs have an interest in not letting fellow MSs undermine the integration and therefore the functioning of the internal market[42]. This is based on the essential for the coherence of the Union perception of mutual trust between MSs, that all MSs have a common respect for the rule of law. Moreover, the approach of the EU of fully harmonised quasi-federal domains of governance generates a need for the Union to protect its citizens in a way independent from its MSs[43].

Besides, the EU puts forward very high rule of law standards for both candidate countries and other international counterparts in order to cooperate with them. Similarly, respect for the rule of law should not only be a prerequisite for accession in the EU but also an obligation for the continuance of the membership[44].

More importantly, it should be considered that in the event of systematic abuse of fundamental rights by one or more MSs, a pathology would be generated in the EU, putting in danger the integration project by deteriorating the position of the individual who is a main actor in EU law, constricting their freedoms and rights guaranteed by the Treaties and downgrading the legitimacy of the EU and its values[45]. Hence, it is important for the EU to have a mechanism to both monitor and prevent such a possibility and correct it.

[40] The link between the political union and the rule of law in the EU legal order was highlighted by Commission President Manuel Barroso in his 2012 speech to the European Parliament. See Konstantinides, T. 2017. *The Rule of Law in the European Union; The Internal Dimension*. Portland: Hart Publishing, p. 141

[41] Closa, C. and Kochenov, D. Reinforcement of the Rule of Law Oversight in the European Union: Key Options, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing p. 177

[42] Ibid. p. 178

[43] Ibid.

[44] Ibid. p. 179

[45] Konstantinides, T. 2017. *The Rule of Law in the European Union; The Internal Dimension*. Portland: Hart Publishing, p. 2

Part A

The EU Rule of Law Mechanism: Origins, Differentiations and Correlations between its variants

Chapter I. The 'Stricto Sensu' EU Rule of Law Mechanism: Art. 7 TEU, the pre-Article 7 Commission Framework and the novel European Rule of Law Mechanism

This Chapter examines the historic evolution of the mechanism of Article 7 TEU in order to establish the reasons behind its introduction in the EU legal order. It presents the characteristics of both the preventive and corrective arms of the procedure set out to ensure the compliance of the MSs with the values of the Union and the soft law instruments adopted by EU institutions and briefly explores their nature.

Paragraph 1. The path towards a political lever to regulate coherence in the EU

The turn towards political integration in the EU led to the need for a constitutional type of organisation which would reflect the core principles of modern western democracies and which would be expressed in the Treaties[46]. Consequently, for the first time in the Maastricht Treaty, Article F paragraph 1 provided that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy." Nevertheless, the Conclusions of the European Council of Copenhagen were the first time the rule of law was mentioned as such in EU law. This text, for the first time, specifically defined the conditions a candidate state had to fulfill in order to become an EU member (Copenhagen Criteria), including the "stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities"[47].

This approach was further enhanced by the Amsterdam Treaty, which in Article F para. 1 provided that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". More importantly, Article F introduced a mechanism for tackling situations where there is a "serious and persistent breach of EU values" including the rule of law. This concept was a result of the 1996

[46] Schroeder, W. 2016. The European Union and the Rule of Law – State of Affairs and Ways of Strengthening, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 9

[47] Conclusions of the Presidency - Copenhagen, June 21-22 1993, no 7 Relations with the countries of Central and Eastern Europe, available at: https://www.europarl.europa.eu/summits/copenhagen/default_en.htm p. 14

Inter-Governmental Conference (IGC), which preceded and set forth the Amsterdam Treaty[48]. The preparatory Reflection Group for the IGC submitted its final report to the European Council in December 1995 drawing out two fields in need of enhancement, namely the legitimacy of the EU in the eyes of its citizens on the one hand and its readiness for the eminent enlargement on the other[49]. It provided that the EU should not be viewed neither as a superstate nor as merely a market but rather as a sui generis authority with its own values which are common among MSs and candidate states[50]. More specifically, fundamental rights were presented as a general principle of Union law and with the view of protecting them within the EU, a sanctioning mechanism for serious violations by MSs was suggested[51]. This mechanism was inspired by the need to address both parameters in a sense that it would reduce EU citizens' reservations concerning the Union's democratic legitimacy and tackle any suspicion within the EU decision-making institutions concerning the accession of post-communist countries and the possibility of lower human rights standards[52]. Nevertheless, it is notable that some MSs within the Reflection Group were somewhat reluctant to grant the EU with human rights responsibilities considering that it was a matter falling within their own competence[53].

This argument against the EU rule of law has a past in EU legal theory and it stems from a fear of competence creep through its promotion. This concept concerns the phenomenon of the EU legislating in areas where it does not have competence. In this case, in the name of constitutional integration EU institutions took a step towards establishing a sanctioning mechanism in areas where MSs act outside the scope of EU law, where, EU competence is evidently questionable[54].

The IGC had a positive reception of the recommendations of the Reflection Group concerning the establishment of a sanctioning mechanism. It is worth mentioning that until June 1996, the form of the mechanism included the involvement of the CJEU, however, considering the aforementioned reservations of the MSs, a legal mechanism to control matters close to their sovereignty, would go beyond what they were willing to accept hence, the thoroughly political mechanism of today's Article 7. In its last form before becoming what today is Article 7, the mechanism presented by the Irish Presidency of the IGC contained the unanimous finding of a grave and persistent violation of the principles of Article F by a MSs, by the Council (at its heads of state level) after a proposal by the Parliament, the Commission or one third of the MSs[55]. The State in question would be able to submit its observations without its vote counting and the measures against it could be decided by the Council

[48] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 4
[49] ibid. p. 5
[50] ibid.
[51] ibid.
[52] ibid. p. 7
[53] ibid. p. 5
[54] Konstantinides, T. 2017. *The Rule of Law in the European Union; The Internal Dimension*. Portland: Hart Publishing, p. 31
[55] Secrétariat général du Conseil de l'Union européenne (Politique de l'Information, transparence et relations publiques), Conférence intergouvernementale en vue de la révision des traités – Semestre de la Présidence irlandaise (juillet à décembre 1996) : recueil de textes, Bruxelles, février 1996. available at: http://www.cvce.eu/obj/recueil_de_textes_produits_sous_la_presidence_irlandaise_de_la_cig_juillet_decembre_1996-fr-19c89444-f49b-4afa-8433-0b204084b02f.html p. 27

at a recommendation of the Commission and after a consultation with the Parliament[56]. Nevertheless, the evolution and the version of the mechanism finally adopted, shows a tendency of the MSs to control the application of the sanctions by demanding unanimity, and to repress the roles of the Parliament and the CJEU[57].

The mechanism as it is today requires the European Council to determine whether a serious and persistent breach of the values referred to in Art. 2 TEU exists on the part of a MS. The decision has to be unanimous, as it was provided in the IGC version, following a proposal by the Commission or one third of the MSs and not by the EP. However, the consent of the Parliament is also provided[58] and the MS in question is required to present its observations[59]. If the breach is determined, the Council acting by a qualified majority may impose sanctions including the suspension of voting rights of that MS in the Council[60].

What is more, a conversation on adding a preventive arm to the mechanism was very much present in the following IGC of 2000. The Commission adopted a Communication proposing an amendment to Art. 7 TEU. It is worth mentioning that the French Commissioner Michel Barnier, who was responsible for the IGC was in favor of a "preventive democratic dialogue" considering that he viewed the enhancement of the Art. 7 procedure as a message addressed to candidate states[61]. The proposed procedure by the Commission included a right of initiative to be shared among the Commission, one third of the MSs and the EP and the action to be taken would be determined by a two third majority vote of the Council[62]. The preventive action would consist only of recommendations to the MS concerned while it would have the chance to submit its observations. The version adopted by the Nice Treaty, had no amendments in the sanction portion of the mechanism adding though a warning procedure to be activated in cases of risk of fundamental rights breaches by MSs which would result in the issuing of recommendations. A reasoned proposal from one third of the MSs, the Commission or the EP would be enough for this mechanism to be activated, giving the EP more of leading role than it had in the sanctioning arm[63]. The Council is responsible for determining the existence of a risk of a serious breach and addressing recommendations by a majority of fourth fifths, after obtaining the consent of the EP. Moreover, the MS under scrutiny is guaranteed a right of defense or rather a right of hearing, since the Council before making a decision has to hear the MS in question. It is worth mentioning that the preventive mechanism of Art. 7 included a report

[56] ibid.
[57] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 10
[58] Rule 83 of the rules of procedure of the EP (July 2014) entitled "Breach by a Member State of fundamental principles and values" para. 1: Parliament may, on the basis of a specific report of the committee responsible drawn up in accordance with Rules 45 and 52: (c) vote on a proposal calling on the Council to act pursuant to Article 7(3) or, subsequently, Article 7(4) of the Treaty on European Union. available at: https://www.europarl.europa.eu/doceo/document/RULES-8-2019-03-25-TOC_EN.html
[59] Art. 7(2) TEU
[60] Art. 7(3) TEU
[61] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 23
[62] ibid.
[63] ibid. p. 24

by independent persons. Nevertheless, both the failed Constitutional Treaty and the Lisbon Treaty removed this provision[64].

It is evident that this mechanism puts a lot of weight on the Council and the political willingness of the MSs by setting high procedural standards through the unanimity or the four fifths requirement. As a result, the role of the CJEU in the context of the Article 7 TEU mechanism has been very limited since the beginning. It was further analyzed in the *Hungary v. European Parliament* case[65]. When the EP initiated the Procedure against that MSs, Hungary brought an action for annulment before the Court against the Resolution via which the Parliament made its reasoned proposal that there existed a risk of a clear breach of the principles of Article 2 TEU in Hungary. Article 269 TFEU expressly provides that "the Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article". At first sight, this provision does not include the Resolutions of the Parliament. However, as the CJEU held, Article 269 TFEU in so far as it imposes a restriction on the general jurisdiction of the Court of Justice it should be interpreted narrowly[66]. Therefore, it must be that the purpose of the authors of the Treaties was not to exclude such an act (that is a resolution of the Parliament introducing a Reasoned Proposal for the activation of Art. 7(1) TEU) from the general jurisdiction of the Court of Article 263 TFEU to review the acts of EU institutions, considering that the EU is a Union based on the rule of law with a fully functioning and well established system of judicial remedies[67].

Furthermore, the Court held that the resolution does produce legally binding effects and thus can be subject to annulment according to Article 263 TFEU. This finding was based on the fact that it initiates the procedure of Article 7 (1) TFEU and as such it makes possible the derogation from the sole Article of Protocol 24, which allows MSs to take into consideration or declare admissible to be examined any asylum application lodged by a national of the MS that is the subject of the preventive arm of the rule of law mechanism of Article 7 TEU[68].

Moreover, the CJEU declared that the resolution could not be viewed as an intermediate measure the legality of which can be challenged only in the event of a dispute concerning the definitive act for which it constitutes a preparatory step. Although the Council has the 'final word' in establishing the clear risk of a serious breach of the rule of law, the Parliament's reasoned opinion annexed to its resolution did not express a provisional position[69]. On that note, it was also stated that the resolution of the Parliament had independent legal effects even though Hungary could theoretically base an action for annulment against the Council's subsequent decision on the

[64] ibid. p. 25
[65] CJEU Case C-650/18, Judgment of the Court of 03.06.2021 *Hungary v. European Parliament*, ECLI:EU:C:2021:426
[66] Ibid. para. 31
[67] Ibid. paras. 33, 34
[68] Ibid. paras. 39-41
[69] Ibid. para. 45

unlawfulness of that resolution, the potential success of that action would not be able to eliminate all the binding effects of that resolution[70].

In addition, the CJEU noted that a wide interpretation of the annulment procedure in the context Article 269 TFEU would deprive that provision of its practical effect. Therefore, an action for annulment concerning a resolution of the Parliament initiating the procedure of Art. 7 (1) TEU, much like what Article 269 TFEU provides, should only be brought by the MS concerned and the grounds for annulment relied on can only be based on the supposed infringement of the procedural rules referred to in Article 7 TEU[71].

Ruling on the substance of the action, the CJEU held that the concept of "votes cast" provided for in Article 354(4) TFEU[72] is not defined in the Treaties and as an autonomous concept of EU law, it should be interpreted in accordance with its usual meaning in society[73]. Accordingly, this notion has the meaning that only the casting of a positive or negative vote on a given proposal can be counted, while abstention, cannot be treated in the same way as a 'vote cast'. As a result, Article 354 (4) TFEU, which requires a majority of votes cast, must be interpreted as precluding to take abstentions into account[74]. The CJEU further observed that that provision lays down a dual requirement for a majority, meaning that not only does it provide agreement from two thirds of the votes cast but also the agreement of the majority of MEPs, in which case abstentions are to be counted[75]. Finally, the Court held that the exclusion of abstentions in the calculation of votes cast is not contrary either to the principle of democracy or to the principle of equal treatment considering that the MEPs who abstained were fully aware of the consequences of their choice[76].

Moreover, in reviewing the Art.7 TEU mechanism it is worth noting that there is no formal link between its sanctioning and preventive arm[77]. Preventive actions do not have to come first and it is possible for one MS to be at the receiving end of both a recommendation for a clear risk of a serious breach and of a suspension of its voting rights at the Council for a serious and persistent breach[78]. In addition, the Council is under no legal obligation to impose the sanctions of Art. 7(3) TEU if it establishes a breach of the values of Art. 2 TEU[79].

Another interesting element of this mechanism is that according to the Court of Justice's jurisprudence it is not possible for a private party to trigger its application. In the Bertelli Galvez Case the Court of First Instance held that "the EU Treaty gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the

[70] Ibid. paras. 46-48
[71] Ibid. para. 59
[72] Article 354(4) TFEU: For the purposes of Article 7 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members
[73] CJEU Case C-650/18, Judgment of the Court of 03.06.2021 *Hungary v. European Parliament*, ECLI:EU:C:2021:426 para. 83
[74] Ibid. paras. 84-88
[75] Ibid. para. 87
[76] Ibid. para. 99
[77] Christianos, V., Papadopoulou, R. E., Perakis, M. 2021. *Introduction to European Union Law*, 2nd edition. Athens: Nomiki Bibliothiki, p. 32
[78] Kochenov, D. and Pech, L. 2015. "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*. Vol. 11: p. 516
[79] ibid.

Member States of the principles laid down under Article 6(1) EU (today's Art. 2 TEU) or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU (today's Art. 7 TEU), save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned"[80].

Furthermore, this sanctioning mechanism is an important tool in the promotion of EU values (Art. 3 TEU), considering that the Council Legal Service regards the supervision of the rule of law within the mandate of the Union, since the rule of law forms part of its values. Contrary to the Charter of Human Rights of the EU (the Charter hereinafter), the rule of law mechanism is not limited to situations where MSs apply EU law, rather it includes cases where MSs act autonomously, within their exclusive competence[81]. This was made rather clear in the Commission's 2003 Communication on Art. 7 TEU where it was explained that it is not confined in areas covered by Union law meaning that "the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously[82]".

In that same document the Commission gave some insight to the importance of the Art. 7 mechanism by explaining how a breach of fundamental rights in one MS that would trigger this procedure, is likely to undermine the foundations of the Union and the trust among MSs[83]. This leads to the conclusion that the basis of the EU, meaning the values of Art. 2 are not only common between MSs, but they extend throughout the domestic orders of the MSs, in a way that implies a blurring of the orthodox distinction between the national and the supranational legal order[84]. In defining the term "serious and persistent breach" of the second paragraph of Art. 7 TEU, the Commission gave emphasis to the systemic nature of the actions of a MS, by contrasting it to cases of individual cases of infringement of freedoms or rights[85]. However, when it attempted to define the "clear risk of a serious breach" referred to in para. 1 of Art. 7 TEU, it gave a rather misleading example, by saying that the adoption of legislation that abolishes procedural guarantees in times of war would constitute a clear risk. In this case the EP came forward and protested that "a higher standard of protection of fundamental rights is needed than that proposed by the Commission"[86]. This is so, considering it is

[80] Court of First Instance T-337/03, Order of the Court of 02.04.2004, *Bertelli Gálvez v. Commission*, ECLI:EU:T:2004:106, para. 15

[81] Hillion, C. 2016. Overseeing the Rule of Law in the EU Legal Mandate and Means. In: Closa, C. and Kochenov, D. (edit*.) Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p 65

[82] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 5

[83] ibid.

[84] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 26

[85] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 7

[86] European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), P5_TA(2004)0309, no G (2), p. 2. available at: https://www.europarl.europa.eu/sides/getDoc.do?reference=P5-TA-2004-0309&type=TA&language=EN&redirect

quite obvious that such legislation would rather constitute a serious and persistent breach, than a mere risk[87].

The Communication makes a distinction between the purpose and the effects of a breach. According to the Commission, a serious breach could be emanating from a purpose against vulnerable minorities, ethnic, religious or national[88]. This could be seen as an indirect reference to the problematic treatment of minorities in candidate states from central and eastern Europe[89]. As far as the results of the breach are concerned the Commission noted that they could implicate one or more principles of Article 6 (today's Art. 2 TEU) and that multiplicity could be evident of its seriousness[90]. Again, the EP made a defiant and important comment, by expanding the list of breaches in order to include the MS's failure to act and therefore established a duty for MSs to intervene in situations of discrimination among individual parties[91].

This very specific genealogy of Art. 7 has brought the roots of the mechanism to light. Originally, there was a very clear allocation of power between the Council of Europe and the European Community in a sense that the latter, until it gained a more constitutional and political character with the Maastricht Treaty it was not preoccupied with the protection of fundamental rights[92]. Accordingly, it was the eastward enlargement of the Union which gave rise to concerns for the protection of fundamental rights within the EU, as states coming out of communist systems acceding in the EU were anticipated to fall short of expectations in the field of the common rule of law-abiding legal and political cultures of the original MSs[93]. Therefore, the raison d'être of the provision of an institutional mechanism to combat breaches of this common value among MSs, which is understood as the rule of law, is set on the political evolution of the EU. Hence, it would not be arbitrary to consider that this preventive and sanctioning mechanism developed and adopted through the Treaties, is the stricto sensu rule of law mechanism, as it was the immediate response to the historic imperative.

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[87] European Parliament, Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) Committee on Constitutional Affairs Rapporteur: Johannes Voggenhuber, 1 April 2004, available at: https://www.europarl.europa.eu/sides/getDoc.do?reference=A5-2004-0227&type=REPORT&language=EN&redirect, p 11

[88] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 8

[89] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 27

[90] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 8

[91] European Parliament, Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) Committee on Constitutional Affairs Rapporteur: Johannes Voggenhuber, 1 April 2004, available at: https://www.europarl.europa.eu/sides/getDoc.do?reference=A5-2004-0227&type=REPORT&language=EN&redirect, p 11

[92] de Burca, G. (2004). "Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union", *Fordham International Law Journal*. Vol 27, No 2: p. 683

[93] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 2

Paragraph 2. The Preventive Arm – Monitoring in the Rule of Law Mechanism in the EU

As it has been mentioned, the Treaty of Nice introduced a preventive step to the sanctioning mechanism against MS's breaches of EU values. This was viewed as an enhancement of the operational scope of the EU's means of controlling the MS's abidance with the values of Art. 2 TEU[94]. It is quite interesting to examine the historic reasoning behind the adoption of this new branch to the mechanism.

The 1999 Austrian election brought to light a surprising rise in power and influence of the extreme right-wing Austrian Freedom Party, led by Jörg Haider. A coalition Government was formed and sworn in February of 2000, in which the Freedom Party took control of six out of ten ministries, including the ministries of defense, finance, social affairs and justice[95]. It is indeed ironic how Austria pressured for the inclusion of a sanctioning mechanism for the deviations of MSs from the EU values in the 1996 IGC, with the view of avoiding rights infringements by the candidate CEE MSs. The EU enlargement was viewed by Haider as a threat to Austrian's jobs, fearing the cheap labour "invasion" from Eastern Europe[96].

However, the situation in Austria was not an isolated case, considering the empowerment of Le Pen and the Front National in France and the Allianza Nazionale in Italy. Reasonably, the following argument came forward when fourteen MSs took the initiative of imposing sanctions to Austria: European governments and politicians, worried by the extreme right parties rising, put pressure on their EU partners to accept the sanctions on Austria, making it rather clear that the motive behind this action was political self - interest rather than political identity[97]. Fourteen MSs issued a statement, not attributable to the EU, declaring bilateral actions against Austria, which included the freezing of contacts with Austrian government officials, withdrawal of EU support towards Austrians applying for senior posts in international organisations and very limited contacts with Austrian ambassadors[98]. The sanctions were short lived considering they came into effect in February of 2000 and lasted until September of the same year[99].

It is worth mentioning that even though this was not a formal EU institutional decision it demonstrated a common EU political identity, a consensus that what happened in Austria was not the way forward and had nothing to do with the Union's values[100].

The implication of the EU in these sanctions, if any, was accentuated when during the Portuguese presidency of the Council the Portuguese PM issued a press release referring to the

[94] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 3

[95] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 12

[96] ibid.

[97] ibid. p. 13

[98] ibid.

[99] ibid. p. 14

[100] The Portuguese PM said that the EU was " a Union based on a set of values and rules and on a common civilization" and the Austrian Freedom Party " did not abide by the essential values of the European family" while the British Foreign Secretary noted that " the naked appeal to xenophobia on which Mr. Haider has Based his platform...is something that strikes against the basis of the European Union", Sadurski, W. supra note 81, at p. 14

reaction of the fourteen EU MSs to the situation in Austria, even though he did not have authorisation to do so. The Council was not at liberty to take any actions under Art. 7 TEU considering that its conditions were not fulfilled, since there was no serious and persistent breach of the EU values in Austria at the time. That statement was not one of the EU but rather of fourteen of its MSs, acting outside the EU legal framework but making clear the connection between their actions and intentions and their EU membership[101]. Nevertheless, this was also viewed as an unacceptable intervention in the democratic decisions of the Austrian people. The MEPs of the EP did not fail to point that out in the debate for its resolution "on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party)". It was noted that that intervention was claiming the authority of the Treaties, which evidently could not allow the democratic expression of the people of Austria to be contained by the will of some of the governments of Europe[102].

However, the resolution adopted by the EP in the end "welcomed the timely political intent of the statement of the Portuguese Presidency in so far as it reiterates Member States' concern to defend common European values as an act of necessary heightened vigilance[103]. It is worth mentioning that this point was seen as ambiguous, considering that the EP used the same wording to assess the Commission's position, which focused on a precise evaluation of actual and specific fundamental rights infringements[104].

The most prominent criticism the measures adopted by the fourteen MSs have received concerned the possible backlash resulting in euro-scepticism. Nevertheless, it would be best to consider these actions as an ideological and political message and interpret them as a statement, which aimed at enhancing the political identity of the EU, taking into account the historical origins of the Union.

The Haider Affair as it became known, was a major refutation of the EU's worries over the post-communist countries' rule of law stability and highlighted the need for an enhanced calculated preventive branch in the rule of law mechanism of Art. 7 TEU, which included a monitoring of the rule of law throughout Europe. This became reality with the Nice Treaty which added the warning stage of Art 7(1) TEU[105].

In a similar vein, the 2003 Communication by the Commission suggested the permanency of the independent network of experts, which was first proposed by the EP in 2000 and later established by the Commission, in order to provide a precise assessment of the fundamental rights situation in

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[101] ibid. p. 15

[102] ibid.

[103] European Parliament Resolution on the Result of the Legislative Elections in Austria and the Proposal to Form a Coalition Government Between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party), Thursday 3 February 2000, B5-0101, 0102, 0103, 0106 and 0107/2000 , *Official Journal of the European Communities*, point 4, available at: https://op.europa.eu/en/publication-detail/-/publication/41c6cef0-0425-4117-9134-190c9d12dcb0

[104] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 16

[105] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 27

each MSs via annual reports[106]. For this to happen the Commission recommended that this network should have an appropriate legal basis, considering that there existed a risk of duplicating the European Monitoring Center for Racism and Xenophobia[107]. This network was the precursor of the Fundamental Rights Agency and was suspended in 2004 when the latter was established as an expansion of the European Center for Racism and Xenophobia[108]. The FRA does not have any decision-making powers and remains under the control of the Commission, unable to receive individual complaints[109]. Nevertheless, it has developed the EU Fundamental Rights Information System (EFRIS), which gathers information on the situation of rule of law-relevant rights in MSs.

Constitutional and political changes in Hungary since 2010, which are to be analysed below, gave rise to serious rule of law concerns in the EU and led to different approaches throughout its institutional system, which attempted to further protect the values of Art. 2 TEU by reinforcing the existing tools. Therefore, monitoring the rule of law situation in the different MSs became a primary target. In its 2013 Resolution on the situation of fundamental rights in Hungary, the EP recommended the creation of a new mechanism to implement Art. 2 TEU, which would consist of two stages, a preliminary one which would assess any risks of breach of the EU values and a second phase during which the appropriate actions would be taken in order to restrain any serious breach of those values[110]. For that purpose, the EP endorsed the constitution of a "Copenhagen Commission", formed by a high level group of experts, which would be responsible of monitoring the situation in the MSs as far as the abidance by the Copenhagen criteria is concerned[111]. However, this approach changed when the EP Committee on Civil Liberties, Justice and Home Affairs focused on a mechanism for crisis situations and more effective infringement proceedings, while departing from the Copenhagen Committee idea, considering that the ECtHR was the most appropriate body to be concerned with fundamental rights and rule of law issues[112].

On that end, it is important to remember, that in its 2/94 Opinion on the accession of the EU in the ECHR the CJEU held that "No Treaty provision confers on the Community institutions any general power to enact rules on human rights"[113]. The Art. 7 TEU mechanism constitutes an exception as far as it allows EU institutions not to confine themselves to EU law areas when addressing breaches of the Union values, as it has been demonstrated above. This is further evidence of the close relationship of this specific apparatus of the mechanism with the protection of the rule of law in the

[106] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003, p. 9
[107] ibid. p. 10
[108] Sadurski, W. 2010. *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider*. Sydney Law School, Legal Studies Research Paper No. 10/01, available at: Social Science Research Network Electronic Library http://ssrn.com/abstract=1531393 p. 29
[109] Council Regulation (EC) 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, recital 15
[110] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) p. 32
[111] ibid.
[112] Closa, K. 2016. Reinforcing Rule of Law Monitoring in the EU: Normative arguments, Institutional Proposals and the Procedural Limitations, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p. 24
[113] CJEU Opinion 2/94, Opinion of the Court of 28.03.1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140, para. 27

EU legal order, making it clear that the core of the rule of law mechanism or rather the stricto sensu mechanism would have to be able to permeate these traditional spheres of national and EU competence.

Moreover, in its 2015 Resolution on the situation in Hungary, the EP again proposed to the Commission the creation of a new mechanism on the Rule of Law and democracy, which would include the annual evaluation of the MSs' compliance with the fundamental rights of the Charter and the values of the Treaties. This did not happen until five years later, when the Commission published its first Rule of Law Report in 2020[114], after that same request by the Parliament had been repeated throughout this time[115].

Since its 2003 Communication on the Art. 7 TEU mechanism the Commission had not taken any steps towards the remodeling and strengthening of the EU rule of law mechanism in order to address the emerging alarming situations in Europe[116]. In March 2014, it announced its proposal of a new framework to strengthen the rule of law[117]. It was rather cautiously presented as a subsidiary mechanism, which would be activated only in cases where the safety net of the national means of guaranteeing the rule of law would cease to apply effectively. Still, this framework would be a complimentary tool, which would assist the Art. 7 mechanism. The Commission attempted to provide a definition of the rule of law in the context of the EU. This was structured primarily around the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, impartiality of the judge, effective judicial protection especially concerning the protection of fundamental rights and equality before the law. The Commission made sure to note that these core elements of the rule of law are common in the constitutional traditions of most MSs' legal systems and therefore constitute the rule of law in the context of the EU legal order[118]. It has become apparent from the historic formulation of the EU rule of law and its current placement in the Treaties, that the Union does not perceive this concept as merely a formal prerequisite which can be compressed into a simple and sterile procedure, but rather a matter of substance and democracy[119]. This was pointed out in the Communication by referencing the CJEU's and ECtHR's jurisprudence[120].

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[114] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Brussels, 30.9.2020 COM(2020) 580 final, 2020 Rule of Law Report; The rule of law situation in the European Union

[115] Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights; Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights. European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights

[116] Again, it was the Hungarian case which motivated national governments, via intergovernmental means such as the Future of Europe Group or joint letters of Foreign Ministers of MSs, to request the involvement of the EU and specifically of the Commission, see supra note 94 at p. 25

[117] Communication from the Commission to the European Parliament and the Council, Brussels, 19.3.2014 COM(2014) 158 final/2, A new EU Framework to strengthen the Rule of Law

[118] Communication from the Commission to the European Parliament and the Council, Brussels, 19.3.2014 COM(2014) 158 final/2, A new EU Framework to strengthen the Rule of Law p. 2, 4

[119] Kochenov, D. and Pech, L. 2015. "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*. Vol. 11: p. 523

[120] Communication from the Commission to the European Parliament and the Council, Brussels, 19.3.2014 COM(2014) 158 final/2, A new EU Framework to strengthen the Rule of Law p. 4

The Commission clearly outlined what the EU rule of law is, its core content and its purpose, but the notion of the threat of a systemic nature was not made as clear. It merely gave a vague explanation, mentioning examples of threats to the rule of law like problematic situations concerning the independence of judges and the separation of powers via the adoption of new measures or widespread practices of public authorities and the lack of domestic redress[121]. It adopted a view of the notion "systemic", as referring to the core elements of the state, without clarifying the means of the threat or the reasons why for example a change in the rules of procedure or the judiciary in a MSs would constitute a threat to the rule of law and how that is important to the EU and also within its competence to judge. This wording is different from that of Article 7 TEU which refers to a "serious and persistent" breach of the values of the EU as a triggering factor of the mechanism. Nevertheless, the framework the Commission presented with this Communication is perceived as a pre-Article 7 TEU procedure[122].

This new procedure follows three stages involving an assessment of the situation of the MS concerned, a recommendation addressed to that MS and a follow-up by the Commission. In the assessment phase the Commission evaluates the status of the MS in question in order to establish whether there are clear indications of a systemic threat to the rule of law. In the case it concludes that such a threat exists, it shall send a rule of law opinion to that MS and give it the opportunity to respond to the Commission's concerns[123]. This opinion should be based on the information it has gathered through the exchange of correspondence and meetings, which shall remain confidential, with the competent authorities on the basis of the MS's duty of sincere cooperation (Art. 4 (3) TEU)[124].

In the second stage, a rule of law recommendation, which will be made public, will be issued towards that MS, if the Commission considers that the appropriate measures we not taken to address the concerns it expressed[125]. In this recommendation the Commission shall make known the specific reasoning behind it, at times proposing concrete solutions and giving the MS concerned a time frame to come up with the proper cure for their rule of law deficiencies, while keeping the Commission updated[126]. Once more, the basis for this procedure will be the dialogue established between the Commission and the MS. The final step following the recommendation involves a monitoring of the situation by the Commission including exchange of information with the MSs concerned. If the Commission is not convinced by its efforts within the time limit set it will be able to activate the Art. 7 TEU procedure[127]. Still, this is provided as a possibility and not a legal obligation of the Commission to trigger Art. 7.

In fact, this is a pre-preventive mechanism which in reality is set outside the mechanism of Art. 7 TEU and mimics the classic infringement procedure of Art. 258 TFEU without the involvement

[121] ibid. p. 7
[122] Reding, V., Vice-President of the European Commission, EU Justice Commissioner, *A new Rule of Law initiative*, Press Conference, European Parliament, Strasbourg, 11 March 2014
[123] Communication from the Commission to the European Parliament and the Council, Brussels, 19.3.2014 COM(2014) 158 final/2, A new EU Framework to strengthen the Rule of Law p. 7
[124] ibid.
[125] ibid. p. 8
[126] ibid.
[127] ibid.

of the CJEU[128]. At this point it is worth noting how this framework contrasted the approach of the Council and the MSs, who rather aimed to establish a dialogue among peers and not an institutional tool[129]. This is interesting for a couple of reasons; firstly, from a competence point of view and secondly it is important for the comprehension of the genealogy of the Commission's discourse on the rule of law. The Council Legal Service in its Opinion on the Commission's Framework to Strengthen the Rule of Law noted that there is no legal basis in the Treaties allowing the institutions to create a new supervision mechanism of the values of Art. 2 that is additional to Art. 7 TEU and suggested that the MSs should address the issue at an intergovernmental level[130]. On the other hand it has been argued that since this framework does not have any concrete legal consequences it is difficult to assume that it infringes upon the principle of conferral. Moreover, Art. 7 TEU itself empowers the Commission to investigate potential risks of a serious breach of the values of Art. 2 TEU and submit a reasoned proposal to the Council. Therefore, it is reasonable to conclude that the Treaty already allows the Commission to monitor the MSs' rule of law standards through the establishment of a framework of that kind, taking also into account its role as a guardian of the Treaties[131].

It is important to establish the character and the role of this framework. It was an attempt by the Commission to bridge the standard procedure for specific violations of EU law, provided in Art. 258 TFEU, with the main procedure for systemic violations of EU values. This new procedure is quite similar to the 258 TFEU, since it includes a dialogue between the Commission and the MS concerned and a rule of law opinion by the Commission when it establishes a systemic threat to the rule of law[132]. Thus it is a tool which incorporates elements of both the infringement procedure and the Art. 7 mechanism as it is presented as a preliminary step to its activation.

What is more, the Commission, for the first time with its 2014 Communication, set up a rule of law monitoring framework to be applied to all MSs regardless. Before that the only monitoring mechanism was provided for Romania and Bulgaria at the time of their accession. The Cooperation and Verification Mechanism (CVM) was established in 2007 when Romania and Bulgaria joined the EU, in order to demonstrate that they would be able to keep up with the rule of law requirements of the Union after their accession. The CVM is a monitoring process that aims at maintaining the rule of law reforms that took place during the accession negotiations in an attempt to target the underlying problems of corruption of both these MSs[133]. The Commission sets specific benchmarks upon which it

[128] Hillion, C. 2016. Overseeing the Rule of Law in the EU Legal Mandate and Means. In: Closa, C. and Kochenov, D. (edit*.) Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p 79
[129] ibid. 80
[130] Council of the European Union, Opinion of the Legal Service on the Commission's Communication on a new EU framework to strengthen the Rule of Law : compatibility with the Treaties, Brussels 27.05.2014, Doc 10296/14, p. 7 points 24, 27
[131] Article 17(1) TEU
[132] much like the reasoned opinion of the Commission in Art. 258(1) TFEU
[133] Vachudova, M. and Spendzharova, A. 2012. "The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU accession", *European Policy Analysis*. Issue 2012:1, Swedish Institute for European Policy Studies, available at: https://www.sieps.se/en/publications/2012/the-eus-cooperation-and-verification-mechanism-fighting-corruption-in-bulgaria-and-romania-after-eu-accession-20121epa/ , p. 2

annually evaluates these MSs in the specific fields and issues a report[134]. These reports tend to be quite detailed and attentive to specific changes like administrative reforms and judicial cases[135].

Nevertheless, a more systematic approach did not come into play until 2020 when the Commission issued its first Annual Rule of Law Report, following its 2019 Communication where it announced its intention of intensifying its rule of law monitoring by publishing Annual Rule of Law Reports in which it would summarize the situation in the MSs[136]. This Report forms part of the European Rule of Law Mechanism, a new gear in what has been described thus far as the EU rule of law mechanism. It is worth noting that this new rule of law mechanism came as a priority of the political agenda of the new President of the Commission, Ursula von der Leyen. It is built around the Rule of Law Reports and was based on the idea of a close dialogue with national authorities and inter-institutional cooperation[137]. Each MS has its own chapter in the Report. They focus on four pillars: the justice system, the anti-corruption framework, media pluralism and other institutional checks and balances. These Reports are viewed as the result of a close collaboration with the MSs at a Council level and through political and technical bilateral meetings in an attempt to establish a stable channel of communication[138]. When setting out the annual report the Commission takes into consideration the contributions of a number of EU agencies, European and national civil societies and international actors including the FRA, the Council of Europe and the European Network of the Presidents of Supreme Courts of the EU[139]. It should be noted that the European Rule of Law Mechanism is distinguished from the Art. 7 TEU and Art. 258 TFEU procedures, unlike the 2014 Framework of the Commission[140].

Overall, the 2014 framework for the rule of law brought new elements, which enforced the rule of law mechanism and made serious efforts to bridge the gap between the infringement proceedings and the stricto sensu mechanism, while bringing attention to the importance of monitoring as a preventive measure in the maintenance of the values of the EU. However, it is necessary to refer to the weaker points of this procedure. Firstly, it presumes that the dialogue it establishes is going to bring positive results, which will most likely not be the case when the governing powers of a MS make a conscious choice to move away from EU values[141]. Moreover, as it has been mentioned the Commission has failed to clearly define the concept of "systemic threat" and make a distinction between the notions of systemic threat and violation[142]. In any event, whether there exists a threat to the rule of law or not, the right to trigger the pre-Article 7 TEU procedure remains

[134] Tzortzi, V. et al. 2020. *Mutual Trust in Times of Crises of EU Values; State of Play and Possible Next Steps*. Athens-Thessaloniki: Sakkoulas Publications, p. 67
[135] Vachudova, M. supra note 114, at p. 3
[136] Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions, Brussels 17.07.2019, COM(2019) 343 final, Strengthening the Rule of Law within the Union; A Blueprint for Action, p. 11
[137]Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions, Brussels 30.09.2020, COM(2020) 580 final, 2020 Rule of Law Report; The Rule of Law Situation in the European Union, p. 4
[138] ibid
[139] ibid. p. 5
[140] ibid. p. 3 footnote no. 12
[141] Kochenov, D. and Pech, L. 2015. "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*. Vol. 11: p. 532
[142] ibid.

with the Commission, which preserves an absolute discretionary power. It is also worth mentioning that the confidentiality of the dialogue between the Commission and the MS concerned may limit the effectiveness of this procedure, considering that a public discussion of this nature would add on political pressure and perhaps turn it more dynamic[143].

The Council's counter-proposal to the Commission's new framework was an annual rule of law dialogue among MSs within the Council, (taking a step further away from an institutional approach in addressing the rule of law issues of the MSs) which would be based on "the principles of objectivity, non-discrimination and equal treatment of all MSs on a non-partisan, evidence-based approach"[144]. This obviously adheres to the reluctance of some national governments to provide the Commission with the power to investigate their rule of law situation, considering the aforementioned supposed obstacle of the principle of conferred competence[145]. The proposal of the Council has been criticised for being ineffective to face the challenges of the rule of law, taking into account that the discursive route adopted by the EU in the past has been equally unsuccessful in promoting EU values in third states[146].

Considering the formulation of the 2014 Framework for the Rule of Law, one should not fail to examine its evolution. In 2019, the Commission issued two new Communications, which aimed at enhancing the rule of law toolbox of the EU and clarifying the role of the Union and its institutions in this issue. In its July of 2019 Communication, which followed the judgment of the CJEU in the Commission v. Poland case, the Commission had to make use of the new jurisprudence of the Court. It focused on the significance of the independence of the judiciary for the rule of law in the EU, while making sure to note many a time that the safeguarding of the rule of law is primarily a responsibility of the MSs. The Commission identified three ways of enhancing the EU rule of law mechanism: promotion of rule of law culture, prevention and a common response when a problem has been identified. In promoting the rule of law culture the Commission mainly targets the general public and aims at informing them on the rule of law by ensuring the independence of the media encouraging the academic discourse and research around the rule of law though funding, supporting European judiciary networks, encouraging national Parliaments to establish an annual rule of law event, deepening the communication with the CoE and restarting the negotiations for the accession of the EU to the ECHR[147].

In its preventive direction, the Commission made an effort to strengthen its monitoring tools. It presented a Rule of Law Review Cycle, which would gather information from existing reliable sources of information, as it has done in the past, like the FRA and the CoE while inviting the MSs to offer their perspectives and share their information, in a rule of law dialogue, in order to fight corruption and take a deep look into issues of media independence and pluralism[148]. Within the frame

[143] ibid. p . 533
[144] Note from the Presidency to the Council "Ensuring Respect for the Rule of Law", 14 November, 2014, p. 5 point 16
[145] Kochenov, D. and Pech, L. 2015. "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*. Vol. 11: p. 534
[146] ibid.
[147] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 17.7.2019 COM(2019) 343 final, Strengthening the rule of law within the Union; A blueprint for action, pp. 5-7
[148] ibid. p. 9, 10

of this Cycle the Commission presented the aforementioned Annual Rule of Law Report and combined it with an enhancement of the EU Justice Scoreboard[149]. It further noted the importance of interinstitutional cooperation, asking the EP and the Council to follow-up on the Rule of law Reports and made a reference to the peer review mechanism envisioned by the Council. Nevertheless, the Commission made sure to highlight its role as a guardian of the Treaties aiming at establishing its autonomy in reviewing the rule of law in the EU[150].

The recent case law of the CJEU[151] gave the Commission a steady foundation to structure its response to rule of law threats in the EU. It announced a strategic approach to the infringement procedure of Art. 258 TFEU, it welcomed the intention of the Council to make the Art. 7 TEU proceedings more efficient and suggested further involvement of the EP and possible third parties like the CoE[152]. Furthermore, the Commission noted the need to further involve other institutions in the functioning of its 2014 Framework[153]. It is worth noting that it made a special provision for the "rehabilitation" of the deviating MS by setting out a monitoring mechanism much like the CVM to follow-up the situation after the implementation of a formal rule of law process[154]. The Commission makes an effort to note that the aim is that the need for a response, whether that is the activation of the Art. 7 procedure or the 258 TFEU proceedings, is limited through all the aforementioned preliminary measures. After all, sanctions research in law and political sciences, has demonstrated that sanctions are quite ineffective in bringing compliance, when compliance has to do with the core of the regime in question[155]. It is therefore made evident that the rule of law of the Union cannot depend on coercion but rather it demands a certain democratic culture to sustain it.

[149] This tool was set through Communications by the Commission and it aimed at evaluating the justice systems of MSs. See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 27.3.2013 COM(2013) 160 final, 'The EU Justice Scoreboard; A tool to promote effective justice and growth' and Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 17.3.2014 COM(2014) 155 final, 'The 2014 EU Justice Scoreboard'

[150] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 17.7.2019 COM(2019) 343 final, Strengthening the rule of law within the Union; A blueprint for action, p. 12

[151] See Cases C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas and C-619/18 European Commission v. the Republic of Poland

[152] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 17.7.2019 COM(2019) 343 final, Strengthening the rule of law within the Union; A blueprint for action, p. 14

[153] ibid.

[154] ibid. page 15

[155] Closa, C. and Kochenov, D. Reinforcement of the Rule of Law Oversight in the European Union: Key Options, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing p. 186

Paragraph 3. The Corrective Arm – The Nature of Sanctions

As it has been demonstrated above, the core of the EU rule of law mechanism lies with the Art. 7 TEU mechanism and the measures adopted by the Commission in order for it to be implemented. However, it does not only rest on preventive measures, but most importantly, at least at first sight it provides for political sanctions against the deviating MS. The intention of the EU behind Article 7 is not to punish deviation from its norms, but to use this corrective mechanism in order to alter the behavior of a MS by providing a negative incentive. In its second paragraph, Art. 7 TEU regulates the determination of the existence of a serious and persistent breach of the fundamental principles of Art. 2 TEU by a MS. The proposal for this determination is made by the Commission or one third of the MSs. Then, the Council acting unanimously, not counting the vote of the MS in question, may decide on the existence of such a breach. Following that, the Council, acting by a qualified majority, may decide to suspend some of the rights assigned to the MSs by the Treaty. This includes the voting rights of the representative of the national executive in the Council. Moreover, Article 354 TFEU provides that in the voting process, the MS in question does not vote and that a MS's abstention does not count[156]. As it has been mentioned, this procedure is independent of the preventive arm of the mechanism and it is not necessary to be subsequent to a decision of the Council finding that same MS to be at a clear risk of a serious breach of the values of Article 2. Again it is worth highlighting that the EP's power in the portion of the Art. 7 TEU mechanism is limited to giving its consent.

The determination of the existence of a serious and persistent breach of the values of the Union as well as the imposition of specific sanctions is left to the discretion of the Council[157]. According to the third paragraph of Article 7 TEU, only certain rights can be suspended, otherwise the result would be equal to an expansion from the EU, which is not mentioned anywhere in the Treaties[158]. Similarly, rights can only be suspended, which means that they must be restorable[159]. This provision concerns rights deriving from the application of the Treaties, therefore only rights related to the membership to the EU may be suspended, including rights stemming from secondary law[160]. Natural and legal persons have to be somewhat protected from such sanctions through the principle of proportionality, in a way that the least onerous measure to achieve the desired goal must be employed. It is also stated in that same paragraph that the obligations of the MS in question continue to apply despite the imposition of sanctions making evident that there is no option for a resort to reciprocity[161]. As far as the subject of the suspended rights, it has been argued, that it is possible that they concern

[156] Article 354 TFEU : For the purposes of Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article.
[157] Poptcheva, E. M. 2016. 922 Understanding the EU Rule of Law Mechanisms , Briefing of January 2016, European Parliamentary Research, Members' Research Service, available at : https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI%282016%29573922_EN.pdf
[158] Dumbrovski, T. 2018. *Beyond Voting Rights Suspension: Tailored Sanctions as Democracy Catalyst under Article 7 TEU*, European University Institute Robert Schuman Centre for Advanced Studies, Working Paper 2018/12, available at: https://cadmus.eui.eu/handle/1814/52925 p. 5
[159] Ibid.
[160] Ibid.
[161] Ibid.

individuals and not strictly apply to MSs, considering that the letter of the provision does not refer to MS's right but rather to rights deriving from the Treaties[162].

It has been maintained that the causal relationship between an institutional crisis in a MS and the impairment of its democratic integrity should lead to the sanctions being oriented towards restoring democratic equality[163]. Furthermore, they should be guided by the principle of effectiveness in a two-fold manner; firstly, they have to be able to achieve the goal of altering the MS's behavior and secondly they have to be able to respond to the resistance of the recipient and specifically to combat the avoidance of the MS[164].

As it has been mentioned before, the corrective arm of Art. 7 TEU is also limited by the principle of proportionality, as the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. Therefore, according to the general proportionality test, sanctions have to be an appropriate measure to obtain the goal of altering the behavior of the MS (and ultimately restore democratic equality) (appropriate), which cannot be achieved by less onerous means (necessary) and even if there are no less burdensome measures, the sanctions cannot have an excessive effect on the MS in question. However, this part of Article 7 TEU can be read as leaving the door open for sanctions targeting individuals as the Council needs to only "take account of" and not for example do everything in its power to avoid any consequences on the rights of individuals, therefore, it suggests that it aims at refraining from having any collateral damage on persons at whom the sanctions are not targeted[165].

Moreover, the sanctions of this mechanism should have an approach focused on the beneficiaries of this Article. It has been mentioned that the aim of this part of the mechanism is to ensure that MS conform to the values of Article 2. Nevertheless, in theory, the ultimate purpose is to protect individuals, meaning the (economically active) citizens of the Union and the undertakings operating in the EU (regardless of their nationality or residence)[166]. Therefore, the sanctions should be focusing at securing the interest of the beneficiaries. Still, posing the dilemma of whether this mechanism aims at protecting the citizens of a deviating MS or the practices of western-minded liberal democracy in that MS, would be taking things out of context. It rather aims at safeguarding the coherence of the EU and of the internal market.

The imposition of sanctions has been a part of EU practice since the introduction of the Common Foreign and Security Policy with the Maastricht Treaty. These measures can be either autonomous or derivative (based on a resolution of the Security Council of the UN) and target third states, individuals, natural or legal persons or generally non-state entities "in cases where they do not respect international law or human rights or pursue policies or actions that do not abide by the rule of law or democratic principles"[167]. Considering that the main means of influence of the EU is its

[162] Ibid.
[163] Ibid. p. 11
[164] Ibid.
[165] Ibid. p 12
[166] Ibid.
[167] Article 21 TEU, See also: General Framework for EU Sanctions, Summaries of EU Legislations, Summary of Article 29 TEU and 215 TFEU, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A25_1

economic powers, this is where the sanctions it imposes based on[168]. Gradual sanctions may be imposed including diplomatic sanctions but most importantly, economic sanctions like arms embargoes, restrictions on imports and exports and restrictive measures for example the freezing of funds of targeted individuals or organisations and travel ban. Restrictive measures are proposed by the High Representative of the Union for Foreign Affairs and Security and then discussed on the Council. The decision is adopted by the Council by unanimity and when the sanctions include economic sanctions, they must be implemented in a Council Regulation[169].

In the case of safeguarding the values of Article 2 TEU in the context of Article 7(3) TEU the type of the sanctions are not specified. There is no mention in the Treaties[170] that they can be directed towards individuals, neither that they are limited to the suspension of the voting rights of the MS in question. It is worth taking a deeper look into the nature of the sanctions that can possibly be imposed under this scheme. The "suspension of rights" is immediately related to political rights of the MS and this happens for two reasons; firstly, it is only logical, that a MS deviating from the values of the EU could not have a valid vote in the legislation procedure of the Union, secondly, the letter of the provision, suggests so.

The limitation of voting rights of the MS concerned is not utterly efficient. One MS cannot have such a vast influence in the Council so that the suspension of its rights would be a sufficient measure, considering that the areas demanding unanimity in the legislative procedures of the EU are limited[171]. This is not true for the EP, where the political reach of the governing powers of the MS in question is amplified. Therefore, it is obvious that the sanctions referring to political rights suspension should involve the connection of the MS with the institutions in more complex ways. For example, a suspension of the right to participate in the meetings of the European Council, or the right to stand in the EU elections would be a more appropriate means of achieving the aim of the sanctions[172]. However, it is certainly not up to the Council to decide matters that affect in such a manner the functioning of other EU institutions. This argument is enhanced by the fact that in the stage of the imposition of sanctions the Council acts alone. This is not entirely true though. The consent of the Parliament is part of both the determination of a risk of breach of the values of Article 2 TEU and of the existence of such a breach. Similarly, the Commission has the role of the initiator in the procedure and the European Council is to evaluate the evidence introduced by the Commission and the defense of the MS. Under those conditions, the Commission may also suggest the sanctions to be imposed and so can the EP when providing its consent[173]. Accordingly, the Council, when deciding on the sanctions, it will be bound by the decision of the European Council, which will be formed either according to the suggestions of the Commission, or taking a different direction[174]. Hence, the decision

[168] Chachko, E. 2019. "Foreign affairs in court: Lessons from CJEU Targeted Sanctions Jurisprudence", *Yale Journal of International Law*, Vol. 44. No. 1, p. 8
[169] Article 31 TEU, See also: European Council, Council of the European Union, Adoption and review procedure for EU sanctions, available at: https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/
[170] Unlike Article 215 TFEU
[171] Dumbrovski, T. 2018. Beyond Voting Rights Suspension: Tailored Sanctions as Democracy Catalyst under Article 7 TEU, European University Institute Robert Schuman Centre for Advanced Studies, Working Paper 2018/12, available at: https://cadmus.eui.eu/handle/1814/52925 p. 16
[172] Ibid. p. 17
[173] Ibid. p 18
[174] Ibid.

of the Council on specific sanctions is formed through a procedure in which all institutions are involved in some way. It should also be mentioned that the CJEU might be involved if the MS in question on the basis of Article 269 TFEU asks the Court to examine the integrity of the procedure. In the event that sanctions are imposed on individuals, they would be able to bring an action for annulment of the decision before the Court. Thus it seems that a suspension of political rights of the nationals of the target MS could be possible within the frame of Article 7. However, a general ban of this kind is likely equal to a suspension of the right not to be discriminated against and would most likely fail the proportionality test[175].

It has also been proposed that the nature of the sanctions of Article 7 TEU may be economic. These may be structured on either suspension of the fundamental freedom of movement, or of EU funding. In both cases, they should be specific and targeted. It has been suggested that instead of giving the funds to the state, which will then distribute them, the EU could directly fund specific projects based on applications and avoid funding blacklisted individuals and entities[176]. The restrictions on free movement should be similarly specified, treating targeted entities as residents of third countries and suspending the customs union for individual cases, or the rights that stem from the free movement of workers or the freedom to provide of services[177].

Conclusion

As it has been demonstrated, the EU rule of law mechanism did not come up by chance at some fortuitous point in time. There are historic and political reasons behind the primary rule of law mechanism of the EU. As the needs of the Union changed with its enlargement and the enhanced integration, the primary tool for safeguarding the core principles of the EU came into play. The shadow of doubt that cast over the MSs at the time of the accession of the former communist countries created a demand for a mechanism that would safeguard the values of the EU and the rule of law among them. However, the Haider Affair in the late nineties revealed the need for a preventive tool in that aspect and made way for the establishment of the preventive arm of the mechanism of Article 7 TEU. As the integration process evolved and political changes in some MSs showed warning signs of an eminent crisis in the field of the rule of law, it became clear that there was a need for a close monitoring of the situation. Thus, the Union came up with new tools and mechanisms connected to the Article 7 procedure based on a dialogue with the MSs concerned in order to resolve the situation at an early stage and avoid triggering the quite rigid rule of law mechanism and the imposition of sanctions which would inevitably lead to political unease in the Union. Even though the preventive arm of Art. 7 TEU was finally triggered for two MSs, the imposition of sanctions was never realized.

[175] Ibid.
[176] Ibid. p. 20
[177] Ibid.

Chapter II. The EU Rule of Law Mechanism Lato Sensu

This Chapter explores the infringement procedure of Art. 258 TFEU as a lato sensu rule of law mechanism and examines its legal nature in the context of enforceability of the values of Art. 2 TEU. It presents the administrative characteristics of the pre-litigation procedure in order to paint the full picture of the legal 'footprint' of an infringement action in the EU legal order. It further examines the features of the principle of judicial independence through the case law of the CJEU and its relation to Art. 267 establishing the preliminary request procedure.

Paragraph 1. The intervention of the judiciary in safeguarding the rule of law in the EU

It is true that the effectiveness of EU law is largely dependent on the compliance of the MSs of the Union to its rules. The establishment and the functioning of the internal market would suffer if MS did not comply with the imperatives of EU law. However, this would not only affect the microeconomic constitution of the Union and the goal of the common market, but it would also have considerable implications for the development of the EU in the field of political integration as it would decrease the value of the commitments MSs have made towards it. This was exactly the role the Treaties handed to the Commission, to monitor the compliance of MSs with EU law[178].

According to the general infringement procedure of Articles 258 and 260 TFEU the Commission may refer to the CJEU in order to establish that a MS has failed to properly implement EU law and on that basis seek the imposition of pecuniary sanctions. This procedure has been in place since the Treaty of Rome (1957) and has since been enforced[179]. The Treaty of Maastricht provided for financial sanctions against repetitive infringements whereas the Lisbon Treaty expedited the procedure for the cases concerning directives transposition, while it facilitated the Commission by removing the obligation for a reasoned opinion in the when bringing a case before the CJEU under Article 260 TFEU (which provides imposition of a lump sum or penalty payment on a MS due to its failure to comply with the judgment of the CJEU finding it guilty of infringing EU law)[180]. This evolution is evidence of the MS's will to safeguard compliance with EU law and enhance the role of the Commission in the process[181].

The procedure of Article 258 TFEU has two main stages: an administrative pre-litigation stage and one before the CJEU. The main goal of the pre-litigation procedure is to give the MS concerned the opportunity to comply voluntarily with its obligations, making this procedure quite

[178] Article 17 TEU
[179] Article 169 of the Treaty establishing the European Community 1957: If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. 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.
[180] Andersen, S. 2011. "Non-Binding Enforcement of EU Law: Interpretation or Centralisation and Norm and Norm Assimilation?" Paper to be presented at EUSA Twelfth Biennial International Conference, Boston, Massachusetts, March 3-5, 2011, available at: http://aei.pitt.edu/52089/ p. 4
[181] ibid.

practical. However, it also serves another purpose, one of defining the dispute before the CJEU, as according to the case law of the Court an action for infringement by the Commission can only be based on the arguments it used at the preliminary stage[182].

The procedure begins when the Commission receives information about a potential breach of EU law. This information may be found in a complaint by an individual or an organisation, in a petition filed with the Petition Committee of the European Parliament, a complaint before the European Ombudsman or even preliminary ruling cases pending before the CJEU[183]. Following the gathering of information the Commission may introduce a series of informal contacts with the MS concerned in an attempt to establish the validity of the claims and obtain all the necessary information, if it chooses to issue a Letter of Formal Notice[184]. Therefore, if the communication with the MS concerned does not satisfy the Commission regarding its compliance concerns it may decide to commence the formal infringement proceeding (since it is in its discretion to do so).

This process starts with a proposal from the respective Directorate General following a consultation with the Legal Service and the Secretariat General. The continuation of the procedure is dependent upon the consensus achieved at a political level in the Commission when the matter will be presented as part of the "A points" on the agenda of the College of Commissioners[185]. If the consensus is not achieved, the cabinet of the Commissioner responsible may bring the issue back to the competent service, close the dossier without taking any further action or bring it for discussion before the College of Commissioners under the "B points" of the agenda. Hence, it becomes evident that there is a complicated administrative procedure even before the formal initiation of the phase.

If agreement is found within the College of Commissioners, the Commission may send a request to the MS concerned for information in the form of a Letter of Formal Notice. This constitutes a legal document and is composed by the competent Directorate General while it is also commented by the relevant directorates and reviewed by the Legal Service. Its purpose is to outline and define the subject of the dispute and give the MS concerned the relevant information so that it may prepare its defense when submitting its observations to the Commission[186]. The Letter provides a specific timeline (usually two months) within which the MS must answer the concerns of the Commission[187]. In the case that the answers provided by the MS do not appease the Commission's suspicions over its failure to comply with EU law, a formal request for compliance may be sent by the Commission, which is the Reasoned Opinion[188]. There, the MS concerned is called to inform the Commission on the measures it has taken to conform to the specific norms of EU law within the timeline set[189]. It is

[182] CJEU Case C-210/91, Judgment of the Court of 16.12.1992, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1992:525, para. 10
[183] De Schutter, O. 2017. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, available at: https://www.opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union p. 11
[184] ibid.
[185] ibid. p. 14
[186] ibid. p. 15
[187] ibid.
[188] Article 258(1) TFEU
[189] De Schutter, O. 2017. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, available at:

important to note that the Reasoned opinion, though it may give a more detailed view on some subjects, it cannot go beyond the grounds established in the Letter of Formal Notice, as that would violate the rights of defense of the MS[190].

It is necessary to shed some light on the discretionary power with which the Commission operates in this procedure. In most cases where a Letter of Formal Notice and a Reasoned Opinion were sent, either the response of the MS was adequate to resolve any possible misunderstanding, or it adopted measures to comply with EU law[191]. On the contrary, when the Commission considers that the matter was not sufficiently addressed, it may file an action for infringement based on the Letter of Formal Notice and the Reasoned Opinion. This leaves a wide margin of discretion to the Commission to act upon an alleged infringement of EU law.

Moreover, the Commission has the ability to withdraw the action in case subsequently to the Reasoned Opinion the MS concerned takes action to compensate for its noncompliance[192]. If it decides to continue with the procedure, the actual existence of a failure to comply with EU law is investigated and established by the CJEU. It is worth noting that in the proceedings before the Court it is only possible for other MSs and EU institutions and not for private parties and individuals to intervene, even though their complaints possibly constitute the motive behind the initiation of the procedure[193]. Private parties are absent from the procedure and not have any rights including being informed and heard by the Commission, considering that complainants do not form part of the 258 TFEU proceedings and that the MS concerned and the Commission may come to an agreement. Therefore, it becomes evident that the Commission has a wide margin of discretion that is not confined by the interests of the persons who contributed to the initiation of the procedure.

The significance of the 258 TFEU procedure is not only found in the fact that it defines the obligations MSs have under EU law and requires them to conform with them, but also in that it may lead to that MS being liable for any damages caused by that violation[194]. A MS found 'guilty' of not abiding by EU rules by the CJEU may also be on the receiving end of financial sanctions, a lump sum or a penalty payment, if it is held by the Court that it has failed to comply with the judgment of the infringement procedure[195].

The infringement procedure is one of the tools of enforcement of EU law, which, naturally, is, according to the Commission, of high priority. Nevertheless, statistics show that this procedure is gradually used less in recent times. In the time period between 2012 and 2016 they have reduced from 47 to 27 completed cases by the CJEU[196], while in the years 2016 - 2020 they have fluctuated between

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https://www.opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union p. 15

[190] Ibid.

[191] ibid. p. 16

[192] ibid. p. 18

[193] ibid. p. 19, See also Statute of the Court of Justice of the European Union (Protocol 3 annexed to the TFEU) Article 40(2)

[194] CJEU joined Cases C-6/90 and C-9/90 Judgment of the Court of 19.11.1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428

[195] Article 260 TFEU

[196] De Schutter, O. 2017. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, available at:

25 and 30 completed cases[197]. This is attributed to the fact that the Commission seems to choose to commence the 258 TFEU procedure only in cases where there is a higher possibility of it being successful[198]. This decrease can also be attributed to the fact that a solution is often found at the initial stage of the procedure, or after the sending of the Letter of Formal Notice[199].

It becomes evident that the procedure of Article 258 TFEU has a strong administrative character until it reaches the phase before the CJEU. Considering this fact, one should not forget that the Court has given the rule of law a central role in the EU administrative system. It views this concept as a means of achieving coherence in the review procedures of measures adopted by EU institutions and national administrations, adopting an understanding of the rule of law close to the principle of legality and a perspective of constitutionality review of both statutory and administrative laws (to the extent that such a distinction applies in EU law), stemming from the constitutional traditions of the MSs[200]. Therefore, it would only be logical for the EU to employ its principal administrative instrument to impose the core concept of its administrative system, considering the discretion the Commission is given throughout this procedure. In this sense, the 258 TFEU procedure is a way of realising the rule of law, if this notion is essentially perceived in a more formalistic way, as a concept closely related to the principle of legality. However, the EU's rule of law is not limited to this perception but it also includes a substance-based approach.

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https://www.opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union p. 22

[197] Court of Justice of the European Union, Annual Report 2020, Judicial Activity, available at : https://curia.europa.eu/jcms/jcms/Jo2_7000/en/ p. 218

[198] De Schutter, O. 2017. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, available at: https://www.opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union p. 22

[199] ibid. p. 25

[200] Pech, L. 2003. Rule of law in France. In: Peenerboom, R. *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the U.S.* London: Routledge. p. 97

Paragraph 2. The role of the infringement procedure in upholding the rule of law in the EU

Both the substantive and formal elements of the perception of the rule of law of the Union are, in principle, protected by the Article 7 TEU mechanism. However, the infringement procedure may contribute to the implementation of this legal principle throughout the EU, not by merely providing a control of the principle of legality. It is important to examine how Article 258 TFEU can be used to achieve the coherent application of the values of Article 2 TEU.

According to Article 17(1) TEU "the Commission shall oversee the application of Union law under the control of the Court of Justice of the European Union". It has been argued that there is nothing in the Treaties to exclude the applicability of the values of Article 2 TEU. Considering that the lettering of Article 258 TFEU provides a horizontal scope for the procedure, a MS failing to fulfill an obligation 'under the Treaties' may well include the obligation to comply with the values of the Union found in Article 2 TEU. The single limitation to the Commission's enforcement powers is related to the Common Foreign and Security Policy according to Article 24(1) TEU. Similarly, there seems to be no restriction over the jurisdiction of the CJEU to examine cases based on Art. 2 TEU. This is thought to be so, considering that the primary lawmakers would have made it explicit either as they did with the CFSP, or when they limited the Court's power to procedural issues of the Article 7 TEU mechanism[201]. Overall, it is accepted that Article 19 TEU attributes general jurisdiction to the Court, from which derogations are to be narrowly interpreted[202].

However, there are a couple of questions that emerge when assuming that Art. 2 TEU is enforceable through the infringement procedure. Firstly, the content of the values is quite vague and therefore could generate some legal uncertainty. This also intertwines with the fact that there are doubts as to whether it imposes any obligations at all[203]. Hence, for the values of Art. 2 TEU to be a subject of infringement procedure, their substance should be clarified. Their definition is thought to have gradually been structured through the enlargement policy of the Union and the prerequisites it imposes on candidate MSs[204]. This argument is enhanced by the fact that the values specified by the benchmarks the Commission demands to be fulfilled by states who wish to accede to the EU are unanimously agreed upon by the MSs[205]. Similarly, the annual reports of the Commission on the progress of the candidate MSs, which have added detail to the substance of the values of the Copenhagen criteria are submitted to the Council and the European Council and at a later stage the final evaluation is to be approved by all MSs which will have to ratify the Accession Treaty on the basis of their constitutional requirements. These procedures demonstrate that the content of the values referred in Art.2 TEU has been specified in the context of the accession of a new MS, with the consent of the MSs. Keeping this in mind one would argue, that the CJEU may codify these accession

[201] Hillion, C. 2016. Overseeing the Rule of Law in the EU Legal Mandate and Means. In: Closa, C. and Kochenov, D. (edit*.) Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p 66
[202] ibid.
[203] ibid. p. 67
[204] Historically, the choices the European Community made on the accession of autocratic states like Franco's Spain or the Kingdom of Morocco expressed the shared community values. See Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 26
[205] ibid. 68

standards as it has done in the past with the General Principles of EU law, without having specific foundations in primary law[206].

However, when linking the rule of law as a value to the General Principles, which also constitute the basis of the Charter, one should keep in mind that they are applicable only when MSs are implementing Union law (Article 51(1) of the Charter). This would mean that the Court would either have to make a distinction between values applicable to MSs in general and when they are implementing EU law or revise the scope of "implementing EU law"[207]. It is true though that a strict interpretation of this notion leads to the paradox that for example, a possible reintroduction of the death penalty in a MS would allow the invocation of the according prohibition provided in Art. 2(2) of the Charter only when that MS is acting in the scope of EU law[208]. Thus, it appears that this relationship should be interpreted in a way that rather improves the coherent application of the values of Article 2 TEU throughout the Union and not strip the Charter of its effectiveness. Still, this goes back to the scope of Article 2 TEU and the principle of conferral as it can be argued that the values of EU law as expressed in this Article are there only for MSs and EU institutions, to adhere to them when they act within the limits of the powers conferred to them by EU law[209].

On this note, it has been suggested by the EP in its Resolution on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, that the Commission may build systemic infringement cases based on Art. 2 TFEU by incorporating several infringement cases together[210]. This shall be based on the findings included in an annual report, which will incorporate data from the FRA, the Council of Europe and other relevant institutions[211].

This idea was originally conceived and put forward by Kim Lane Scheppele (professor at Princeton University and specialist of Hungarian constitutional law). She commented that the Commission's choice to address the lowering of retirement age of Hungarian judges, through an infringement proceeding based on the Employment Directive[212] is taking away from its political character, since the decision of Hungary was primarily affecting the independence of the judiciary and despite the Commission winning the case before the CJEU, the Hungarian government was able to avoid restoring the judges back to their posts, but rather offered them compensation[213]. Were the Commission to take the route of systemic infringements it would be able to demonstrate how specific

[206] ibid. p. 69
[207] ibid. p. 70
[208] ibid. p. 71
[209] Konstantinides, T. 2017. The Rule of Law in the European Union; The Internal Dimension. Portland: Hart Publishing, p. 165
[210] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)) , Article 10 available at: https://www.europarl.europa.eu/doceo/document/TA-8-2016-0409_EN.html
[211] ibid.
[212] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
[213] Scheppele, K. L. 2016. Enforcing the Basic Principles of EU Law through Systemic Infringement Actions, In: Closa, C. and Kochenov, D. (edit*.) Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p 109

cases form part of a larger rule of law issue. These individual infringements would be presented as evidence for the existence of a threat to judicial independence and therefore to the rule of law[214].

This approach would identify patterns in many fields of law, which would point to a specific practice on the part of a MS against the values of the EU[215]. This would not be the first time the Commission does not treat certain behaviors individually and independently but rather as symptoms of a larger motif taking into account the C-491/01 Commission v. Ireland case and the concept of general and continuous failure to fulfill obligations[216]. The systemic infringement procedure could also be enhanced by the use of other proceedings like interim measures or accelerated proceedings, which would turn it quite effective, while keeping in mind the possible application of Article 260 TFEU and the suspension of EU funds for MSs failing to comply with a systemic infringement judgment[217].

Nevertheless, reflecting upon this ambitious doctrinal basis for bundling violations of EU law, one should not fail to note the possibility that the CJEU may decide that the specific procedure of Article 7 TEU precludes the use of the infringement procedure in these cases. This is based on the presumption that Art. 2 TEU is to be perceived as a lex specialis to Art. 7 TEU, since the latter specifically refers to the former and in that sense, legal actions outside this framework could not be allowed[218].

On the other hand, this approach does not seem to have a basis in the Treaties and could be considered to interfere with the institutional balance of the Union (Article 13(2) TEU), in a sense that it unjustifiably limits the overseeing powers of the Commission[219]. Moreover, it is maintained that limiting the rule of law mechanism to Art. 7 TEU would seriously impede the aim of the promotion of the values of the EU, considering that the infringement procedure makes intervention possible at an earlier stage before the breach becomes serious and persistent[220]. Following that, it should be noted that the two branches of the rule of law mechanism of the Union can be viewed as complementary, considering that the Art. 258 TFEU procedure should be able to tackle any failure of a MS to comply with EU law, whereas Art. 7 TEU addresses only a serious and persistent breach of the rule of law (and generally of the values of Art. 2 TEU for that sake). Similarly, at a sanctions level, Art. 258 TFEU imposes a judicial sanction, which might induce the imposition of a lump sum or penalty payment, while the "stricto sensu" mechanism of Art. 7 TEU may lead to political sanctions of

[214] ibid. p. 117
[215] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 20
[216] Christianos, V., Papadopoulou, R.E., Perakis, M. 2021.*Introduction to European Union law*, 2nd edition. Nomiki Bibliothiki: Athens, p. 210
[217] ibid. pp. 22-23
[218] Kochenov, D. and Pech, L. 2015. "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review*. Vol. 11: p. 520
[219] Hillion, C. 2016. Overseeing the Rule of Law in the EU Legal Mandate and Means. In: Closa, C. and Kochenov, D. (edit*.) Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p 72
[220] ibid. p. 73

suspension of the particular MS's rights aiming at isolating it in order to protect the functioning of the Union[221].

Other than the doctrinal issues that emerge from the possible use of Art. 2 TEU as a basis for an infringement case before the CJEU, the operation of this procedure by the Commission in practice, has put emphasis on its limits. As it has been mentioned before, the Commission chooses to launch only a small portion of the possible infringements and more importantly, when it does so it shows determination in negotiating (without public disclosure) the problems with the MS concerned and resolving it at the earliest stage possible[222]. It approaches the procedure having a rather narrow view of the EU acquis, in a way that deprives it of its meaning, framing cases based on specific violations of secondary law[223]. More specifically, when infringement actions are limited to direct violations of the acquis, the fact that these specific violations most likely constitute symptoms of a larger systemic problem, is overlooked[224]. Similarly, the complexity of the procedure makes it cumbersome and slow allowing for an impairment of the situation of the MS in question in the meantime[225]. The characteristics the procedure has deployed, could lead to the conclusion that they only exist to conceal the Commission's unwillingness to bring out the issue of federalisation and question the MS's competence to structure their proper institutions[226]. As a result, the Commission has fixated on technical violations in cases of MSs with serious constitutional deficiencies prevailing and has failed to set the proper priorities in the use of 258 TFEU[227].

[221] ibid.
[222] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 46
[223] ibid.
[224] ibid. p. 47
[225] ibid.
[226] ibid. p. 60
[227] For example, it used the infringement procedure against Hungary because it failed to properly impose the VAT taxation, while at the same time the Venice Commission warned about the impairment of constitutionalisation in the country. See supra note 203 at: p. 62

Paragraph 3. Judicial Independence as a moving force of the EU Rule of Law Mechanism

The imperative of judicial independence is essential to the right to a fair trial and therefore it is important that it be incorporated in administrative practices and for such matters to be open to judicial review[228]. Article 47 of the Charter provides that the right to a fair trial is guaranteed only through an independent and impartial tribunal. However, even before the adoption of the Charter the CJEU had applied the requirement of judicial independence as a part of the right to effective judicial protection as a general principle of EU law, expressed in the common constitutional traditions of MSs.

Judicial independence is considered to have a dual expression; external and internal. External judicial independence means that the judges as a body and as individuals have to be able to exercise their duties autonomously, without external interventions, whether that may be pressure from the executive power or a hierarchically higher judge/president of the court[229]. The internal aspect has to do with the impartiality and objectivity of the judge. Both need to be guaranteed by an appropriate statutory framework which ensures that the conditions of appointment of judges are inviolable, that the principle of irremovability of judges is safeguarded[230], that the grounds for the dismissal of judges are sufficiently precise and consistent with the principle of legal certainty, that the decisions of the judiciary are binding and that their remuneration is proportionate to the importance of their work in order to protect them from attempts of corruption[231].

In general, it is true that in cases where EU law does not have specific provisions concerning the procedure of protecting rights granted by it, the burden falls on the MS to establish appropriate procedural rules according to the principle of procedural autonomy. Still, they have to abide by the principles of equivalence (the MS's procedural rules cannot be less favorable than those governing similar situations of domestic law) and effectiveness (they cannot make it excessively difficult or impossible in practice to exercise the rights conferred by EU law). Those principles are a direct effect of the general obligation of the MSs to ensure the protection of the rights their citizens have under EU law, according to Article 19 (1) TEU. Besides, MSs' courts are not only courts of national law, since they are called to also apply EU law and therefore, they constitute a keystone in protecting the EU rule of law and ensuring respect for community law through the principles of primacy, direct effect, consistency of interpretation and state liability[232].

In the Johnston Case, the Court made it clear that the requirement of independence is crucial for safeguarding the rights of individuals in the context of EU law. M. Johnston challenged the

[228] Adam, S. 2019. Judicial Independence as a Functional and Constitutional Instrument for Upholding the Rule of Law in the European Union. In: Craig, P et al. *Rule of Law in Europe Perspectives from Practitioners and Academics*. European Judicial Training Network. Available at: https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/ p. 17

[229] ibid. p. 18

[230] Exceptions to the irremovability of judges have to be subject to the principle of proportionality and any disciplinary regimes concerning judges must have guarantees that they will not become a tool of political control over the judiciary. See supra note 161urts at p. 21

[231] Members of the judiciary may be at the receiving end of negative measures concerning their remuneration, which at all events have to be justified by a legitimate objective and be proportionate to that objective. See supra note 161, at p. 23

[232] Lenaerts, K. 2019. Overview of the Case Law of the Court of Justice of the European Union with Respect to the Rule of Law. In: Craig, P et al. *Rule of Law in Europe Perspectives from Practitioners and Academics*. European Judicial Training Network. Available at: https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/ p. 72 See also European Parliament Report A6-0224/2008 of 4.6.2008 on the role of the national judge in the European judicial system (2007/2027(INI)) Committee on Legal Affairs Rapporteur: Diana Wallis, p. 58

decision of the competent Irish administrative authority not to renew her contract as a full-time police reserve and to allow her to participate in arms-training, on the basis of discrimination based on gender, considering that domestic law allowed only males to carry firearms. This national provision was considered to be justified on the basis of the protection of public safety and order. What is more, an act based on that provision was not reviewable before courts as it was considered a priori justified hence, the domestic rule compelled the court to accept the difference in treatment and the justification by an administrative authority. The CJEU, responding to a preliminary request of the Industrial Tribunal of Northern Ireland (based on Art. 177 EEC, today's art. 267), concluded that this constituted an obstacle to the right to effective judicial protection against unequal treatment on the basis of art. 6 of Directive 76/207[233] on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which was applicable in this situation[234].

The requirement of judicial independence as a prerequisite for effective judicial protection, which became settled law, was further explored in the El Hassani Judgment of the CJEU. The Case considered the provision of a right to appeal against a decision rejecting a visa application[235]. The Polish national law did not provide a remedy against such a decision before administrative courts and a refusal by the Consul (the competent national authority) was only subject to review before the same Consul. The Court held that considering that the Visa Code constitutes EU law, the Charter, and therefore Art. 47 therein, concerning judicial independence, was applicable[236]. On that note, it recalled that judicial independence in the context of EU law demands that the judiciary act as a third party in relation to the authority which adopted the contested decision, which was not the case with the Polish national law[237].

One must not fail to observe the importance of judicial independence specifically in the light of the preliminary request mechanism, as it is a basic prerequisite for the uniform interpretation of EU law. It is necessary for national courts to be independent and impartial when there emerges a need to refer a preliminary question to the CJEU. When a national court has doubts as to how an EU law provision should be interpreted it has the ability or rather the obligation to refer a preliminary question to the CJEU. The CJEU in its 2/13 Opinion on the accession of the EU to the ECHR, explained that the preliminary ruling procedure is not only a tool of consistency in EU law, but also at the core of the

[233] Article 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

[234] ECJ Case 222/84, Judgment of the Court of 15.05.1986, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para. 20

[235] This right was provided for by Art. 32(3) of the Visa Community Code (Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas) according to which: Applicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State.

[236] CJEU Case-403/16, Judgment of the Court of 13.12.2017, *Soufiane El Hassani v Minister Spraw Zagranicznych*, ECLI:EU:C:2017:960, para. 37

[237] ibid. para. 40

autonomy of the EU legal order[238]. Therefore, this procedure is crucial for the protection of the rights conferred on individuals by EU law and forms part of the toolbox of the EU in protecting the rule of law within the Union.

National procedural rules cannot limit the powers and obligations domestic courts derive from Article 267 TFEU. When for example there is a pending case before a court of first instance for the second time after it has been appealed by a higher court, the same court must be able to refer a preliminary question to the CJEU, even if it is bound by the decision of the higher court by national law, otherwise, its autonomous jurisdiction conferred by Article 267 TFEU would be challenged[239]. The establishment of a proceeding against a decision to refer a preliminary question is not precluded by EU law, however the referring court alone must decide on amending or withdrawing the preliminary reference. By the same token, the CJEU has declared national proceedings that do not allow a chamber of a court of final instance to address a preliminary reference when it does not agree with the decision of the plenary session, unless it refers that question to its plenary session, are incompatible with EU law[240].

[238] CJEU, Opinion 2/13, Opinion of the Court of 6.2.2014, *Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties,* ECLI:EU:C:2014:2454, para. 176

[239] Adam, S. 2019. Judicial Independence as a Functional and Constitutional Instrument for Upholding the Rule of Law in the European Union. In: Craig, P et al. *Rule of Law in Europe Perspectives from Practitioners and Academics*. European Judicial Training Network. Available at: https://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/ p. 29

[240] CJEU C-689/2013, Judgment of the Court 5.4.2016, *Puligienica Facility Esco SpA (PFE) v Airgest SpA*, ECLI:EU:C:2016:199, para. 36

Conclusion

It is evident that the judicial scheme of enforcement of EU law embedded in the Treaties is not an entirely indifferent mechanism when it comes to protecting the values of the Union. The classic infringement actions of Article 258 TFEU are a procedure with a strong administrative character, programmed to ensure the application of the EU acquis. Thus, their connection to the concept of the rule of law is mostly through the principle of legality, as its main purpose is to ensure that MS's actions comply with the letter of the Treaties. However, it has been argued both by different scholars and by EU institutions that this provision can become a sort of constitutionality control of the MS's behavior based on Article 2 TEU. The actions of the MSs may be brought before the CJEU and challenged for their compliance with the values of the Union. This suggestion however, hits a doctrinal wall if one brings up the need for a substantially specific EU law provision that the MS's behavior will be measured against but also the presumption that Article 2 TEU is a lex specialis to Article 7 TEU therefore it cannot be used for the purposes of the infringement procedure. These arguments can be curbed by claiming that there no provision in the Treaties that limits the jurisdiction of the CJEU for those matters (like there is for the CFSP) or that viewing Art. 2 TEU as a lex specialis would seriously limit the rule of law toolbox of the Union. These assumptions are mostly backed though by the recent case law of the CJEU, which used the infringement proceedings against Poland to enforce the basic values of the EU rule of law. Although, for that to happen, it needed a precedent which led the way for EU law to be linked through Article 267 TFEU and the preliminary ruling procedure with the national legal orders and the independence of their judiciary.

Part B

The effectiveness of the EU Mechanism in the Rule of Law Backsliding in Recent Years

Chapter I. Recent Cases of Rule of Law Backsliding in the EU and the Role of the Stricto Sensu mechanism

The EU is based on a specific set of values, i.e. the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights and for a third European state to become a MS of the EU it has to adhere to those values. They are stemming from the common constitutional traditions of the MSs and in theory they are one of the main elements that bind European states together in the frame of a supranational legal order. Their upholding is a goal set for both the EU and individual MSs and it is achieved, partly, via the rule of law mechanism as it has been described thus far. In order to better understand their full spectrum it is important to examine the situations under which they are deemed to be threatened and in need of protection by said mechanism.

Paragraph 1. The historic roots of the problem

During the past decade, legislative reforms in Hungary and Poland have caused unrest in the EU since they have been viewed as colliding with the rule of law standards of the Union. This situation, known as 'rule of law backsliding', has not been formally defined even though this notion has been used in EU official documents[241]. It begins with the society losing trust in the governing powers for reasons that have to do with a rise in unemployment and inequality combined with a crisis in the party system[242]. This leads to the election of a new government with a radical approach, which utilizes the concept of the 'will of the people' and moves quickly to neutralize cells of resistance in the system focusing on the independence of the judiciary and of the media[243]. They more often than not turn against civil society and make an effort to change the election laws in order to maintain power[244]. As a result, voters are left with few means of resistance considering that the democratic and constitutional system has been tampered with[245]. Eventually, emerges a democratically elected

[241] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 6
[242] Ibid.
[243] Ibid. p. 7
[244] Ibid.
[245] Ibid.

government, which aims at weakening the checks and balances of the system in order to dismantle the democratic liberal governance and replace it with a long-term ruling of the dominant party[246].

Even though significant rule of law problems have emerged throughout the Union, due to some MSs' corruption-weakened judiciary and their systems being challenged by serious budgetary problems, the cases of Hungary and Poland should be treated differently. This is because their 'rule of law crisis' was a deliberate route of governance inspired by the Russian model of 'managed' democracy, as Jan-Werner Müller has suggested, aiming at maintaining a democratic façade through regular elections, while at the same time ensuring that a change, an overthrow of the government, will be all but impossible via debilitating the institutional checks and balances[247]. In essence, there is a distinction to be made between a MS which has achieved the rule of law and is now in a process of deconstructing it and a MS which was finding it difficult to achieve it in the first place[248].

The words of the Hungarian Prime Minister (who has been in power since 2010) accurately describe the direction the MS has taken the past decade. More specifically, he has described the Hungarian state as 'an illiberal state, a non-liberal state, which would not reject the fundamental principles of liberalism such as freedom and would not make this ideology the central element of state organisation, but instead includes a different, special, national approach'[249]. Their government achieved a fundamental revision of the constitutional order in Hungary, which altered the rather successful transition from communism to a system of liberal democracy, towards a semi-authoritarian regime, which systematically undermined the rule of law[250]. It is important to examine whether the illiberal democracy established in Hungary constitutes either a clear risk of a serious breach or a breach of the values of Article 2 TEU.

One of the most prominent examples of the character the Hungarian constitution has deployed is the distinction in its preamble between Hungarians, and "the nationalities living with us" which are part of "the Hungarian political community" but not of the nation, which is a quite explicitly nationalistic concept[251]. In 2013, the Hungarian Parliament adopted a "Fourth Amendment" to its constitution, which introduced limitations to the independence of the judiciary, enhanced governmental control over universities, allowed political prosecution, criminalized homelessness, put obstacles to the exercise of freedom of religion and generally imperiled human rights[252]. Moreover,

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[246] Ibid.

[247] Bugarič, B. 2016. Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union.* Cambridge University Press. p. 87

[248] See supra note 239 at: p. 8

[249] Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad, Romania), available at: https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/

[250] Bugarič, B. 2016. Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p. 82

[251] "Editorial Comments: Hungary's new constitutional order and 'European unity'". 2012. *Common Market Law Review*, Vol. 49 Issue 3, pp. 874 available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/49.3/COLA2012033

[252] Bugarič, B. 2016. Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p. 89

the Hungarian government introduced a two-thirds majority in the Parliament for legislation on 'critical' topics, the president of the Supreme Court was dismissed prematurely, the electoral law was reviewed in a way that would make it difficult for any other party than the dominant to win the election, introduced a Regulatory Authority in media law which provided for high penalties for journalists and editors and catered for an overall nationalist governance against minorities particularly Roma communities[253].

What brought the most unease was the amendment of Articles 12 and 19 of Hungary's Fundamental Law, which restrained the power of the Constitutional Court, making the rule of law suffer a serious blow. These amendments essentially repealed all decisions made by the Court before the new Hungarian Constitution entered into force making it impossible for any previous precedent to be invoked in new cases based on the constitution[254]. They also limited the Court's jurisdiction to only procedural review of new amendments, preventing from reviewing their substance as regards conflicts with constitutional principles[255].

The newly found Hungarian constitutional order was faced with strong criticism within the EU especially in the report of 24 June 2013 adopted by the European Parliament (Tavares Report[256]) on the situation of fundamental rights in Hungary (pursuant to the European Parliament resolution of 16 February 2012). In this report, the EP made a suggestion, which has then been repeated, to create an independent mechanism to monitor the situation in Hungary and as it has been mentioned, proposed the creation of a 'Copenhagen Commission', which would be a body of experts with a purpose to assess the continuous compliance with the Copenhagen criteria[257]. This body would submit recommendations to the EU institutions and the MSs on ways to combat the situation and avoid any deterioration[258]. Moreover, in its 2015 Resolutions[259] the EP was vocal about the deterioration of the rule of law situation in Hungary, calling attention to the Hungarian legislation concerning asylum seekers and refugees, policies which undermined the rights of minorities (including Roma, Jews and LGBTQI+ persons), the independence of the judiciary and of other institutions and to corruption allegations[260]. The attacks on academic freedom through the restriction of the Central European University and on civil society, which incurred in 2017, were only the continuation of the situation established in the Resolutions of the Parliament[261].

On that note, it is important to refer to the Hungarian legislation, which ignited much criticism and was thought to be interfering with the independence of the judiciary. The Transitional Act, an explicatory supplement to the constitution, provided the lowering of the retirement age for judges

[253] Lichtenberger, E. 2016. The Rule of Law in European Policy: A Parliamentarian's View, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 49
[254] Ibid.
[255] Ibid.
[256] Named after Rui Tavares, the Portuguese MEP, who was the rapporteur
[257] Ibid. p. 90
[258] Ibid.
[259] Of 10 June and of 16 December
[260] European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) (2017/C 399/13), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015IP0461 points F and G
[261] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 17

from 70 to 62 years, which led to the retirement of 274 judges and public prosecutors[262]. Among the judges who would have to retire, most were presidents of the courts and were responsible for assigning cases. This not an entirely novel practice of intervention of the executive power in the judiciary as history shows. In 1963, the de Gaulle administration proposed a reform of the French Conseil d' État. It included the obligation for Counselors of State to retire upon reaching 65 years, reducing the 70-year age limit[263]. This obviously created a suspicion at the time in the circles of constitutional and administrative law theorists, concerning the ability of the government to retire judges opposing it, thus doubting the separation of powers[264].

However, the Hungarian government was not left untenable in this debate, considering they could validly bring up examples of other European jurisdictions, which were akin to the institutional amendments it had proposed[265]. For instance, the German federal judges are elected by a body consisted of political delegates without representation of judges, therefore, in this sense it is difficult to condemn the Hungarian proposal providing for an independent President of the National Office for the Judiciary elected by the Parliament (with a two-third majority) with a competence of appointing judges[266].

Following the general elections, on 19 November 2015, the Sejm (the lower house of the Parliament of Poland), through an accelerated procedure, amended the law on the Constitutional Tribunal, introducing the possibility to annul the judicial nominations made by the previous legislature and to nominate five new judges. On 25 November 2015, the Sejm passed a motion annulling the five nominations by the previous legislature and on 2 December nominated five new judges.

The results of Polish legislative elections in the fall of 2015 lead to the PiS (Prawo i Sprawiedliwość, Law and Justice) party seizing power and moving forward with amendments, which caused significant turmoil In the EU and lead the Commission to take action according to the rule of law framework it had issued a year earlier. Following the general elections, the Sejm amended the law on the Constitutional Tribunal through an accelerated procedure and made it possible to essentially annul the judicial nominations of the outgoing legislature and nominate five new judges[267].

The Constitutional Tribunal was occupied by the matter and proceeded to deliver two judgments on the 3 and 5 December 2015, in which it ruled that the previous legislature of the Sejm was in fact entitled to nominate the three judges whose terms expired on the 6th November 2015. Accordingly, it held that the nominations by the new legislature had no legal basis, as three judges had

[262] Bugarič, B. 2016. Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p. 95

[263] Burin, F. S. 1966. "Executive power and the Rule of Law in the Fifth French Republic", *Social Research*. Vol. 33, No. 3: p. 425

[264] Ibid.

[265] Badó, A. and Bóka, J. 2016. Access to Justice and Judicial Independence: Is there a Role for the EU?. In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation.* Portland: Hart Publishing. p. 49

[266] Ibid.

[267] European Commission, Brussels, 20.12.2017 COM(2017) 835 final 2017/0360 (NLE) Reasoned Proposal in Accordance with Article 7(1) of the Treaty of the European Union Regarding the Rule of Law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law p. 3

already lawfully been nominated by the previous one[268]. On 22 December, the Sejm adopted new legislation concerning the functioning of the Tribunal as well as the independence of its judges, which was found to be unconstitutional by the Tribunal[269]. This decision was not published in the Official Journal; therefore, it had no legal effect. Failing to publish unwelcomed decisions of the Constitutional Tribunal has been a regular practice on behalf of the government. Moreover, in late 2015 and early 2016, the Sejm proceeded to adopt a number of sensitive laws through an accelerated procedure, which concerned media law, a new Civil Service Act and the police[270].

This turn of events led the Commission to initiate the procedure of the rule of law framework it had presented with its above-analysed 2014 communication, by carrying out a preliminary assessment of the situation[271]. The Polish government failed to ease the Commission's rule of law concerns leading to the adoption of a Recommendation by the Commission in July 2016 with which it gave Poland three months to implement its five concrete recommendations[272]. On the other hand, Polish authorities preferred to question the validity of the rule of law framework, rather than cooperate with the Commission, threatening to bring the Recommendation and the (formal) Opinion, which preceded it, before the Court based on an action for annulment[273]. However, these acts of the Commission obviously are not strictly speaking legally binding acts. Their compelling force is rather found on the duty of sincere cooperation. On the 22 July 2016, the Sejm adopted a new law on the Constitutional Tribunal, which was deemed to be unconstitutional by that same tribunal on the grounds of the separation of powers, the independence of the judiciary and the principle of integrity and efficiency of the public institutions[274].

Under those circumstances, the Commission had to issue a complementary Recommendation. The fact that the Polish government continued to undermine the Constitutional Tribunal and as a result its ability to provide efficiently a constitutional review of legislative acts, aggravated the Commission's concerns[275]. On that note, the new laws adopted which gave the government more power over the functioning of the Tribunal along with the unusual appointment of a new president confirmed the rule of law violations[276]. The Polish administration, faithful to its patterns, once more refused to publish the decision of the Constitutional Tribunal, which found the law of 22 July to be unconstitutional[277].

The reform of the Polish justice system continued and led the Commission to issue a third Recommendation on 26 July 2017. New laws introduced by the Sejm provided further amendments

[268] Ibid.
[269] Ibid. pp. 3-4
[270] Ibid.
[271] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 11
[272] Ibid.
[273] Ibid. p. 12
[274] See supra note 266 at: p. 6
[275] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 13
[276] Ibid.
[277] European Commission, Brussels, 20.12.2017 COM(2017) 835 final 2017/0360 (NLE) Reasoned Proposal in Accordance with Article 7(1) of the Treaty of the European Union Regarding the Rule of Law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law p. 7

concerning the National School of Judiciary[278], National Council for the Judiciary, the Ordinary Courts and the Supreme Court, demanding the dismissal and forced retirement of all Supreme Court judges, except those designated by the Minister of Justice[279]. These legislative choices allowed further interference of the administration in the judiciary, essentially giving them the power to fire and appoint judges at all levels of the system[280]. Although public unrest delayed their enforcement, Polish officials were committed to reintroduce the laws[281].

The Commission found the condition of the rule of law in Poland to be deteriorating. In particular, it pointed out that the recomposition of the Constitutional Tribunal through the unlawful appointment of a new President and of three judges of that Court, and the inability of the lawfully nominated judges by the previous legislation to take their function since 2015, had as a result the inadequacy of this Tribunal in its role of constitutionality observer due to its evident lack of independence. The aforementioned laws on the Supreme Court, the National Council for the Judiciary, the Ordinary Courts and the National School of Judiciary were considered by the Commission to "aggravate the systemic threat to the rule of law and to raise serious concerns as regards their compatibility with the Polish constitution"[282].

The law on the Supreme Court lowers the general retirement age of judges from 70 to 65 years old. This measure was meant to apply to all judges at office at the time forcing to retirement all those who had reached 65 or would reach the age limit within three months of the entry into force of the law[283]. This would result in 31 of 83 judged of the Supreme Court to retire and by that seriously affecting the irremovability of judges, which is an important part of the principle of judicial independence[284]. Evidently, the Polish government used the same measures the Hungarian administration had previously employed. It therefore constitutes a very efficient means of capturing the judicial power, considering that the retirement of these judges would lead to vacancies filled by judges appointed by the President of the Republic, on a recommendation by the newly composed National Council for the Judiciary, which was similarly influenced by political powers[285]. More importantly, the President of the Republic was offered the discretion to decide on the prolongation of the active mandate of judges of the Supreme Court, without any specific criteria[286]. Furthermore, this law introduced a new procedure named the extraordinary appeal, which would allow the Supreme Court to overturn any decision of a Polish Court of the last 20 years, including judgments of that same Court, raising concerns regarding the principle of legal certainty[287]. It also had an effect on the disciplinary procedures of the Supreme Court, leaving space for interference of the President of the Republic even in this field, allowing them to appoint a disciplinary officer other than the disciplinary officer of the Supreme Court[288]. Correspondingly, procedural guarantees for judges being investigated

[278] Ibid. p. 9 point (45)
[279] Ibid. pp. 10 points (43), (44), (49)
[280] See supra note 273 at: p. 15
[281] Ibid.
[282] See supra note 275 at: p. 11 points (1)-(4)
[283] Ibid. p. 21
[284] Ibid.
[285] Ibid.
[286] Ibid. p. 24
[287] Ibid.
[288] Ibid. p. 26

for a disciplinary offense were constrained[289]. The lowering of the retirement age was again used in the law concerning the Ordinary Courts, reducing the age limit from 67 to 60 for female and form 67 to 65 for male judges[290].

What is worth mentioning is that these amendments to the judicial system by the new Polish legislature were considered to be incompatible with the Polish constitution, not only by the Commission, but by the Constitutional Tribunal itself. On the other hand, Hungary did not have to violate the constitution in order to create an illiberal state as it had the ability (or the supermajority in the legislative branch) to amend the constitution every time it wanted to proceed with an action that could possibly be challenged on a constitutionality basis[291].

[289] Ibid.
[290] Ibid. p. 31
[291] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 21

Paragraph 2. The effectiveness of the Article 7 mechanism in the cases of Hungary and Poland

The deeply problematic turn the Hungarian governance took through new legislation and constitutional amendments were at least a warning sign of a violation of the values of the EU on behalf of that MS. However, it was not until 2018 that an EU institution took action based the Article 7 TEU mechanism. The European Parliament took a step forward, relying on the powers conferred upon it by Art. 7(1) TEU, so that the Council would eventually examine whether Hungary was culpable of being at a clear risk of a serious breach of the values of Art. 2 TEU[292]. It rather took a long time considering that the suspicious structural changes in that MS had been happening for some time. It has been argued that the European People's Party (EPP), the center-right coalition with the majority of seats at the Parliament, of which the Hungarian governing party formed part, had been reluctant to take action regarding the situation and halted the activation of the mechanism[293]. Before that, the EP had indeed been the most vocal of the EU institutions concerning the rule of law backsliding in Hungary, when it adopted the Tavares Report[294], which was met with little action on behalf of the other institutions[295]. The immediate response from the Hungarian administration to the Report was rather hostile, adopting a (national) Parliament resolution, which considered the EP's action a discrimination against Hungary, until it was pressured to make some mild changes[296].

As the situation continued to deteriorate the EP called for action by the Commission with its 2015 Resolution, seeking for the rule of law framework, which was essentially tailored for Hungary, to be activated[297]. Interestingly enough, the Parliament referred to the necessity of proof of the EU's political willingness to protect its founding values[298]. This perhaps is a testament to the characterisation of the Article 7 TEU mechanism as a nuclear option being rather misleading, especially as far as its preventive arm is concerned, and it all comes down to sheer political will of both the EU institutions and the MS. Nevertheless, the framework was never activated against Hungary. At first, the Commission justified its inaction by claiming that Hungary had always been open to a constructive dialogue with the EU institutions[299]. This however was untrue considering the

[292] The proposal, approved by 448 votes to 197, saw a clear risk of a serious breach of the EU founding values in Hungary, specifically regarding the judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees in that MS.
See European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html

[293] Bugarič, B. 2016. Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p. 90

[294]Previously, it had adopted resolutions in 2011 and 2012 criticising Hungary's constitutional amendments and media law

[295] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 26

[296] Halmai, G. 2018. The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States. European University Institute Department of Law, EUI Working Paper LAW 2018/06, available at: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Halmai-2018-Hague_Journal_on_the_Rule_of_Law.pdf p. 3

[297] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 17

[298] Ibid.

[299] Ibid. p. 19

defiant reaction of the Hungarian government when the Commission opened an infringement procedure against the so-called Lex-CEU[300]. Still, in the context of the Article 7 TEU mechanism it is unclear whether there is, if any, hierarchy between the competent EU institutions, in its triggering making the EP's request of the Commission less defendable. On that note, it should be noted that the adoption of a new instrument in the prevention and remedy against the rule of law backsliding in the EU was a determined effort by the Commission to respect its role as guardian of the Treaties. On the other hand, the Council has been proven to be less willing[301].

The activation of the mechanism for Hungary came eight years after the commencement of the systemic amendments, which defied the 'constitutional order' of the Union. However, the EP's long due initiative mobilized the progression of the situation, giving the Council the chance to find whether there exists a clear risk of a serious breach of the values of Art. 2 TEU. The Reasoned Proposal for the activation of the preventive branch of the rule of law mechanism annexed to the Resolution of 12 September 2018 expressed the concerns of the Parliament over the situation in Hungary. It cited various reports by the Venice Commission and the UN Human Rights Committee regarding the lack of transparency of the constitutional amendments process and the subsequent weakening of the national checks and balances[302]. Moreover, it made note of the limitations of the competences of the Hungarian Constitutional Court and the restriction of the constitutional complaint procedure[303]. The attacks on judicial independence and the independence of other institutions like the Data Protection Commissioner were further worrying signs concerning Hungary's compliance with the standards of the rule of law, which were also confirmed by the jurisprudence of both the CJEU and the ECtHR[304].

The OSCE (Organization for Security and Cooperation in Europe) Office for Democratic Institutions and Human Rights report (to which the EP Resolution referred) concluded that the limited transparency of the election campaign spending was contrary to international obligations and undermined the voter's right to make an educated choice with their vote[305]. Furthermore, the EP used evidence provided by OLAF (European Anti-fraud Office) which revealed serious irregularities and conflicts of interest in important infrastructure projects[306]. It also based its reasoning on the dangerous developments in the areas of freedom of expression and academic freedom, especially the constriction of foreign universities operating in the country[307].

The Hungarian Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, which reduced the number of recongised churches and the subsequent amendment to the Fundamental Law to grant the Hungarian Parliament authority to select religious communities for cooperation were used as grounds

[300] Ibid. p. 20
[301] Ibid. p. 21
[302] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html p. 5
[303] Ibid.
[304] Ibid. pp. 7-8
[305] Ibid. p. 8
[306] Ibid. p. 9
[307] Ibid. p. 12

for the reasoned proposal as well, based on the infringement of the freedom of religion[308]. Moreover it considered that the legislative practice of linking foreign funds with NGOs as recipients with illegitimate purposes such as money laundering and the discourse presenting said organizations as foreign agents were impeding the freedom of association, considering that the same concerns were expressed by the several Rapporteurs of the UN and the UNHCR[309]. The Reasoned Proposal also addressed concerns regarding the rights of persons belonging to minorities, including Roma and Jews and their protection against hateful statements against such minorities as well as the right to equal treatment[310]. Similarly, the conditions surrounding Hungarian practices around its asylum system had raised concerns about its treatment of refugees which were expressed by the UNHCR[311]. Therefore, the European Parliament using information provided by sources enumerated by the 2003 Communication of the Commission which are to be considered when assessing the rule of law situation in MSs, based its proposal on the failings of Hungary to observe the imperatives of checks and balances when it tampered with its constitution, the independence of its judiciary and the standards of its democracy as well as the fundamental rights not only of Hungarians but of persons residing voluntarily or not in Hungary.

This action by the EP did not stop the Hungarian administration from proceeding to enhance its policy of 'capturing' the judicial power via a new law on administrative courts[312]. Moreover, it introduced a procedure, which allowed government officials to take any decision of an ordinary court to the politically conditioned Constitutional Court to overturn that decision[313]. Therefore, the activation of the mechanism had no immediate practical return, making it at least for now, ineffective. What is worth noticing, is that despite the activation concerned only the first part of the mechanism, the so-called preventive arm, introduced with the Nice Treaty, it still took a surprisingly long time just to set it forth. This is partly due to the high voting threshold demanded by the Treaties since according to Article 354 TFEU "for the purposes of Article 7 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members". As it has been mentioned, another reason for this serious procrastination could be traced back to political affiliations not allowing the EP to enact its full institutional potential.

On the other hand, in the case of Poland, the Commission took that step somewhat earlier, by setting forth the Rule of Law Framework it had initially created for Hungary. After having completed multiple cycles of fruitless dialogue with the Polish Authorities and four Recommendations the Commission issued, in December 2017, a reasoned Proposal for a Decision of the Council on the Determination of a Clear Risk of a Serious breach of the rule of law by Poland according to the first paragraph of Article 7 TEU[314]. However, as during that time of dialogue and recommendations the

[308] Ibid. p. 13
[309] Ibid. pp. 14-15
[310] Ibid. pp. 16-20
[311] Ibid. p. 20
[312] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 39
[313] Ibid.
[314] Halmai, G. 2018. *The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States*. European University Institute Department of Law, EUI Working Paper LAW

Commission did not even attempt to start the corrective arm of the mechanism, the Polish Government had the time and ease to proceed with its judicial reforms without any obstacles by the EU institutions whatsoever[315]. This choice by the Commission could only be attributed to its attempt to find political support in the Council in order to move forward with the Article 7 TEU mechanism[316]. Nevertheless, such a choice by the Commission might be considered to be unwise, keeping in mind its role as an independent institution that was designed specifically that way in order to be able to take difficult decisions like in this case[317]

The results of the use of the Framework in the case of Poland brought forward its weaknesses. As it has been mentioned before, this structure employed by the Commission to resolve the structural weaknesses of MSs was mostly based on a discursive approach on the presumption that a constructive dialogue with the MSs concerned would have a positive outcome[318]. This hypothesis, could not lead anywhere and more so in the cases where the MS deliberately and openly undermined the rule of law[319]. The fact that the recommendations the Commission had issued were not legally binding and that the triggering of the Article 7 TEU mechanism was up to its discretion, quite obviously, left much room to the Polish government, and to any administration breaching the rule of law, to continue with its policies almost undisturbed. The use of the framework came to be a procrastination as regards the activation of the 'preventive' arm of Article 7 TEU and therefore allowed the Polish administration to dismantle its Constitutional tribunal and Supreme Court as well as its Ordinary Courts in the meantime. Furthermore, as the case of Hungary demonstrated, the Commission and the tools it had at its disposal were not enough to reinstate discharged judges or restore civil society organisations[320].

Therefore, the utility of the Framework was undermined by the way the Commission used it. Initially it was a tool to be "activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law"[321]. It aimed to bridge the gap between the infringement procedure and the Article 7 TEU mechanism through a more flexible framework, considering the high threshold for the activation of both branches of said mechanism[322]. However, the fact that it was not used in the case of Hungary, which exactly depicted the situation it was constructed for, hindered its success[323]. Moreover, when the framework was adopted, the UK, still a MS at the time, criticised it claiming that it was essentially duplicating the Art. 7 (1) procedure and by

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2018/06, available at: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Halmai-2018-Hague_Journal_on_the_Rule_of_Law.pdf p. 10

[315] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 14

[316] Ibid. p. 15

[317] Ibid. p. 24

[318] Ibid. p. 22

[319] Ibid.

[320] Ibid. p. 23

[321] Communication from the Commission to the European Parliament and the Council, Brussels, 19.3.2014 COM(2014) 158 final/2, A new EU Framework to strengthen the Rule of Law p. 6

[322] Maurice, E. 2021. *Protecting Checks and Balances to Save the Rule of Law*. Fondation Robert Schuman, Policy Paper, European Issues no 590, available at: https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-590-en.pdf p. 4

[323] Ibid.

doing so it also enhanced the role of the Commission and weakened the position of the MSs in the process[324]. What is more, the discretion the Commission is granted in this procedure is problematic not only due to the procrastination it may encompass, but also considering that it could be influenced by political reasons[325]. For example, it has been argued that the power of the EPP had an effect in the handling of the Hungarian case, keeping in mind that its government was affiliated with it, whereas it was easier for the Commission to act in the case of Poland whose administration was closer to the marginal European Conservatives and Reformists party (ECR).

In the case of the Council, initially, it did not support the Commissions' efforts when it brought forward the framework and instead it chose to establish the aforementioned annual dialogue, which was evidently ineffective[326]. In the same vein, the Council Legal Service enhanced that position when it questioned the Commission's competence to form and implement such a framework[327]. It took until May 2017 for the Council to criticize Poland and address the situation in its General Affairs Configuration meeting, where the vast majority of MSs pointed the MS's uncooperative position[328]. Yet should a MS clearly ask for the Commission's intervention in activating Art. 7 TEU, a complex diplomatic situation would arise. Therefore, it falls on the Commission to initiate this procedure, as its role is independent as mentioned. However, the Commission on its part would have it difficult to make a proposal, which no national government would support. Hence, this situation turns out to be a conundrum of political willingness and institutional roles. Furthermore, the minimized role of the EP in the procedure of Article 7 TEU as it came to be shaped today, has seriously limited the mechanism's effectiveness, considering that this institution has been actively criticising the development of the situation both in Hungary and Poland and called for action at an early stage[329].

In the context of the procedure of Article 7(1) TEU, the Council has held four hearings with the Polish government and two with Hungary the most recent of which was on 22 June 2021 for both MSs[330]. It is worth noting that since the triggering of the procedure four countries had held the

[324] Halmai, G. 2018. The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States. European University Institute Department of Law, EUI Working Paper LAW 2018/06, available at: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Halmai-2018-Hague_Journal_on_the_Rule_of_Law.pdf p. 11

[325] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 23

[326] Ibid. p. 24

[327] Ibid.

[328] Ibid. p. 25

[329] Michelot, M. 2019. The "Article 7" Proceedings against Poland and Hungary: What Concrete Effects?. Notre Europe Institut Jacques Delors, Europeum Institute for European Policy, available at: https://institutdelors.eu/wp-content/uploads/2020/08/190415-EN-Etatdedroit.pdf p. 3

[330] Halmai, G. 2018. The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States. European University Institute Department of Law, EUI Working Paper LAW 2018/06, available at: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Halmai-2018-Hague_Journal_on_the_Rule_of_Law.pdf p. 1

See also: Council of the European Union, Brussels, 9 July 2021 (OR. en) 10246/21, LIMITE JAI 793 FREMP 197 POLGEN 122 AG 57, Note From General Secretariat of the Council On 9 July 2021 To Delegations Subject: Rule of Law in Poland - Article 7(1) TEU Reasoned Proposal - Report on the hearing held by the Council on 22 June 2021 available at: https://www.statewatch.org/media/2618/eu-rule-of-law-council-poland-outcome-hearing-22-6-21-10246-21.pdf

Council of the European Union, Brussels, 9 July 2021 (OR. en) 10247/21, LIMITE JAI 794 FREMP 198 POLGEN 123 AG 58, Note From General Secretariat of the Council On 9 July 2021 To Delegations Subject: Values of the Union -

Council presidency and did not initiate hearings for Poland despite the deterioration of the situation of the independence of the judiciary the problematic disciplinary regime and the failure to comply with CJEU decisions[331].

Hungary - Article 7(1) TEU Reasoned Proposal - Report on the hearing held by the Council on 22 June 2021 available at: https://www.statewatch.org/media/2619/eu-rule-of-law-council-hungary-hearing-outcome-22-6-21-10247-21.pdf

[331] Halmai, G. 2018. The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States. European University Institute Department of Law, EUI Working Paper LAW 2018/06, available at: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/06/Halmai-2018-Hague_Journal_on_the_Rule_of_Law.pdf p. 1

Paragraph 3. The role of sanctions in the cases of Hungary and Poland

The corrective arm of the Art. 7 TEU mechanism is quite political both in its functioning and in the nature of the sanctions. It revolves around the operation of the Council and is considered to have an inherent diplomatic character[332]. In addition, as it has been demonstrated above, the reasons behind the establishment of a sanctioning mechanism against MSs who are deviating from the core values of the EU were political, therefore it was only natural that the forces behind this provision wanted to maintain control over it. However, there are reasonable grounds to question the dynamics of the Art. 7 mechanism. Firstly, if one observes the situation its activation would generate through the lens of the internal market, it is easy to understand the unwillingness of the rest of the MSs to impose sanctions on one of their own, considering that due to the interdependence of the EU economies this would equal to sanctioning their own undertakings[333].

Furthermore, it has to be taken into account that this is a very cumbersome mechanism, since it has the requirement of unanimity in the Council, which would be practically impossible to achieve if there were more than one MSs violating the values of Art. 2 TEU. Similarly, it is difficult to imagine how the restriction of the political rights in the EU of a MS whose governing powers are circumventing the rule of law would result in the reversal of such a regime[334]. Even though the sanctions portion of the mechanism has never been triggered, one could look at the political sanctions imposed in the Haider Affair (although the EU did not impose these sanctions strictly speaking) in order to gain some perspective on possible outcomes.

The Commission's lack of decisiveness to initiate the Rule of Law Framework in the case of Hungary when it was suggested by the Parliament meant that it could not take advantage of a unique opportunity to curb the high standards (unanimity in the Council) of the sanctioning branch of the rule of law mechanism of Art. 7 TEU. Had it done so, it would have been able to introduce reasoned proposals for the opening of this procedure against both MSs, thus disallowing the veto the Hungarian administration had proclaimed in case Poland were to be subject to sanctions[335]. Nevertheless, it is not dogmatically correct to assume that such a possibility exists, as it would likely only have a basis on the principle of effectiveness[336].

However, it is worth mentioning that the inability to impose any type of sanctions through the Article 7 mechanism has not remained solely on that level as the creation of an interdependence between the attribution of EU funds and the upholding of the rule of law in MSs has also been unsuccessful for the most part and the situation in Hungary and Poland played a role in this. The imposition of Economic sanctions on MSs, who are not complying with the core values of the EU, has been a point of discussion for some time. In the context of Art. 260 TFEU, by means of which the

[332] Konstantinides, T. 2017. *The Rule of Law in the European Union; the Internal Dimension*. Portland: Hart Publishing, p. 163
[333] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 35
[334] ibid.
[335] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 24
[336] Ibid. p. 24

CJEU may impose a penalty payment on a MS not complying with its judgment, some MSs proposed the imposition of budgetary restrictions on MSs who fail to comply with both the Court's decision finding them to be deviating from the rule of law and its subsequent fine. The foreign Ministers of Germany, the Netherlands, Finland and Denmark addressed a letter to the Commission, with which they proposed the withholding of funds for such situations as a last resort measure[337]. It is important to keep in mind that Poland and Hungary are two of the largest recipients of EU regional and cohesion funding. Therefore, the possibility of withholding EU funds until a Member State complies with the values of the EU and the rule of law may in fact result in the those states' governments to finally comply[338].

This became a reality only in 2020 with the establishment of Regulation 2020/2092 (Conditionality Regulation) which linked the funds of the Union to the rule of law. What needs to be taken into account is that the impairment of the rule of law situation in some MSs had to be addressed in conjunction with the macroeconomic policies of the EU, considering that the same MSs have used EU funds in support of illiberal political aims far from the Art. 2 TEU values. A legislative proposal for the adoption of a regulation to combat systemic deficiencies in MSs had already been put forward by the Commission in 2018[339]. The EP did adopt a position on this proposal, however, the Council was quite hesitant until July 2020 when the European Council decided to introduce a conditionality mechanism with the forthcoming budget of the Union (Multiannual Financial Framework) and the Recovery Fund (New Generation EU Fund), providing the political backing for the Regulation[340].

The Commission published a draft of the Regulation on 5 November 2020, following the negotiations between the Council, the Parliament and the Commission[341]. However, even though the publication was received positively by the majority of the EP and the MSs in the Council, Hungary and Poland threatened to veto the Own Resources Decision[342], hence the MFF and the NGEU. This was because although the Conditionality Regulation could be adopted on a qualified majority, the MFF had to be adopted on unanimity and the Own Resources Decision had to be approved by each MS according to its constitutional requirements[343].

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[337] Closa, C. and Kochenov, D. Reinforcement of the Rule of Law Oversight in the European Union: Key Options, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe; From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing p. 186

[338] Pech, L. and Scheppele, K. L. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU", Cambridge Yearbook of European Legal Studies Vol. 19 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280 p. 36

[339] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, Brussels,2.5.2018 COM(2018) 324 final 2018/0136(COD)

[340] European Council Conclusions of 17-21 July 2020, Special Meeting of the European Council, points 22-23

[341] Kierst, N. 2021. "Rule of Law Conditionality: The Long Awaited Step Towards a Solution of the Rule of Law Crisis in the EU?", *European Papers*. Vol. 6 No. 1 available at: https://www.europeanpapers.eu/en/europeanforum/rule-law-conditionality-long-awaited-step-towards-solution-rule-law-crisis p. 103

[342] "The Own Resources Decision (ORD) establishes how the EU budget is financed. Its entry into force requires approval by all EU Member States according to their constitutional requirements", European Parliament Think Tank, Briefing of 02.06.2021 available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2021)690520

[343] Kierst, N. 2021. "Rule of Law Conditionality: The Long Awaited Step Towards a Solution of the Rule of Law Crisis in the EU?", *European Papers*. Vol. 6 No. 1 available at: https://www.europeanpapers.eu/en/europeanforum/rule-law-conditionality-long-awaited-step-towards-solution-rule-law-crisis p. 103

The situation was resolved in the December Summit of the European Council through declaratory comprehensive statements among the heads of states leading to the adoption of the Regulation by the Council on 14 December 2020 and subsequently by the EP on the 16th, making it a law after its publication in the Official Journal of the EU[344]. This regulation has its legal basis on Article 322(1)(a) TFEU, which provides that 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: the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts[345]. According to Article 1 of the Regulation its purpose is the protection of the budget of the Union when there is a breach of the principles of the rule of law, a declaration which outlines a practical view of the rule of law. This is further explained in Art. 2 where there is a specification of these principles which include the principles of legality, legal certainty, the prohibition of executive arbitrariness, effective judicial protection, separation of powers, non-discrimination and equality before the law[346]. The principal limitation of this Regulation, if it is to be considered a part of the core rule of law mechanism, is its very strict attachment to the EU budget. A MS violating the rule of law principles would be affected by this regime, only when its behavior has a sufficiently negative effect on the EU budget, and specifically, on the sound management of the Union budget or on the financial interests of the Union[347].

Article 6 of the Regulation provides the procedure of triggering this regime. It is quite obvious that this is an EU mechanism, as it is visibly inspired by both the infringement procedure of Art. 258 TFEU and the rules of the Economic and Monetary Union. In the event that the Commission establishes the existence of a breach of the principles of the rule of law, it is to send a written notification to the MS concerned[348]. The MS may respond to the findings of the Commission and suggest remedial measures by providing its observations which are to be taken into consideration by the Commission before moving forward with the submission to the Council of the implementing act to cut funds[349]. It is worth noting that there had been proposals from the Commission and the EP to implement a reverse qualified majority voting procedure[350] (taking inspiration from the EMU rules), which would mean that the MS concerned would have the burden of proof. However, this was not approved by the Council during the negotiations for the regulation, even though the Council Legal Service did not eliminate the possibility of a RQMV[351]. It is important to take note of the fact that according to recital 26 of the Regulation a MS against which this procedure has been triggered, may exceptionally request the discussion of the issue in the European Council, in case it finds that the

[344] Ibid. p. 104
[345] Article 322(1)(a) TFEU
[346] Article 2 (a) of 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
[347] Sachpekidou, E. 2021. *European Law*, 3rd edition. Athens: Sakkoulas, p. 154
See also Article 4 (1) of Regulation 2020/2092
[348] Article 6 (1) of Regulation 2020/2092
[349] Article 6(5), (6) of Regulation 2020/2092
[350] Reverse Qualified Majority Voting (RQMV) means that the measures under discussion are deemed to be approved by the EU Council of Ministers unless a qualified majority of Member States overturns them
[351] Kierst, N. 2021. "Rule of Law Conditionality: The Long Awaited Step Towards a Solution of the Rule of Law Crisis in the EU?", *European Papers*. Vol. 6 No. 1, available at: https://www.europeanpapers.eu/en/europeanforum/rule-law-conditionality-long-awaited-step-towards-solution-rule-law-crisis p. 106

principles of objectivity, non-discrimination and equal treatment have been violated by the Commission's proposal. This leitmotiv of protecting a MS against a non-objective assessment by the Commission, concerning its compliance with the EU standards of the rule of law, has been used in the past by the Council to protect the interests of the MSs in the context of the 2014 rule of law framework of the Commission.

The substance of the principles of the rule of law is understood through the lens of Art. 2 TEU, in conjunction with the rest of the values of the EU[352]. Nevertheless, there is a clear distinction as far as fundamental rights are concerned, since the Regulation is not directly linked to them, unless their infringement is linked to judicial protection or unequal treatment[353]. Article 3 provides an indicative, non-exhaustive list of examples of breaches of the principles of the rule of law, whereas Article 4(2) is indicative of how the breach of the rule of law may affect the Union budget, specifically when the mechanisms of the MS which are concerned with financial control, anti-corruption and prevention and combating of fraud are not properly functioning.

The measures that may be taken in defense of the Union budget from the rule of law backsliding in a MS are presented in Article 5 of the Regulation. This provision is closely related to Regulation 2018/1046 (Financial Regulation) and accordingly lays out two streams of measures based on whether funds are implemented by the Union itself or under shared management with MSs[354]. The imposition of these measures is not to affect the obligations government entities have towards the final recipients or beneficiaries based on the program or fund which was affected by said measures[355]. What is more, there is a provision for the lifting of the sanctions in cases where the breaches of the rule of law principles have been remedied by the MS itself. According to Article 7 of the Regulation the MS concerned may submit a written notification to the Commission supported by evidence that the conditions for the sanctions are no longer fulfilled. On the same note, the Commission has to review the existing measures annually and in the event that the measures are lifted, the MS may retrieve the funds withheld[356].

However, the mechanism of the Conditionality Regulation has not been applied yet, since Hungary and Poland made a reference to the CJEU in March of 2021 concerning its conformity with the Treaties[357]. In its action for annulment of the Regulation[358], the Republic of Poland contested its legal basis claiming that this article does not allow neither the establishment of a mechanism that indicates breaches of the rule of law, nor does it give the power to the Commission and the Council to indicate the infringement of the principles of the rule of law and to adopt measures for that matter[359]. Therefore, it alleges that this mechanism intends not the protection of the budget of the EU but rather

[352] Article 2(a) of Regulation 2020/2092
[353] ibid.
[354] Article 5(1) of Regulation 2020/2092
[355] Article 5(2) of Regulation 2020/2092
[356] Article 7(3) of Regulation 2020/2092
[357] Maurice, E. 2021. *Protecting Checks and Balances to Save the Rule of Law*. Fondation Robert Schuman, Policy Paper, European Issues no 590, available at: https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-590-en.pdf p. 3
[358] Seeking to annul the entirety of the Regulation
[359] CJEU Case C-157/21, Action brought on 11 March 2021 — Republic of Poland v European Parliament and Council of the European Union, first plea in law available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0157&qid=1635955694731

the imposition of sanctions to MSs failing to comply with the values of the Union. Its main argument was based on the presumption that legal tools in EU law for 'enforcing' the rule of law can only be based on Article 7 TEU; hence, the creation of a new instrument which is not provided in the Treaties is equivalent to a prohibited Treaty amendment. In consequence, the purpose of Regulation 2020/2092 is considered to be overlapping with that of Art. 7 TEU thus, bypassing the procedure that Article establishes[360]. Similarly, it submits that this legislation is breaching the principle of conferral of Articles 4(1) and 5(2) TEU and sees that it unduly restricts the 'core' of national sovereignty regarding its territorial integrity of the state its competence to ensure the maintenance of law and order and the protection of national security thus infringing Art. 4(2) TEU[361]. The conflation of the rule of law with national security is not a new invention. France has used in the past the safeguarding of internal security as a legitimate aim in order to somewhat arbitrarily shut down their dwellings and deport illegal Roma migrants, in a case that was much debated concerning the legality of the actions of the French authorities and their compliance with the rule of law[362].

Moreover, the Polish Republic claims that this Regulation, by defining the 'rule of law' it limits the jurisdiction of the CJEU within the frame of Article 269 TFEU to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU[363]. In the same vein, it brings forward a procedural argument concerning the feeble reasoning of the proposal for the regulation[364]. Articles 3 and 4(2) of the Regulation are deemed to be insufficiently clear and precise to meet the requirements of legal certainty. However, the Polish government presents this argument in a general fashion as well. Similarly, it broadly refers to a breach of the principle of proportionality without stipulating how that is, meaning whether the Regulation as a whole is disproportionate or specific provisions of it are and how would the principle of proportionality apply in this case[365]. The cornerstone of Poland's argumentation is a generic allegation of abuse of power claiming that the purpose of the regulation is not the protection of the budget of the Union but rather finding a leeway to avoid the high procedural standards of Art. 7 TEU and the substantive intricacies of basing an infringement procedure on the breach of the rule of law[366].

On the other hand, Hungary in its own action for annulment took a different direction and sought to be more precise by alternatively asking for the annulment of specific provisions of the Conditionality Regulation. It primarily contests the legal basis of the Regulation, as did Poland, and structured its position on the same arguments of infringement of Article 7 TEU (and of Article 269 TFEU), viewed as the sole mechanism to review the situation of the rule of law in the Union and of a breach of the principle of conferral, enhancing it with a reference to a supposed infringement of the principle of institutional balance[367].

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[360] Ibid. fifth plea in law
[361] Ibid. seventh plea in law
[362] Konstantinides, T. 2017. *The Rule of Law in the European Union: The Internal Dimension*. Portland: Hart Publishing, p. 147-148
[363] Supra note no. 356 sixth plea in law
[364] Ibid. fourth plea in law
[365] Ibid. tenth plea in law
[366] Ibid. eleventh plea in law
[367] CJEU Case C-156/21 Action brought on 11 March 2021 — Hungary v European Parliament and Council of the European Union plea, first and second pleas in law, available at : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0156&qid=1635955619616

It then goes on to explain the incompatibility of some specific provisions of the Regulation with EU law. Firstly, Hungary alleges that Article 4 (1) of the Regulation, which provides that appropriate measures shall be taken where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way, fails to observe the principle of legal certainty. Similarly, it found that the measures adopted under that provision would be disproportionate where the effect on the Union budget was not adequately defined[368]. Furthermore, it observed that in Article 4(2)(h) the Regulation failed to specifically provide the situations under which the authorities of a MS influence the sound financial management of the Union by infringing the principles of the rule of law, thus it did not comply with legal certainty[369].

Moreover, according to the Hungarian government, Article 5(2), which provides that the adoption of measures, pursuant to Regulation 2020/2092, must not affect the obligations MSs have towards the final recipients of the funds that were targeted by the measures, should be annulled based on the fact that it has an effect on the budget of the MSs without having a sound legal basis to do so and it further discriminates between MSs hence it interferes with the principle of equality of the MSs[370]. This argument was also used by Poland without however making a reference to a distinct provision of the Regulation[371].

According to Article 5(3) 'the measures imposed shall be proportionate and determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union". Nevertheless, Hungary chose to overlook the first sentence of that provision which explicitly demands that the measures adopted for the purposes of the Regulation shall be proportionate and focused on its third sentence according to which "the nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account". Accordingly, they argued that this provision called into question the relationship between the breach of the rule of law and the impact on the Union budget making it incompatible with the legal basis of the Regulation and Article 7 TEU, while it was considered not to comply with the principle of legal certainty once more[372].

Similarly, they contested the legality of the last sentence of that same provision according to which "the measures shall, insofar as possible, target the Union actions affected by the breaches. The wording that the EU legislature chose ("in so far as possible") was again considered to be less than clear and precise and more importantly it was thought to be unable to guarantee the existence of a direct relationship between the breaches of the principles of the rule of law and the measures to be adopted, therefore it should be annulled for being disproportionate. However, it seems that this

[368] Ibid. fourth plea in law
[369] Ibid. fifth plea in law
[370] Ibid. sixth plea in law
[371] CJEU Case C-157/21, Action brought on 11 March 2021 — Republic of Poland v European Parliament and Council of the European Union, eighth plea in law available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0157&qid=1635955694731
[372] CJEU Case C-156/21 Action brought on 11 March 2021 — Hungary v European Parliament and Council of the European Union plea, seventh plea in law, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0156&qid=1635955619616

argument is somewhat poorly structured considering that the purpose of that provision is exactly to guarantee the proportionality of the measures, which shall be targeted to specifically 'compensate' for the damage done by the breaches of the rule of law principles in those concrete aspects of the budget of the Union.

Finally, Hungary asked for the annulment of paragraphs three and eight of Article 6 of the Regulation which referred to the sources of information the Commission may use to assess whether the conditions for the imposition of measures of Article 4 are fulfilled (paragraph 3) or to judge whether the measures are in fact proportionate (paragraph 8). On that note, they argued that both the information and the sources which are to be taken into account by the Commission are not sufficiently defined, making these provisions lack legal certainty[373].

Therefore, it is evident that Poland and Hungary approached the annulment actions differently. Hungary came up with specific provisions in the Regulation which were in theory vaguely expressed (in some cases purposefully so) and sought their annulment on the basis of them causing legal uncertainty whereas Poland proceeded with a more general view. However, both contested the legal basis of the Regulation and claimed (although Poland did so more eloquently) that a new tool to enforce the rule of law is not possible considering that Article 7 TEU is the only mechanism provided for in the Treaties for this purpose, therefore its establishment would require a Treaty amendment. What these arguments fail to keep in mind is that the EU was principally an economic Union and it has used this primary aim to infiltrate all levels economic activity among MSs, creating a very close interdependence which has since been able to legitimize its control over many areas which the MSs perceived to be close to their sovereignty. Therefore, the protection of the Union funds does not seem at all an unlikely or even a 'pretend' purpose for the EU to seek to achieve through this Regulation. It is also false to assume that the rule of law is only maintained through the Article 7 TEU mechanism and any other new mechanism would require a Treaty amendment considering that the recent case law of the CJEU has quite effectively shown that the regular judicial procedures of Articles 258 and 267 TFEU have been used to implement the rule of law, even though this is not, strictly speaking, provided in their mandate.

[373] Ibid. ninth plea in law

Conclusion

The activation of the preventive mechanism of Article 7 TEU in the cases of Hungary and Poland highlighted its weaker points. The political elements of this procedure ingrain all expressions of its functioning. The attempt to establish just the risk of a breach of the values of the EU has been severely delayed in both cases. The EU has been a witness of a serious deterioration in the level of liberal and democratic values of its two MSs and has still been unable to use its main instrument to remedy this disorder. The lack of political will in all EU institutions, even those who are not strictly speaking political, has been detrimental in these cases and it has been able to mask itself as the "nuclear" nature of Art. 7 TEU. Therefore, one could only assume that neither the reason behind the creation of that mechanism nor its aims sought for it to be "unenforceable" otherwise it would have ceased to exist. Hence, most likely the truth is that the unwillingness of the EP to lose political power based in Hungary and of the Commission to be discredited before the Council postponed the utilization of the mechanism and not the fear of a catastrophe or complete decomposition of the EU after its activation. This however, allowed the two MSs to continue their illiberal policies. It remains to be seen whether the new Conditionality mechanism will pass the test before the CJEU and will be applied.

Chapter II. The effects of the judicial procedures of Articles 258 and 267 TFEU in the rule of law crisis in the EU

The illiberal direction both Hungary and Poland have taken emerges through measures on the structure of the judiciary and of higher education, the freedom of the press or the organisation of the electoral system, which at first do not seem to be easily subject to infringement proceedings in the absence of a general EU competence in these fields. As a result, the Commission initially had to base its infringement actions on primary and secondary EU law usually with a relation to the principle of equal treatment or the fundamental freedoms of the internal market and not directly on the values of Art. 2 TEU. The most prominent example of this use of the 258 TFEU procedure was the Case C-286/12 Commission v. Hungary. However, following the Associação Sindical dos Juízes Portugueses judgment, which shall be analysed below, the Commission, was able to have a less technical perspective.

Paragraph 1. The use of the infringement procedure in the case of Hungary

The Commission decided to approach the decision of the Hungarian administration to lower the retirement age of judges, prosecutors and notaries from 70 to the general retirement age of 62, with an infringement procedure based on Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. This piece of secondary legislation, which has its legal basis on Article 19 TFEU was part of the employment and social policy of the EU and was directed towards gender equality and combating discrimination[374]. Accordingly, the Commission saw that the Hungarian legislation was obviously problematic and found that "the lowering of the age-limit for compulsory retirement applicable to judges, prosecutors and notaries from 70 to 62 gives rise to a difference in treatment based on age between persons within a given profession"[375].

The Court, taking note of the principle of equal treatment (as it was defined in the Directive at issue) meaning the prohibition of direct (or indirect) discrimination, which is the less favorable treatment of a person than another in a similar situation, examined whether the allegation of the Commission was true. It held that the disputed national measure did in fact impose a less favorable treatment to workers who have reached that age compared to all other persons in the labour force, considering that individuals engaged in those professions and who had reached the age of 62 were in a comparable situation to younger individuals engaged in the same profession[376]. Article 6(1) of Directive 2000/78 allowed MSs some deviation from the principle of equal treatment when the national measure is objectively justified by a legitimate aim and where the means of achieving that

[374] See Conceil de l' Union Europeenne Bruxelles, le 1er février 2001, 12458/00 LIMITE PV/CONS 61 SOC 363, 2296ème session du Conseil (Emploi et politique sociale), tenue à Luxembourg, le 17 octobre 2000 available at: https://data.consilium.europa.eu/doc/document/ST-12458-2000-INIT/fr/pdf

[375] CJEU Case C-286/12, Judgment of the Court of 06.11.2012 *Commission v. Hungary*, ECLI:EU:C:2012:687, para. 24

[376] Ibid. paras. 50-51

aim are appropriate and necessary, providing essentially an exemption on the basis of the principle of proportionality[377].

Accordingly, the CJUE found that even though the Hungarian law did not expressly set out a specific goal to be achieved the possibility for said law to be justified under that principle was not excluded[378]. The Court identified two objectives put forward by Hungary, first the standardization of the age limit for compulsory retirement in the context of professions in the public sector and secondly the establishment of a more balanced structure in order to facilitate access for younger individuals to the professions of judge, prosecutor and notary[379]. The Court had already held that the aims to be considered legitimate in the context of Article 6(1) of the Directive they have to be related to social policy, employment policy or labour market goals[380]. Having that in mind, the Court observed that both aims constituted legitimate employment and labour market policy objectives[381]. As regards the first aim, it found that the reduction of the age limit in those professions was in principle an appropriate measure to achieve standardization. However, in applying the principle of proportionality, the Court highlighted that the abrupt and significant compulsory reducing of the retirement age was not a necessary measure, considering that there were no transitional measures and Hungary did not provide any evidence that a more lenient regulation would not be able to achieve the goal[382]. On the second aim of facilitating to access to those professions for young lawyers, the Court noted that the measure would only have a short-term effect and therefore was not appropriate[383]. Consequently, the national measure was held by the Court, to give rise to a difference in treatment on the grounds of age and it was not justified by a legitimate aim based on the principle of proportionality.

Despite the Commission's 'victory', the Hungarian government was able to avoid restoring the judges to their prior jobs, especially those in higher positions, whose posts had been filled while the case was pending[384]. The fact that only 21 of the 152 reported by the Hungarian government judges were reinstated in their original jobs, whereas 56 chose a lump sum compensation, which is typical in discrimination cases, is indicative of the actual effect the infringement case had[385]. As a result, the government was able to reconstruct Hungary's judicial leadership according to its liking[386]. Therefore, the infringement was successful in legal terms but it was not able at alter the situation or grasp the gravity of the violation of EU values[387].

The core of the issue was not merely a discrimination on the grounds of age but rather the breach of the principle of independence of the judiciary. In a similar case where the independence of

[377] Ibid. para. 55
[378] Ibid. paras. 57-58
[379] Ibid. para. 59
[380] Ibid. para. 60
[381] Ibid. paras. 61-62
[382] Ibid. paras 68-75
[383] Ibid. paras 76-79
[384] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at: https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 43
[385] Ibid.
[386] Ibid. p. 44
[387] Ibid.

the ombudsman of the Hungarian office for data protection was at risk the CJEU held that "if it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence[388]". It has been suggested by professor Scheppele that were the Court to substitute the word "judge" for "supervisory authority" it would become clear that the independence of the judiciary was at the heart of the case[389]. Furthermore, when structuring its reasoned opinion for the infringement procedure, the Commission considered deploying a combined reading of Articles 2 and 19 TEU. According to Article 19 TEU, the national courts are to play an important role in ensuring the effective application of EU law thus, a measure undermining the independence of national courts would constitute a breach of that Article[390]. However, the Commission decided not to pursue that path in the end.

A similar strategy has been used in more recent cases, which in their essence concerned the situation of the rule of law in Hungary and have been named by the EP as reasons to initiate the Article 7(1) TEU. Firstly, as it has been mentioned, in spring of 2017 Hungary adopted, in an urgent legislative procedure, a law on higher education aiming at reforming the licensing regime applicable to foreign higher education institutions[391]. More specifically it provided that universities originating in states outside the European Economic Area (EEA) would only be able to commence or continue their activities in Hungary provided that an international treaty had been concluded between that state (and in the case of federal states by their central government) and Hungary. Additionally, it was required for that institution to operate in Hungary to offer the same education in their country of origin[392]. The law was perceived as being targeting Hungarian-born US businessman George Soros considering that he funded the Budapest-based Central European University (CEU) which was the only active foreign higher education institution in Hungary that did not meet the new requirements (hence, the law was publically known as Lex CEU)[393].

The Commission brought an action for infringement before the CJEU claiming that the Hungarian law was incompatible with the General Agreement on Trade in Services (GATS), concluded within the framework of the World Trade Organisation (WTO)[394], the freedom of establishment (Article 49 TFEU), the free movement of services (Article 56 TFEU) and the provisions of the Charter relating to academic freedom (Article 13 of the Charter), the freedom to found higher education institutions (Article 14(3) of the Charter) and the freedom to conduct a business (Article 16 of the Charter). Hungary maintained that the action for infringement was in fact

[388] CJEU Case C-288/12, Judgment of 08.04.2014 *Commission v Hungary*, ECLI:EU:C:2014:237, para. 54

[389] Scheppele, K. L. 2016. Enforcing the Basic Principles of EU Law through Systemic Infringement Actions, In: Closa, C. and Kochenov, D. (edit.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press. p 116

[390] Closa, C. and Kochenov, D. Reinforcement of the Rule of Law Oversight in the European Union: Key Options, In: Schroeder, W. (edit.) *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing p. 184

[391] Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról szóló 2017. évi XXV. törvény (Law No XXV of 2017, amending Law No CCIV of 2011 on national higher education)

[392] CJEU Case C-66/18, Opinion of Advocate General Kokott of 05.03.2020 *Commission v. Hungary*, ECLI:EU:C:2020:172, p. 1

[393] Wahl, T. 2020. "Rule of Law Developments in Hungary", *eucrim* 19 May, available at: https://eucrim.eu/news/rule-law-developments-hungary/

[394] "By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), 3 the Council approved the Agreement establishing the WTO and the Agreements in Annexes 1, 2 and 3 to that Agreement, which include the General Agreement on Trade in Services", CJEU Case C-66/18, Opinion of Advocate General Kokott of 05.03.2020 Commission v. Hungary, ECLI:EU:C:2020:172, p. 2 para. 7

inadmissible since it was based on illegitimate political interests of the Commission regarding the CEU. However, considering the wide margin of discretion of the Commission to initiate an infringement procedure, the Court held that it was not able to control the possible motives behind such an action[395]. Similarly, AG Kokott noted that the Commission's obligation is to state why it perceives that a MS has infringed EU law and not the reasons it led it to bring an action based on Art. 258 TFEU[396]. Moreover, the Court held that it had jurisdiction to examine cases disputing WTO law, as any international agreement entered into by the EU becomes an integral part of EU law, which was the case with the agreement establishing the WTO and the GATS[397]. According to Article 3(1)(e) TFEU, the EU has exclusive competence in the area of common commercial policy and even though MSs have retained broad competence in the field of education, commitments under the GATS which concern the liberalization of trade in private educational services fall within the common commercial policy competence[398]. Furthermore, Hungary contested the jurisdiction of the Court alleging that the dispute settlement system of the WTO had an exclusive interpretative power, to which the Court responded that the obligation of all Members of the WTO including the EU to observe its obligations under the law of the organisation expressly grants the CJEU to decide on such an infringement case[399].

The substance of the case was based on an alleged infringement of Article XVII of the GATS via the imposition of the requirement of a prior international treaty. This provision declares that "each member of the WTO is required, in the sectors inscribed in its schedule of specific commitments and subject to any conditions and qualifications set out therein, to accord to services and service suppliers of any other member of the WTO treatment no less favorable than that it accords to its own like services and service suppliers". Therefore, members prescribe to a specific schedule of commitments (set out in two columns) and in the case of Hungary concerning the 'limitations on market access', as regards higher education services supplied by means of a commercial presence, it provided the condition that the establishment of schools is subject to license from the central authorities[400]. In the 'limitations on national treatment', the according column contained the word 'none' as regards higher education services[401]. Hence, what needed to be clarified was whether the prior authorisation requirement was equal to that imposed by the Hungarian law of a prior international treaty. The Court went on to specify that according to Article XX a prior authorisation reservation can apply to national treatment only in so far as it relates to a measure which is inconsistent both with the market access (Article XVI) and the national treatment commitment[402]. The general nature of the prior authorisation scheme used by Hungary to limit market access was not discriminatory, hence it could not be used to rule out any breach of the principle of national treatment[403].

Moreover, the Court established that the requirement of the conclusion of an international treaty imposed an additional condition for foreign providers the fulfillment of which was at the discretion of Hungarian authorities and thus it constituted a modification of the conditions of

[395] CJEU Case C-66/18 Judgment of the Court of 06.10.2020 *Commission v. Hungary*, ECLI:EU:C:2020:792, paras. 56-57
[396] CJEU Case C-66/18, Opinion of Advocate General Kokott of 05.03.2020 *Commission v. Hungary*, ECLI:EU:C:2020:172, para. 82
[397] CJEU Case C-66/18 Judgment of the Court of 06.10.2020 Commission v. Hungary, ECLI:EU:C:2020:792, paras. 69-71
[398] Ibid. paras. 74-75
[399] Ibid. paras. 85-86
[400] Ibid. para. 109
[401] Ibid. para. 110
[402] Ibid. para. 112
[403] Ibid. paras. 113-114

competition in favor of Hungarian institutions[404]. Subsequently the Court examined whether the national measure was justifiable under the Article XIV exception of the GATS, which allowed members to provide restricting measures in order to safeguard public order and safety and prevent fraudulent practices, as long as they are not imposed arbitrarily or lead to unjustifiable discrimination between countries[405]. On that note, the Court held that Hungary failed to put forward any arguments to substantiate the claim that the lack of such a measure would cause a genuine and sufficiently serious threat to their interests[406]. Similarly, the AG noted in their Opinion, that the specific requirement, which demanded the central government to be the signatory of the international treaty in cases of federal third states was even more arbitrary considering it would be very unlikely to happen[407]Furthermore, it stated that the political power of the Hungarian authorities under those circumstances constituted a means of arbitrary discrimination[408].

As far as the second requirement of the Hungarian law is concerned, the Court noted that it modified the conditions of competition in favor of Hungarian institutions[409]. Once more, it stated that the justification provided by Hungary on the grounds of protection of public order and prevention of fraudulent practices were insufficient and therefore they failed to fulfill their commitments under Article XVII of the GATS[410]. Next, the Court examined the possibility of infringement of the fundamental freedoms of the internal market by the disputed national measure. It held that it constituted an unjustified restriction on both the freedom of establishment and the freedom to provide services of Article 16 of Directive 2006/123[411].

Furthermore, the Commission based its infringement on an alleged breach of Articles 13, 14(3) and 16 of the Charter. On the applicability of the Charter, the Advocate General had pointed out in her Opinion that according to Article 51(1) of the Charter and in the light of the fact that the individual commitments under the GATS were obligations of the Union under international law, the EU institutions were bound by the Charter, whereas MSs were obligated to comply only when implementing EU law. However, this responsibility of the MSs did not go as far as meaning that measures adopted within their field of competence in the education sector have in general to be assessed in relation to the fundamental rights of the EU[412]. This shall be the case only when there are particular obligations imposed by EU law. Consequently, because the Hungarian legislation is not compatible with the duty of national treatment imposed by Article XVII of the GATS, the Charter should be considered applicable[413]. The Court further added, on the applicability of the Charter, that the restrictions imposed on the fundamental freedoms of the internal market by the national measures, which Hungary claimed to be justified by overriding reasons in the public interest recognised by the EU, shall imply the implementation of EU law, hence applicability of the Charter[414].

In examining the possible breach of academic freedom protected under Article 13 of the Charter, the Court, as did the AG before, in the light of the jurisprudence of the ECtHR, it saw a

[404] Ibid. paras 120-121
[405] Ibid. para. 4
[406] Ibid. para. 131
[407] CJEU Case C-66/18, Opinion of Advocate General Kokott of 05.03.2020 Commission v. Hungary, ECLI:EU:C:2020:172, para. 120
[408] CJEU Case C-66/18 Judgment of the Court of 06.10.2020 Commission v. Hungary, ECLI:EU:C:2020:792, para. 136
[409] Ibid. para. 147
[410] Ibid. paras. 154-156
[411] Ibid. paras 190, 207
[412] CJEU Case C-66/18, Opinion of Advocate General Kokott of 05.03.2020 Commission v. Hungary, ECLI:EU:C:2020:172, para. 129
[413] Ibid.
[414] CJEU Case C-66/18 Judgment of the Court of 06.10.2020 Commission v. Hungary, ECLI:EU:C:2020:792, para. 214

relation of this right to the freedom of expression, especially in the field of research[415]. What is more, the Court pointed out that academic freedom is not to be read strictly, as the researcher's freedom to express their views, but it should include an institutional and organizational dimension to it relating to the autonomy of educational institutions of this kind[416]. The Court held that the measures adopted by Hungary were capable of limiting the freedom of foreign higher education institutions by preventing them from having the necessary infrastructure for conducting their scientific research and educational activities[417]. For similar reasons Article 14(3) regarding the freedom to found educational establishments and Article 16 protecting the freedom to conduct a business were considered by the Court to be limited by the Hungarian legislation. Article 52(1) of the Charter provides that limitations on the rights and freedoms of the Charter could only be justified when they are provided by law and are respecting the essence of the rights and the principle of proportionality. However as it was shown above, the measures adopted by Hungary did not pass the proportionality test and therefore could not be justified.

The judgment of the Court in this Case was again a 'victory' for both the Commission and the Central European University. However, it was too late as by the time Hungary was condemned of not complying with EU law the University had already moved to Vienna obeying the Hungarian law[418]. More importantly, the return of the university in Budapest is unlikely, considering the costs of relocation[419]. Thus, it is evident that the effectiveness of the infringement procedures is limited by the length and duration of the procedure, considering that the Commission did not waste time in initiating the procedure[420].

The results were similar in another highly debated case concerning the Hungarian law restricting the financing of NGOs[421]. This legislation labeled "Transparency Law" was presented as aiming to ensure the transparency of civil organisations who received donations from abroad. It demanded that they register with the Hungarian courts as 'organisations in receipt of support from abroad' if they received foreign donations above a minimal amount. Furthermore, they had to indicate the names of donors whose support exceeded the sum of HUF 500.000 (€ 1.400) and the exact amount of the donation. Then they were obligated to publish that information on a freely accessible electronic platform. The civil organisations concerned must also state, on their homepage and in all their publications that they are an 'organisation in receipt from abroad'. The Commission brought forward a case for an infringement of Article 63 TFEU concerning the free movement of capital and Articles 7, 8 and 12 of the Charter, regarding the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.

The Court held that the transactions covered by the 'Transparency law" fell within the scope of Article 63 TFEU, specifically within the notion of movement of capital[422]. It further declared that it was a restrictive measure of discriminatory character since it established a difference in treatment between domestic and cross-border movement of capital (considering that the two situations were alike) and it was able to deter natural or legal persons residing in other MSs from providing financial

[415] Ibid. para. 225
[416] Ibid. para. 227
[417] Ibid. para. 228
[418] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", Yearbook of European Law, Vol. 39, No. 1. Available at : https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 48
[419] Ibid.
[420] The Commission launched the procedure three weeks after the adoption of the law. See supra note 333 at p. 6
[421] CJEU Case C-78/18, Judgment of the Court of 18.06.2020 *Commission v. Hungary,* ECLI:EU:C:2020:476
[422] Ibid. paras. 50-51

support to these organisations[423]. More specifically the registering and publicity requirements singled out organisations receiving support from other MSs or third states and it made them subject to penalties were they not to comply[424]. Furthermore, the measures generated a climate of distrust regarding those associations[425]. The provision concerning disclosure of information in relation to persons offering a donation, which exceeds the set limit, is a further deterring factor. In consequence, the Court held that the obligations of registration declaration and publication and the according penalties provided for their non-compliance were infringing primary EU law that is Article 63 TFEU[426].

Furthermore, the Court investigated the possibility of a justification of this restriction, which in theory could be found in an increased necessity for transparency as an overriding reason in the public interest[427]. Nevertheless, Hungary, who had the burden of proof of the proportionality of the measure and of the public interest it was serving, was unable to provide specific arguments to support validity of the measure, especially since it applied indiscriminately to all donations exceeding a certain threshold instead of targeting those, which may have a significant influence on public life and public debate[428].

Accordingly, the Court examined the applicability of the exemption of Article 65(1)(b) TFEU according to which "the provisions of Article 63 shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security". The Court held that deviations from the general rule of Article 63 TFEU might rely on grounds of public policy or public security in fields where EU law is not harmonized and cannot ensure their protection especially as regards the fight against money laundering the financing of terrorism and organised crime[429]. Still, these exemptions may not be relied upon unless there is a genuine, present and sufficiently serious threat to a fundamental interest in society, something that Hungary failed to prove. Therefore, the CJEU concluded that Hungary did not fulfill its obligations under Article 63 TFEU[430].

In what concerns the infringement of the fundamental rights of the Charter, the Court held that the right to freedom of association of Article 12 thereof is essential to the functioning of a democratic and pluralist society and that the Transparency Law rendered the action of associations protected by that right more difficult[431]. Similarly, the right to respect for private and family life protected under Article 7 of the Charter was limited by the obligations of declaration and publication of the national law, as was the right of Article 8(1) concerning the right to protection of personal data (which is closely related to that of Article 7 of the Charter)[432]. Moreover, the Court noted that the limitations of the Transparency Law were not justified by the general interests Hungary relied upon, on the basis of the principle of proportionality set out in Article 52 of the Charter[433].

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[423] Ibid. para. 57
[424] Ibid. para. 58
[425] Ibid.
[426] Ibid. para. 65
[427] Ibid. para. 78
[428] Ibid. paras. 81,82, 86
[429] Ibid. paras. 88, 89
[430] Ibid. paras. 91, 93, 96
[431] Ibid. paras. 112, 115
[432] Ibid. paras. 132, 134
[433] Ibid. paras. 139-141

However, even though the Commission won again, many prominent NGOs were essentially forced out of the country by the time the ECJ delivered its judgment[434]. Another restriction upon civil society was the so-called 'Stop Soros" legislation, which imposed a 25% tax on donations from organisations 'supporting illegal migration' and criminalized assistance to persons seeking asylum, including legal help, with a prison sentence of up to a year[435]. The Commission brought an action for infringement against that law which is still pending before the CJEU. More specifically the national law provides the criminalization of the organizing activity designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting of international protection established by national law. The AG has delivered their Opinion in which they conclude that the national measure is liable to constitute an obstacle to the exercise of the rights guaranteed by EU law in relation to assistance for applicants for international protection[436]. It has been argued that the Commission could have brought an action on a systemic basis combining the three laws and avoided initiating multiple separate proceedings on a technical basis, which eventually allowed the Hungarian government to undermine the democratic foundations required by the Treaties[437].

[434] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at : https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 48

[435] Ibid.

[436] CJEU Case C-821/19, Opinion of Advocate General Rantos of 25.02.2021 *Commission v. Hungary*, ECLI:EU:C:2021:143, para 42

[437] See supra note 433 at p. 49

Paragraph 2. The importance of the principle of judicial independence in the Case of Poland

The most important step in the case of Poland and in the enhancement of the role of the judicial instruments of the Union in reinforcing the rule of law in the EU happened in the Associação Sindical dos Juízes Portugueses Case[438]. In the context of EU financial assistance provided to Portugal, the Portuguese legislature introduced a temporary reduction in remuneration of persons working in Portuguese public administration including judges[439]. The ASJP challenged that measure on the basis of judicial independence enshrined not only in Portuguese but also in EU law as it is provided in Article 19(1) TEU and Article 47 of the Charter protecting the right to effective judicial protection and to a fair trial[440]. The issue was referred to the CJEU for a preliminary ruling according to the Art. 267 TFEU procedure.

The Court focused on the importance of the principle of judicial independence in the EU legal order, as specified in Art. 19(1) TEU, mainly through the independence of national courts and tribunals. It described this principle as giving concrete expression of the rule of law as stated in Art. 2 TEU, since it entrusts the responsibility for ensuring judicial review in the EU legal order not only to the CJEU but to national courts as well[441]. Moreover, it noted that the mutual trust between MSs is based on the fundamental premise that they share common values on which the EU is founded and it highlighted the duty of sincere cooperation among MSs based on Article 4(3) TEU[442]. Therefore, the Court ruled that national courts have a duty conferred by the Treaties to observe the effective application of EU law[443]. This led to a further conclusion according to which in order for EU law to produce its full effect and for private parties to benefit from the principle of effective judicial protection national courts have to be independent[444].

The CJEU held that as national courts or tribunals within the meaning EU law are to be considered permanent, independent bodies, established by law, whose jurisdiction is compulsory, adjudicating, inter partes procedures and which are applying rules of law[445]. On that basis, the Court provided a set of criteria according to which national courts or tribunals are to review national measures, which may infringe the EU principle of judicial independence. More specifically it rule that they have to examine whether the measures in question are i) capable of affecting the independence of national judges ii) justified by an objective reason of public interest iii) proportionate iv) temporary v) specific to judges[446]. What is important to note is that the Court emphasized that the requirement of judicial independence, which it linked to Article 19 (1) TEU, is not limited at a Union level and does not concern only the Judges of the Union and Advocates-General, but also the national judges[447].

As regards the scope of Article 19 TEU, the Court held that relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter, hence the scope of application of Article 19(1) is different to

[438] CJEU Case C-64/16, Judgment of the Court of 27.02.2018 Associação Sindical dos Juízes Portugueses v. Tribunal de Contas ECLI:EU:C:2018:117
[439] Pech, L. and Platon, S. 2018. "Judicial independence under threat: The Court of Justice to the rescue in the ASJP case", *Common Market Law Review* Vol. 55, p. 1829
[440] ibid.
[441] CJEU Case C-64/16, Judgment of the Court of 27.02.2018 Associação Sindical dos Juízes Portugueses v. Tribunal de Contas ECLI:EU:C:2018:117 para. 32
[442] Ibid. para. 30
[443] Ibid. para. 33
[444] Ibid. para. 34, 37, 38, 41
[445] Ibid. para. 38
[446] Ibid. paras 46-51
[447] Ibid. para. 42

that of Article 47 of the Charter[448]. Consequently, this ruling allows the possibility to allege violations of the principle of judicial independence by a national measure whose link with EU law is weak, or where the MS concerned was not implementing EU law in the sense of Art. 51 of the Charter and therefore it established a general obligation for MSs to ensure judicial independence[449].

The importance of this judgment is found in the fact that it imposed an obligation to MS to observe the independence of their courts in order to give full effect to EU law. In a sense, it made the rule of law, viewed through the independence of the judiciary, an enforceable principle[450]. More importantly, it inspired the Commission to initiate infringement proceedings against Poland based on Article 19(1) TEU.

The Polish Supreme Court was simply another judicial institution to be compromised by the policies of the administration. As it has been mentioned, the national law concerning that court provided for the lowering of the age limit of its judges and gave the President of the Polish Republic the discretion to essentially reinstate the retired judges. As a result, 27 judges including the President of the Court were forced to leave office[451]. Moreover, amendments to that law saw the number of judges in the Supreme Court increased and the procedure for their appointment to be influenced by the politically 'captured' National Council for the Judiciary, which was suspended from the European Network on Councils of the Judiciary for not being politically independent[452].

On that note, the Commission maintained that the Polish law lowering the retirement age for the judges of the Supreme Court infringed the principle of irremovability of judges whereas the granting to the President of the Republic the ability to extend the activity of judges that were about to retire was viewed as breaching the principle of judicial independence[453]. What was distinct about this infringement case was its practical effectiveness, which it owes to the utilization of the procedure of interim measures. In October 2018 the Vice-President of the Court granted interim measures suspending the relevant provisions of the national law and therefore guaranteeing that the judges would remain in their positions. The Order of the Court further required of Poland to refrain from adopting measures concerning the appointment of a new First President of the Supreme Court[454]. The Polish Government was unable to replace the judges; therefore it was possible that a judgment finding that they had left their posts prematurely would be enough to allow them to remain in office.

The Court in its Judgment in the Case of Independence of the Supreme Court practically repeated what had already established in the ASJP Case. It held that in the light of Article 49 TEU[455], MSs have freely and voluntarily committed themselves to the common values of Article 2 TEU, to respect and promote them hence, the EU law is based on the fundamental premise that MSs share these values and each one of them trusts its counterparts to abide by them[456]. This premise is the

[448] Ibid. para. 29
[449] See supra note 437 at p. 1833
[450] Scheppele, K. L., Kochenov, D. and Grabowska-Moroz, B. 2020. "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, Vol. 39, No. 1. Available at : https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852?login=true p. 53
[451] Ibid. p. 55
[452] Ibid.
[453] CJEU Case C-619/18, Judgment of the Court of 24.06.2019 *Commission v. Poland (Independence of the Supreme Court)* , ECLI:EU:C:2019:531 para. 63
[454] CJEU Case C-619/18 R, Order of the Vice President of the Court of 19.10.2018 *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:852
[455] Article 49 TEU "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."
[456] CJEU Case C-619/18, Judgment of the Court of 24.06.2019 *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531 para. 42

basis for the mutual trust among MSs that their court will uphold the values of the EU, including the rule of law and will implement EU law[457]. Accordingly, in the context of the preliminary procedure of Article 267 TFEU national courts play a part in establishing the autonomy and effectiveness of EU law[458]. In that frame, the Court repeated the ASJP case as regards the role of MSs in the upholding of the rule of law and of the principle of effective judicial protection by their national courts and tribunals[459].

Moreover, the Court insisted on a recurring theme in its case law and EU law, according to which despite MS have competence in an area of law, they still have to comply with the obligations imposed by EU law. Consequently, although MSs have competence in the organization of their judiciary, however they have to comply with Article 19 (1) TEU and ensure that their courts and tribunals meet the requirements of effective judicial protection[460]. Nevertheless, the Court made it clear that requirement does not mean that the Union is claiming competence over this field[461]. In the disputed Case, the Supreme Court was competent to rule on matters involving the application of EU law; hence, it had to maintain its independence[462].

Next, the Court presented the characteristics of judicial independence and made a distinction between its external and internal aspects. As it has been mentioned, the external aspect related to the autonomy of judges and the internal to their impartiality[463]. For these elements to be effective there need to be rules regarding the composition of judicial bodies, the length of service of judges and their dismissal. This is intended to be guaranteed by the principle of irremovability of judges among other things[464]. The Court then went on to examine the proportionality of the measures adopted by Poland, since they were considered prima facie incompatible with the principle of judicial independence. As far as the lowering of the retirement age is concerned, the CJEU held that the measure was not justified by a legitimate objective noting that there were serious doubts as to whether that reform was not aimed at side lining a specific group of judges of that court[465]. The Polish government presented the standardization of retirement age limits as a legitimate objective that the national measure sought to achieve, however the Court as it did in the Commission v. Hungary Case noted that "national provisions immediately and significantly lowering the age limit for compulsorily ceasing to serve as a judge, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned who are in post upon the entry into force of those provisions, do not comply with the principle of proportionality"[466].

As regards the discretionary power of the president of the Republic to decide whether to allow the judges of the Supreme Court to continue to carry out their duties once they have reached retirement age, according to the Polish government it constitutes a power derived from the prerogative to appoint judges conferred on him under the Constitution[467]. Thus, the main argument is that the President of the Polish Republic is the most fitting authority to protect the judiciary from interference by both the executive and legislative branches. Even though the decision to allow a judge of the Supreme Court to remain in their position is made under no procedural or substantive

[457] Ibid.
[458] Ibid. para. 45
[459] Ibid. para. 47
[460] Ibid. para. 52, 58
[461] Ibid.
[462] Ibid. paras. 56-59
[463] Ibid. paras. 72-73
[464] Ibid. para. 76
[465] Ibid. para. 82
[466] Ibid. para. 92
[467] Ibid. para 103

guarantees and cannot be reviewed by a court[468]. Therefore, the Court was bound to rule that Poland breached Article 19(1) TFEU[469]. In its analysis, which led to this conclusion, the CJEU took note of the feeble guarantees provided by the national rule, especially as far as the prior involvement of the National Council for the Judiciary is concerned. On that note, it held that this body is not able to provide the President with objective information with regard to the exercise of their discretion to decide whether a judge of the Supreme Court may not be forcibly retired[470].

The importance of this judgment can be traced in that it indirectly recognizes the systemic threat to the rule of law in Poland and it establishes a de facto precedent to retroactive lowering of the retirement age thus creating a deterring factor to any attempts in any MS to tamper with the independence of the judiciary[471]. However, its practical effects were limited even if a significant number of Supreme Court judges had refused to unlawfully and forcibly retire and they were supported in that decision by both their Chief Justice and the interim measures of the CJEU[472]. In addition, the Court did not address a significant concern raised by the Commission regarding the decision of the Polish President to increase the number of judges in the Supreme Court, something that would allow the Polish government to eventually capture it[473]. This question was to be answered in the preliminary request brought forward by that Court. Similarly, the Court was unable to address the lack of Constitutional review in Poland, considering that its Constitutional Tribunal had been restructured by the new legislature since 2016, and its credibility and independence were affected. This is problematic since this tribunal may be instumentalised by the Polish administration to avoid implementing legal obligations stemming from EU law, including non-compliance with judgments of the CJEU, and justify this behavior on constitutionality grounds[474].

Another interesting issue addressed indirectly in this Case was the relationship between the mechanism of Article 7 TEU and the infringement procedure, in the context of upholding the rule of law in the EU. In his Opinion, AG Tanchev examined the argument concerning the nature of Article 7 TEU as a lex specialis in the monitoring and implementing EU values and for that reason having priority over the infringement procedure. Were that to be true, the Commission should not have initiated proceedings against Poland on the grounds that the preventive arm of the stricto sensu rule of law mechanism had been activated and the procedure was ongoing[475]. He rather considered that the Article 7(1) TEU and 258 TFEU are complementary[476]

An important point, which reappeared in the Independence of the Supreme Court case, was the relationship between Article 19(1) TEU and Article 47 of the Charter. AG Tanchev addressed this issue in his Opinion and specifically found that Poland failed to fulfill its obligations under Article 19(1) TEU while Article 47 of the Charter was not applicable in this case due to the limitations imposed by Article 51 thereof[477]. This problem comes up often in EU case law as regards the European Arrest Warrant (EAW). More specifically, in the LM preliminary request case

[468] Ibid. para. 103
[469] Ibid. para. 124
[470] Ibid. para 117
[471] Pech, L. and Platon. S. 2019. The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v. Poland (independence of the Supreme Court case). EU Law Analysis, available at: http://eulawanalysis.blogspot.com/2019/06/the-beginning-of-end-for-polands-so.html
[472] Ibid.
[473] Ibid.
[474] Ibid.
[475] CJEU Case C-619/18, Opinion of Advocate General Tanchev of 11.04.2019 *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:325, para. 49
[476] Ibid.
[477] CJEU Case C-619/18, Opinion of Advocate General Tanchev of 11.04.2019 Commission v. Poland (Independence of the Supreme Court), ECLI:EU:C:2019:325, para. 67

(otherwise known as the Celmer judgment), the High Court of Ireland asked the CJEU whether the competent judicial authority is obliged to honor an EAW issued by Poland whose judicial independence is not guaranteed[478]. In its essence, the question was under which circumstances MSs might circumvent the principle of mutual trust, when the values of the EU are jeopardized. The Court held that the right to a fair trial of Article 47 of the Charter may be a 'device' for protecting other fundamental rights when they are vindicated in the course of litigation, however, it is also a means of guaranteeing the observance of the rule of law and of the principles of Art. 2 TEU[479]. Notwithstanding the fact that this judgment, much like the ASJP case, confirmed that judicial independence at a national level is not in its entirety left to the competence of the MSs, since its effects are mirrored in the EU legal order, it set the bar so high by demanding an assessment of the independence of the particular court in the particular proceeding that would hear the expedited person's case that postponing the surrender on the basis of inhuman treatment would be easier[480].

Moreover, the Court revisited the reform of the Polish judicial system in the infringement proceedings concerning its Ordinary Courts. The aforementioned national law of July 2017 provided for a lowering of the retirement age of judges of the ordinary courts of Poland from 67 to 60 for female judges and 65 for male judges. The Commission brought an action for infringement under 258 TFEU against Poland with respect to the obligations arising from Article 157 TFEU[481] and Directive 2006/54[482]. Firstly, the Court ruled that the national measure fell within the scope of both Article 157 TFEU and the Directive[483]. It stated, that the difference as regards the time when the retiring persons will have access to the advantages provided for by the pension schemes constituted a direct discrimination based on sex[484]. The Polish government put forward the argument that it constituted a positive discrimination measure in compliance with Article 157(4) TFEU. However, the Court replied that according to settled case law such a presumption cannot be accepted, considering that the national law did not seek to outbalance the disadvantages female judges are exposed to in their professional lives and were not a remedy to such problems[485].

The Polish law also allowed the Minister for Justice to decide whether or not to permit judges of the ordinary courts to continue to carry out their duties beyond the new retirement age. Since it had the same motif as the law on the Polish Supreme Court, for which the CJEU had already ruled, the latter repeated its previous judgment. The Court held that the ordinary courts could be called to implement and interpret EU law and therefore they were covered by the scope of Article 19(1) TEU[486]. Accordingly, these courts have to independent within the meaning of the principle of judicial independence as interpreted by the CJEU[487]. The Court held that the fact that an institutional

[478] CJEU Case C-216/18 PPU, Judgment of the Court of 25.07.2018 *Minister for Justice and Equality (Deficiencies in the System of Justice),* ECLI:EU:C:2018:586 para. 25
[479] Ibid. para. 48
[480] Ibid. paras. 52, 68, 73, 74
[481] Article 157 (1) Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. (2) For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.
[482] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
[483] CJEU Case C-192/18, Judgment of the Court of 05.11.2019 Commission v. Poland (Independence of Ordinary Courts), ECLI:EU:C:2019:924 paras. 60, 73
[484] Ibid. para. 78
[485] Ibid. paras. 79-82
[486] Ibid. para. 104
[487] Ibid. paras. 105, 108

instrument, such as the Minister for Justice, is entrusted with the power to decide whether or not to grant an extension to the period of judicial activity beyond the normal retirement age is, not sufficient in itself to conclude that the principle of independence has been undermined[488]. Moreover, it ruled that the procedural and substantial guarantees surrounding the decision-making powers of the Minister were not such as to dissolve the doubts concerning the independence of the judges[489]. The criteria on which the decision is to be based were too vague and unverifiable, while it does not need to state reasons it is not reviewable by a court and the length of the wait period for judges until it is delivered falls within the discretion of the Minister[490].

In what concerns the principle of irremovability of judges, the Court repeated the ruling of the Supreme Court Case. This principle requires that judges remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term[491]. Exceptions could only be allowed in order to protect a legitimate aim and subject to the principle of proportionality[492]. Therefore, the combination of the measure of lowering the retirement age and of the discretion of the Minister in deciding whether to keep some judges or let them go cannot comply with the principle of proportionality[493].

Furthermore, in the A.K. and Others Case, the Court was able to provide an answer to the preliminary question set forth by Polish Supreme Court, which concerned the independence of its Disciplinary Chamber. Three Polish judges of the Supreme Administrative Court and of the Supreme Court relied on an alleged infringement of the principle of equal treatment with respect to discrimination based on age in employment to challenge their retirement based on the 2017 law on the Supreme Court. Repeating its previous case law, the Court held that both Article 47 of the Charter and Article 19(1) TEU were applicable on the basis of the implementation of Directive 2000/78[494]. The Court again noted that the independence of the courts forms part of the right to effective judicial protection which is of cardinal importance in ensuring the protection of all rights individuals derive from EU law and of the values of the Union enshrined in Art. 2 TEU and specifically of the rule of law[495]. Moreover, it highlighted the importance of the principle of separation of powers in the context of the rule of law and noted that the independence of the judiciary is to be perceived in relation to the executive and legislative powers[496].

As regards the independence of the Disciplinary Chamber the Court stated that the mere fact that the judges of this chamber were appointed by the President of the Republic does not in itself give rise to a relationship of subordination or to doubts about its impartiality as long as when they are appointed they are free from influence[497]. The prior participation of the National Council for the Judiciary in this selection of judges, which consists of proposing judicial appointments is in theory able to control the President's discretion, provided though that this body is observing independence guarantees[498]. Therefore, the referring court is to evaluate the circumstances under which the NCJ members are appointed and the way this body ensures the independence of courts[499]. The Court

[488] Ibid. para. 119
[489] Ibid. para. 120
[490] Ibid. para. 122, 123
[491] Ibid. para. 113
[492] Ibid.
[493] Ibid. para. 130
[494] CJEU Joined Cases C-585/18, C-624/18 and C-625/18, Judgment of the Court of 19.11.*2019 A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982, paras. 81, 82
[495] Ibid. para. 120
[496] Ibid. para 124
[497] Ibid. para. 133
[498] Ibid. para. 137, 138
[499] Ibid. para. 140

underlined that notice should be taken of the scope of the judicial review over the propositions of the NCJ considering that the President's appointment decisions are not amenable to such review[500].

Next, the Court examined the specific characteristics of the Disciplinary Chamber. Considering that it had previously ruled on the incompatibility of provisions of the Polish law on the Supreme Court with Article 19(1) TEU, it noted that the Disciplinary Chamber was granted exclusive jurisdiction to rule on cases of retiring judges of the Supreme Court and that it had a high degree of autonomy in doing so. Moreover, it pointed out that these factors taken in isolation would not necessarily be able to interfere with its independence whereas their combination would[501]. At any case, the CJEU ruled that it is for the referring court to determine the independence and impartiality of the Disciplinary Chamber. If these principles are deemed to be violated, then the primacy of EU law requires it not to apply the national rule, which awards exclusive jurisdiction to that court to rule on matters of the retirement of the Supreme Court judges[502].

It is worth mentioning that as of 27 October 2021 Poland is faced with interim measures imposing a daily penalty payment of € 1.000.000 essentially for not complying with the findings of the judgment concerning the Disciplinary Chamber of the Supreme Court, since the Commission had launched an infringement procedure on that basis and an interim order had been issued by the Vice-President of the Court[503]. This penalty came shortly after the Polish Constitutional Tribunal ruled against the primacy of EU law[504].

[500] Ibid. para 145
[501] Ibid. paras. 147-152
[502] Ibid. paras. 160-161
[503] CJEU Press Release No 192/21, Luxembourg, 27 October 2021, Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf
[504] Deutsche Welle, 07.10.2021. "Poland's top court rules against primacy of EU law", available at: https://www.dw.com/en/polands-top-court-rules-against-primacy-of-eu-law/a-59440843

Paragraph 3. The way forward

Even though both Hungary and Poland are subject to the procedure of Article 7(1) TEU and to a number of infringement procedures, which address their systemic issues in different ways, they still manage to promote their illiberal agenda. Most recently, they have introduced laws, which discriminate against persons of the LGBTIQ community.

In January 2021, the Hungarian Consumer Protection Authority obliged a publisher of a children's book, which featured LGBTIQ characters to include a disclaimer in the book that it depicted 'behavior deviating from traditional gender roles'[505]. This was viewed by the Commission as a restriction to the right of freedom of expression and of non-discrimination as enshrined in Articles 11 and 21 of the Charter respectively[506]. Moreover, it constituted a breach of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market[507]. The Commission sent a letter of formal notice to Hungary claiming that this requirement was discriminatory on the basis of sexual orientation and imposed an unjustified restriction. Hungary on its part was unable to give grounds for its limitation on fundamental rights or to substantiate its claim over the negative effects of exposure to LGBTIQ content on children[508].

Furthermore, Hungary adopted a new law in June 2021 to limit the access to content, which propagates 'a divergence from self-identity corresponds to sex at birth, sex change or homosexuality' for individuals under 18[509]. Notwithstanding that, the aim pursued by this legislation is the protection of minors, which is something that the EU protects, the reasons why the exposure to that content would be detrimental for minors have not been proven by Hungary[510]. The Commission established a number of inconsistencies of that law as regards compliance with EU law. Firstly, it noted a breach of the Audiovisual Media Services Directive[511] with respect to standards for audiovisual content and the free provision of cross-border audiovisual services, considering that the restrictions imposed by Hungary on the basis of sexual orientation were unjustified and disproportionate[512]. Then it brought forward the matter of compliance of the national law with the e-commerce Directive[513] and the country of origin principle, in that it prohibits the provision of services from other MSs, which

[505] European Commission Press Release, 15 July 2021, "EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people", available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668

[506] Ibid.

[507] Ibid.

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (Text with EEA relevance)Text with EEA relevance and Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance)

[508] European Commission Press Release, 15 July 2021, "EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people", available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668

[509] Ibid.

[510] Ibid.

[511] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance)

[512] Ibid.

[513] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

display different sexual orientations[514]. Similarly, it unjustifiably restricted the cross-border information society services[515]. Next, the Commission challenged the Hungarian law on the grounds that it failed to inform it in advance as it was obligated under the Single Market Transparency Directive (Directive 2015/1535)[516]. Then, it went on to the infringements of primary EU law and of the fundamental economic freedoms, claiming that the national measure was breaching the freedom to provide services (Article 56 TFEU) and the free movement of goods (Article 34 TFEU) for the reason that it failed to demonstrate that the restrictions were justified non-discriminatory and proportionate[517]. On that note, the Commission argued that Hungary was breaching fundamental rights protected by the Charter, which is applicable in so far as Hungary is implementing EU law. More specifically it stated that Article 8 of the Charter concerning data protection was violated by some of the provisions of the national law, as well as Article 1 protecting human dignity, Article 7 regarding the freedom of expression, Article 11 on the respect for private life and Article 21 on the right to non-discrimination. Interestingly enough, the Commission has referred to the values of Article 2 TEU, which it finds to be violate, considering the gravity of the infringements of EU law by the contested national measure[518].

In the case of Poland, it had been noted since 2019 that several municipalities and regions had adopted resolutions claiming to establish 'LGBTIQ-ideology free zones'[519]. The Commission considered that they might be breaching EU law regarding non-discrimination on the basis of sexual orientation and sought to assess them. However, Poland did not provide the information the Commission had requested[520]. Therefore, the Commission had to conclude that Polish authorities were obstructing the Commission from exercising the powers the Treaties have vested it with thus failing to observe their obligation of sincere cooperation under Article 4(3) TEU[521]. Hence, the Commission sent a letter of formal notice to Poland.

The Commission did not depart from its technical approach to the infringement procedure and based most of its reasoning on EU secondary law and on the fundamental freedoms of the internal market. It does not take the systemic infringement route, however, the fact that it referred to a breach of Article 2 TEU based on the severity of the infringements of the rights of the Charter, is an important step in enforcing that provision, while at the same time it risks being interpreted on the basis of Article 51 of the Charter thus limiting its scope of application. Therefore, it remains to be seen how the Court will approach these proceedings.

Theoretically, in attempting to find MS liability under Article 2 TEU, it may also be argued that it is possible to link the restoring of the rule of law with the principle of solidarity, considering that it was highly emphasized in the Lisbon Treaty and enhanced by the CJEU case law. This is to be

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[514] See supra note no. 506

[515] Article 2(a) of Directive 2000/31/EC "For the purpose of this Directive, the following terms shall bear the following meanings: a) information society services: services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC"
Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codifying Directive 98/48/EC) "service means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"

[516] According to this EU legislation, MSs' authorities have to inform the European Commission of any draft technical regulations on products and information society services before they are adopted in national law.

[517] See supra note 506

[518] Ibid.

[519] Ibid.

[520] Ibid.

[521] Ibid.

considered since in a case of systematic breach of EU values "self-healing" of the deviating MS is most likely implausible therefore, 'external' assistance in the form of intervention of the EU with the cooperation of MSs or of the MSs using means of the Union is to be viewed as a gesture of solidarity[522].

On that note, it is worth examining the possibilities a direct state v. state action based on Article 259 TFEU may offer in enforcing the values of Article 2 TEU. This provision has been mostly ignored by commentators and scarcely been used. One of the reasons behind this is its use in the past. MSs have employed Article 259 TFEU attempting to achieve national political goals rather than the enforcement of EU law. This was clearly demonstrated in the Hungary v. Slovakia Case in which free movement of persons was invoked by Hungary when Slovakia refused entry to the Hungarian president under sensitive political circumstances[523]. Nevertheless, this provision is structured on the presumption that MSs have a shared interest in ensuring compliance with EU law among them and aims at exactly giving them the ability to bring their peers before the CJEU when they failed to fulfill their obligations under the Treaties[524].

Another reason behind the general rejection of this Article is its placement in the Treaties and its relationship towards Article 258 TFEU. According to Article 259(2) TFEU "before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission ". This procedure therefore is not entirely up to the MS to bring about, as it includes an institutional involvement through the reasoned opinion of the Commission, similarly to the Art. 258 TFEU procedure. In most cases the MS will not have to initiate the 259 TFEU procedure as the Commission will most likely take over through an infringement action, however, it cannot be pressured into submitting a reasoned opinion, considering as it has been mentioned above that it enjoys a wide margin of discretion in this aspect. It is understood that the Commission will not, and rightly so, initiate proceedings solely based on a national government's political aspirations and interests especially when the allegations against the receiving MS are not true[525]. Therefore, it seems that Article 259 TFEU is in a sort of auxiliary place in the EU rule of law enforcement scheme. Nevertheless, in the case of values enforcement, one should keep in mind that it is possible that direct state v. state actions may fulfill the gap caused by the Commission's reluctance to employ the infringement procedure for this purpose. The fact that the values of Article 2 TEU are presented as shared constitutional values among the MSs' legal orders (indicating that the institutions are not the principal actor in enforcing EU values) and the political character of Article 7 TEU, viewed as the stricto sensu rule of law mechanism add to this argument[526].

[522] Konstantinides, T. 2017. *The Rule of Law in the European Union; The Internal Dimension*. Portland: Hart Publishing, p. 155
[523] CJEU 364/10, Judgment of the Court 16.10.2012, *Hungary v Slovak Republic*, ECLI:EU:C:2012:630
[524] Kochenov, D. 2015. *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, Jean Monnet Working Paper 11/15, available at: https://jeanmonnetprogram.org/paper/biting-intergovernmentalism-the-case-for-the-reinvention-of-article-259-tfeu-to-make-it-a-viable-rule-of-law-enforcement-tool/ p. 12
[525] Ibid.
[526] Ibid. p. 15

Moreover, it has been argued that this procedure is somewhat precarious in a sense that it challenges the relationships between the MSs. This is disproved by the ample litigation in the context of the CoE where largely similar values have been at stake and direct state v. state action has been used (albeit in extreme circumstances), demonstrating that this concept is not all catastrophic for inter-european relations. Considering the difficulties of setting in motion the Article 7 TEU mechanism and the limited initiatives of the Commission based on Article 258 TFEU, it is possible to view Article 259 TFEU as another option in implementing the rule of law in the EU, in a way that does not threaten the principle of conferral (as it has been argued in the case of the infringement procedure). Nevertheless, such a possibility should be handled with caution and not exceed the limits of EU law, within the supranational sphere and not adhering to intergovernmentalism, as it happened in the aforementioned case of Austria[527]. On the contrary, it has been suggested that a peer review mechanism or a 'horizontal Solange' scheme, which would allow MSs to impose sanctions not in the context of EU law but rather outside it, would be most effective[528]. At any case, the infamous letter of 6 March 2013 sent by four Foreign Affairs Ministers (of Germany, the Netherlands, Finland and Denmark) to the President of the Commission is able to show that some MSs are more eager to fight for the implementation of EU values than others considering also that actions brought by several states are not per se precluded by Art. 259 TFEU. In that letter, they proposed the creation of a mechanism preceding the Art. 7 TEU procedure, based on the prominent role of the Commission which shall be able to conclude binding agreements with the MS concerned in order to resolve the situation, prior to which a consultation with that MS would be held[529]. However, that proposal would require a Treaty amendment hence, it was not realized.

[527] Ibid. p. 17

[528] Argalias, P. 2018. The EU Mechanisms for Safeguarding the Rule of Law in the Member States. In: Chrysomallis, M. D. (edit.) *The Principle of the Rule of Law in the Legal Order of the European Union*. Nomiki Bibliothiki: Athens, p. 98

[529] Kumin, A. J. 2016.Global Activities and Current Initiatives in the Union to Strengthen the Rule of Law – A State of Play, In: Schroeder, W. (edit.) St*rengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*. Portland: Hart Publishing. p. 216

Conclusion

The CJEU led by the Commission's infringement actions was able to address the rule of law issues in Hungary and Poland however somewhat ineffectively. The limitations of the scheme of the procedure of Art. 258 TFEU allowed these MSs to continue the restructuring of their constitutions and judicial systems establishing an illiberal governance pattern and essentially overturning the rulings of the CJEU. Nevertheless, it was the Court of Justice, who made an important step in rediscovering the restrictions of addressing matters, which fall within the competence of the MSs and which are close to their sovereignty, in the context of EU law. This is further proof of the 'ever closer' Union and of the interdependence built in the frame of the Union. The CJEU used the principle of judicial independence in order to get through to the rule of law. It based its reasoning on the fact that the national judge is also a European judge therefore is responsible to implement and interpret EU law and for that reason, the Union may intervene in the organisation of the judiciary of a MS. The inability of a MS to guarantee the protection of the interests of the Union and of its citizens allows the EU to step in fields that are traditionally considered to be at the core of the state. Still, the Commission has not been 'brave' enough to bring that issue forward in a more direct way, using Article 2 TEU as a basis for the litigation. The latest developments in Hungary and Poland make them fitting for such a procedure.

Conclusions

It is evident that the distinction highlighted in this dissertation between the stricto and lato sensu of the rule of law mechanism of the Union is deeply rooted in the historic evolution of the Union.

The EU steadily moved from an economic Union between European States to a supranational sui generis organisation which allowed a close cooperation and finally (albeit partial) integration of the legal orders of its MSs, based on their common constitutional traditions and societal and legal values. However, the eastward (post-communist) enlargement of the Union caused some turmoil as the targeted states and legal orders were not in tune with what the original states considered their institutional basis. In order to protect that perception of the EU they introduced a mechanism to combat MSs' behaviors that depart from the rule of law of the EU. It is this part where things get more complex. There is a will within the EU to control the governance choices of its MSs, which was reflected in the Treaty and the Art. 7 TEU mechanism. However, the high procedural and substantive standards of this procedure make it hard to be activated and turn it dependent on the political willingness of the institutions vested with the power to trigger it.

As a result, when illiberalism, nationalism and Euroscepticism came to surface the main tool the EU had created to combat those situations was acutely ineffective. This led the Court of Justice to reinvent the provisions of the Treaties, as it has done in the past, in order to control the damage. The classic judicial procedures provided by the Treaties, intended to protect EU law and the interests of the persons stemming from it, were used in order to 'interfere' with fields close to what is traditionally perceived as national sovereignty, like the structure of the judiciary. In a balancing act, on the edge of EU competence, the CJEU has been able to connect the EU rule of law, perceived through the principle of legality and the judicial review of the acts of its institutions, with the national rule of law. In other words, it was able to use an instrument intended to safeguard the compliance with EU law to impose restrictions on MSs who deviate from the basics of western liberal democracies and therefore break the orthodox borders between the national and supranational legal order. One could see an analogy between the values of the EU mirrored in the national values and the other way round. However, the multiplicity of national legal orders and the respective interpretations and contents of the shared values, in the context of the EU, disrupt this analogy.

Nevertheless, the progressive jurisprudence of the CJEU has not proved to be adequate in restraining the undemocratic, at large, route some MSs have taken. They have been able to get away with not conforming to the judgments of the Court and have only been prevented by specific and targeted interim measures of the Court. Therefore, the Union has altered its approach and recently came up with a new Regulation in order to make the financing of MSs by the Union conditional upon their compliance to the rule of law. This seems the most pragmatic of perspectives and in theory is likely to be the most effective. Even though the situation in some MSs continues to deteriorate and challenge the Union, this mechanism, which is neither based on Art. 7 TEU nor on 260 TFEU and as such does not involve neither the Court nor the Council (at least not in the same way Art. 7 does) cannot yet be implemented as the intention to link the economic constitution of the Union to its legal and political values has been questioned before the Court by the MS which were likely to be the first targets of its implementation.

The stricto sensu rule of law mechanism in all its expressions, both soft and hard law, which and intended to prevent a derailing of the values of the EU and the effects that would have in the internal market was unable to do exactly that. Similarly, the mechanisms developed by the Treaties to ensure compliance with EU law in a wider sense, which had to be broadened in order for the judge of the Union to give legal enforceability to the values of the Union have not been as successful. These results could hence be attributed to the perhaps new and underdeveloped political reflexes of the EU and the respectively formed common European democratic conscience and the still existing limits to the competence of the Union. However, the developments in this area are all the more worrying in a way that questions the effectiveness of EU law in protecting its citizens and the power of the Union to impose the democratic and legal standards it prides itself to be a guardian of.

Tables

Infringement Proceedings before the CJEU 2012-2016[530]

	2012		2013		2014		2015		2016	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	5	1	2	1	4		2		1	
Bulgaria					1	1	2		1	
Czech Republic	1		2	2					1	
Denmark			1	1	1		1			
Germany	1	2		2	3	1	3		1	
Estonia	1									
Ireland	2		3	1				1		
Greece	5		2	1	4		3		4	
Spain	3		6		6				3	
France	4		5	3	1		4		1	
Croatia										
Italy	3		7	1	6		2		1	
Cyprus	2		1						1	
Latvia							1			
Lithuania					1					
Luxembourg			1	1			2		1	
Hungary	1		1		2				1	
Malta										1
Netherlands	3	1	2	2		1			1	1
Austria	3			1						1
Poland	3		4	2	4		3	1	2	
Portugal	5			1	3				6	
Romania									1	
Slovenia	1		1				1			
Slovakia		1	1					2		
Finland	1			2						
Sweden	1		1	1	1		1			
United Kingdom	2			1	4		1	1	1	1
Total	47	5	40	23	41	3	26	5	27	4

[530] Court of Justice of the European Union Annual Report 2016 Judicial Activity, p. 99, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf

Infringement proceedings before the CJEU 2016-2020[531]

	2016		2017		2018		2019		2020	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	1		1		2		1		3	
Bulgaria	1		1		1				1	
Czech Republic	1				2			1		
Denmark						1				
Germany	1		4		2	1	3			1
Estonia										
Ireland			1		1		2		2	
Greece	4		5		4		2		2	
Spain	3		2		3		1	1	2	
France	1				1		1			
Croatia							1			1
Italy	1				2		5	1	3	
Cyprus	1								1	
Latvia							1			
Lithuania										
Luxembourg	1		1							
Hungary	1		1		1		1		4	
Malta		1			1					
Netherlands	1	1					1			
Austria		1			1	1	1		2	
Poland	2				4		3		1	
Portugal	6		2				1			1
Romania	1				1				2	
Slovenia			1		1				1	
Slovakia					1					
Finland									1	
Sweden										
United Kingdom	1	1	1		2		1		1	
Total	**27**	**4**	**20**		**30**	**3**	**25**	**3**	**26**	**3**

[531] Court of Justice of the European Union Annual Report 2020 Judicial Activity, p. 218, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_jud_2020_en.pdf

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Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance)

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codifying Directive 98/48/EC) “service means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”

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