Democratic Efficacy and the Varieties of Populism in Europe

Working Paper

Legal Responses to Populism

Best Practices at National and European Levels

May 2022

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 822590. Any dissemination of results here presented reflects only the consortium's view. The Agency is not responsible for any use that may be made of the information it contains.

Abstract

The research conducted on this working paper focused on the best practices adopted at the European level to respond to populist threats to constitutional rules. The investigation, based on ten country reports involving national experts' information, allowed the evaluation of the role of the constitutional judiciary and the impact of courts' decisions-interpretations on the spread and on the counterreaction to populism. These pieces of empirical evidence allowed to identify three different types of methods and practices: (I) the "business-as-usual model", in cases no changes in the jurisprudence occurred to react to populist threats (Austria, Italy, Romania, Czechia, United Kingdom); (II) the "changing interpretive practice to promote populist aspirations", meaning those cases where populist issues triggered changes in interpretive practice resulting in a substantive concepts change and in some cases bringing real innovations into jurisprudence (Greece, Poland, Hungary); (III) the "changing interpretive practices to counteract populist initiatives" (Croatia). However, it should be noticed that in all cases populism did not generate any new theory of interpretation. Likewise, no close connection can be established between populist constitutionalism and methods of constitutional interpretation. In short, populists do not have preferrable interpretive patterns of theory or practice. Elements relating to populist constitutional drifts were grouped into four categories: (a) the preference of popular sovereignty and the promotion of direct democracy; (b) the claim for authentic representation and, together with this, the anti-pluralism; (c) an extreme approach of majoritarianism; (d) the restriction of certain fundamental rights together with intolerance/discrimination against certain minorities. The analysis proved that there are no national answers to "populist threats" that are effective everywhere, every time. However, some best practices are more dominant in the EU than others. Moreover, legal reactions to anti-constitutionalist tendencies were examined on the basis of the Venice Commission opinions and the European Court of Human Rights decisions. Regarding the legal practices and practices of law in response to populism under the EU rule of law principle, the "EU Toolbox" – naming the set of legal tools and legal responses aiming to safeguard the EU Rule of Law – was examined theoretically and scrutinised in practice through case-law examination. The evaluation was assessed through the tailored "best practices" methodology: "efficiency", "effectiveness" and "transferability" criteria.

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Introduction

This working paper will classify legal institutions and solutions as either reinforcing or taming anti-constitutionalist moves, building on a broad take on questions like electoral systems, campaign regulation and referendum, policies on fake news, integration policies etc. Possible scenarios on the prospects of the European project in this perspective will be elaborated. The research will address the puzzle in enlargement conditionality literature on how institutional-legal reforms can become sustainable guarantees that are hard to be reverted, once conditionality pressure fades. Our goal is to formulate policy recommendations, based on best practices and innovative proposals, for how to best counter anti-constitutionalist tendencies".

Based on the outcomes of all previously conducted research in DEMOS (most relevant: WP2, 5, 6), and after having chosen the definition of "political populism" as the point of observation from which to direct the research on 7.5, the legal team of DEMOS is equipped with all necessary prerequisites to proceed in a "best practice" methodological approach.

The "best practice" methodology has been adapted to satisfy the criteria of 7.5 legal research: this approach allows to formulate reliable policy recommendations, transcending the purely doctrinal-theoretical content, and drawing conclusions that are based on scrutiny and case investigation.

In compliance to the requirements of the methodological approach, the DEMOS project has defined the *areas* responsible for the democratic functioning in the EU, constituting our "research areas", and has determined the related legal-institutional *populist challenges* (threats/violations) of the democratic principles and the principles of the rule of law, which now constitute our "information criteria". Finally, we also have acquired knowledge on which *institutions*, and which legal *practices* and practices of law are expected to address these challenges, thus orienting us towards the "competent institutions" to examine[1].

The Macro-Areas of research for the "best legal practices" involve two macro-levels of investigation (national and European), consisting in the broader thematic areas of 'Democracy and the Rule of Law', therefore including the examination of responses on challenges perpetrated towards constitutions, judicial organization and independence, representative democracy principles and practices, systematic fundamental rights violations, rule of law and democratic principles and values. A section called 'special issues' is included to allow cases or practices that are considered of crucial interest in addressing the question of the "responses to populism" of this working paper and involve indirectly the above-mentioned areas of research.

Please find a thorough explanation of the methodology used in this research at the Annex 1.

[1] Please see the ANNEX for more detailed information on the "best practices" methodology approach

BEST-PRACTICES RESEARCH AREA	"INFORMATION CRITERION"	"COMPETENT INSTITUTION"
Constitutions	Reforms; Amendments;	Constitutional or Supreme Court; Venice Commission; ECHR; CJEU; Public Administration praxis; Ombudsman
Rule Of Law and Democracy	Major institutional and procedural changes in legislature, electoral laws, governmental decision making (centralization, simplification of decision-making) Populist use of populist sovereignty; antipluralism; extreme majoritarianism; restriction of rights	National (Supreme Courts and Legal Reviews); Constitutional or Supreme Courts at the national level; CJEU and ECHR; EU law on the domestic rule of law backsliding; EU law intervening in EU level mechanisms; Venice Commission
COURTS (EU, ECHR and national level)	Judicial Independence; Judicial Review; Court's efficiency; Enforcement of Court decision; Amending judicial appointment rules and/or reforming disciplinary regimes	EU law intervening in domestic law backsliding; National and Supranational regulation; Constitutional Courts; CJEU; ECHR; Venice Commission
SPECIAL ISSUE	Media as a tool for democratic efficiency	Venice Commission; National and EU Courts; Ombudsman; Civil Society and NGO's legal actions, reports and observations; Constitutional or Supreme Courts on the national level and CJEU; Institutional responses (i.e.Independent Authority for Communication and Transparency)

PART A. Legal reactions to populism in the EU Member States with special regard to the European constitutional courts and other high courts and Member States' best practices according to national experts

By Fruzsina Gárdos-Orosz, Zoltán Szente, Emese Szilágyi, and Domonkos Polonyi (Centre for Social Sciences, Budapest, CSS)

I. Legal reactions and scenarios from the European constitutional courts and other high courts under populist pressure

The problem-setting of the first part of the research we did (Fruzsina Gárdos-Orosz, Zoltán Szente (eds): Populist challenges to constitutional interpretation in Europe and beyond, Routledge, 2021) was based on the recognition that one of the most characteristic political tendencies in contemporary Europe is modern populism, which seeks to realize its power ambitions as well as its values and aspirations through constitutional changes.

Our research is based partly on country reports. We have asked national experts to respond to our questions concerning how the constitutional courts influence the spread of populism in Europe, what is the role of the constitutional judiciary and ultimately how it influences the spread of populism or how it preserves the values of liberal constitutionalism in the legal sense, through constitutional interpretation. Our starting point was that the action of the courts manifest in decisions and the decisions are always reasoned. Reasoning needs the interpretation of the constitutional provisions. We have discussed this problem at a Demos conference in 2019 in Budapest with international scholars who deal with constitutional interpretation. After this general discussion about the problem-setting and the experiences, we have asked the experts of those countries where populism had a great effect on constitutional adjudication to contribute to our book by explaining how populist aspirations were strengthened or counteracted, rejected by the constitutional courts or other high courts in the EU countries.

Furthermore, we have asked the experts to prepare a greater overview about the effects of populism on the role of the constitutional court and on their actual, interpretation related work. We have also asked one of the greatest experts on populist constitutionalism, Mark Tushnet (Mark Tushnet and Bojan Bugaric: The effects of populism on the constitutional systems, Oxford University Press, 2021) to explain to us in the book what the frames of this court activity are, to find out if there is a special pattern that serves the spread of populism in constitutional adjudication, or – in the contrary – if there is a specific pattern that helps to resist populist aspirations.

The populist agenda influences constitutional development not only when populists are in government, but also when they are in opposition and when the government, often under pressure from public opinion, takes on and pursues similar policy objectives. Nevertheless, real constitutional moments occur only rarely, and formal constitutional changes often lack the appropriate majority support. In such circumstances, the importance of the use of informal tools

and procedures to change the constitutional design increases. Among them, constitutional courts and other high courts and constitutional interpretation can have a crucial role, because if new methods are used to reveal the meaning of the constitutional text, or certain substantive constitutional concepts are reinterpreted, significant reforms can be performed even without amending the constitution. Constitutional courts by interpretation, by their jurisprudence can change the constitutional setting.

We explored how and where this populist influence can be traced in constitutional judicial practice of interpretation in the European countries. We examined 10 countries which were in the focus of the discourse on populism in the recent years: Greece, Spain, UK, Czech Republic, Hungary, Poland, Croatia, Italy, Romania, Poland.

How to assess judicial responses to populist-inspired constitutional issues?

The country studies showed that no matter how populism is present in a national political system, populist-inspired changes have reached constitutional review to varying degrees. Exploring how the constitutional and the equivalent courts have responded to these challenges, and whether they have developed and applied new interpretive methods or judicial constructions, we primarily examined, as a first step, whether the practice of constitutional interpretation has changed in the cases involving constitutional reviews of legislation inspired by populism. We assumed that one theoretical possibility was that the interpretative practice of the courts has remained unchanged, that is, they have used the same principles and methods of interpretation in these cases as in others. Therefore, as a first step we examined whether there has been any change in the methods of interpretation. Then, in the second phase of our analysis, assuming that the interpretive practice has changed, we examined what kind of change(s) have taken place, and

• whether new 'technical' interpretive modes have come to the fore, or the emphasis has been placed on methods already used by the courts, or

• whether certain substantive constitutional concepts have been reinterpreted or new substantive categories have been used (possibly created or borrowed) by the courts.

Certainly, the courts may reply to the populist challenges by combining these mechanisms, using, for instance, a mixture of interpretive methods as well as evoking dormant constitutional provisions or inventing new substantive concepts. The attitudes towards activism and deference represent another dimension of possible judicial strategies, as the same methods can be applied extensively, or moderately. Finally, as the third step, we summarized the assessments of the authors of the country reports on how the continuity or the changes in constitutional interpretation have had repercussions on populist claims; that is, whether the courts, by way of constitutional interpretation, have resisted or supported populist aspirations, or, possibly, had a neutral effect on them.

The country reports combine theoretical and analytical methods, apart from discussing specific populism-related cases, the authors shed light on more general theoretical considerations regarding the responses to populism.

1. Business-as-usual model

In some cases, there were no changes in the jurisprudence: this is the business-as-usual model. Analysing the national case studies, it can be stated that the interpretive practice of some constitutional courts or other equivalent supreme courts has not changed even when they have encountered populist-inspired cases. Paradoxically, this does not represent an unchanged judicial strategy, but only the continuity of the techniques or substance of constitutional interpretation. However, behind the application of the same interpretive tools may lie different judicial strategies or behaviours. (Austria, Italy, Romania, Czech Republic, Great Britain)

As Konrad Lachmayer reports, for example, even though there are no perceptible changes in the interpretive methods used by the Austrian Constitutional Court, the Court has become more self-restrained in the past decade than it was before, in particular in the protection of fundamental rights. Prior to 2008, the Court pursued an activist stance for promoting basic rights, boldly using teleological reasoning and interpreting substantive concepts such as equality. As a result of this kind of judicial activism, the body was able to be an effective barrier to the first wave of populism in Austria. Now, however, due to the more deferential approach of the Court, it has lost its earlier role in this respect. This illustrates that even when there is no change in the interpretive methods applied, there can be different outcomes depending on whether the courts pursue an activist or self-restraining practice.

Gianmario Demuro and Riccardo Montaldo evaluate the Italian Constitutional Court's responses to populist initiatives in a similar way, claiming that the Court has not taken the opportunity to curb populist aspirations – although in some cases this would have been possible – but has evaded responsibility for the decision on procedural bases. Interestingly, however, some ordinary courts have acted against populist attempts and annulled individual decisions using a constitutionally conforming interpretation that used to be applied otherwise by the Constitutional Court.

Alexandra Mercescu draws a similar conclusion, saying that the interpretive practice of the Romanian Constitutional Court has remained unchanged in cases that can be considered populist 'mostly because of their outcome'. However, this jurisprudential continuity, as she argues, means the perpetuation of weaknesses in standard reasoning such as the argumentative fallacies of 'non sequiturs, tautologies, contradictions and selective treatment of case law'. The results of the low-level judicial reasoning ultimately weaken constitutional guarantees and control mechanisms, even if the Court's rulings do not comply with the objectives of the populist political agenda.

In the Czech Republic, as Zdeňek Kühn supposes, although the populist trends have had little effect on the jurisprudence of the Constitutional Court, the body observed the coming new wave of populism and embarked on a more moderate practice, at least in the sense that it ceased to extend its powers, and some of its decisions have not been 'in line with the earlier case law'. The self-restraining practice culminated in refusing the justiciability of the declaration of the state of emergency in 2020, but the interpretive toolkit and the self-understanding of the Court have remained unchanged.

As opposed to the cases discussed so far, the continuity of constitutional jurisprudence has obstructed populist ambitions in Spain. In this country, as Balaguer Callejón states, neither Catalan separatism, nor the national populist parties have 'managed to generate a jurisprudential line of interpretation of the constitution that can be defined as populist', because the Spanish Constitutional Court has resolutely resisted such aspirations. This means that the existing interpretive practice has provided appropriate tools for the Court to combat populist constitutionalism. Essentially, the Court has taken the position that unilateral legislative actions that do not respect the constitutional framework, even on the basis of the popular will, are unconstitutional.

In Britain, according to McEldowney's analysis, during the protracted Brexit controversies, the Supreme Court's decisions were consistent with the well-established judicial practice reviewing the prerogative powers of the Executive, giving priority to the principle of parliamentary sovereignty, and rejecting the special legal status and judicial enforceability of constitutional conventions.

2. Changing interpretive practice to promote populist aspirations

In other cases, we have observed changing interpretive practice to promote populist aspirations in the jurisprudence of certain European constitutional courts. In those cases in which populist issues have triggered changes in interpretive practice, these effects have taken a variety of forms. The outcomes of our research show that most often some substantive concepts have come into the mainstream of constitutional interpretation, in some cases bringing real innovations into jurisprudence. (Greece, Poland, Hungary)

In Greece, for example, when the Council of State (endowed with the power of constitutional review of laws) sought to act as the protector of the people's interests, it fulfilled this mission primarily through the interpretation of the concept of constitutional identity. According to Vlachogiannis, the development of this substantive concept needed a holistic approach, but only after the turn in its practice. Previously, when dealing with the debt crisis, the Court had raised sovereignty issues rather than the concept of constitutional identity. In 2018, however, the Court reactivated the 'prevailing religion' clause of the Constitution, yielding normative power to this provision that had previously been considered a purely declarative clause, claiming that the Greek Orthodox religion is a centrepiece of Greek constitutional identity. It is also worth noting that, in contrast to the jurisprudence of the German Federal Constitutional Court, the Council of State did not invoke the eternity clause of the Constitution when it evolved the new concept of constitutional identity. This new approach postulates national selfhood as a pre-constitutional phenomenon which can be contrasted with external threats to the nation's existence. In addition, the Court, similar to its Hungarian counterpart, considers the Preamble of the Constitution to be an aid to interpretation. It is worth noting that the Court, in the relevant part of its jurisprudence, preferred the contextual interpretation of the constitutional text. However, neither constitutional identity as a newly discovered substantive concept nor the contextual method have become general or pervasive modes of constitutional interpretation. Yet these interpretive tools are now available and can be revived at any time in the future, not just in cases in which they have been used so far (i.e. judgments on nationality,

Sunday laws and religious education).

The Greek Council of State is not the only court examined in this volume that has used some new interpretive tools to pursue a populist stance. The invention of new substantive concepts and the reinterpretation of older ones have been characteristic of the jurisprudence of the Hungarian Constitutional Court in recent years as well. As Fruzsina Gárdos-Orosz explains, here, the 'historical constitution' (in effect the one existing before the end of World War II) and 'constitutional identity' are the most preferred new magic words, while the concept of 'human dignity' has been significantly reinterpreted. In this country, the Constitutional Court, fully packed by the government parties, has assiduously favoured the legislative policy of the government, which is widely believed to be the archetype of populist rule. Notably, in this country, the right-wing populist government has always exploited its constitution-making majority unscrupulously whenever it has needed to, so even an independent Constitutional Court would have lacked the weapons to deal with the government-dominated legislature. In addition, Hungary is the only country where the constituent power also sought to influence constitutional interpretation by including the preferred interpretive methods in the constitutional text. In such circumstances, it might be surprising that these modes do not play a prominent role in the recent jurisprudence of the Court. The current judicial deference uses a mixture of interpretative modalities in the same way as it did in its activist era in the past, but this time to support the governmental power rather than to counterbalance it. Overall, the overwhelmingly populist political course, which has overcome all institutional barriers and resistance, has ultimately led to significant changes in the content of the constitutional interpretation without radically reshaping its methods.

Populism has also had a very significant effect on constitutional interpretation in Poland because, as Wojciech Brzozowski puts it, 'the populist revolution relied greatly on constitutional arguments and interpretations put forward by the political branches of government … interpretations which were proposed and enforced precisely against the judges and the courts'. In this country, the Constitutional Tribunal was quickly packed by the populist government, and it has used old techniques for new purposes. Thus, the Court has not abandoned the practice of giving guidelines to courts on the proper interpretation of constitutional provisions. However, the Constitutional Tribunal has used this tool only in a narrowly tailored way, namely to defend the controversial measures of the populist majority. While the interpretive techniques applied have not changed, if the previous practice obstructs the governmental will, it is rapidly changed by the Court. Brzozowski argues that there is no consistency in the interpretive practice, which he characterizes as a 'cherry-picking model'.

3. Changing interpretive practice to counteract populist initiatives

While constitutional interpretation using new substantive terms has not been used by constitutional courts in Greece and Hungary to prevent or counteract populist aspirations, the Croatian Constitutional Court has sought to resist some populist initiatives by applying similar interpretive tools. (Croatia) For this country, Gardasevic examined the methods and changes

in constitutional interpretation in connection with the constitutional review of popular constitutional initiatives, based on the assumption that some of them pursued populist goals such as anti-elitism, the restriction of minority rights and backing of identity politics. According to his analysis, the Croatian Constitutional Court has also used contextual interpretation to develop certain substantive concepts, bestowing upon them high constitutional values, such as constitutional identity or unconstitutional constitutional amendments. Likewise, it has reserved some unenumerated powers for itself, such as the constitutional review of popular constitutional initiatives, although this can be seen as a manifestation of the constituent power (since successful referendums result in an immediate amendment of the constitutional text). It is noteworthy that these substantive categories are not included in the text of the constitution, so in this case the populist challenge has provided an opportunity for the Constitutional Court to strengthen its position and, in many cases, to break with its previous practice, to establish a kind of hierarchy among constitutional values. As to the modalities of constitutional interpretation, the Constitutional Court has used several different methods inconsistently; the interpretive tools applied have 'varied significantly from case to case' in relevant review procedures, but as Gardasevic argues, the Court has used the various methods always against populist demands; it rejected the popular constitutional initiatives aimed at restricting minority rights by the proportionality test, refused the initiative to change the electoral system on the basis of a grammatical interpretation, and then, referring to the systematic interpretation, also declared the referendum to prevent the outsourcing of certain public services unconstitutional.

Conclusion

As we have seen, constitutional courts and other high courts exercising constitutional review have reacted to populist legal aspirations in different ways. The diverse judicial strategies may be manifested not only in the outcome of the constitutional interpretation but also in its method. If we accept that the aims and means of populist constitutionalism challenge the constitutional system of liberal democracies, undermine the functioning of traditional institutions and seek to establish an alternative constitutional design, it is reasonable to assume that they also affect the well-accepted forms and methods of constitutional interpretation. Presumably, the power of interpretation is therefore greatly appreciated in the eyes of populists. And if this is the case, it is plausible to presume that they seek to develop a specific interpretive method that will most effectively help them to achieve their goals.

However, Anna Gamper, based on a wide-ranging comparative analysis, has found no evidence that populists would favour any particular method of constitutional interpretation. As she demonstrates, although the new constitutions prescribe mandatory interpretive methods more often than the old ones, wherever this occurs, populism is not the main explanatory variable. Presumably, their approach is a target-oriented one, that is, it does not matter how the desired result is achieved. Interestingly, she has concluded that when constitutions contain binding guidelines for interpretation, they are mostly intended to establish and promote liberal democracy (at least on paper). What can make a difference is that 'established liberal democracies rarely entrench such rules in their constitutions, because they rather consider

constitutional interpretation to be the domain of independent courts', while populist or illiberal constitutionalism calls into question whether the courts should really be the ultimate interpreters of the constitution.

Among the countries examined, only in Hungary have the populists become so strong that they were able to adopt their own constitution, which included preferred methods of constitutional interpretation. However, this has not had a decisive effect, even in this country. Comparative analysis has not proved that different political systems would have their own specific rules of constitutional interpretation. Nevertheless, there may be some room for national peculiarities in that the same interpretive methods are used in different combinations in various countries, establishing a specific hierarchy between them. In this sense, different meanings can be attributed to the same substantive concepts depending on the national legal culture in which they operate. Analysing the country studies, the most plausible explanatory variable of judicial behaviour is the political context that surrounds the courts.

Where populists have been strong enough to pack the constitutional courts, such as in Hungary and Poland, they have taken this opportunity to replace judges with their own nominees. However, the new judges have not developed new interpretive methods to legitimize the majority will; at most, they have placed some new legal concepts or constitutional provisions at the centre of their jurisprudence, or creatively resorted to the methods available, choosing the one best suited to justify the preferred decision. It is also interesting that the political subordination of a constitutional court does not necessary involve judicial deference, but also depends on the given political circumstances.

In Hungary, where the government majority may write anything in the constitution that they want, the Constitutional Court has pursued a self-restraining stance in recent years, while in Poland, where the governing parties do not have a sufficient majority to amend the constitution, populists have urged judicial 'passivism' only in opposition, but in government, they have needed a fairly activist Constitutional Tribunal to reinterpret the unchanged constitution. In a number of countries, the mainstream parties have succeeded in preserving the support of their voters, or the fragmentation of the party structure has prevented populist movements from coming to power or reaching a position in which they could influence the composition of the high courts. Yet, as the Austrian, Czech and Italian examples illustrate, some constitutional courts have started a more self-restraining practice, showing deference to the decisions of political branches, even if they have otherwise remained intact. We assume that if such a court relinquishes its earlier activism in the hard cases generated by a populist agenda, this can be better explained by its own institutional interest or the pressure of public opinion, rather than by the national legal culture.

Nevertheless, constitutional traditions can play a decisive role, where the ancient constitution and the well-accepted methods of constitutional interpretation favour populist aspirations. Furthermore, some authors have argued that although the existing interpretive toolbox has provided appropriate instruments for the courts to resist populist aspirations which seek to reshape the constitutional framework, only some high courts have used these instruments for this purpose. As a matter of fact, only a few of the constitutional and supreme courts we have examined have undertaken decisive action against populist initiatives, even if the latter have

challenged the traditional constitutional framework; perhaps the high stakes involved (such as the unity of the state against Catalan separatism in Spain, or EU membership in Croatia) have encouraged these courts to do so. Overall, where populists are in opposition, and where the constitutional or supreme court is in a strong position, the business-as-usual model is most likely; and vice versa, where populists rule and have been able to change the competence or composition of the court(s) reviewing the constitutionality of legislation, there has been a change in constitutional jurisprudence in favour of populist objectives.

All country studies show that where populism has influenced the interpretive practice of the courts, no new theory of interpretation has evolved, and no close connection can be established between populist constitutionalism and any specific method of constitutional interpretation. In short, populists do not have any favourite interpretive method or theory. Even the rubber-stamp courts do not need to use specific interpretive methods or judicial philosophy; this does not mean, however, that such courts would be reluctant to find the most appropriate ways to be deferential to the political will of the government. However, in these cases, the choice of the modalities of interpretation applied is made on a pragmatic basis, from case to case, depending on the desired end result, and there is no consistent interpretive theory or practice behind it. In other words, even if populists are able to achieve informal constitutional changes by influencing the high courts' jurisprudence, the methods of constitutional interpretation play a merely instrumental role. In these countries, even the most sophisticated and elaborate interpretive theories and methods can be used to justify blatantly unconstitutional laws and initiatives. Putting our research results in a broader context, we can also draw an important conclusion.

Our presumption was that if populists are not strong enough to achieve formal constitutional changes, they are likely to want to influence the way the constitution is interpreted in order to reach their goals by the constitutional judiciary. We also assumed that if 'populist constitutionalism' is an analytically useful tool, the constitutional adjudication and the methods of constitutional interpretation must be its crucial domain. However, we have not been able to confirm this presumption; we have concluded that no substantive theory or specific mode of constitutional interpretation can be ascribed to populist aspirations, and populist constitutionalism does not, in effect, have a special constitutional toolbox. In other words, populism, as a political phenomenon, although it can achieve real constitutional changes, does not achieve them in any particular legal way, by elaborating a new constitutional theory. In case the populists capture the court or in case the court becomes otherwise populist their behaviour can be described rather by political than by legal terms.

The growing literature on populist constitutionalism is based on the assumption that, firstly, populism is a worldwide trend, and that secondly, it has made significant constitutional changes whenever populists have been able to. The term 'populist constitutionalism' may at most refer to this relationship, but we have not found any evidence that these achievements have elaborated any specific constitutional, legal ideas or methods which would be characteristic only of populism. All indications are that populism considers constitutional interpretation only in a purely instrumental way, handling every legal concept and procedure, including

constitutional adjudication and – as an element of this – constitutional interpretation, as a tool to achieve political objectives and goals.

II. Responses to populism and good practices in the domestic constitutional settings of EU Member States

In the second part of the results, we relied on the survey that was made by the DEMOS project, more precisely prepared by the Hungarian team and refined by the legal team of DEMOS. In this very work package, we have used these questionnaires from the 28 EU countries (we have included the UK because it was still a member at the beginning of the research) to get information about the populism-related national best practices. Our results are based purely on this data collection: 23 national experts have completed the questionnaires themselves and in 5 cases the DEMOS group needed to prepare the answers in the lack of international cooperation. In these 5 cases we have asked national experts to verify the data that we had found.

When we had all of the questionnaires at our disposal, we qualified certain elements of the data as a best practice against populism following the judgment of the author of the country report. These elements were then put on a list of best practices. On top of that, we included other antipopulist legal reactions on the list which were deemed best practices not by the authors but by the DEMOS team. For this, we have read through every country report searching for relevant constitutional/legal changes. Every time we found a counteraction against populism in constitutional law, we added it to our list.

As to the methodology of the research, we decided to apply a methodology of our own which we call "graphics methodology" and furthermore, we evaluated certain best practices with the help of the "best practice methodology" of this paper. This means that we partly diverge from the central methodology of this report. The reason behind this is that Part A is very different from Part B and C in many ways. As opposed to the two other parts of this research, here we are not concerned with the legal practice of one international organization, but with the legal reactions of as many as 28 European countries. This is a huge scope which the methodology had to be adjusted to. In short, we felt the need of using slightly different approaches, which will all be explained in detail below.

The main part of the report consists of two parts. First, we give an EU-wide overview of the legal fight against populism with the help of our so-called "graphics methodology". Second, we turn to the "best practices methodology" which will take the form of case studies (an in-depth evaluation of four different best practices in four different EU countries). At the end of Part A, we attach the questionnaire in order to clarify the framework that we used for data collection and the list we had created, with more than 110 best practices on it.

II.1. Graphics methodology

In the EU countries, where populist aspirations are more and more present in the recent years,

totally different legal reactions were given to these challenges. In this part of the report, we are visualising the great difference between these reactions we call best practices, using a graphics method.

As explained above, after analysing the questionnaires, we have created a list of national best practices. All the elements of this list were then grouped into four different categories. It is important to emphasise again that our research results are based purely on the content of the 28 questionnaires, we have not reproduced or added any other data. The categories, taken from the populist constitutionalism literature, are the following:

1. the preference of popular sovereignty and the promotion of direct democracy
2. the claim for authentic representation and, together with this, the anti-pluralism
3. an extreme approach of majoritarianism
4. restriction of certain fundamental rights together with intolerance of or discrimination against certain minorities

Each category is a certain "populist threat" and the best practices belonging to the category are the legal reactions which were challenging in one way or another that particular threat. We have noticed that the best practices within each category are hugely different from each other, sometimes even the opposites of each other. In order to show this finding, we have decided to use graphics.

For each category, we have created a graphic and a diagram. These two models show the results of our research slightly differently. The graphic gives an impression on the difference between the best practices within each category. Following every graphic, we are going to explain the differences between the best practices given to the same „populist threat". The graphics help us create sub-categories within each big category. The graphics prove that there are no national answers to „populist threats" which are effective everywhere, every time.

The diagrams demonstrate the popularity of each sub-category. They show how many countries used, according to our best practice list, a certain type of best practice. These diagrams can be easily used to draw certain consequences on how widespread a particular sub-category of best practices is in the EU. They help us to determine which sub-category is more widespread among the member states. The diagrams, in short, prove that some best practices are more dominant in the EU than others.

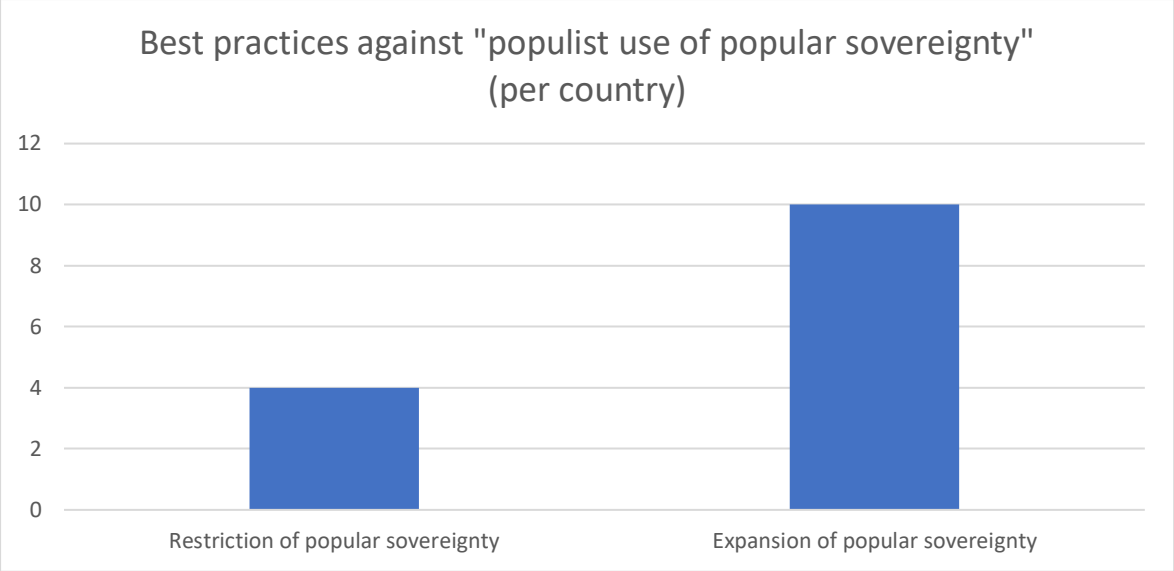
1. Populist use of popular sovereignty

As the illustration above shows, there are two different ways to react to this particular "populist threat":

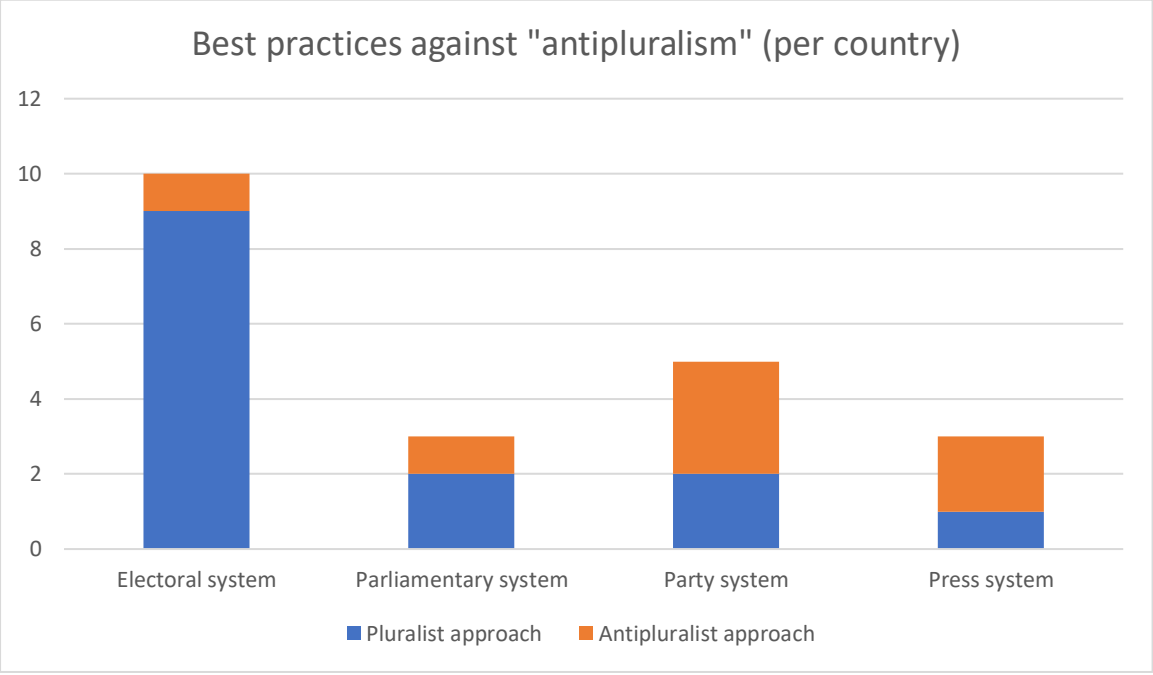
1. Restriction of popular sovereignty. Referendums are more difficult or impossible to initiate, which means that populist parties (either in power or in opposition) have a hard time thematizing referendums.
2. Expansion of popular sovereignty. Introduction of participatory models alternative to referendums, which make citizens involved in governmental/parliamentary decision-making.

The diagram below illustrates that according to the country reports, the expansion of popular sovereignty is more significant. It can be observed in Scandinavian countries (DK; FI; SW), in former Eastern Bloc countries (LT; LV; PL) as well as in Ireland. The restriction of popular sovereignty, on the other hand, is not very widespread and most of the time it is not even connected to antipopulist efforts. In some countries the lack of referendums has a centuries-long tradition (e.g., in the Benelux countries), while in other countries the restriction of popular sovereignty was carried out by governments often characterized as populist (e.g., Hungary and Slovenia).

Conclusion: the expansion of popular sovereignty is more widespread than the restriction of popular sovereignty.



2. Antipluralism



The diagram points out that there are two different ways to fight populist antipluarlism: with a pluralistic or with an unpluralistic approach. In this project, we are analysing four different systems, where populist antipluralism often prevails and show what kind of reactions can be given to this "populist threat" in these very same systems.

2.1. Electoral system

1. Unpluralistic electoral system. The more dominant the "first past the post" element in an electoral system is the less pluralist the election results are. The UK uses a purely

"first past the post" system, however the author of the UK country report emphasised that this is what prevents the rise of populist parties (because little parties have no chance). This approach cannot be found in any other country report.

2. Pluralistic electoral system. Most country reports hailed the electoral system of their country because of its proportionality. The general opinion is that a proportional electoral system is the most effective against populist tendencies (this was mentioned in the country reports of Scandinavian countries, Benelux countries, ex-Eastern Bloc countries, Southern countries and of Ireland, as well).

Conclusion: the pluralistic electoral system is more widespread than the unpluralistic electoral system.

2.2. Parliamentary system

Only few country reports elaborated on the pluralism of their country's parliamentary system, so no far-fetching conclusions can be drawn from such a small number of results. It is interesting to note that the German "militant democracy" concept appears in this context, as well, but I am going to go into the details in the next point.

2.3. Party system

1. Unpluralistic party system: the concept of militant democracy. The idea that democracy must be protected from the "enemies" of democracy (sometimes in ways which could hardly be described as democratic) stems from Germany. The German country report states that this tendency can be sensed most strongly in the party system: according to the Constitution, antidemocratic parties can be banned. However, only little, insignificant parties have been banned before. The concept took root in other European

countries, as well, although usually in a milder version (in Denmark and Portugal parties cannot be banned but state donations can be suspended).

2. Pluralistic party system. It is not clear why the pluralistic nature of the party system was mentioned only in two country reports (Latvia and Romania). Either the authors take it for granted, or they do not find it effective enough.

Conclusion: the unpluralistic approach to the party system is more widespread (or at least mentioned more often) than the pluralistic approach.

2.4. Press system

The situation of the press system was not analysed in many of the country reports, consequently we do not wish to formulate any conclusions. However, I find the judgment of the Greek Council of State noteworthy, in which the panel decided that the restriction of the number of private mass media outlets was unconstitutional.

3. Extreme majoritarianism

First, we are going to examine the fight against extreme majoritarianism more generally, then we are going to take a look at the concept of "unconstitutional constitutional amendments".

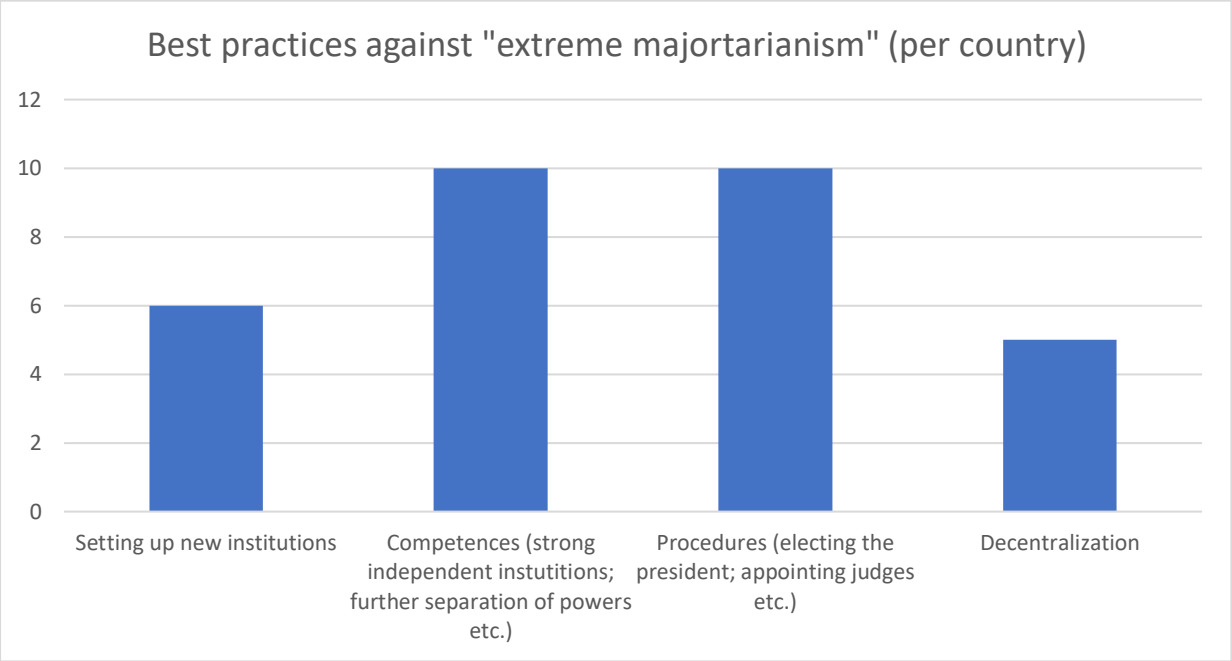
3.1. General examination

As the diagram below highlights, we grouped the possible measures taken against this "populist threat" into four different categories.

1. New institutions are set up. E.g., administrative courts (in Austria and Cyprus), judicial self-governing authorities (in Finland) or ombudsmen (in Luxemburg and the UK).
2. Independent institutions/authorities have strong competences. This might be a result of

a shift of competences which took place in recent years, sometimes admittedly as a means of fighting against populism. E.g., the strengthening of the competences of the Court of Audit (in Portugal), the first chamber of the parliament (in France), judicial self-governing authorities (in Croatia) or ombudsmen (in Sweden). Another typical scenario described in the country reports is that a constitutional figure who has traditionally had strong competences came into action in recent years when faced with populist threats and used their powers effectively. E.g., the Public Prosecutor was successful in battling populism in Cyprus, similarly to the president of Italy.

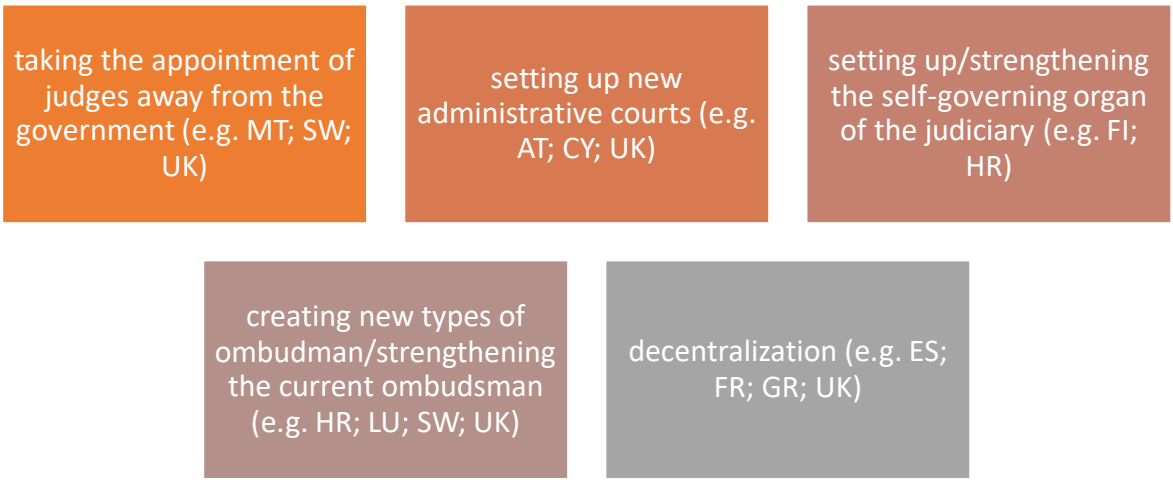
3. Procedures constraining populist powers. Under this point, I collected three procedures which are quite different from each other, but which were mentioned in more than one country report. First, the direct election of the president (introduced newly in the Czech Republic, looking back to a longer tradition in Austria and Bulgaria). Second, taking the appointment of judges away from the government (this happened in the last decade in Malta, in Sweden and in the UK). Third, the easy creation of parliamentary investigating committees (this has been so for a long time in Austria, while Germany has recently taken certain steps in this direction).
4. Decentralization. In some countries, decentralization is a hot topic (e.g., in Spain and in the UK). Other country reports indicate that decentralization can be carried out much more peacefully, as well (e.g., in France and in Greece).



The illustration below makes it visible that there are certain overlaps between these groups we created. The biggest overlap is between the first and the second category. In some countries new institutions were set up, in other countries the same institutions had already existed, but they were strengthened – the result is the same. This is why we reached the following

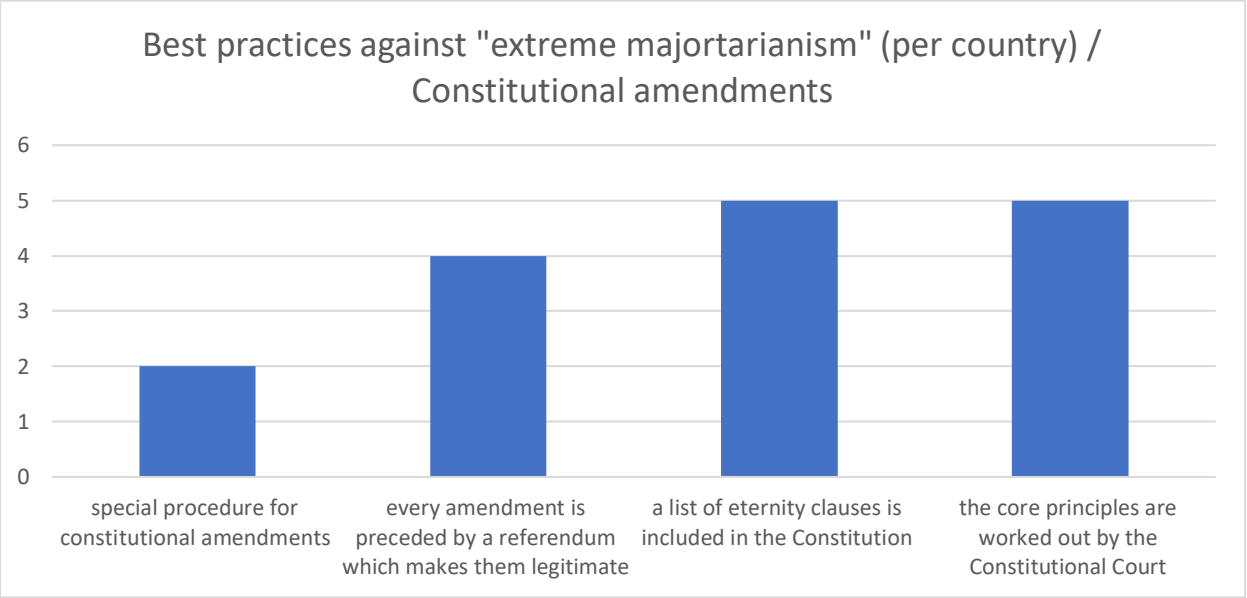
conclusion.

Conclusion: strong independent institutions are the most widespread.



3.2. Unconstitutional constitutional amendments

The concept of "unconstitutional constitutional amendments" is connected to the fight against extreme majoritarianism because it makes it impossible to carry out certain amendments, even if a party has extreme majority in the parliament. We asked the national experts in our questionnaire whether this concept exists in their countries. Their answers can be categorized as follows.



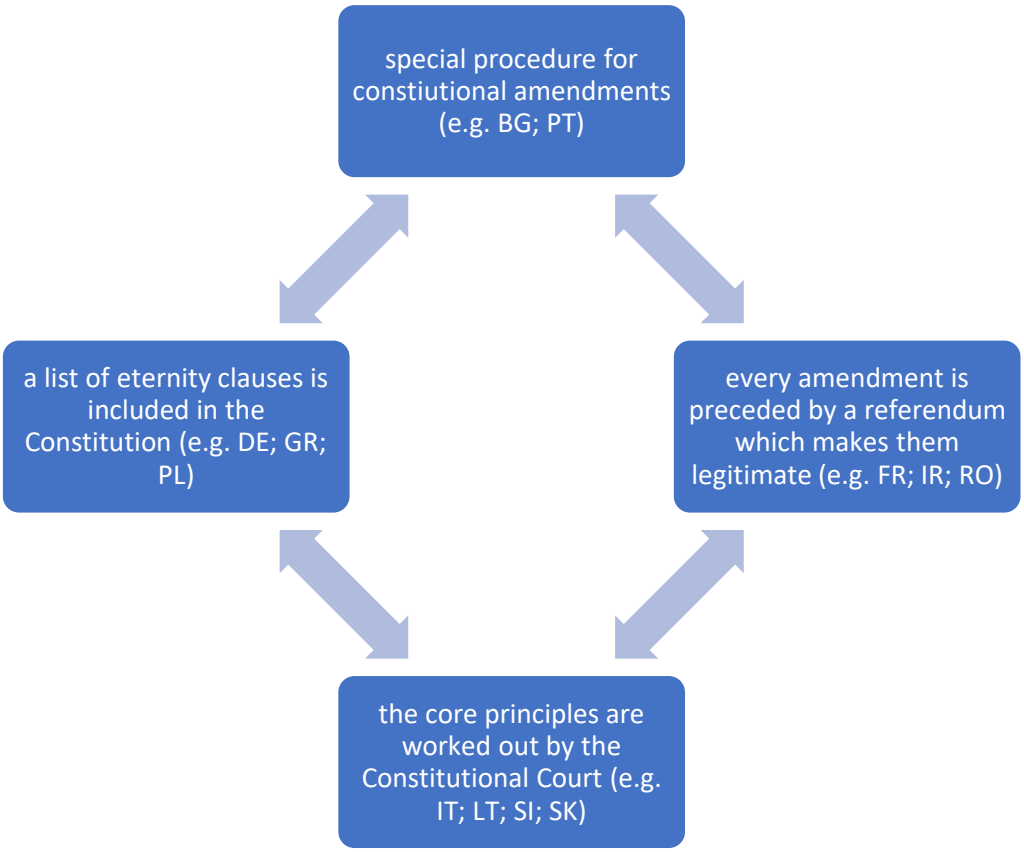
1. The concept is not alive, but the amendment procedure makes sure that constitutional change is a rare occasion (this was explicitly mentioned in the country reports of

Bulgaria and Portugal).

2. The concept is not alive because every constitutional amendment must be preceded by a referendum. This way amendments are strongly connected to popular sovereignty, and it would question popular sovereignty itself if amendments made like this could be deemed unconstitutional. Therefore, the concept is not used (e.g., FR; IR; RO).
3. The concept is alive and the Constitution itself contains, in the form of eternity clauses, which are the unchangeable paragraphs (the home country of eternity clauses is Germany, but it also appears e.g., in Greece and Poland).
4. The concept is alive, but there are no eternity clauses in the Constitution. Instead, it was the Constitutional Court's practice which worked out that certain paragraphs of the Constitution cannot be changed. These are usually called the core principles of the Constitution (this is typical of ex-Eastern Bloc countries, but it can also be observed in Italy).

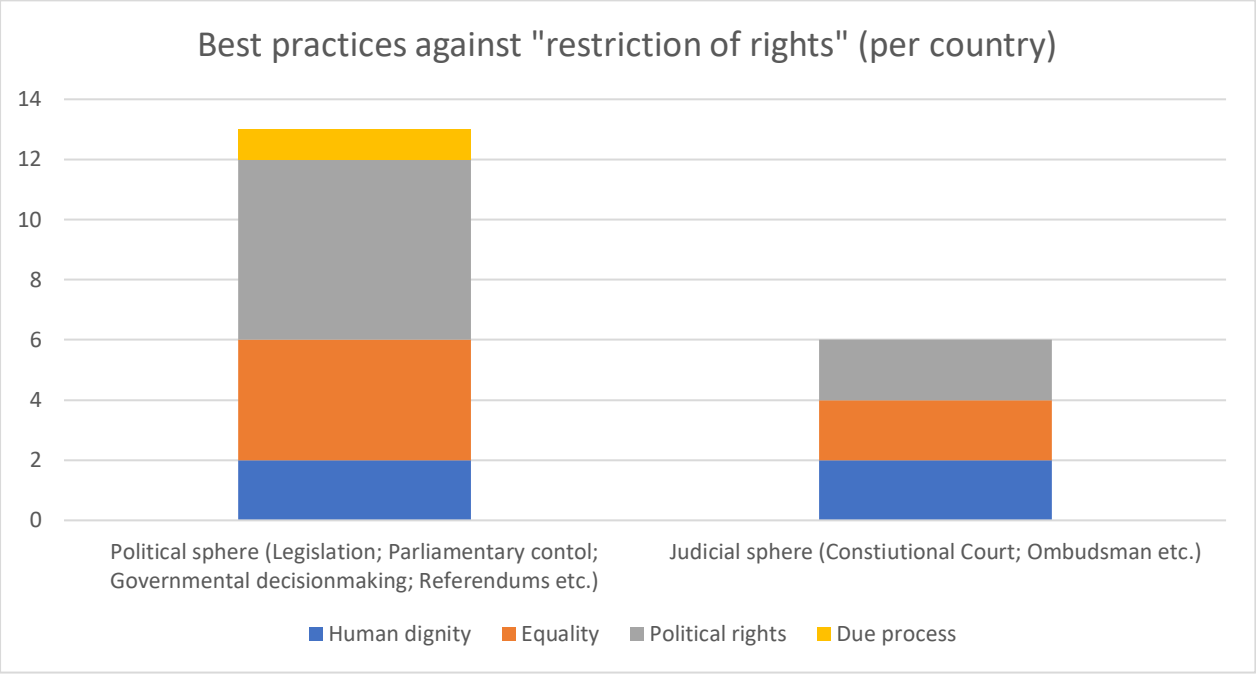
Most probably, there are many more countries which belong to the first group, only the authors of the reports did not find the procedure significant enough to mention it. At the same time, we found that the concept of "unconstitutional constitutional amendment", either in the form of eternity clauses or of core principles worked out by the Constitutional Court, is used in many countries, usually effectively.

Conclusion: the concept of "unconstitutional constitutional amendment" is widespread.



4. Restriction of rights

This is the most sensitive topic, because the question whether same-sex marriage or gender quotas belong to the category of basic rights is nowadays not exactly a legal, but rather a political (ideological) issue. However, many country reports touched on questions like these. As a result, we looked at these topics as a means of fighting against the "restriction of rights". There are two different ways of fighting against this particular "populist threat".



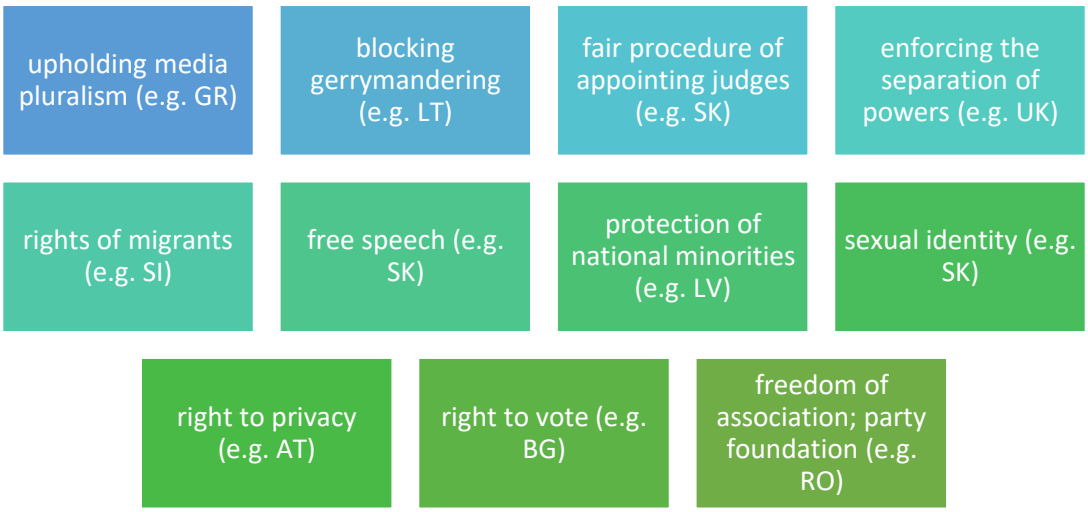
1. Political sphere. This means that governments and parliaments which define themselves as antipopulist take political action in order to strengthen existing rights or "give" new rights to people. This can manifest in many different forms, most often in the form of legislation or governmental decision-making, but sometimes parliamentary committees are investigating issues concerning basic rights (e.g., in Germany such a committee was delving into the surveillance techniques of the secret service), or important referendums are held in such questions (e.g., the well-known abortion referendum in Ireland).
2. Judicial sphere. This means that populist parties are in power, or at least the parties in power take populist and/or restrictive action, and judicial bodies are successfully protecting basic rights. These judicial bodies are usually the Constitutional Courts, but e.g., the Slovakian report pointed out that a very active former ombudswoman was fighting successfully against every form or restriction of rights.

The diagram above shows the number of mentions for political and judicial actions in the country reports. These results may indicate that political actions are much more widespread. However, it is worth looking at the bigger picture. In the country reports, the Constitutional Courts and other constitutional forums were mentioned not only in the context of basic rights, but on many different occasions. A lot of important judgments were quoted. I collected these

and created the illustration below.

This shows quite clearly that Constitutional Courts are indeed fighting very effectively against phenomena we named "populist threats". Furthermore, it demonstrates that most of the judgments are decisions are actually protecting some sort of basic rights, even if the case is not connected very strongly to basic rights. Consequently, it is no exaggeration to state that the judicial actions of Constitutional Courts are just as effective as the political actions of parliaments and governments when it comes to basic rights.

Conclusion: both political and judicial actions against the restriction of rights are widespread.



II.2. Best practice methodology

In this part of the study, we analyse our results using the "best practice methodology" of this report. To achieve this, we turn our attention again to the best practice list (appendix B of Part A). In theory, every single element of this list could be evaluated with the best practice criteria. However, there is no place in this report to carry this out. Consequently, instead of evaluating more than 110 best practices, we introduce a case study-based approach.

This means that we take four different best practices from the list and perform an in-depth analysis on them. This consists of two parts: first, the presentation of the "populist threat" and the legal reaction to it (the best practice itself); second, the evaluation both in text and in the matrix.

When selecting the cases, our aim was to find best practices which can all be evaluated a little bit differently. We came up with the following groups of evaluation:

1. successful and repeatable: the national reaction worked and can be used elsewhere
2. successful but not repeatable: the national reaction worked but it is questionable whether it would work elsewhere
3. not successful but repeatable: the national reaction did not reach its purpose, but it might be worth experimenting with it elsewhere
4. not successful and not repeatable: the national reaction did not work and is clearly tied to the country which tried to use it

These four groups served as an orientation point when searching for adequate cases. In the end, we managed to find a case for all four groups.

	successful	not successful
repeatable	Slovakian case	German case
not repeatable	Cypriot case	Spanish case

1. Successful and repeatable

The Slovakian case of unconstitutional constitutional amendments

In Slovakia, the Constitutional Court declared its competence to nullify unconstitutional constitutional amendments for the first time in 2019. The background to this was a constitutional amendment from 2014. This ordered that every judge-to-be has to go through a vetting carried out by the national security services. The Government argued that the reason behind this change was to enhance the independence of the judiciary. (Many surveys showed that the judges of Slovakia were among the least independent in the EU.) However, many questioned whether the motivations of the Government were genuine, and the amendment could easily be regarded as a "populist threat".

The case was examined by the Constitutional Court. Before this, the Court had never nullified a constitutional amendment, so the main question was whether it had the competence to do so. The judges decided that the Constitution allowed them to act. The Court reasoned that its "power to protect the Constitution of the Slovak Republic extends across the whole sphere of constitutionality and is unconditional".

Evaluation:

Efficiency: The innovation of the Constitutional Court was indeed capable of battling the "populist threat". With the introduction of the concept of unconstitutional constitutional amendments, the Constitutional Court was able to nullify a constitutional change it deemed abusive and efficiently stopped the vetting of Slovakian judges.

Effectiveness: The effect of the nullification of the amendment was self-evidently totally direct and immediate: after the nullification of the amendment came into effect, the constitutional amendment was no longer in force and the vetting of Slovakian judges stopped. Consequently, this best practice can be described as highly effective.

Transferability: The judgment set a precedent and the Constitutional Court of Slovakia can use this new tool again if it finds it necessary. On a European level, the concept is very much alive (as I have explained above in the previous chapter) and although the Constitutional Courts of some countries oppose its introduction for various reasons, its popularity was obviously growing in the previous years in the EU.

	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency			X

Effectiveness			X
Transferability			X

2. Successful but not repeatable

The Cypriot case of the Attorney General

According to the Cypriot country report, written by George Coucounis and Nikolas Koukounis, the previous Attorney General of Cyprus was a very popular figure. He was successful at gaining the trust of both the public and his fellow politicians. The report describes him as a "neutral, fair and just gatekeeper against corruption and populism".

It is important to note that the Cypriot Attorney General has a wide range of powers and because of this they generally play an important role in the legal and political life of Cyprus. The Attorney is appointed by the President and serves as a legal adviser of the President. This is a model which is quite different from the systems employed in other parts of Europe. The report explains:

When exercising the powers afforded to him by the Constitution, the Attorney General is continuously called upon by the President of the Republic and the Council of Ministers to give his opinion and advise on a wide range of matters, represents the Republic and the President in Court procedures in and out of Cyprus, and presides the Legal Service which is *inter alia* regularly preparing bills on behalf of the Council of Ministers and participates in the bill discussion and deliberations before the Parliamentary Committee.

Evaluation:

Efficiency: The previous Attorney General managed to fight against certain "populist threats". He used the powers given to him by the Constitution efficiently and was able to battle populism, especially corruption, in Cypriot public life.

Effectiveness: The work of the Attorney General had a fairly direct and immediate on the level of corruption in Cyprus, however, self-evidently, he was not able to eliminate it altogether. This is why his effectiveness can be evaluated as good, but not as best.

Transferability: The country report suggests that a lot depends on the character of the officeholder. The previous Attorney General was a special person who used his powers to fight against populism. However, nothing guarantees that nominees of the future will do the same. The transferability of this model to other European countries is also questionable because the Cypriot prosecution model is very special and has no real historical traditions in other parts of Europe.

	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency			X

Effectiveness		X	
Transferability	X		

3. Not successful but repeatable

The German case of militant democracy

The concept of militant democracy (as already mentioned above in the previous chapter) has strong roots in Germany. The creators of the Grundgesetz turned to this ideology when formulating the article on the functioning of parties (Article 21). With the maneuvers of the Nazi Party still in their memories, they decided against complete party freedom, and gave the Constitutional Court powers to ban unconstitutional parties. However, this tool was only activated twice in the 1950s, when political tensions were very high all over Europe. In this period, the Constitutional Court (on the initiation of the government of Adenauer) banned both a Nazi and a Communist party. Parties have not been banned since.

Article 21 came to the forefront of German politics again in 2016 when the Government initiated the banning of the National Democratic Party (NPD). The party has been active for more than half a century and openly follows a neo-Nazi ideology. It must be emphasized, though, that the party has no real support and only managed to get less than 1% of party list votes in 2017.

In 2017 the Constitutional Court agreed with the Government that the functioning of the party is unconstitutional but argued that it was too unimportant and unpopular to be banned. The Court hinted that the correct sanction would be the suspension of state funds, which resulted in a constitutional amendment in the same year. A new 3rd paragraph was added to Article 21, stating that parties can be excluded from state financing on the decision of the Constitutional Court if they are "oriented towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany". In 2019 authorities were examining if Alternative for Germany (AfD) exhausted this new criterion, but in the end decided not to pursue their investigations.

Evaluation:

Efficiency: There is a general consensus in German politics (which was legally verified by the decision of the Constitutional Court) that the banning of parties, even if they are posing as a "populist threat" or hold extremist views, might be too strong a sanction. The 2017 constitutional amendment was trying to solve this problem by introducing the suspension of state funds. However, this modification did not bring along huge changes and to a large extent remained a declaration rather than an efficient method of fighting "populist threats".

Effectiveness: In the previous point I evaluated both the banning of the parties and the suspension of state funds as largely inefficient, as a result they cannot be deemed effective, either.

Transferability: Even if its efficiency and effectiveness has been low so far in Germany,

militant democracy, especially the exclusion of unconstitutional parties from state finances, might gain importance in Europe in the following years. As I have already in pointed out in the previous chapter, the same concept has already started spreading in Europe, appearing in countries such as Denmark and Portugal. Some think this is a form of ideological bribery, others are convinced there is a great potential in it. In any case, it is very likely that the supporters of militant democracy will make themselves heard all over Europe in the future, this is why its transferability can be evaluated as fair.

	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency	X		
Effectiveness	X		
Transferability		X	

4. Not successful and not repeatable

The Spanish case of decentralization

Uniquely, Spain is a unitary state built up of 17 autonomous communities. Each of these regions have their own parliaments, the competences of which are laid down in the communities' Statute of Autonomy. The Statute of Autonomy of Catalonia was reviewed in 2006 when the central government of Spain intended to expand the authority of the government of Catalonia. A new statute was accepted in the same year. However, the Constitutional Court found most of the statute unconstitutional in 2010, after four years of deliberation. This judgment was one of the major reasons behind a new wave of nationalism in Catalonia, which later resulted in the disputed referendum of 2017 and the unrests in the region up to now. The Catalan nationalists are pro-independence and republican and are sometimes described as populist.

Evaluation:

Efficiency: Originally, the Statute of Autonomy of 2006 was accepted by most Catalan parties, but the people of Catalonia were not really interested in it. The turnout of the referendum on the statute was lower than expected, less than 50% voted. The statute did not give in to separatist voices, but it did not enrage them, either. This is why it can be evaluated as fairly efficient.

Effectiveness: Even if the statute had the potential of fighting the "populist threat" of separatism, eventually it had the exact opposite effect because of the ruling of the Constitutional Court. Because of that, the effectiveness of this attempt of decentralization is poor.

Transferability: As explained above, the territorial organization of Spain is very special because of ethnic, geographical and other reasons. Even if the decentralization had been effective, it could not easily be copied in another European country. All EU states with a large

population of national minorities should find their own way of solving their problems and resolving the tensions, because there is no guarantee that following the Spanish example would help.

	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency		X	
Effectiveness	X		
Transferability	X		

II.3. Appendix of Part A

A. Questionnaire

DEMOS (Democratic Efficacy and the Varieties of Populism in Europe) is a research project aiming at better understanding populism. Funded by the EU Horizon 2020 Framework Programme, the project is carried out by 15 partner institutions in Europe and led by the Centre for Social Science of the Hungarian Academy of Sciences.

The project addresses the populist challenge through the lens of democratic efficacy. The concept of democratic efficacy combines attitudinal features (political efficacy), democratic skills and democratic opportunity structures by building on the assumption that the expression of populism is a symptom of a mismatch between how the democratic polity operates and how citizens conceive of their own aspirations, needs and identities vis-à-vis the polity.

The project has two major goals. First, it aims at a better understanding of the populist phenomenon by identifying and filling existing lacunas in the literature. More specifically, the project will study the conditions and contexts of populism with an emphasis on its socio-psychological roots, while concurrently analysing the varieties of populism across Europe – building on the assumption that populism has both generalisable socio-psychological foundations and many context-bound manifestations rooted in history, culture and specific socio-economic conditions. The project will devote attention to 'populism in action,' that is, exploring the impact and consequences of populist governance and policymaking across several levels – from the individual to the supranational – acknowledging that recently the influence of populism has increased dramatically and gained power in several countries. Finally, the project will shed light on the responses and reactions of social actors to the challenge of populism, identifying coping strategies, good practices, successes and failures, as well as forecast probable scenarios.

Second, DEMOS aims at addressing the challenge of populism through the operationalisation of the concept of 'democratic efficacy.' The project will study the potential of democratic efficacy to counter populism through experiments and action research, devoting special

attention to the youth, studying schools and educational measures, and developing educational tools as well as policy recommendations on how to boost civic awareness and reflective engagement through increasing democratic efficacy.

Although the conceptualisation of populism appropriate for these purposes is one of the tasks of the first phase of this research, populism is in our understanding a mind-set or coping strategy in response to the mismatch between how the polity operates and how citizens conceive of their own aspirations, needs and identities vis-à-vis the polity. This Questionnaire uses this concept as a political ideology and/or policy which has certain basic features as follows:

- anti-elitism
- general claim for representing 'ordinary people'
- personal or oligarchical political leadership
- state capture by private interests
- use of social demagoguery in mass communication
- constitutional and legal reforms weakening constitutional guarantees and control mechanisms.

The questionnaire has been drafted and discussed between the members of the law team of the project, notably: the University of Barcelona, the Centre for Social Science of the Hungarian Academy of Sciences, the University of Copenhagen and the University of Business Engineering and Management.

This Questionnaire is a tool for collecting data and information about the legal repercussions of populist politics or ambitions in the EU Member States. We are aware that it contains quite general and abstract questions, some of which cannot be interpreted in some countries at all, while in other countries, a whole study or book would be needed to reply to them. However, all the questions (apart from the fact-finding ones) should be answered in relation to populism or populist trends in the respondent's own country.

Please feel free to give your personal assessment if the Questionnaire does not relate to facts, but in these cases try to justify your evaluation with evidence or arguments. You are kindly requested to give us as much precise data as you can, indicating, for instance, the legislative acts and judicial decisions to which you refer. It would also be extremely useful if you gave the most relevant academic literature available in English, French or German.

Institutional context

The first part of the questionnaire deals with the changes of constitutional values as well as

the institutional transformations of the last ten years in the EU Member States. These questions are based on the presumption that populist governments make efforts to consolidate their own power and to weaken the institutional guarantees of constitutional democracy.

1. **What kind of constitutional changes have taken place in the last ten years in your country? Please specify the date and content of constitutional amendments, as well as the failed attempts of constitutional changes.**

   Please specify all constitution-making acts in the past ten years in your country. If there were any changes in the constitutional text, please briefly describe their topics and motives.

2. **Are constitutional identity and 'unconstitutional constitutional amendment' present in the domestic constitutional discourse? If so, in what form and what is its main content?**

   Constitutional identity might have different understandings, like being identified with the core principles of the Constitution, or the collective identity of citizens related to the Constitution. Constitutional and other courts' judgments, legislation referring to the constitutional identity as well as the relevant academic literature can be used in answering this question. The idea of unconstitutional constitutional amendment is also at the crossroads of the present-day international constitutional discourse. You should clarify whether these ideas are parts of the constitutional debates today in your country, and if yes, in what form.

3. **Please describe the major institutional and procedural changes in the legislature, if any happened in the last decade.**

   To this question, changes of parliamentary standing orders and reforms of legislative drafting can have special importance.
   There have not been any major successful changes. However, populist ANO repeatedly expressed their desire to limit parliamentary debates.

4. **Have there been any changes in electoral laws?**

   In replying to this question, the practice of gerrymandering, campaign financing rules, and the rules guiding political advertisements might be particularly important.

5. **What sorts of development have taken place in governmental decision-making?**

   The centralization and simplification of the governmental decision-making process (e.g. by dismantling procedural obstacles, eliminating coordination or other changes in internal procedural rules of the government) can be relevant for replying this question. Please indicate also if the legal/constitutional context of local government has changed (especially as a result of centralization).

6. **Have the legislative rules governing the scope of responsibility and the legal status of neutral or control institutions changed in the recent ten years? If so, please describe the major changes in brief. You are kindly asked to assess the practical**

effects of these changes on the operation of the respective public bodies. With this question, please focus on the legal changes concerning the constitutional court, the judiciary, the audit commission, the ombudsman and the similar public authorities.

In this point, you are kindly requested to present the institutional changes of the specified public authorities, including the transformations of their tasks and functions as well as their internal structure.

In contrast to the preceding questions, the following questions focus on the recent changes in certain constitutional procedures which might in theory be useful for both promoting and hindering populism. For this purpose, you should consider whether populist challenges have affected these processes (e.g. by changing the balance between the branches of public power or direct and indirect democracy).

7. **How have the relationship or balance between the branches of public power changed in the past ten years?**

   The aim of this question is to explore whether or not the relationships between the legislative, the executive and the judiciary have changed in the past ten years. In assessing these relationships, you should assess how the role of the various power institutions (like the legislature, the government or the constitutional court) have changed during this time. It would be especially useful for our project if you could give insights into the reasons for these changes (if any occurred).
   You are kindly asked for a specific examination of whether the previous equilibrium situation has changed between the political decision-making bodies (such as the legislature or the government) and the neutral, non-political institutions (eg Constitutional Court, ordinary courts).

8. **In what matters have national (or sub-national, if it has a relevance) referendums been held? What other forms of citizen's participation are used in your country (in practice)?**

   Here we want to get information on whether the previous balance between representative and direct democracy has changed in the examined period. In respect to our research topic, the subject-matters of referendums and other forms of citizens' participation that occurred in this time period are also important.

9. **How have the constitutional-legal changes of recent years affected the autonomy of non-governmental organizations (churches, higher education, civil organisations)? Did the legal status of political parties change in the last ten years in your country?**

   Please describe the relevant legal changes, specifying the legal sources and the recent trends in this area.

10. **Please assess the relationship between the European/international law, and the domestic law! Are there any conflicts between the two legal systems?**

    In assessing this relationship, you can use the number of non-compliance procedures and the relevant ECJ judgments in the recent years. Any changes in the system of the representation of national interests in the EU institutions might also be very informative. You should instantiate how the domestic courts respect the judgments of the European Court of Justice and the European Court of Human Rights concerning their own country.

Populism and the European Union: major policy fields and legal conflicts

This part of the research project examines what populist actions were taken against the EU's migration policy and what responses were given to this challenge by the governments. Besides that, we explore what kind of policy measures were proposed by populist parties in the various Member States in the European Parliament.

11. **What kind of legislative and judicial policy responses to the EU migration policy have been given in your country?**

    Replying this question, you should give information about how legislative changes have happened in relation to the legal status and treatment of refugees and emigrants. The relevant policy-making of the last decade should also be described.

12. **What policy measures relating to European-level matters were proposed by populist parties in your country?**

    In the field of this question, the Euro-zone crisis, the refugee and migrant crisis, or terrorism might be particularly relevant issues.

Populism's impact on law, legal concepts and the juridical process

The major task of this part of the research is to survey how legal processes have been affected by populist politics. We presume that even in countries where populist parties have not come to power, populist challenges could impact various legal proceedings, including administrative and judicial procedures. The other major issue here is to investigate which constitutional guarantees have been effective in resisting or repealing populist challenges or, alternatively, which constitutional institutions/policies/procedures have been successfully used in the EU Member States to strengthen liberal constitutionalism. Thus, in this section of the questionnaire, you should focus on the practice of constitutional bodies not in general terms, but in relation to populist politics or tendencies.

13. **In your assessment, has the jurisprudence of the constitutional court (or any other high court having constitutional review power) changed?**

Your assessment can be based on the so-called landmark decisions which were made in the last ten years. Besides that, you can evaluate the stability versus changeability of the constitutional case-law of the relevant courts. It is important to present evidence (precise indication of 'landmark decisions', arguments for/against the stability of jurisprudence, etc.) of your assessment.

14. Have any changes occurred in administrative procedures?

The question aims to identify the changes and tendencies of the practice of administrative authorities and independent bodies which can be linked to populism. The unprecedented deference to government actions (e.g. in refugee cases) can be illustrative in this respect.

15. In your opinion, in the past ten years, which constitutional institutions and/or procedures have proved to be most successful in hindering or, conversely, promoting the development of populism?

One of our project's goals of high priority is to formulate (constitutional) policy measures to strengthen the constitutional and legal safeguards of liberal democracy, so we seek 'good practices' and great achievements in the field of law. We urge you, therefore, to set out which institutions, procedures or behavioural patterns were effective against populist political aspirations in your country.

B. Best practice list

Best practice as identified in the country report	Country	Indicators (popular sovereignty: 1; antipluralism: 2; extreme majoritarianism: 3; restriction of rights: 4)	Happened/introduced in the last 10 years (yes: 1; no: 2)
using means of direct democracy against populist endeavours	AT	1	1
introducing popular consultation at the regional level	BE	1	1
citizens' initiative	DK	1	1
citizens' initiative	FI	1	1
the conditions of initiating a referendum became stricter	HU	1	1
holding citizens' deliberations before referendums	IR	1	1
the obligation of having a balanced budget is included in the Constitution	IT	1	1
draft bills can be assessed on the website of the parliament	LT	1	1
collective submissions (participation in the law-making of the parliament)	LV	1	1
citizens' initiative	PL	1	1
the role of Parliament in the budgetary process was strengthened	PT	1	1
before holding a referendum, its topic is reviewed by the	PT	1	2

Constitutional Court			
restriction of the possibility of holding a referendum	SI	1	1
thematic consultation forums, especially in EU matters	SW	1	1
citizen participation was strengthened in the local decision-making processes	SW	1	1
complex electoral system, ensuring that no party has supermajority	CZ	2	2
the parliamentary role of AfD was limited by other parties “for the sake of democracy”	DE	2	1
the electoral system was made more proportional	DE	2	1
constitutional amendment: unconstitutional parties can be excluded from public funding	DE	2	1
ban on anonymous donations to political parties, transparency of party funding	DK	2	1
Prime Minister’s question time, every party was given the same amount of time	DK	2	1
“extremely” proportional electoral system	FI	2	2
decision of Council of State: the restriction of the number of private mass media outlets was unconstitutional	GR	2	1
representation of national minorities in the parliament	HR	2	1
preferential voting system	HR	2	1
single transferable vote system	IR	2	2
conservative (objective) approach to journalism	IR	2	2
the electoral system was made more proportional	IT	2	1
CC ruling: deviation of number of voters in all electoral districts may not be larger than 10%	LT	2	1
the state funds of political parties were increased	LV	2	1
strict procedure for changing the borders of constituencies	MT	2	2
“extremely” proportional electoral system	NL	2	2
party donations are strictly reviewed	PT	2	2
CC annulled: only min. 25 000 citizens are allowed to found a party	RO	2	1
ban of political advertisements on TV and radio	UK	2	2
first past the post voting system	UK	2	2
certain constitutional amendments can only be carried out after a referendum	AT	3	2
directly elected president	AT	3	2
parliamentary investigation committees are easy to create	AT	3	2
federalism	AT	3	2
establishment of a first instance administrative court	AT	3	1
CC uses the concept unconstitutional constitutional amendments; defined with the help of core principles	AT	3	2
strong financial autonomy of neutral institutions	BE	3	1
only a so-called Grand National Assembly can amend the constitution	BG	3	2
directly elected president	BG	3	2

establishment of an administrative court	CY	3	1
the Attorney General has a powerful role: he was successful in battling corruption and ensuring that laws are constitutional	CY	3	2
unconstitutional constitutional amendment: eternity clauses	CY	3	2
the House of Representatives was granted financial autonomy	CY	3	1
the direct election of the president was introduced	CZ	3	1
the second chamber fights populist tendencies successfully	CZ	3	1
board of public TV and radio is elected by parliament (not appointed by government)	CZ	3	2
unconstitutional constitutional amendment: eternity clause	DE	3	2
the necessary votes for installing a parliamentarian committee of inquiry were lowered	DE	3	1
process of decentralization, autonomous communities were set up	ES	3	1
a new, independent judicial self-governing authority was established	FI	3	1
the Senate prevented the abolition of a special court which tries the corruption cases of politicians	FR	3	1
procedure of QPC (question referred to the Conseil constiutionnel)	FR	3	2
constitutional reform: the power of the parliament was strengthened	FR	3	2
process of decentralization: new administrative units were set up	FR	3	1
constitutional amendments must be preceded by a referendum	FR	3	2
unconstitutional constitutional amendment: eternity clause (core values)	GR	3	2
the autonomy of the local governments was strengthened	GR	3	1
strong financial autonomy of neutral institutions	HR	3	1
the role of the National Judicial Council, the Ombudsman and the State Audit was strengthened	HR	3	1
transparency and broadening the publicity of legislative process	HR	3	1
every constitutional amendment must be preceded by a referendum	IR	3	2
the president elected by parliament has powers to successfully guarantee the Constitution	IT	3	2
CC uses the concept unconstitutional constitutional amendments; defined with the help of supreme principles	IT	3	2
CC uses the concept unconstitutional constitutional amendments; defined with the help of fundamental constitutional values	LT	3	1
a new type of ombudsman was institutionalized (for protecting the rights of children)	LU	3	1
unconstitutional constitutional amendments: inviolable core of the Constitution	LV	3	1
constitutional reform: the PM does not take part in the appointment of judges any more	MT	3	1
constitutional reform: the Public Prosecutor is no longer the advisor of the government	MT	3	1
unconstitutional constitutional amendments: eternity clauses	PL	3	2

the jurisdiction of the Court of Auditors to control public spending was expanded	PT	3	1
the Council of Public, a fiscal watchdog was set up as an independent administrative authority	PT	3	1
constitutional amendments need 2/3 majority (with two strong parties this is impossible to reach without consent)	PT	3	2
constitutional amendments must be preceded by a referendum	RO	3	2
unconstitutional constitutional amendment: if the Constitution is amended with the motivation of bypassing the review of the CC	SI	3	2
CC: the conditions of becoming a judge cannot be changed with retrospective effect	SK	3	1
CC uses the concept unconstitutional constitutional amendments; defined with the help of implicit material core	SK	3	1
constitutional reform: a new procedure for appointing judges in order to promote transparency	SW	3	1
the scope of task of ombudsmen was extended to the framework of the National Preventive Mechanism against torture	SW	3	1
the House of Lords fought populist tendencies during the Brexit procedure	UK	3	1
continuation of the devolution process	UK	3	1
setting up the Supreme Court with judicial authority transferred away from the House of Lords	UK	3	2
Miller judgments of the Supreme Court: a serious obstacle to the government's measures to restrict the Parliament's freedom of action	UK	3	1
more than 20 ombudsmen, with numbers having expanded	UK	3	1
independent Judicial Appointments Commission	UK	3	1
four separate audit institutions and the local audit framework was set up	UK	3	1
CC annulled unconstitutional surveillance package	AT	4	1
CC annulled: if someone does not take part in the mandatory elections, they can be sanctioned	BG	4	1
the rules of procuring public data were simplified	BG	4	1
the minimum voting age was lowered	CY	4	1
parliamentary committees were set up regarding the NSA and its questionable surveillance techniques	DE	4	1
the rules of fundraising were simplified, which favoured smaller NGOs	FI	4	1
party lists must be compiled in accordance with gender provisions	FR	4	1
procedure of référé-liberté (protection of basic rights by administrative courts)	FR	4	2
party lists must be compiled in accordance with gender provisions	HR	4	1
referendums resulting in a more secular Constitution	IR	4	1
party lists must be compiled in accordance with gender provisions	IT	4	1
more state donations are given to human rights NGOs	LU	4	1

strong cooperation between the government and NGOs to strengthen civil society at all levels of decision-making	LV	4	1
CC protects the rights of national minorities	LV	4	1
law-making processes are subject to a requirement of ex ante gender impact assessment	PT	4	1
an NGO development fund was established	SI	4	1
CC: free speech rulings	SK	4	1
antiracist practice of the Ombudswoman and the Supreme Court	SK	4	1
CC: no referendum can be held on restricting forms of cohabitation other than marriage	SK	4	1

PART B. Best Practices for Legal Reactions to anti-constitutionalist tendencies

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Introduction and methodology

The present Section analyses the Venice Commission and the European Court of Human Rights documental activity in search for practices and standards which may constitute 'best practices', as defined in the Research Methodology Section. The scope of the research is limited to three thematic clusters – Constitutions, Rule of Law and Democracy, Courts – and one Special Issue, the independence of media. The main point of reference will obviously be the opinions and documents of the Venice Commission, as the body principal aim is indeed to identify and define the 'best standards' of European constitutionalism.[2] The judgments of the European Court of Human rights will be instead used to evaluate the effectiveness of specific institutional arrangements to curb anti-constitutionalist tendencies.

The Section is structured as follows. The first three Paragraphs correspond each to a different thematic cluster, the First is on Constitutions, the Second on Rule of Law, the Third on Courts. The Fourth Paragraph is devoted to the Special Issue, i.e. the independence of media.

Before presenting the results of the research it is necessary to provide the reader with a methodological caveat.

This research is based exclusively on the documents and opinions of the Venice Commission as well as on the judgments of the European Court of Human Rights. In practice, this means that rather than good practices, the majority of the standards elaborated by the two Council of Europe organs, refer to good institutional arrangements. Yet, when it comes to institutional arrangements, as the Venice Commission itself recognises, their effectiveness and efficacy cannot be properly evaluated in abstract, i.e. without taking into account the peculiarities of each legal system. Further, since the opinions of the Venice Commission, being instruments of soft law, lack any binding effect - the same applies to some extent to judgments of the ECtHR - in most of the cases the good practices elaborated by the two bodies remain without any practical confirmation. This is why in some cases has not been possible to apply the common evaluation matrix. Yet, the relevance of this research is not diminished by the inapplicability of the matrix as these good practices can be tested using as a yardstick national practices and policy recommendations elaborated in the previous phases of DEMOS.

1. Constitutions

1.1 The Venice Commission's Doctrine on Constitutional Revision

[2] G. Buquicchio and S. Granata-Menghini, 'The Venice Commission Twenty Years On. Challenge Met but Challenges Ahead', in M. van Roosmalen et al. (eds), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk* (2013), 41 ss.

Assistance in the process of constitutional amendment represents the main function of the Venice Commission.[3] This Chapter illustrates the Venice Commission position as regards the procedure to adopt a constitutional amendment. On this point, besides the various opinions adopted,[4] there are two main documents that may serve as a point of reference the 2010 Report on Constitutional Amendment,[5] and the 2015 Compilation concerning constitutional Provisions for amending Constitutions.[6] These two documents, integrated with the opinions which were adopted in the last five years define the material scope of this analysis.[7]

As to the general principles informing the practice of constitutional-amendment, the Venice Commission notes that is crucial to the legitimacy of the constitutional systems to ensure the stability of the constitution,[8] and the widest possible consensus.[9] This implies that constitutional amendment should in principle requires qualified majorities or other procedural aspects which should make harder to modify the constitution whilst at the same time ensuring the involvement of political minorities..[10] Yet, the Venice Commission is aware that "[t]here is no common European "best model" for constitutional amendment, much less any common binding legal requirements. Neither has there been any attempt so far at articulating any common European standards."[11] Therefore rather than try to define a European best standard, the Venice Commission followed a casuistic approach aimed at striking a fair balance between the necessity to ensure a certain degree of rigidity and the necessity to adapt the constitutional text to societal changes.[12]

The Venice Commission identified four core aspects in the process of constitutional revision, the initiative, the parliamentary procedure, the popular ratification, and the limits to the material scope of constitutional amendments. The following sub-Paragraphs are each devoted to one of these aspects to present the varieties of solutions adopted by European Sates.

A. Initiative

Concerning the initiative, the Venice Commission observes how in all European States the parliament has the power to start a constitutional amendment process. Conversely, only a minority of European States, especially from Central and Eastern Europe, recognises this faculty to citizens.[13] In any case, from the perspective of identifying best practices in the legal

[3] In the course of the Paragraph we will mainly refer to constitutional amendments, even though the majority of the principles elaborated by the Venice Commission are applicable also to constitutional making process in particular as regards the central role for the legislative assembly.
[4] See: https://www.venice.coe.int/webforms/documents/default.aspx?topic=4&year=all. Last accessed 10 May 2021.
[5] CDL-AD (2010)001, *Report on Constitutional Amendment*, Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).
[6] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions*, adopted by the Venice Commission at its 105th Plenary Session (Venice, 18-19 March 2015).
[7] This means that, to avoid redundancy, the opinions that are cited in the Compilation, i.e. those adopted before 2015, will not be referenced to in the footnotes.
[8] Ibidem, II.B.
[9] Ibidem, II.C; CDL (2018)009-e Georgia, *Draft Opinion on the draft constitutional amendments*, adopted on 15 December 2017 at the second reading by the Parliament of Georgia, para. 18.
[10] CDL-AD (2010)001, *Report on Constitutional Amendment*, paras 5-6.
[11] Ibidem, para. 7.
[12] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions,* II.A, CDL-AD(2013)029, Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia, para. 34.
[13] CDL-AD (2010)001, *Report on Constitutional Amendement*, paras 30-33.

reactions to populism, the initiative phase seems to be the less relevant, as it only concerns the possibility of triggering the process. The Venice Commission only warns against conferring the Head of State the power to launch[14] or veto initiative of constitutional revision,[15] as this may alter the separation of powers.

B. Parliamentary Procedure

Concerning the parliamentary procedure, the Venice Commission observes that almost all European States have a constitutional requirement of a qualified majority in the parliament in order to amend the constitution.[16] The Venice Commission also clarified that the participation of the parliament is a necessary element of a good constitutional amendment procedure, even when the reform is subject to an approval referendum.[17] The required majority varies between three-fifths, two-thirds and three-fourths. This requirement responds to the necessity of ensuring the widest possible consensus around the constitutional reform and the participation of political minorities. The Venice Commission however specified that without any further requirement, a single vote by qualified majority, may not sufficiently guarantee the stability of the constitution.[18]

Other requirements instead are intended to allow a thorough reflection on the content of the proposed reform. These are the provision of time delays between the initiative and the first debate, and eventually between the first and the second reading, and the requirement of multiple readings in the parliaments.[19] This delay shall not be too rigid, as they should follow the progresses made in the substantive debate on the merit of the reform.[20] In general, the Venice Commission held that to carry out a constitutional reform in a delay of a few weeks that does not correspond to the best standard for constitutional reform as it does not allow a meaningful discussion on the content of the reform .[21]

A special mention is made to the constitutional revision procedure which requires the consents of two distinct legislatures.[22] The Venice Commission held that whilst these strengthen significantly the democratic legitimacy of the reform, “it may in many situations turn out to be a severe impediment to sometimes urgent reforms and/or necessary fundamental reforms of the state”.[23]

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[14] CDL-AD (2021)007-f Kirghizistan - *Avis conjoint de la Commission de Venise et de OSCE/BIDDH sur le projet de constitution de la République Kirghize*, adoptée par la Commission de Venise lors de sa 126e session plénière, para. 158.
[15] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions*, 10, CDL-AD(2007)045, *Opinion on the Constitutional Situation in the Kyrgyz Republic*, para. 47.
[16] CDL-AD (2010)001, *Report on Constitutional Amendment*, para. 38.
[17] CDL-AD (2021)007-f Kirghizstan - *Avis conjoint de la Commission de Venise et de OSCE/BIDDH sur le projet de constitution de la République Kirghize*, para. 154.
[18] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions*, 12; CDL-AD(2013)029, *Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia*, para. 58.
[19] CDL-AD (2010)001, *Report on Constitutional Amendment*, paras 36-37.
[20] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions*, 8; CDL-AD (2011)001, *Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, para. 19.
[21] CDL-AD (2021)007-f Kirghizstan - *Avis conjoint de la Commission de Venise et de OSCE/BIDDH sur le projet de constitution de la République Kirghize*, paras. 26-27.
[22] Belgium, the Netherlands and Spain.
[23] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions,* 12; CDL-AD (2012)010, *Opinion on the Revision of the Constitution of Belgium*, para. 19

C. Popular Ratification

As noted by the Venice Commission, in the majority of European States the whole process of constitutional amendment takes place in parliament.[24] Many European constitutions however provide for the involvement, either on an optional or mandatory basis, of the electorate to ratify the reform. When the electorate's involvement is optional, the constitution confers the power to trigger the referendum either to a parliamentary minority, varying from a minimum of one-tenth up to one third, or to the head of the state, in its role of the guarantor of the constitution, or, finally, to local authorities.

According to the Venice Commission, however, approval referendum should be held only for fundamental revisions or for revision restricting or limiting the scope of individual rights.[25]

Finally, only a minority of constitutions, demand a minimum participation for the referendum's results to be valid. This requirement is considered negatively by the Venice Commission, which held that "a minimal requirement for turnout can be a major obstacle for constitutional reform" and it tends to foster abstention.[26]

This position has been nuanced in the Revised Guidelines on Referendum which affirmed that an approval quorum or a specific majority requirement is acceptable for referendums on matters of fundamental constitutional significance.[27]

D. Limitations to the material scope of constitutional amendments

Concerning the material limitations to constitutional amendments, the Venice Commission distinguishes three possibilities.[28] The first is the s.c. eternity clause, which explicitly renders a part of the constitution, typically as regards fundamental rights or form of the state, unamendable. The Venice Commission considers unamendable provisions favourably provided that they only affect substantive rules - i.e. not constitutional revisions rules - and aims at protecting "fundamental Constitutional human rights and freedoms, [and] rule of law principles".[29] Ideally international human rights Treaty should also be included as unamendable provisions.[30]

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[24] CDL-AD (2010)001, *Report on Constitutional Amendment*, para. 46.
[25] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions*, 13; CDL-AD (2013)010, *Opinion on the draft New Constitution of Iceland*, paras 172-175.
[26] CDL-AD (2020)035-e Bulgaria - *Urgent Interim Opinion on the draft new Constitution*, endorsed by the Venice Commission on 11 December 2020, at its 125th online Plenary Session (11-12 December 2020), para. 91. See also, CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions*, 16; CDL-AD (2014)010, *Opinion on the draft Law on the Review of the Constitution of Romania*, paras 202-203.
[27] CDL-AD (2020)031, *Revised guidelines on the holding of* referendums, Approved by the Council of Democratic Elections at its 69th online meeting (7 October 2020) and adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), II.7.
[28] CDL-AD (2010)001, *Report on Constitutional Amendment*, paras 51-55.
[29] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions*, 17; CDL-AD (2005)003, *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitutional of Georgia*, para. 112.
[30] Ibidem.

The second is a distinction between different sets of constitutional provisions, with the Articles covering a special importance being harder to change than others. To this regard the Venice Commission clarified that when a distinction is introduced, it should not leave space for doubts, for instance by referring explicitly to constitutional provisions.[31] Finally, there are the temporal limitations, which can be of two types. A first set impede s constitutional reforms when a state of emergency is declared, whilst a second set aims at preventing the constitutions to be changed too often, thus establishing a time period from the last constitutional amendment in which the constitutions cannot be further modified. Concerning the first type, the Venice Commission noted that, even in absence of a specific prohibition in international or domestic law, it should be avoided to deliver a constitutional reform during a state of emergency, as a constitutional reform necessitates 'free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome'.[32] For this reason, according to the Venice Commission it would be better to let a period of time elapse from the end of emergency state before beginning a constitutional revision.[33] **Yet, if the reform cannot be delayed at least all the restrictions to political freedoms should be lifted**.[34]

E. The involvement of the Constitutional Court

The involvement of the Constitutional Court in the constitutional amendment process is becoming a recurring feature in the constitutions of Central Eastern European States,[35] nevertheless the Venice Commission affirmed that it does not constitute a requirement of the rule of law.[36] On the point the Commission does not express any specific recommendation only affirming that if established, the constitution shall detail precisely the scope, and effects of the constitutional court review as well as the bodies allowed to trigger its scrutiny.[37] In essence, **the Venice Commission seems to look with suspicion to the practice of revising the constitutionality of constitutional amendments by constitutional courts, affirming that "non-amendable" provisions and principles should be interpreted and applied narrowly and that judicial review should be conducted with prudence and moderation, leaving a margin of appreciation to the authors of the Constitution**".[38]

1.2 Towards a best practice for constitutional amendments?

In its 2010 Report, the Venice Commission acknowledges the existence of a common model

[31] CDL-AD (2020)035-e Bulgaria - *Urgent Interim Opinion on the draft new Constitution*, para. 92.
[32] CDL-AD (2010)001, *Report on Constitutional Amendment*, para. 245.
[33] CDL-AD (2009)030, *Opinion on a draft constitutional law on amendments to the Constitution of Georgia*, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), para. 5.
[34] CDL-AD (2017)005-e Turkey, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017*, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), para. 42.
[35] For instance, Azerbaijan, Kyrgyzstan, Moldova, Turkey and Ukraine.
[36] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions,* 17, CDL-AD (2012)010, *Opinion on the Revision of the Constitution of Belgium*, para. 66.
[37] CDL-AD (2021)007-f Kirghizstan - *Avis conjoint de la Commission de Venise et de OSCE/BIDDH sur le projet de constitution de la République Kirghize*, para. 159.
[38] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions*, 20, CDL-AD (2013)032, *Opinion on the final draft constitution of the Republic of Tunisia*, para. 219.

characterised by "a certain qualified majority in parliament (most often 2/3), and then one or more additional obstacles – either multiple decisions in parliament (with a time delay), or additional decision by other actors (multiple players), most often in the form of ratification through referendum."[39]

In light of this Report and the subsequent opinions adopted by the Venice Commission, it is possible to identify the elements for a good practice in constitutional amendment procedure.

The most established element is the parliament involvement in the procedure. To this regard it is worth noting that the Venice Commission does not express its position on the possibility of the establishment of an *ad hoc* body, like a constitutional assembly.[40] Yet, it possible to infer from a comprehensive reading of its opinions that such a solution would only be acceptable in case of a total or fundamental revision of the constitution. As to the required majority, it seems that the ideal requirement for the Venice Commission is a two-third majority, as "[r]aising the bar for such amendments further would lead to a situation where it may become very difficult to amend the Constitution".[41]

As to the referendum, the position of the Venice Commission is more nuanced. Its celebration is seems indeed recommended only when explicitly established by the Constitution, without any approval quorum, when the constitutional amendments affect several provisions of the constitutions - or in any case aims at changing the fundamental structure of the State - and it should be always accompanied with the requirement of a qualified majority in the parliament.[42]

Concerning the material limitation on the scope of constitutional amendments, the Venice Commission seems to recommend the establishment of an eternity clause' to protect fundamental rights, in particular as resulting from international human rights treaties.[43] As a last point, the Venice Commission seems to disfavour the involvement of constitutional courts in the process of constitutional revision, giving prominence to the democratic principle.

To sum up, in light of the Venice Commission opinions, an optimal constitutional revision procedure should be designed as follows.

1)The initiative should be entrusted either to the parliament or the citizens, marginalising the role of the head of State;

2)An optimal constitutional amendment procedure should envisage a central role for the parliament. The optimal required majority is of two-thirds;

3)Approval referendum should be celebrated only when the revision affects fundamental

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[39] CDL-AD (2010)001, *Report on Constitutional Amendment*, para. 62.
[40] CDL-AD (2020)035-e Bulgaria, *Urgent Interim Opinion on the draft new Constitution*, para. 89, 95.
[41] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions*, 13; CDL-AD (2015)014*, Joint Opinion on the Draft Law "On Introduction of changes and Amendments to the Constitution of the Kyrgyz Republic*, para. 30.
[42] CDL-AD (2021)007-f Kirghizstan - *Avis conjoint de la Commission de Venise et de OSCE/BIDDH sur le projet de constitution de la République Kirghize*, para 157; CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions*, 14-15, CDL-AD (2015)014, *Joint Opinion on the draft Law "On Introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*, para. 23.
[43] CDL-PI (2015)023, *Compilation of Venice Commission concerning constitutional Provisions for amending Constitutions*, 17, CDL-AD (2005)003, *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitutional of Georgia*, para. 112.

rights or the organisation of powers. Participation quorum should be in principle avoided;

4)Unamendable provisions are to be welcomed if they protect fundamental rights. The procedure for constitutional revision should always be amendable;

5)The involvement of the constitutional courts is not a necessary element. In any case the judicial review of constitutional amendments is dubious to the eyes of the Venice Commission.

1.3 The evaluation of the Hungarian case

The 2010 Hungarian constitutional reform and the subsequent amendments offers the ideal testing ground for evaluating the effectiveness, efficacy, and transferability of the above-mentioned good practices. Actually, the only requirement which according to the Venice Commission seems to constitute an established good practice is the centrality of the parliament in the procedure and the necessity of a 2/3 qualified majority in order to approve the reform.

As regards the **effectiveness,** The central role of the parliament combined with the requirement of a qualified majority for approving the reform seems poorly effective to guarantee the widest consensus possible around the reform and the involvement of the opposition. Even without considering the elections after 2010, Fidesz and its ally, the Christian-Democrat party, in the 2010 elections obtained a landslide victory in fair and free elections allowing them to rewrite the Constitution and triggering the process of democratic backsliding in Hungary. Similarly, the 2013 constitutional amendments were approved with the required majority, with the Socialist party boycotting the vote.

As regards the **efficiency**, the evaluation is fair good. Once introduced in the constitution, these kinds of instruments operate automatically, and without the need of any further implementation.

Finally concerning the **transferability**, it is self-evident that this reaction may be, and actually is, adopted in a variety of legal systems without the necessity of taking into account national specificities. Therefore concerning the transferability parameter, the assessment is positive.

2/3 Qualified Majority	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency		X	
Effectiveness	X		
Transferability			X

2. Democracy and Rule of Law

Together with individual freedom and political liberty the rule of law is one of the three

"principles which form the basis of all genuine democracy".[44] It is indeed a commonplace that democracy and the rule of law are two principles which are deeply intertwined. Yet, being rule of law and democracy two potentially whole-embracing concepts, in the search for the most effective legal reactions to strengthen constitutional democracy *vis-à-vis* populist threats, the analysis has been restricted to their most fundamental aspects.

Concerning, democracy is usually defined as a 'system in which parties lose elections".[45] This implies a government characterised by competitive elections, in which citizens vote and the losers concede; in which a minimal set of right to speech and the ability to run for office are protected.[46] Adopting this minimal definition of democracy, the research has been focused on the Venice Commission opinions and documents concerning electoral legislation, as it represent a fundamental aspect of a well-functioning democracy.

The Rule of Law is a 'concept of universal validity',[47] meaning that every state and international organisation need to abide by its requirements. Yet, these requirements are far from being well-established. There is however a unanimous consensus on the fact that the rule of law implies at least the government subjection to the law and the separation between powers. The first aspect will be investigated under Section 3 of the present document, whilst the present Section focuses on the requirements of separation of powers, and in particular the relationship between the legislative and the executive power,[48] according to the Venice Commission.

Finally, a third subparagraph will be dedicated to specific institutes of constitutional democracy that were objects of investigation in previous stages of DEMOS.[49] Those are the prohibition of imperative mandate and the referendum.

2.1. Democracy

2.1.1 The good practices in the electoral field in the Venice Commission's opinions

The electoral field constitute one of the three main thematic areas around which the work of the Venice Commission is organised.[50] The starting point to gain an understanding of what

[44] Ibidem, para. 11.
[45] The definition was firstly used by A. Przeworski, *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge, CUP, 1991.
[46] T. Ginsburg, A.Z. Huq, *How to Save a Constitutional Democracy,* Chicago, Chicago University Press, 2018, 10.
[47] CDL-AD (2016)007rev, *Rule of Law Checklist*, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) Endorsed by the Ministers 'Deputies at the 1263rd Meeting (6-7 September 2016) Endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016) Endorsed by the Parliamentary Assembly of the Council of Europe at its 4th part Session (11 October 2017), para. 9.
[48] The separation of the judiciary ensured throughout the institutional guarantees of judicial independence forms part of the analysis under Section 3 of the present document. See: *infra*, 3.1
[49] In particular, as concerns the legal aspects D.2.2 and 6.1.
[50] The other two being 'Democratic Institutions and Fundamental Rights' and 'Constitutional Justice'. See: https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN.

are the best practices in the electoral field according to the Venice Commission is the Code of Good Practice in electoral matters[51] and its interpretative declarations.[52] Next to the Code of Good Practice in Electoral Matters, the Commission issued a vast array of opinions on different aspects of electoral legislation which has been recollected in 12 different Compilations.[53]

Having regard to this body of documents, it is possible to recapitulate what are the general principles which compose the European electoral heritage as interpreted by the Venice Commission.

First and foremost, the Venice Commission prescribes that rules in electoral matters must have at least the rank of statute,[54] with a preference for organic laws with passive force superior to ordinary ones.[55]

The law, moreover should be stable, as "the stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy".[56] The stability is not only confined to the general principles but, more importantly, to rules of detail such as those concerning the drawing of constituencies boundaries and the composition of electoral commissions.[57] The stability of electoral in principle implies that it should not be possible to amend the law less than a year before the elections.[58] Concerning the frequency of elections, the Venice Commission affirms that they should be held at regular intervals, but in any case the legislature duration shall not exceed five years.[59]

Concerning the electoral system, the Venice Commission has consistently repeated that there is no best model of electoral system.[60] The States remain free to choose any electoral

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[51] CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters. Guidelines and explanatory Report*, Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002).

[52] CDL-AD(2005)043-e, *Interpretative Declaration on the Stability of the Electoral Law*, adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005)CDL-AD(2005)043-e; CDL-AD(2006)020-e; *Declaration on Women's Participation in Elections*, adopted by the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006); CDL-AD(2011)045-e, *Revised interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections*, adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011);cCDL-AD(2011)045-e; CDL-AD(2016)028, *Interpretative declaration to the code of good practice in electoral matters on the publication of list of voters having participated in the elections*, Adopted by the Council for Democratic Elections at its 56th meeting (Venice, 13 October 2016).

[53] For the full list and text of these documents see: https://www.venice.coe.int/WebForms/pages/?p=04_Compilations&lang=EN

[54] CDL-AD (2002)023rev2-cor, *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Guideline II. 2; Explanatory Report*, para. 63-65) cited in, CDL-PI (2020)020-e, *Compilation of Venice Commission opinions and reports concerning the stability of electoral law*, endorsed by the Venice Commission at its 125th Plenary session, online, 11-12 December 2020, 3.

[55] Ibidem, 6.

[56] Ibidem, 4; CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters*, para. 63.

[57] CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters*, para. 64.

[58] Ibidem, II.2.B; CDL-AD (2005)043, *Interpretative Declaration on the Stability of the Electoral Law*, 2.

[59] CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters,* 9.

[60] All the considerations contained in the paragraph refers exclusively to national elections for the lower chamber, as order of problems for local and regional elections are different and the electoral system for second chamber varies significantly from state to state.

provided that its design guarantees universal, equal, free and secret suffrage.[61] In particular, the Venice Commission held that the electoral system cannot be viewed in isolation, rather "it must be seen in the context of the constitutional, legal and political traditions of the state, the party system, and territorial structure. […] The perception that the chosen system works well in one state does not necessarily mean that it can be successfully replicated in another".[62] Given the importance of the choice, the Venice Commission however recommends reaching the widest consensus possible both in parliament and in the society.[63]

The basic choice concerning the electoral system is between proportional and majoritarian systems, and also to this regard the Venice Commission did not express a preference,[64] even though the vast majority of the European States adopt a proportional system.[65] The Venice Commission actually seems to disfavour the adoption of majoritarian systems with single constituencies, as well as mixed systems - especially proportional systems with majority bonus - in emerging democracies.[66] More generally, the Venice Commission seems to favour proportional systems in countries that are not established democracies, as this "might help to strengthen the representation of a plurality of political views in Parliament".[67] Concerning proportional system, the Venice Commission is any case aware that they may produce highly fragmented parliaments, this is way it recommends the introduction of electoral threshold.[68] Concerning the level of this threshold, the Venice Commission affirms threshold above 5% are in principle problematic,[69] especially if the political panorama is composed of a limited number of parties.[70] Also, the level of the threshold should consider whether there are other provisions in electoral legislation which may restrict access to parliament and the size of the electoral constituencies. Even a 5% threshold, if combined with the prohibition to form coalitions, has been held too high by the Venice Commission.[71] In general, notwithstanding the general level of the threshold in European states is between 4 and 5%, the Commission

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[61] CDL-PI (2019)001, *Compilation of Venice Commission opinions and reports concerning electoral systems*, 4, CDL-AD (2017)012 - Republic of Moldova, *Joint Opinion on the draft laws on amending and completing certain legislative acts*, para. 25.

[62] Ibidem.

[63] CDL-PI (2019)001, *Compilation of Venice Commission opinions and reports concerning electoral systems*, 4, CDL-AD (2016)019 Armenia – *Joint Opinion on the draft electoral code as of 18 April 2016*, para. 27.

[64] CDL-PI (2019)001, *Compilation of Venice Commission opinions and reports concerning electoral systems*, 5, CDL-AD (2013)021, *Opinion on the electoral legislation of Mexico*, para. 17.

[65] CDL-AD (2015)001-e, *Report on Proportional Electoral Systems: the Allocation of Seats inside the Lists (open/closed lists)*, paras 16, 66.

[66] In particular, the Venice Commission repeated this statement in opinions concerning Albania, Armenia, Georgia, and Moldova. See: CDL-PI (2019)001, *Compilation of Venice Commission opinions and reports concerning electoral systems*, 8-10.

[67] The statement is contained in an opinion on the draft constitution of the Kyrgyz Republic. See: Ibidem, 14.

[68] Ibidem, 17.

[69] CDL-PI (2018)004, *Compilation of Venice Commission opinions and reports concerning threshold which bar parties from access to parliament*, 7, CDL-AD (2012)003, *Opinion on the law on political parties of the Russian Federation*, para. 30.

[70] For instance, the Venice Commission held that a 6% threshold may be too high if only 5 parties obtained vote in the last elections. See: CDL-PI (2018)004, *Compilation of Venice Commission opinions and reports concerning threshold which bar parties from access to parliament*, 6-7, CDL-AD (2018)008, Republic of Moldova, *Joint opinion on the law for amending and completing certain legislative acts (Electoral system for the election of Parliament)*, para. 25.

[71] CDL-PI (2018)004, *Compilation of Venice Commission opinions and reports concerning threshold which bar parties from access to parliament*, 7, CDL-AD (2013)016, *Joint Opinion on the Draft Amendments to the Laws on election of people's deputies and on the Central Election Commission and on the Draft Law on repeat elections of Ukraine*, para. 16.

consider this level too high. Also taking into account a Resolution of the Parliamentary Assembly of the Council of Europe calling on Member States to consider reducing threshold below 3%,[72] it is possible to affirm that a 3% threshold constitute the optimal level for the Venice Commission as well.

As to the aim of electoral legislation, it should guarantee a universal, equal, free, and secret suffrage. Whilst these are well established concepts of constitutional law, it may be convenient to precise their meaning and scope in the Venice Commission perspective.

A) *Universal Suffrage*

The Venice Commission affirms that "[u]niversal suffrage means in principle that all human beings have the right to vote and to stand for election."[73] Evidently, certain restrictions on basis of age, nationality, residence, or for detainees may be established by national law. Concerning nationality there is not much to say, as the right to vote in national elections represent the very essence of the citizenship status. As to age, the Venice Commission supports the same required age for both active and passive suffrage.[74] Residence requirement may also be imposed, but they should be avoided for local and regional elections.[75] More controversial is the right to vote for detainees.[76] On this issue the Venice Commission suggests that all limitations should be proportional and imposed only for serious offender.

B) *Equal Suffrage*

The principle of equal suffrage implies that each voter has in principle one vote, and where the electoral system provides voters with more than one vote, each voter has the same number of votes.

The principle of equal suffrage assumes special practical relevance in the drawing of boundaries of electoral constituencies and it entails "a clear and balanced distribution of seats

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[72] Resolution 1705 (2010) of the Parliamentary Assembly of the Council of Europe, *Thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe member states*, available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17808&lang=en.

[73] CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters*, Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002) 5.

[74] Ibidem.

[75] Ibidem. In general, the ECtHR confirms the Venice Commission stance as regards the legitimacy of residence requirements, declaring the inadmissibility of application lamenting the violation of the right to vote cause by residence requirements. See: *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights Right to free elections*, 11.

[76] Emblematic is the *Anchugov* saga. The Russian Constitutional Court confirmed its interpretation of Article 32 of the Russian Constitution imposing an absolute ban on the right to vote for prisoners, in spite of a ruling of the European Court of Human Rights, declaring that such an interpretation was incompatible with Article 3 Protocol 1 of the ECHR. United Kingdom also had similar problems. More extensively on this issue see: E. Celiksoy, Execution of the Judgments of the European Court of Human Rights in Prisoners 'Right to Vote Cases, 20 *Human Rights Law Review* 3 [2020]:555–581.

among constituencies".[77] Without fair and clear allocation criteria there is indeed the possibility for practices of 'gerrymandering' - where constituencies are redrawn to the advantate of the ruling party - to emerge.

According to the Venice Commission the criteria to be used are:

"population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged. iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration"[78]

Further, in order to guarantee the correspondence to reality of this criteria, the distribution of seats shall be reviewed at least every ten years.

C) *Free Suffrage*

The freedom of suffrage is composed, according to the Venice Commission, of two aspects. The first is the freedom of voters to form an opinion, which implies the duty of State authorities to observe a strict neutrality.[79] The Second is the freedom of voters to express their preferences which implies the simplicity of the voting procedure and the transparency of the electoral process.

D) *Secret suffrage*

The secrecy of the ballot is not only a right but also a duty of the voter. In particular, the principle of secret suffrage prohibits the publications of the list of persons who actually voted and imposes the disqualification of any ballot whose content is disclosed.[80]

E) *Direct suffrage*

The principle of direct suffrage implies that the voters are in charge of determining directly the composition of the legislative assembly. Thus, a practice according to which political

[77] CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters*, 6.
[78] Ibidem, 6-7.
[79] This aspect will be further discussed in relation to public media. See: *infra*, Section 4.
[80] CDL-AD (2002) 23, *Code of Good Practice in Electoral Matters*, 9.

parties may, after the election, indicated who amongst the names included in the list are the elected is not in line with European standards.[81]

2.1.2 The doctrine of the European Court of Human Rights in the electoral field

First of all, it has to be underscored that insofar the ECtHR has applied Article 3 of Protocol 1 of the ECHR only to parliamentary elections.[82] As the Venice Commission, the ECtHR has indeed recognised that States retain a wide margin of appreciation concerning the organisation of their electoral system.[83] In particular, the following have been declared to be compatible with Article 3 Protocol 1 ECHR by the Strasbourg Court:[84]

- Proportional representation or majority voting;
- Simple (one round) or relative (two round) majority voting;
- Two stage or indirect voting (as in the case of French senatorial elections by an electoral college made up of elected members);
- Single transferable or alternative voting, in which citizens receive two or more votes,

More generally, it can be said that the judgments adopted in the electoral field by the European Court of Human Rights (the ECtHR) seems to correspond well to the position expressed by the Venice Commission in its opinions concerning, in particular, electoral thresholds,[85] residence requirements,[86] and the deprivation of the right to vote.[87]

2.1.3 Which best practices in the field of electoral law?

Unlike the procedure for constitutional amendment, it is impossible to identify the common features of a good electoral legislation. However, there are a few common general principles that should be mentioned:

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[81] CDL-PI (2019)001, *Compilation of Venice Commission opinions and reports concerning electoral* systems, 23; CDL-AD(2007)004-e, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th plenary session (Venice, 16-17 March 2007), para. 51.

[82] The ECtHR however did not exclude the possibility to extend the applicability of the provision to presidential elections and referenda. See: *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights Right to free elections*, 4-5. Available at: https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf.

[83] 24833/94 [GC], *Matthews v. United Kingdom*, 18 February 1999, para. 64.

[84] CDL-PI(2019)001, *Compilation of Venice Commission opinions and reports concerning electoral systems*, 6; CDL-AD(2008)013, *Report on Dual Voting for Persons belonging to National Minorities,* paras 20-23.

[85] See: 10226/03 (Grand Chamber), *Yumak and Sadak v. Turkey,* 08 July 2008; where the ECtHR held that a 10 % threshold may precluded optimal representation of the various political tendencies, even though national authorities remain free to evaluate whether this is actually the case

[86] The ECtHR in principle declares inadmissible applications founded on the violation of the right to vote cause by a residence requirement. See: *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights Right to free elections*, 11.

[87] In any case, in conformity with the Venice Commission position on the issue, the ECtHR held that the measure cannot be imposed automatically, and it must comply with the principle of proportionality. See, for instance: 74025/01 [GC], *Hirst v. The United Kingdom*, 06 October 2005.

1)The electoral law should be stable, meaning that it should be modified less than one year before the elections. This stability is better ensured by conferring the electoral law an infra-constitutional status;

2)The legislature duration shall not exceed five years;

3)Deprivation of the right to vote can never be applied automatically;

4)When introduced, legal threshold for entering the parliament should not be above 3%;

The indication of the Venice Commission is a little more detailed as regards new and not-established democracies. In particular for those countries the Venice Commission recommends the adoption of a proportional electoral system as it fosters plurality in parliament and society.

2.2. The Rule of Law

2.2.1 The best practices of the Venice Commission concerning the relationship between the legislative and the executive powers

As the Venice Commission observes, the extent of separation powers ultimately depends on the political system as determined by the national constitution. In Europe, the political systems can be reduced to three basic models: presidential systems, characterised by a clear separation between the legislative and the executive powers; semi-presidential systems, where government has to answer both to a directly elected president and to the legislature; and parliamentary systems, where the separation between the political powers is usually less marked because the executive (government) is appointed from a parliamentary majority.[88] When the State opts for a presidential system a certain degree of influence and control of the parliament should be guaranteed, conversely if the choice is a parliamentary system, mechanisms should be put in place to ensure an effective separation of powers.[89]

The Venice Commission did not express an explicit preference for any of these models, repeating consistently that the choice of the form of government is a political one, to be made freely by each State.[90] Yet, the Venice Commission "repeatedly welcomed and supported constitutional reforms that aimed at decreasing the powers of the President and at increasing those of the parliament", thus expressing an implicit preference for parliamentary system, especially for new democracies.[91] More generally, in the Rule of Law checklist, the Venice Commission held that the whole constitutional system should be designed to ensure the "supremacy of the legislature' as a fundamental premise of the rule of law.[92]

Consequently, the majority of the Venice Commission's on the relationship between the

[88] See: CDL-PI (2020)012, *Compilation of Venice Commission Opinions and Reports concerning the Separation of Powers*, 4; CDL-AD(2013)018, *Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco*, para. 16.
[89] Ibidem, 4.
[90] See at various points: Ibidem, 4, 5
[91] Ibidem, 5. The opinion thereby cited regarded the 2017 revision of the Turkish Constitution.
[92] CDL-AD (2016)007-e, *Rule of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), para. 49.

executive and the legislative powers concern presidential systems. The Commission indeed believes that the danger of neglecting fundamental rules concerning separation of powers and judicial independence, and the consequential degeneration into an authoritarian rule is higher in presidential systems. Therefore, where a presidential system is chosen the Venice Commission requires very strong check and balances, in first place a strong and independent judiciary.[93]

First and foremost, it is a mandatory requirement that the election day for the legislative assemble, and the head of State shall be different, as otherwise the President will also control the parliamentary majority thus blurring the separation of powers.[94] Further in order to avoid excessive concentration of powers in the hands of the head of the State, it should not be allowed to serve more than two terms.[95]

Concerning presidential powers, the Commission held that it is particularly dangerous to bestow upon the President the faculty to dissolve the legislature as this seriously undermine the separation of powers.[96] If this faculty is conferred to the president in any case he/she should not be able to link a constitutional amendment to a question of confidence,[97] as this runs contrary to the principles that should inform constitutional revision, *in primis* the reach of the widest consensus possible among political forces.[98]

Surprisingly enough, given the magnitude of the phenomenon in many European democracies, we found in the Venice Commission opinions little material concerning executive law-making. The Rule of Law checklist only prescribes that governmental law-making power should be clearly defined as to their objectives, contents, duration and scope by the parliamentary delegation and that abuse should be amenable to judicial review.[99] However, these principles are not further substantiated in other opinions.[100]

However, in recent times the Venice Commission devoted much of its attention to threat to the separation of powers coming from the use by European government of emergency powers to face the COVID-19 pandemic.[101] As a general remark, the Venice Commission declared that the respect for the rule of law requires the executive emergency powers to be consequence of a declaration of a state of emergency, preferably pursuant to a norm of constitutional rank.[102] Akin to constitutional revision, the declaration of the state of

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[93] As already said, to this issue is dedicated the next Section. See: *infra*, 3.1.
[94] Ibidem, 6.
[95] Ibidem, 6
[96] Ibidem, 6.
[97] CDL-AD (2019)022-ePeru, *Opinion on linking constitutional amendments to the question of confidenc*e, adopted by the Venice Commission at its 120th plenary session, Venice, 11-12 October 2019, paras 32-33.
[98] See: *supra*, p. 2.
[99] CDL-AD (2016)007-e, *Rule of Law Checklist*, 12.
[100] The lack of more detailed principles and standards on the issue of the governmental lawmaking seems to be confirmed by the circumstance that in the 2021 Venice Commission Compilation on law making procedures and the quality of law, there is not a single mention to the features of delegating legislation. See: CDL-PI (2021)003, *Compilation of the Venice Commission Opinions concerning law making procedures and the quality of law*, Endorsed by the Venice Commission at its 126th Plenary Session (online, 19 - 20 March 2021).
[101] For a detailed exposition see: P. Biglino, J.F. Durán, *Los efectos horizontales de la covid-19 sobre el sistema constitucional: estudios sobre la primera oleada*, Fundación M. Giménez Abad, Zaragoza, 2021, 437-464.
[102] CDL-AD (2020)018 *Interim Report on the measures taken in the EU Member States as a result of the COVID-19 crisis and their impact on democracy the rule of law and fundamental rights*, paras. 29-31; CDL-PI(2020)005rev, *Respect for democracy, human rights and the rule of law during states of emergency – Reflections*, paras 22-24.

emergency requires the broadest possible consensus.

More in details the Venice Commission enshrined a series of principles to guarantee respect of rule of law and the separation of powers in emergency situations. First the temporariness, meaning that the measures should cease to be in force as soon as the circumstances that led to their approval are over.[103] Second the Commission prescribes that, as in normal times, when Parliament delegates powers to the Executive "the objectives, content and scope of this delegation of powers should be explicitly defined in a legislative act".[104] Further, the rules contained in emergency laws should comply with the principle of necessity, i.e. it is not possible to take advantage of the rules enacted to deal with the emergency to include structural rules intended to be permanent, in particular constitutional revision,[105] that introduce changes in the organization and functioning of the institutions.[106] Concerning the declaration and prorogation of the state of emergency, the parliament should be competent and a qualified majority is a desirable requirement.[107]

Finally, as regards specifically the relationship between the executive and the legislative, the Commission recommends enhancing parliamentary scrutiny, both *ex ante* and *ex post*, over governmental decrees.

Those principles albeit affirmed in respect to emergency legislation, provide a useful source to identify good legal reactions to anti-constitutional tendencies. The concentration of powers in the executive hands and the government's habitual use of legislative powers, are indeed longstanding threat to the separation of powers, thus an anagogic application of some of the solutions enacted to guarantee separation of powers during the pandemic, may also be useful in normal times.

As a last point, we have to underline an issue which receives scarce attention in the opinions of the Venice Commission is the regulation of independent administrative authorities. Albeit the Venice Commission seems to be aware of the threat to the separation of powers coming from 'technocratic powers claimed by government' no standards are dictated by the Venice Commission on the point.[108]

All in all, from the opinions of the Venice Commission emerges clearly a preference for a political system in which the parliament centrality is ensured. Conversely, the Commission seems to look with suspicion to presidential systems, especially when these are chosen in new and transitioning democracies. In respect of presidential the Commission in fact identified a series of 'dangerous practices', which interpreted *a contrario* may lead to the identification of the following 'good practices':

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[103] CDL-AD (2020)018 *Interim Report on the measures taken in the EU Member States as a result of the COVID-19 crisis and their impact on democracy the rule of law and fundamental rights*, adopted by the Plenary session on 8 October 2020 paras 26-27.

[104] Ibidem, para. 58.

[105] See: *supra*, 1.1.C.

[106] CDL-PI (2020)003, *Compilation of Venice Commission opinions and reports on states of emergency*, 25, CDL-AD (2017)005, Turkey, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National um on 16 April 2017*, paras. 30-31

[107] CDL-AD (2019)015, *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist*, para. 121; *Compilation* of *Venice Commission opinions and reports on states of emergency* CDL-PI (2020)003, 16, CDL-AD(2015)037, *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia*, para. 93.

[108] This is probably due to the fact that independent administrative authorities are normally regulated at a sub-constitutional.

1)The election day for the president and the parliament should be different so to avoid that powers are routinely controlled by the same majority;

2)the president should serve for a maximum of two terms;

3)the separation of powers must be rigid, meaning in particular that the president should not be able to dissolve the parliament or to appoint MPs as members of its cabinet.

More generally from a reading of the most recent documents of the Venice Commission on emergency laws, it is possible to identify some practices susceptible of being evaluated as best practices to regulate executive law-making powers.

In particular:

1)concerning legislative delegation, requiring a qualified majority for the approval of the delegation, so that delegation is used only in complex and technical matters;

2)concerning law decrees, ensuring a stricter application of the principle of necessity so to avoid that law making powers are exercised to adopt without any connection with the situation of pending urgency.

2.3 Specific institutes of constitutional democracy investigated in previous phases of DEMOS

Considering the previous research work carried out in the context of DEMOS,[109] it seems necessary to undertake an analysis of two specific institutes of constitutional democracy which emerged as particularly significative from the perspective of populist constitutionalism. Those are: the use of referendum and the prohibition of imperative mandate.

A. Referenda and constitutional democracy

The Venice Commission dedicated significant efforts in seeking to establish good practice concerning the use of referenda.[110] The present paragraph however only deals with the general principles concerning referendums without illustrating the technical requirements prescribed by the Venice Commission.

The Commission has clarified that the circumstances, scope and procedures of referendums are a matter to be determined by national constitutional law. [111] Nonetheless, the

[109] See in particular Deliverable 2.2. and Deliverable 6.1, both published as working paper on the DEMOS official website: See: https://openarchive.tk.mta.hu/433/; https://openarchive.tk.mta.hu/423/.

[110] First and foremost, the Code of Good Practice on Referendums and the Revised Guidelines on the holding of referendums. See: CDL-AD(2007)008rev-e, *Code of good practice on Referendums*, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007); CDL-AD(2020)031-e, *Revised guidelines on the holding of referendums*, Approved by the Council of Democratic Elections at its 69th online meeting (7 October 2020) and adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020). It is worth specifying that in this paragraph we will not consider relevant the distinction between the various types of referendums, as we are seeking to identify general principles concerning their use and limits.

[111] CDL-AD (2020)031-e, *Revised guidelines on the holding of referendums*, para. 8.

Commission is aware that 'referendums and representative democracy should be harmoniously combined', meaning in first place that referendums should not be used to circumvent constitutional checks and balances.[112] This means in essence that referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them.[113] But also that, when referendum has not been called by the parliament, the latter shall be able to express its opinion before the vote.[114]

The rules of referendum shall be established with general character by a norm with the rank of law and its adoption requires the widest possible consensus.[115] Concerning procedural rules, in order to ensure the transparency and fairness of the consultation, the Venice Commission prescribes for the referendum to be administered by an independent impartial authority or even ben by independent *ad hoc* commission set up at all levels.[116] Also, the Commission expresses a clear preference for binary questions, in the form of a yes or no answer. [117] As regards quorums, as we mentioned in the preceding section,[118] the Commission held that validity quorum or specific majority requirements, are acceptable only for matters of constitutional significance.[119]

As regards the content of the text submitted to referendum, this shall comply with the principles of democracy, rule of law and human rights and it shall not be contrary to international law obligations of the state.[120] The text, moreover, shall be uniform, meaning in first place that, except for total revision, it shall not affect various issues disconnected from each other.[121]

Finally, as to the effects of legally binding referendums, the reversal of the will of the people expressed in the referendum, requires the celebration of another referendum.[122] Yet, the Commission does not specify the period of validity of the above-mentioned rule.

In conclusions, the following good practices concerning referendums can be identified:

1)First and foremost referendums should be celebrated only when so provided by the constitution or by a statute in conformity with the constitution;

2)The parliament should always be able to express its opinion on the subject-matter of the referendum;

3)The referendum shall be administered by an independent and impartial body

4)the content of the referendum shall comply with the principle of democracy and rule of law and may not run contrary to the international obligation of the state;

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[112] Ibidem, 9.
[113] Ibidem, p. 10.
[114] Ibidem, p. 16.
[115] Ibidem, p. 11.
[116] Ibidem.
[117] Ibidem, p. 15.
[118] See: *supra*, p. 5.
[119] CDL-AD (2020)031-e, *Revised guidelines on the holding of referendums*
[120] Ibidem, p. 13.
[121] Ibidem.
[122] Ibidem, p. 15.

5)validity quorum should be in principle avoided;

6)for legally binding referendums, the popular decision can be reverted, during a certain period of time, only by means of another referendum.

B. The prohibition of imperative mandate

As the Venice Commission notes, the institute of imperative mandate, which confers on the electorate the right to revoke the mandate of the parliament, is virtually inexistent in Europe, being present only at subnational level.[123] Nonetheless, given that, as was noted in D. 2.2 and D.6.1, the introduction of institutes like imperative mandate and the recall have been proposed - the latter especially at subnational level - by various populist parties in Europe, it is necessary to illustrate what the Venice Commission has said on the issue.

The position of the Venice Commission on the issue of the imperative mandate is reflected in the 2009 Report on the imperative mandate and similar practice.[124]

In general, the Venice Commission notes that while imperative mandates and similar practice may pursue a legitimate aim, i.e. the prevention of floor crossing, they are disproportionate as they annul the principle of free and independent mandate, which is "a cornerstone of European democratic constitutionalism".[125]

In its only opinion that to the date it has dictated on this issue, the Venice Commission held that imperative mandate does not comply with the standards of European constitutionalism even if the faculty to revoke the mandate is conferred to the political party to which MP belongs as this would mean "put the parliamentary bloc or group in some ways above the electorate" and "it is not compatible with the role a deputy has to play in a free parliamentary system. compatible".[126]

Therefore, according to the Venice Commission, it appears out of doubts that the prohibition of imperatives mandate, also in the form of "party administered mandate", cannot constitute a good practice to prevent floor-crossing and thus enhancing democratic quality.

The Report is also interesting inasmuch it provides a comparative overview of the solutions adopted by different countries around world to prevent MPs to switch party too frequently. Even though the Venice Commission does not explicit its opinion, some arrangements indeed appear to strike a fair balance between the freedom and independence of the MP and the necessity to prevent excessive floor-crossing. It is particularly worth mentioning the solution adopted in the Canadian province of Manitoba, which imposed on MPs who quit their political party to serve out the remainder of their term as independents.[127] A similar goal is pursued in Spain via a common accord of political parties, the 'Acuerdo sobre un código de conducta

[123] Ibidem, para. 13.
[124]CDL-AD(2009)027, *Report on the imperative mandate and similar practice*, Adopted by the Council for Democratic Elections at its 28th meeting (Venice, 14 March 2009) and by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009; CDL-AD(2019)011rev, *Report on the Recall of Mayors and Elected Local Representatives*, Adopted by the Council of Democratic Elections at its 65th meeting (Venice, 20 June 2019) and the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019).
[125] Ibidem, para. 39.
[126] Ibidem, paras 32, 38.
[127] Ibidem, para. 30.

política en relación con el transfuguismo en las corporaciones locales' (Agreement on a Code of Political Conduct on floor-crossing in Local Authorities). The agreement, which was firstly signed by all major Spanish parties in 1998, has been renewed in November 2020 after a 10-year period of inactivity.[128] In the agreement, valid at any level of government, the parties essentially commit themselves to not collaborate with MPs exiting from other parties.

All in all both the two solutions above indicated appear to adequately ponder the two countervailing interests here at stake. The Spanish agreement on floor-crossing should thus receive particular when determining the effectiveness of the legal reactions.

2.4 The Evaluation of the Hungarian and Polish Case

Concerning the rule of law standards, the Hungarian and Polish governments have disregarded virtually every European best-standard. It is therefore complicated to evaluate the effectiveness of practices that were never applied concretely in the two countries. It is however noteworthy, as regards the choice of the politicly system, that both countries are parliamentary democracies, a choice that in Hungary has been reinstated - at least formally - by the 2011 Fundamental Law. Yet, this has not impeded the democratic erosion in the two countries, thus seemingly confirming that the choice of the political systems is not a relevant factor for anti-constitutionalist tendencies.

3. Courts

This thematic cluster aims to identify possible best practices in relation to the composition, organisations and powers of the courts. By the term 'courts' we refer both to ordinary courts and constitutional jurisdiction.

Concerning the former, in light of the research work carried out in previous WP of DEMOS, the analysis has been centred around two main issues: judicial independence, with particular attention to judicial appointment processes; and the composition and function of judicial councils. As to constitutional courts, we present the good practices, identified by the Venice Commission, as regard their composition and powers.

3.1 The good practices of the Venice Commission to protect the independence of ordinary courts

Especially in the last decade, mainly due to the events unfolding in Hungary and Poland, judicial independence became a hot issue of debate. Some authors seem to blame on the EU for having applied, in the course of the accession process of Central and Eastern European States, too rigid standards of judicial independence to countries just came out of authoritarian

[128] https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/territorial/Paginas/2020/111120-transfuguismo.aspx. Last accessed 10 May 2021.

regimes where guarantees of judicial independence were completely absent.[129]

This is why the search for the good practices concerning judicial independence in the Venice Commission opinions and reports, should be subject to the *caveat* that those principles are currently contested in many European States - not only the usual suspects but also consolidated democracies like Spain - and therefore the evaluation of their suitability of being best practices - which will be carried in the Conclusions of this Report - to counter populist tendencies may not produce the expected results.

Further, it must be noted from the outset that the Venice Commission explicitly declared to rely for defining its standards of judicial independence on the various sources existing at the European level, in first place the jurisprudence of the ECtHR.[130] Therefore, the positions of the two positions of the two bodies are presented jointly as they reflect the Council of Europe standards on judicial independence.

In the European constitutional heritage, as resulting from the Venice Commission[131] and the ECtHR judgements,[132] judicial independence is a twofold concept. First, the independence of the judiciary has an objective component, which an indispensable quality of the Judiciary as a whole and an indispensable guarantee for the separation of powers.[133] As a corollary of the first, judicial independence is also a necessary attribute of each individual judge, who shall be free from any undue influence in adjudication. The European standards concerning these two dimensions will be separately presented in the next two sub-paragraphs.

3.1.1 The external dimension of judicial independence

First, concerning the level of regulation, the Venice Commission strongly recommends that "[t]he basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts".[134] This means in essence that the Constitution shall explicitly recognise judicial independence as a constitutional principle.

As regards the access to the judicial career, the Commission considers that both the access by competitive examination and the selection from a pool of experienced practitioners raised some question. The former system because it does not account into the account the candidates' personal qualities and experiences; the latter because it may not guarantee the objectivity of the selection process.[135]

Concerning the system of appointment, on a principled basis, the Venice Commission affirms that there is no such thing as a European model of judicial appointments.[136] Yet, as we have

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[129] See: M. Bobek, The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries, 14 *European Public Law* 1 [2008]:99-123. It may be worth noting that the author is currently serving as Advocate General of the European Court of Justice.

[130] CDL-AD (2010)004-e, *Report on the Independence of the Judicial System Part I: The Independence of Judges,* para. 12.

[131] CDL-AD (2010)004-e, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para. 5.

[132] Recently in 26374/18 [GC], *Guðmundur Andri Ástráðsson v. Iceland*, 01 December 2020.

[133] In the literature amongst many see: M. Cappelletti, Who Watches the Watchmen. A comparative study on Judicial responsibility, 31 *The American Journal of Comparative Law* 1 [1983]:1-62.

[134] Ibidem, para. 22.

[135] CDL-AD (2007)028-e, *Judicial Appointments*, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), para. 36.

[136] CDL-AD (2010)004-e, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, para. 31.

observed as regards the choice of the political system, the Commissions seemingly apply a "double standard". On the one hand indeed, it considers that in older democracies a system of judicial appointment where the executive has decisive influence may work well and guarantees and independent judiciary.[137] On the other, the Commission affirms that, at least for ordinary courts, any influence of political bodies should be in principle avoided.[138] This applies especially to elective appointment, where is the parliament who elects the judges. Concerning the appointment by the head of the State, s.c. direct appointment, the Commission traces a distinction.

In parliamentary systems, where the head of the state is a figure who normally observes a strict neutrality towards political parties, the Commission considers that the power to appoint judges, be it formal or effective, is, in principle, less dangerous for judicial independence.[139] However, the Commission held that when the president of the republic is capable of determining the composition of superior jurisdictions, competent to adjudicate on fundamental issues like the regularity of elections, this may cause a serious threat to the functioning democracy, as these kind of decisions should appear to be adopted in absence of any political influence.[140] Therefore what ultimately matters most is the extent to which the head of state is free in deciding on the appointment, i.e. whether the head of the state is bound by instructions received by an independent body, normally a judicial council: "[a]s long as the President is bound by a proposal made by an independent judicial council (see below), the appointment by the President does not appear to be problematic".[141]

What the Commission indeed makes clear is its preference for the appointment, promotion and disciplining of judges to be controlled by a judicial council.[142] Actually, the Venice Commission seems to endorse a strong role for judicial councils in the appointment, possibly consisting in the judicial council directly appointing the members of the judiciary.[143] Yet, the existence of a judicial is not *per se* sufficient to exclude political considerations in the appointment process, because if its composition is determined by a political body, this will end up affecting the independence of the judicial council and lead to partisan apportioning of judicial posts.[144]

Concerning the composition of a judicial council, the Commission is aware that the involvement of the political branches of power ultimately guarantees the accountability of the judiciary as a whole and it is thus legitimate, if not necessary.[145] However, the Commission prescribes that a 'substantial number of its members', preferably a majority, should be elected by the judiciary itself.[146] The other members instead should be elected by the parliament amongst legal experts so to fuel the body with the necessary democratic

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[137] CDL-AD (2007)028-e, *Judicial Appointments*, para. 45.
[138] Ibidem, paras 46-47.
[139] Ibidem, para. 14.
[140] CDL-AD (2017)031-e Poland, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), para. 43.
[141] Ibidem.
[142] CDL-AD (2010)004-e, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, para. 32.
[143] CDL-AD (2007)028-e, *Judicial Appointments*, para. 17.
[144] The point has been discussed in Deliverable 6.1. See: J.M. Castellà, M.A. Simonelli, Populist constitutionalism. Its impact on the constitution, the judiciary and the role of the EU, *Demos Working Paper*, 7-10. Available at: https://openarchive.tk.mta.hu/433/1/Populist_Constitutionalism_Final%20.pdf last accessed 10 May 2021.
[145] CDL-AD (2007)028-e, *Judicial Appointments*, para. 28.
[146] Ibidem, para. 29.

legitimacy.[147] It is worth noting on the point that the Venice Commission recommends, in order to ensure the depoliticisation of the body, to require a qualified majority for the elections of the lay members of the judicial council.[148] The Commission instead looks with suspicion, notwithstanding the diffusion of this practice, to the presence of executive members in the judicial council.[149] In any case, the Commission explicitly prohibits the minister of justice participation in the decisions concerning the disciplining of judges.[150] This because the guarantee for security of tenure implies that [a]fter appointment, any link between the judge and the political organs should be severed; there should be no space for interventions by either the legislative or the executive, not even if they are merely symbolic. In order to inspire the confidence, which is necessary in a democratic society, courts must not only be independent, but also appear to be independent".[151]

As to the mandate of judicial council members, it should be preferably longer than that of the legislature, and to reinforce the independence of the judicial council members it should be incompatible with that of parliamentarian and not renewable.

To sum up, the following good practices for guaranteeing the external dimension of judicial independence can be identified in the Venice Commission opinions:

1)The basic principles of judicial independence should be enshrined in the constitution;

2)concerning the system of appointment, the Venice Commission seems to endorse a model where judges are directly appointed by an independent judicial council. This requirement is stronger concerning appointment to superior jurisdictions;

3)as to the composition of this body, the Commission recommends half of its members to be elected by judges themselves;

3a)to ensure the judiciary's democratic legitimacy the parliament shall elect the other members amongst legal experts;

3b)executive members should not form part of the judicial council. In any case, the minister of justice shall not take part in the decisions concerning the sanctioning and disciplining of judges;

3c)the mandate of judicial council's members should be longer than that of MPs, incompatible with parliamentarian mandate, and not renewable.

3.1.2. The internal dimension of judicial independence

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[147] Ibidem.

[148] CDL-AD (2007)028-e, *Judicial Appointments,* para. 32; CDL-AD (2020)001-e, Moldova, Republic of, *Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy*, adopted by the Venice Commission on 20 March 2020 by a written procedure replacing the 122nd Plenary Session, para. 49.

[149] CDL-AD (2007)028-e, *Judicial Appointments*, paras 33-34.

[150] Ibidem, para. 34.

[151] CDL-AD (2015)027, *Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015*, para. 15.

Concerning the internal dimension of judicial independence - i.e. the guarantees of independence for each individual judge - the most important is obviously the security of tenure. To this regard, the Commission observes that in the European practice is customary to appoint ordinary judges until the reach of the mandatory retirement age.[152] In the case the possibility to extend the judges' mandate beyond mandatory retirement is envisaged by the legal system, the decision on the decision shall be adopted pursuant to clear criteria and not be left to the discretion of elected politicians.[153] On this respect, the Commission specifies that any change of the mandatory retirement age, even if established in the constitution, shall not apply to currently serving judges as this undermines the principle of the security of tenure.[154] The same has been affirmed in the landmark judgment of the ECtHR in the *Baka* case.[155] The judgment besides adds that at any rate the judges shall have the right to challenge the premature termination of the mandate.[156]

The principle of security of tenure also implies that transfers against the will of the judge should be limited to exceptional circumstances, however it can be imposed as a disciplinary sanction.[157] On this aspect, the Commission prescribes that disciplinary sanctions should be adopted by a judicial council or by specialised disciplinary courts.[158] In particular, disciplinary may not be conferred to the minister of justice.[159] The independence of the individual judge indeed shall be guaranteed not only vis-à-vis the political branches of the government, but also from undue influences coming from superior jurisdictions. To this regard the Venice Commission affirmed that attributing to courts' president an unfettered discretion in setting up panels, distributing cases amongst them and assigning judges to cases, is not in compliance with the principle of judicial independence, and the right to an ordinary predetermined by the law.[160] Cases shall be assigned randomly and the exception to this principle shall be limited as to their scope and clearly established in the law.[161]

All in all, the following good practices concerning internal judicial independence can be identified:

1)The principle of the security is better guaranteed with appointments until the judge reaches the legal mandatory retirement age;

1a) legislation lowering the mandatory retirement age shall not apply to currently serving judges

1b)decisions on the extension of the judges' mandate beyond mandatory retirement age shall be taken by an independent body pursuant to well-defined legal criteria;

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[152] CDL-AD (2010)004-e, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, para. 34.
[153] CDL-AD (2017)031-e Poland, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, para. 52; 130.
[154] Ibidem, paras 46-49.
[155] 20261/12 [GC], *Baka v. Hungary,* 23 June 2016.
[156] Ibidem, paras. 120-122.
[157] CDL-AD (2010)004-e, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, para. 43.
[158] Ibidem.
[159] CDL-AD (2017)031-e Poland, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts,* para. 130.
[160] Ibidem, paras. 83-88; 122-126.
[161] Ibidem, para. 130.

2)the power to discipline judges shall be conferred to the judicial council or specialised disciplinary courts

3)the principle of random allocation of cases can be derogated in exceptional circumstances clearly defined by law.

3.2. The good practices of the Venice Commission to guarantee the effectiveness of judicial review of legislation

In the European model of constitutional democracy, constitutional courts ensure the government subjection to the law, and are thus an indispensable prerequisite of the rule of law. On the one hand, constitutional courts are the ultimate guarantor of the checks and balance between powers, and thus ultimately of the separation of powers, on the other they ensure the supremacy of the constitution by scrutinising the laws approved by the political majorities for respect with fundamental rights as recognised in the constitution.

This is why the promotion of constitutional justice was the key objective pursued with the establishment of the Venice Commission.[162] This paragraph is divided in two parts. In the first are presented the good practices of the Venice Commission on the appointment and composition of constitutional are presented, the second is dedicated to the powers of constitutional courts.

3.2.1 The Venice Commission good practices on appointment and composition of constitutional courts

At the outset it must be noted that the Venice Commission considers the system of appointment essential to ensure high quality decisions of the constitutional courts.[163] In the European context, the systems of judicial appointment can be reduced to three macro-models.

The **first** is a system of direct appointment, in which an authority directly appoints the members of the constitutional courts without any voting procedure.[164]

The **second** is the elective system in which the parliament elects all the judges of the constitutional courts typically with a qualified majority.[165]

The **third** is a hybrid-system, in which some members of the constitutional court are elected and some are directly appointed.

Independently of the system chosen, the Venice Commission affirms that the principal aim of the appointment procedure shall be to insulate the constitutional court from political pressure thus guaranteeing its independence whilst at the same time guaranteeing a balance

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[162] G. Buquicchio, S. R. Dürr, *Constitutional courts - the living heart of the separation of powers. The role of the Venice Commission in promoting constitutional justice*, in G. Raimondi et al. (eds), *Human Rights in a Global World, Essays in Honour of Luis Lopez Guerra*, Oisterwijk, Wolf Legal Publishers, 2018, 515-546.

[163] CDL-AD (2020)039-e, *Ukraine - Urgent opinion on the Reform of the Constitutional Court*, endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020), para. 71.

[164] CDL-STD (1997)020, *The Composition of Constitutional Courts*, 4.

[165] Ibidem, 5.

composition.[166]

As regards direct appointments a competitive selection process managed by independent screening committees may well serve that purpose.[167] Also in order to ensure a balanced composition the appointing power should be conferred to a plurality of actors, e.g. the parliament, the head of the state and the judicial council. The Venice Commission such diversification to be a good practice in appointing constitutional judges.[168] Concerning specifically the members appointed by the parliament, the Venice Commission favours the requirement of a qualified majority.

All in all, between the three systems the Venice Commission seems to favour the hybrid-one, as it better guarantee the insulation from the political sphere and the balanced composition of the court. As showed by the Hungarian case a fully elective system, with the parliament electing all the members of the constitutional courts by a qualified majority does not provide a sufficient guarantee for the court's independence.[169] The president of the constitutional courts instead should be elected by the judges themselves.[170]

Concerning the duration of the mandate it should be longer than that of the legislature, and it should provide for a mechanism of prorogation in case the appointing body fails to make timely appointment so to allow the constitutional courts to continue functions despite the inertia of political bodies, even though this should remain an exception.[171] In order to better guarantee the independence of the judges the mandate shall not be renewable.[172] The same guarantee of security tenure for ordinary judges applies to constitutional ones.[173] Premature termination of a constitutional judge's mandate should be limited to cases of serious disciplinary offences that should be clearly detailed by the law.[174] Ideally the termination should be accompanied by some procedural safeguards, like the requirement of a qualified majority of the constitutional judges voting in favour of the dismissal.[175]

In conclusion the following good practices elaborated by the Venice Commission appear worthy of being further analysed for the purpose of identifying the best legal reactions to anti-constitutionalist tendencies.

1)The system of appointment which seems to best guarantee the independence of the constitutional court is a hybrid one, in which different authorities, which should include the parliament by qualified majority and the judicial council, determine the composition of the constitutional court;

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[166] Ibidem, 6.
[167] CDL-AD (2015)027, *Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015*, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), para. 24.
[168] Ibidem, para. 24.
[169] CDL-AD (2012)009, *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), para. 8.
[170] Ibidem, para. 9.
[171] Ibidem, para. 15.
[172] Ibidem, para. 7.
[173] See: supra, fn 151.
[174] CDL-AD (2015)027, *Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015*, para. 28.
[175] CDL-AD (2012)009, *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, para. 19.

1)the president of the court shall instead be elected by its fellows;

2)the mandate of constitutional judges shall be longer than that of the legislature and not renewable;

2a)premature termination for serious offences shall be possible only with the consent of a qualified majority of the constitutional court;

3)competitive selection processes managed by independent committees may foster the transparency of the appointments by limiting the discretion of the appointing body.

3.2.2. The Venice Commission good practices on the powers of constitutional courts

Concerning the regulation of the powers of constitutional courts, the Venice Commission affirm that is shall seek to pursue essentially two aims.

On the one hand to avoid an excessive involvement of the constitutional court in the political arena, on the other ensure a manageable workload for the constitutional jurisdiction. Hence, the Commission prescribes that when *ex ante* constitutional review is introduced, the "entitlement to submit a request for binding preventive abstract review should be awarded restrictively.".[176]

On the other, the constitutional court shall be capable of effectively ensuring the majority subjection to the constitution. This means that political monitories and the institutions for the protection of fundamental rights shall have the power to trigger the scrutiny of the court.[177] Concerning individual access, the position of the Venice Commission is more nuances, as it is aware of the necessity of keeping the caseload manageable. In this sense it considers legitimate the introduction of filter criteria, like the prior exhaustion of domestic remedy, the existence of a serious violation of a fundamental right, or the constitutional significance of the complaint. At the same time, however, the Commission is wary towards the possibility of establishing additional criteria.[178] The Commission is also firmly against shielding infra-constitutional norms[179] from judicial review of constitutional courts, as this runs contrary to the very nature of a constitutional democracy.[180]

Concerning the effects of the judgments, the Commission reaffirms as part of the European constitutional culture the fact that judgments of the constitutional shall have binding *extra*-omnes effects, embracing both the reasoning and the *ratio decidendi* of the judicial decision.[181] As regards the temporal effects, the Venice Commission observes how the common European practice is for constitutional courts' judgment to have *ex nunc* effects - and *ex tunc* in the individual cases. However, the Commission welcomes as a good practice the wide-spread diffusions in Europe of the practice of constitutional judges modulating the

[176] Ibidem, para. 24.
[177] Ibidem, para. 27.
[178] Ibidem, para. 28. More extensively on the issue of individual complaints see: CDL-AD (2021)001, *Revised Report on Individual Access to Constitutional Justice*, Adopted by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020).
[179] This does not apply to constitutional amendments. See: *supra*, 6-7.
[180] CDL-AD (2012)009, *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, para. 38.
[181] Ibidem, para. 36.

temporal effects of their judgments.[182]

In conclusion, concerning the powers of constitutional court, the good practices elaborated by the Venice Commission seems to correspond to wide-spread practice in Europe, with some challenges coming from populist-ruled countries. The only element that seems worthy to be further investigated is whether the possibility for the parliamentary opposition to activate the scrutiny of the constitutional may constitute an effective legal reaction. In any case concerning constitutional courts it appears more useful to concentrate the analysis of legal reactions on the best practices for the appointment of constitutional judges.

3.3 The Evaluation of the Hungarian and Polish Case

Concerning the relationship with the courts, and as regards judicial appointments, the Hungarian and Polish governments have disregarded virtually each and every European best-standard. In particular, it appears that the Venice Commission is right in reinstating the necessity of involving a plurality of actors in the appointment of constitutional judges, as both Hungary and Poland have an appointment system in which all constitutional judges are elected by the parliament. It is therefore unsurprising that those courts show an extreme deference towards the ruling majority.

Concerning the duration of constitutional judges' mandate, even though in **Hungary** is longer than that of the legislature, the mandate is renewable, thus contravening European standards.

In **Poland**, instead, the mandate of the judges of the Constitutional Tribunal is of 9 years at it is not renewable, hence it is possible to apply the evaluation matrix to see whether this reaction can be considered a best practice.

As regards the **effectiveness,** a 9 year not renewable mandate for constitutional judges seems poorly effective to guarantee the independence and impartiality of the constitutional court. Indeed, if this provision is not accompanied with guarantees for ensuring the participation of a plurality of actors in the appointments, the judges are chosen by the parliament having regards to their partisan affiliation. Further,

As regards the **efficiency**, the evaluation is fair good. Once introduced in the constitution, these kinds of instruments operate automatically, and without the need of any further implementation.

Finally concerning the **transferability**, it is self-evident that this reaction may be, and actually is, adopted in a variety of legal systems without the necessity of taking into account national specificities. Therefore concerning the transferability parameter the assessment is positive.

9 Year not renewable mandate	POOR	FAIR - GOOD	VERY GOOD - BEST

[182] Ibidem, para. 41.

Efficiency		X	
Effectiveness	X		
Transferability			X

4. Special Issue. The regulation of media

There are at least two reasons supporting the decision to investigate the Venice Commission good practices on media regulation. First, as the Venice Commission itself notes, the role of media in contemporary democracy is a vital one.[183] Freedom is indeed essential to guarantee the pluralism of opinions and ideas, without which a society cannot be called democratic.

Secondly, the media in a democracy act as public watchdog, enhancing governmental accountability towards the populace and the transparency of its actions. It is thus unsurprisingly that the independence of media, together with that of courts, is particularly heinous for populist majorities.

In the present paragraph the general principles elaborated by the Venice Commission are presented together with the most relevant judgements of the ECtHR. The paragraph is divided into two sub-section, the first concerning general principles on the regulation of media, and the second on the composition and powers of media regulatory authorities.

4.1 Good practices on the regulation of media

As a general principle, the Venice Commission affirmed that media must enjoy a degree of protection higher than any other commercial activity, and the State is the ultimate guarantor of freedom of media has an essential element of a pluralistic society.[184] On the point the Venice Commission held that "[m]edia pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views."[185] Also, this implies that the State shall guarantee also with respect to private media, fair, transparent and non-discriminatory access to services to everyone.[186] Without amounting to a positive obligation, States should introduce financial subsided for private media in order to promote media

[183] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 6, CDL-AD(2013)024, *Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan*, para. 22.
[184] Ibidem, 7.
[185] CDL-AD (2005)017, *Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, paras 37, 40.
[186] Ibidem.

pluralism.[187]

As regards public media, albeit the State has no obligation to engage directly in imparting information to the general public, when it does it shall ensure internal pluralism, meaning that different political, cultural and social views shall be represented.[188] Public service broadcasting also must be independent from the government and the legislative, e.g. individual public service media cannot be obligated to use as news-source an agency controlled by the government.[189] Pluralism should also be ensured in the boards of public media, meaning that the government or the majority coalition or party shall not have a decisive influence in appointing the members of the boards. The Commission, however, does not specify what amounts to decisive influence, simply requiring that "a fair representation of all important political, social and relevant professional groups within those bodies must be secured".[190] Finally, concerning financing the Venice Commission warns against the possibility for public-controlled media company to be listed on the stock-exchange as this may put "pressure to maximise the advertising income, which will interfere with the achievement of the public-policy aims"[191]

In the case-law of ECtHR, special attention is dedicated to the restrictions of freedom of expression of media and journalists. According to a well-established case-law of the ECtHR that any restriction on freedom of media should be interpreted narrowly, as media are "purveyor of information and public watchdog".[192] This implies in first place that criminal sanctions against journalists for opinions expressed on topics of public interest should be in principle avoided. [193] Concerning defamatory statements, the Venice Commission recommends that the right to reply should be recognised to public officials only to untrue factual information which damages someone's reputation, and not critical opinions so that avoid a chilling effect on freedom of expression.[194]

As regards internet and social media, already in 2015, the ECtHR recognised that [T]he Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest. ... Moreover, as to the importance of Internet sites in the exercise of freedom of expression, 'in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general'.[195] Thus essentially affirming that internet shall be treated by State authorities as a media.

The ECtHR also affirmed that users of social media and blogger are entitled to the same level

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[187] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 24; CDL-AD (2005)017, *Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, para. 178.

[188] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 20.

[189] Ibidem.

[190] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 23.

[191] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 24.

[192] The principle was firstly affirmed in *Barthold v. Germany* and subsequently confirmed by the Strasbourg Court, lastly in: 46232/10 74770/10, *Timakov and OOO ID Rubezh v. Russia*, 08 September 2020.

[193] *Timakov and OOO ID Rubezh v. Russia*, para. 68.

[194] CDL-AD (2020)013, Albania, Opinion on draft amendments to the Law n°97/2013 on the Audiovisual Media Service, adopted by the Venice Commission on 19 June by written procedure replacing the 123rd Plenary Session, para. 49.

[195] 48226/10 14027/11, *Cengiz and Others v. Turkey*, 1 December 2015, paras 49, 52.

of protection of public media.[196] Yet, in the landmark ruling *Delfi AS v. Estonia*, it specified that the owners of a website may be held responsible for anonymous defamatory contents posted on its pages.[197] In any case, according to the Venice Commission, the scope for restricting freedom of expression, by blocking, filtering, slowing down or shutting down Internet services on internet is extremely narrow as these measures appear *prima facie* disproportionate.[198]

Concerning media-regulatory authorities, the Venice Commission repeats the usual *caveat* that 'there is no single European model of organisation of the media regulatory authorities' yet it identifies as the overarching principle that this authority institution should be independent and impartial.[199] As to the system of appointment, the Venice Commission strongly encourages the adoption of a model in which an element of self-government is present. This means that the media community and the telecommunication industry should be able to appoint or delegate representatives to the independent authorities as this would ensure pluralism and neutrality of the authority.[200] On this point, the Commission clarified that detailed rules preventing conflicts of interest should be adopted.[201] If instead a model chosen in which the composition of the body is politically influence, the system of appointment shall ensure political diversity and the representation of the different social groups that compose the society.[202] Concerning the president of the authority, the Commission recommends it to be elected by the members of the authority themselves.[203]Concerning the powers of the authority, the Commission only affirms that in any case the regulatory shall exercise an a priori control on the content of programmes as this would be tantamount to a form of censorship.[204]

4.2. Which good practices on media regulation?

In light of the previous analysis, it has been possible to identify some good practices susceptible of being further evaluated for the purpose of identifying the best practices for legal reactions to anti-constitutionalist tendencies. Those are in particular:

1) Concerning private media, in order to foster pluralism public subsidies should provide for independent newspapers and media;
2) Concerning public media, they must be independent both from market forces, i.e. they shall not be listed in the stock-exchange, so that they can remain free to pursue public policy objectives.
3) As to the independent regulatory authorities, the Commission strongly supports a model of self-government in which the media community appoints the members of the authority, as this ensures strict neutrality *vis-à-vis* party politics;

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[196] 18030/11, *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, para. 168.
[197] 64569/09 [GC], *Delfi AS v. Estonia*, 16 June 2015.
[198] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 10, CDL-AD(2016)011, *Opinion on Law No. 5651 on regulation of publications on the internet and combating crimes committed by means of such publication ("The internet law")*, para. 64.
[199] Ibidem, 26.
[200] Ibidem, 25.
[201] Ibidem, 26.
[202] Ibidem.
[203] Ibidem, 26.
[204] Ibidem, 25.

3b) However this model requires detailed rules on conflicts of interest so to avoid that the authority ends up being controlled by big media corporations

PART C. Legal practices and practices of law in response to populism under the EU rule of law principle[205]

By Helle Krunke, Sune Klinge, Athanasia Andriopoulou, William Tornøe, and Caroline Egestad Wegener (University of Copenhagen, UCPH)

Introduction

This part of the Report deals with the evaluation of the legal tools at disposition of the EU institutions to address populist threats and violations of the EU legal order, and more specifically of the principles and values enshrined in art. 2 TUE: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

Art. 2 TUE "*is not only a political and symbolic statement. It has concrete legal effects*"[206] the respect of which constitutes a prerequisite for EU membership[207]. Respect for the rule of law is essential for the very functioning of the EU: for the effective application of EU law, for the proper functioning of the internal market and for mutual trust among member states. The "rule of law and democratic principles" general approach is based on their twofold practical function "to protect people from their government and people from each other"[208], keeping in mind that the contextual elements of the Rule of Law are not limited to exclusively legal factors, but they may extend to socially relevant reality or the political and legal culture where it applies[209]. The EU values enshrined in Article 2 TEU apply to all member states through mutual amplification with a specific provision of EU law but 'does not aim at the existence of uniform principles and rules, but solely at the observing of European minimum standards.[210] In other words, Article 2 is the legal foundation of the EU Rule of Law and further inspires the mechanisms and procedures designed to protect and guard the EU values.

The initial versions of the Treaties relied on a presumption of compliance by the Member States with the then non-codified values of the Communities expressed in the Schuman Declaration

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[205] The UCPH team is composed by Helle Krunke, Sune Klinge, Athanasia Andriopoulou, William Tornøe, Caroline Egestad Wegener

[206] J.C. Piris, 2010. The Lisbon Treaty: A Legal and Political Analysis, Cambridge: Cambridge University Press, p. 71

[207] Art. 49 TEU stipulates that "*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*"

[208] Th. Konstadinides, 2017. The Rule of Law in the European Union. The internal dimension, Hart

[209] Venice Commission, Rule of Law Checklist, para 42

[210] See W. Schroeder, 2016. 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening', https://www.bloomsburyprofessional.com/uk/strengthening-the-rule-of-law-in-europe-9781849469500/

and unwritten founding values of the Union. The EU enlargement drove to a gradual crystallisation of those core values[211], soon manifesting the need to enforce the compliance beyond the *acquis*, via what are now Articles 258 and 259 TFEU (later reinforced by Art. 260 TFEU)[212]. The tools to defend the European values and principles may be of various nature (political, administrative and judicial, binding and non-binding), pertain to different legal orders, and applied by different, sometimes even competence-competing institutions. We choose here to examine only those tools having "legal nature" (legal practices or practices of law), whose legal purpose is to oppose threats and violations of the "EU rule of law and democracy".

Building on DEMOS 6.1 report, in which the EU level of "Rule of Law and Democratic principles" was confronted with populism's impact, the research focuses now on the examination of possible "best legal practices or practices of law", leading to formulating reliable policy recommendations. However, our research interest is limited by the scope of this research, which suggests narrowing the examination of the "rule of law mosaic" in the implications the legal principles in question may imply when applied in practice, and further narrowing in those instances defined as "populist cases".

Which legal tools in EU?

While in the political framework of the European Parliament there are some actions available to restrict or control potential and occurring violations of the rule of law (the plenary debate, the law on sanctioning radical political parties[213], disciplining instruments within Europe's political alliances[214]) it is the tools comprised in the so called EU **"Rule of Law Toolbox"** that provide in detail legal tools envisaged to protect the Rule of Law, democracy, human rights and the "common EU values". These tools will be considered together with relevant CJEU case law, which, unlike political bodies, cannot avoid making legally binding decisions, and can be called upon to decide (via the infringement and the preliminary ruling procedures) supporting the actions coming from the other institutions[215].

The analysis under the designed "best practices" methodology makes it possible to argue on the ability of these tools to be employed to react legally to threats or violations triggered by political populism in the EU context.

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[211] J. H. H. Weiler, 2012. 'The Schuman Declaration as a Manifesto of Political Messianism' in Dickson and Eleftheriadis (eds), Philosophical Foundations of European Union Law, Oxford University Press; D. Kochenov, 2005. 'EU Enlargement Law: History and Recent Developments – Treaty-Custom Concubinage?', 9(6) European Integration Online Papers

[212] L. Gormley, 2017. 'Infringement Proceedings', and Wenneras, 'Making Effective Use of Article 260' in Jakab and Kochenov (eds), The Enforcement of EU Law and Values, Oxford University Press

[213] Regulation (EU, Euratom) 1141/2014 on the statute and funding of European political parties and European political foundations (2014) OJ L317/1, art. 3 and art. 6

[214] Art. 9 of the European People's Party Statutes, for example, permits the exclusion of both individual and Member State political parties, but does not define a reason for exclusion. Similar provisions are contained in Art. 16 Statutes of the Alliance of Liberals and Democrats for Europe Party.

[215] An important example for this is the role it attributes to the qualifications made in the Commission's proposal to institute a procedure under Article 7 TEU CJEU, Minister for Justice and Equality, supra note 37, paras. 69 et seq

The EU Rule of Law Toolbox

Name of mechanism	Legal basis	Actor triggering the procedure	Scope of application	Decision-maker	Effects
European Semester	121, 148 TFEU	Commission	Fiscal, macro-economic and employment policy of the Member State	Council acting by qualified majority	Country-specific recommendations (CSRs). Lack of compliance with certain CSRs relating to fiscal and macro-economic policy can lead to sanctions, including fines
EU Justice Scoreboard	n/a	Commission	Civil, commercial and administrative justice in the Member State	Commission	Indicators for the efficiency, quality and independence of justice systems; feeds into the European Semester CSRs
Commission rule of law framework	n/a	Commission	'Systemic threat to the rule of law' in a Member State	Commission	Non-binding recommendations
Council's rule of law dialogues	n/a	Council	'Rule of law in the framework of the Treaties'	Council	n/a
Article 7 (1) TEU (preventive arm)	Article 7(1) TEU	Commission, Parliament or 1/3 of Member States	'Clear risk of serious breach' of EU values by a Member State	Council (majority of 4/5) after obtaining the consent of Parliament (2/3 of votes cast, representing the majority of MEPs)	Declaration that there is a clear risk of breach of EU values by the Member State concerned and possible recommendations addressed to that Member State
Preliminary references	Article 267 TFEU	National courts	Doubts, harboured by a national court, concerning the interpretation of any rule of EU law or the validity of an act of secondary EU law	Court of Justice	Legally binding interpretation of EU law, empowering national courts to set aside non-compliant national legislation, possibly interim measures (Article 279 TFEU)
Infringement proceedings	Article 258-260 TFEU	Commission/ another MS	Failure to fulfil an obligation under the Treaties by a Member State	Court of Justice	Legally binding determination of breach of EU law, possibly interim measures (Article 279 TFEU) and financial penalties (Article 260 TFEU)
Article 7(2)-(3) TEU (sanctions mechanism)	Article 7(2)-(3) TEU	Commission or 1/3 of Member States	'Serious and persistent breach' of EU values by a Member State	Step 1: European Council (unanimity) after obtaining the consent of Parliament (2/3 of votes cast, representing the majority of MEPs)	Declaration that there is a 'serious and persistent breach' of EU values by the Member State concerned
				Step 2: Council by reinforced qualified majority (72 % of the Member States representing at least 65 % of the EU's population)	Suspension of certain rights deriving from the application of the Treaties, including voting rights of the Member State concerned in the Council

Source: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS_STU(2020)652088_EN.pdf

We examine the tools' "efficiency", "effectiveness" and "transferability" capacity on applied cases, further developing critical considerations on what can/should be done in order to optimise their performance and reach the maximum of their potentiality, in accordance to the "best legal practice" methodological approach (see attached **Annex 1**).

In particular, we examine the responses to populist challenges on the EU Rule of law based the following legal basis provided by the tools:

1. **Rule of law framework**: [COM(2019) 343 final] Communication from the Commission to the European Parliament, the European Council and the Council. The European Economic and Social Committee and the Committee of the Regions. Strengthening the rule of law within the Union. A blueprint for action; [COM/2019/163 final] Communication from the Commission to the European Parliament, the European Council and the Council Further strengthening the Rule of Law within the Union state of play and possible next steps and related Recommendations (Poland)[216]
2. **Proceedings ex art. 7 of the Treaty on European Union** and selected cases
3. **Preliminary ruling proceedings — recommendations** to national courts **ex art 267** of the Treaty on the Functioning of the European Union and selected cases

[216] Recommendation (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, C/2017/9050; [COM/2017/0835 final - 2017/0360 (NLE)] 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; [C/2017/5320] Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146; [C/2016/8950] Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374; [C/2016/5703] Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland

4. **Infringement proceedings ex art. 258 and 260** of the Treaty on the Functioning of the European Union and selected cases
5. **Interim measures, ex art. 279 Treaty on the Functioning of the European Union** and selected cases
6. Regulation (EU, Euratom) 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**

Tool N. 1. The EU Rule of Law Framework

Based on the Commission's initiative, the EU Rule of Law framework is one of the three mechanisms at the disposition of EU institutions that can be used as a preliminary-preparatory step towards legal action, when a persistent threat against the values and principles of the EU rule of law emerges on the national level[217]. In particular, the Commission Recommendations' development is renowned for aiming at enforcing and strengthening the Rule of Law against populist views[218].

In its **2014 Communication to the European Parliament and the Council on "A new EU framework to strengthen the rule of law"**, the Commission states clearly that […] "*the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.* [….] *Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights.* […] *The rule of law is therefore a constitutional principle with both formal and substantive components. This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process"* [219].

First launched in 2014[220] together with the Council's Annual Dialogues on the Rule of Law

[217] Including the transitional 'special cooperation and verification mechanism' (included in the Act of Accession for Bulgaria and Romania), the Commission's rule of law framework, and the Council's annual dialogues on the rule of law.
[218] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654186/EPRS_STU(2020)654186_EN.pdf
[219] http://ec.europa.eu/justice/effective-justice/files/ com_2014_158_en.pdf
[220] European Commission, "A New EU Framework to Strengthen the rule of law", COM (2014) 158 final,

(2014)[221], the Rule of Law Framework (RoL) provided a structured dialogue between the Commission and Member States, allowing national governments to consider rule of law related issues.

In 2019 an amended version of the EU RoL Framework was launched[222], prompted by the observation of growing threats on Union's fundamental values and principles. Strong of the experience matured since 2014, the Commission initiated a series of queries to further develop its action, together with the latest '***EU Rule of Law: A blueprint for Action'***[223], which designs more concrete and solid actions for the short and the medium term.

The mechanism intends to ensure the application of the rule of law principles against systematic threats but aims also to enforce the 'mutual trust' among EU member states. We can consequently determine that this legal tool was designed to enhance the confidence of citizens in the EU rule of law common principles and values, through the monitoring and implementation of a "standardised EU level" of compliance.

As stated in the Commission's Communication (COM/2014/0158 final), the RoL Framework "*seeks to **resolve future threats** to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met"*[224]*.* It is therefore meant **to fill a gap, not as an alternative but rather as a preceding and complementing step to the Article 7** TEU mechanisms, and of the infringement procedures under Article 258 TFEU. This is also achieved by being a mechanism which can be introduced **quickly**[225].

We can therefore consider this tool from a broader European perspective as destined to contribute reaching the objectives of the Council of Europe, including the expertise of the European Commission for Democracy through Law (Venice Commission). It is also expected to raise awareness and to encourage Member States to implement structural reforms in the areas covered by its scope, including the **EU Justice Scoreboard**[226] and the **European Semester**[227], and now the **Next Generation EU**[228] plan: in the goals of the EU RoL Framework is included the promise of protection of fundamental rights and values, through the correct application of the EU law in the investment-friendly business environment shared by EU Members.

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https://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1.Pdf.

[221] Council Document 16862/14, 12 December 2014

[222] Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps. COM/2019/163 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN

[223] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN

[224] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158&rid=7

[225] European Commission, "A New EU Framework to Strengthen the rule of law", COM (2014) 158 final, https://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1.Pdf., p. 5

[226] An annual comparative information tool aiming to assist the EU and Member States improving the effectiveness of their national justice systems by providing objective, reliable and comparable data on a number of indicators relevant for the assessment of the efficiency, quality and independence of justice systems in all Member States

[227] Cfr. the corresponding reports by the Commission, in particular the Report from the Commission to the European Parliament and the Council, On Progress in Bulgaria under the Cooperation and Verification (COM (2018) 850 final)

[228] https://ec.europa.eu/info/strategy/recovery-plan-europe_en

It is a tool to address threats of **a systemic nature**[229] and intervene when the national rule of law appears weak, defenceless, or reveals to be inefficient in addressing them. The choice of the restriction of the pursuable threats in those with a "systemic" character has unleashed vivid debates: for example, in the case of Hungary in which the lack of "systematic" nature of the threats determined the unsuitability of the RoL Framework tool[230]. **The RoL Framework** must be, therefore, considered as **both a protective and a preventive measure** from emerging or deepening of the problems**,** which is equally applicable in all Member states, operating on the basis of the same benchmarks as to what is a systemic threat to the rule of law. It is the Commission the deputy institution to identify threats to the rule of law that cannot be effectively addressed by the existing instruments. Unlike other existing mechanisms (such as for example the infringement procedures - ex art. 258 TFEU - that can be activated by the Commission only when a breach of a provision of EU law has already occurred, or such as the preventive and the sanctioning mechanisms provided for in Article 7 TEU)[231], the EU RoL Framework features both as a **key common value meant to explain, strengthen and enforce the EU law, as well as a guiding tool of principles and values, complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law**[232]. The Commission in the vest of "the guardian of the Treaties" and as an "independent and objective referee"[233] assumed the responsibility to ensure respect and protect the "general interest of the Union", activating at the same time a series of instruments that go beyond the "nuclear option" of art. 7 TEU and the "soft power" persuasive power[234].

What the EU Rule of Law Framework **cannot do is to be triggered by individual breaches of fundamental rights or by a miscarriage of justice**. These cases can and should be dealt by the

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[229] The political, institutional and legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress.

[230] https://javorbenedek.hu/en/letter-to-mr-timmermans-on-the-systemic-threat-to-the-rule-of-law-in-hungary/; and https://javorbenedek.hu/wp-content/uploads/2017/05/letter_to_vice-president_timmermans_04052017_annex.pdf

[231] Article 7(1) TEU, which can be activated only in case of a "clear risk of a serious breach", or Article 7(2) TEU, only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 TEU

[232] Article 8 of the Statute of the Council of Europe provides that a Member State that has "seriously violated" the principles of the rule of law and human rights may be suspended from its rights of representation and even be expelled from the Council of Europe. Like the mechanisms set out in Article 7, 3 TEU, this mechanism has never been activated

[233] See http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/pressrelease_SPEECH-13-684_en.htm.

[234] In March 2013, the foreign ministers of Denmark, Finland, Germany and The Netherlands called for more European safeguards to ensure compliance with fundamental values of the Union in the Member States. On the discussion in the General Affairs Council see http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf. On the conclusions of the Justice and Home Affairs Council see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf; See the EP resolutions setting out various recommendations to the EU institutions on how to strengthen the protection of Article 2 TEU (the Rui Tavares Report of 2013, the Louis Michel and the Kinga Göncz Reports of 2014 - http://www.europarl.europa.eu/committees/en/libe/reports.html); at the Assises de la Justice, a high level conference on the future of justice in the EU in November 2013 which was attended by over 600 stakeholders and interested parties, one session was specifically dedicated to the topic "Towards a new rule of law mechanism". A call for input was organised before and after the conference that attracted numerous written contributions (see http://ec.europa.eu/justice/events/assises-justice-2013/contributions_en.htm)

national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties.

The Communication 2019[235] has concretely promoted the deepening of the cooperation for the best protection of the RoL. Indeed, the Communication was the outcome of broad consultations involving not only EU exponents but also national, international institutional actors, civil society and academia[236]. The cooperative dialogue, fostering mutual trust, seem to be at the centre of the Commission's focus: deepening the cooperation with Member States and the EU institutions was one of the reasons for establishing a "Rule of Law Review Cycle"[237] and implementing a periodic "Rule of Law Report"[238].

The RoL Review Cycle examines the capacity of Member States to fight corruption, to media pluralism and elections, with a need for all actors – institutional as well as from civil society – to share information and have their position heard. As a result, the regularity of monitoring and the intensity of the cooperation would have to be stepped up in Member States where rule of law challenges are more apparent, with the objective of finding cooperative solutions to problems before they escalate. On this basis, a network of national contact points in Member States should be set up for dialogue on rule of law issues, and act as a forum for discussion of horizontal issues, and for sharing information and best practices. The network of national contact points can constitute a sort of a permanent forum for early warning on rule of law related reforms and for discussion amongst Member States, while promoting a closer and continuous cooperation between EU institutions and Member States.

The RoL Annual Report is the annual summary of the situation in Member States as regards the rule of law. It looks at major issues, ongoing developments, positive changes, best practices and other notable information on the national rule of law. It is grounded, among other sources, in legal standards laid out in EU law, European Court of Human Rights case law and standards established by the Council of Europe. The RoL Report has been already implemented for 2020[239] and launched for 2021[240].

Hungary[241] and Poland[242] stand out as facing the greatest challenges, facing extensive and critical concerns regarding core elements of the rule of law identified by the Commission. However, other countries as well, while not seen as facing similarly severe challenges, are

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[235] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en

[236] 60 written contributions in which the relevance and complementarity of the three pillars -promotion, prevention and response- was strongly reiterated https://ec.europa.eu/info/policies/justice-andfundamental-rights/effective-justice/rule-law/initiative-strengthen-rule-law-eu_en#stakeholdercontributions; https://www.ejtn.eu/PageFiles/19048/2019-056-RoL%20Manual-170x240-WEB_FINAL.pdf

[237] https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-2020-annual-rule-of-law-report

[238] https://ec.europa.eu/info/sites/info/files/7_en_act_part1.pdf

[239] https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1756

[240] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en

[241] https://ec.europa.eu/info/sites/info/files/hu_rol_country_chapter.pdf

[242] https://ec.europa.eu/info/sites/info/files/pl_rol_country_chapter.pdf

highlighted, among which Slovakia[243], Croatia[244], Romania[245], Bulgaria[246] and Malta[247].

The "supplemental legal tools" to the RoL Framework, with admonishing, monitoring and preventive role are completed by:

- **The European Semester cycle of economic, fiscal and social policy coordination[248],** which provides country specific analysis and provides recommendations for structural reforms encouraging growth. The analysis under this instrument covers the fight against corruption, effective justice systems, and reform of public administration. When serious challenges in these areas are identified in individual country reports, the Council adopts targeted country specific recommendation[249]
- The **annual EU Justice Scoreboard[250]** (operating since 2013), which looks at a range of indicators to assess the independence, quality and efficiency of national justice systems. This comparative tool is complemented by country specific assessments in the framework of the European Semester, presented in the Country Reports, which enable to make a deeper analysis based on the national legal and institutional context. In the 2019 Communication of the Commission to the EU Parliament, EU Council and the Council[251], reflecting on the latest Scoreboard Report, announced the need to further strengthening the Rule of Law within the Union[252]
- The **Cooperation and Verification Mechanism[253]**, which was established as a special mechanism for Bulgaria and Romania, destined to assist the countries in their joining the Union in 2007, addressing remaining shortcomings in the areas of judicial reform, the fight against corruption and, for Bulgaria, organised crime. This mechanism works as a transitional measure with the goal of closing it once the defined benchmarks have been satisfactorily fulfilled. While it was supposed to be concluded shortly after the adhesion of the countries in the EU, today it is still in force because of the backtracking trend of the Rule of Law in both countries. However, the experience gained by now is

[243] https://ec.europa.eu/info/sites/info/files/sk_rol_country_chapter.pdf
[244] https://ec.europa.eu/info/sites/info/files/hr_rol_country_chapter.pdf
[245] https://ec.europa.eu/info/sites/info/files/ro_rol_country_chapter.pdf
[246] https://ec.europa.eu/info/sites/info/files/bg_rol_country_chapter.pdf
[247] https://ec.europa.eu/info/sites/info/files/mt_rol_country_chapter.pdf
[248] https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline_en
[249] MA Vachudova, 2016. Why improve EU oversight of rule of law, in C. Closa, D. Kochenov (eds) Reinforcing the rule of law oversight in the European Union. Cambridge University Press, pp 270–289
[250] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en
[251] https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-163-F1-EN-MAIN-PART-1.PDF
[252] See also, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. The 2018 EU Justice Scoreboard (COM(2018) 364 final), p. 4 et seq; A. Dori, 2015. The EU Justice Scoreboard – Judicial Evaluation as a new Governance Tool. MPILux Working Paper 2. http://www.mpi.lu/fileadmin/mpi/medien/persons/Dori_Adriani/ The_EU_Justice_Scoreboard_-_Judicial_Evaluation_as_a_New_Governance_Tool.pdf
[253] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en

relevant when addressing rule of law challenges in all Member States.

- **The Technical Support Instrument**[254] (TSI) (former Commission's Structural Reform Support Service, Regulation (EU) 2017/825 of 17 May 2017), which provides technical support for structural reform in the Member States, including areas such as public administration, the judicial system, and the fight against corruption. The support is provided upon request from Member States, and it is tailor-made to address needs reflecting defined reform priorities provides tailor-made technical expertise to EU Member States to design and implement reforms. The support is demand driven and does not require co-financing from Member States.

As a premise, it must be verified that 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 national institutions and the mechanisms established to secure the rule of law. Whether a Member State fails to cooperate in this process or obstructs it, will be an element to evaluate and consider in the assessment of the 'seriousness' of the threat. **The RoL procedure** unfolds in structured stages of action:

1. *the assessment stage*, where the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. At this stage, when the Commission's concerns are substantiated, a dialogue with the Member State concerned starts by sending its 'Rule of Law Opinion'. The dialogue aims to ensure an objective and thorough assessment of the risks at stake, indicating swift and concrete actions to address the systemic threat and to avoid the use of Article 7 TEU mechanisms. In other words, this phase acts as a sort of early warning in line with the duty of sincere cooperation set out in Article 4(3) TEU: the compliance relies in the expected willing cooperation with the Member State, by persuading and orienting the national authorities to refrain from adopting any irreversible measures.
2. *the recommendation stage* may follow, in which the Commission addresses its 'Rule of Law Recommendation', thus making public the expected actions and their applicable time-framework;
3. *the follow-up stage* concludes the procedure, where the Commission monitors the Member State's action/inaction. If the State's performance is found unsatisfactory, the Article 7 procedure can be triggered —either on its own, or prompted by $^1/_3$ of the Member States or asking the European Parliament to do so.

254 https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/technical-support-instrument-tsi_en

THE CASE OF POLAND

The Commission engaged in an exchange of views with the Polish government, issuing four recommendations on various trends of the national constitutional politics, identifying "*threats to judicial independence*" and '*systemic threats*' to the rule of law.

1) **Recommendation 2016/1374** focused on: a) alleged irregularities concerning the appointment of certain judges of the Polish Constitutional Court (PCC) and the lack of implementation of PCC judgments of 3 and 9 December 2015; b) the lack of official publication or implementation of the PCC judgment of 9 March 2016; c) the effective functioning of the PCC and the alleged lack of effectiveness of constitutional review of new legislation, in view of the Constitutional Court Act of 22 July 2016.

2) **Recommendation 2016/146** focused on all the concerns pointed out in the prior recommendation, plus the rules applicable to the selection of candidates for the post of PCC President and Vice-President and the potentially unlawful appointment of an acting PCC President.

3) **Recommendation 2017/1520** focused on the alleged lack of an independent and legitimate constitutional review (based on the concerns pointed out in the previous recommendations) and on modifications introduced by a number of laws (mainly, the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation, the law on the National Council of the Judiciary and the law on the Supreme Court) possibly affecting the independence of the Polish judiciary.

4) **Recommendation 2018/103** focused on the Supreme Court law of 8 December 2017 and the law amending the law on the National Council for the Judiciary of 8 December 2017, which sparked concerns in relation to the independence of the Polish judiciary[255].

On **23 March 2021**, as a certain indication of the absence of any significant outcome resulting from the abovementioned Recommendations, the Committee on Civil Liberties, Justice and Home Affairs has launched a **Motion** (2021/2025(INI)) to the EU Parliament, asking for a final resolution[256].

The first three recommendations mainly focussed on the first part of the Polish judicial reforms starting in the last months of 2015, making changes to the composition of the Constitutional Court, the process of appointing judges and the process of cases before the constitutional court. Generally, the reforms were bringing the constitutional review of new laws and the independence of the Constitutional Court in question. Furthermore, the Commission was worried by the lowered retirement age of especially Supreme Court Judges and the changes to the National Council of the Judiciary and the disciplinary procedures. This

[255] Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520. C/2017/9050 (OJ L 17, 23.1.2018, p. 50–64)
[256] https://www.europarl.europa.eu/doceo/document/LIBE-PR-689878_EN.pdf

was in total creating uncertainty of the status of the Rule of Law in Poland.[257]

In the last Recommendation, which complemented the previous ones adopted as part of the Framework to strengthen the Rule of Law[258] and the numerous occasions on which the Commission has stated its concern at the worrying trends in constitutional politics in Poland, it denounces the "*threats to judicial independence*" and confirms the existence of a systemic threat to the rule of law, before urging the Polish authorities to urgently adopt a whole set of "*appropriate actions to address this threat as a matter of urgency*".

Evaluation of the Polish case

Efficiency: The Rule of Law Framework has the theoretical potential to solve a situation occurred as the Framework was activated quickly and in dialogue collaboration with Poland. After recommendation no. 1 some minor changes were made in the Polish law to meet the recommendations from the Commission.[259] The very existence of recommendation no. 2 and 3 nevertheless shows that the threat was not eliminated. Furthermore, the late activation of article 7 (1) shows that the aim of The Framework – to prevent article 7 – was not met.

Poland could have decided not to take part in the dialogue with the Commission without any direct sanction. This weakens the efficiency as the Framework requires collaboration from the member state to solve the possible threats. The Framework appears, in other words, as a prevalently political tool rather than a legal tool and should have been able to create a general political pressure or effect in Poland. It is questionable whether this has been obtained as the same judicial reforms led by the Polish government continued during and after the dialogue.[260]

Effectiveness: As changes to the Polish law was made, the Rule of Law was restored minimally during the process of the Rule of Law Framework. The effectiveness of the implementation of the EU RoL framework has not been inexistant, however, in this concrete case, the degree of restoration was remarkably small, to the extent to result irrelevant. The procedure consists in a dialogue that should be able to support a process of repairing and supporting the aims of the Commission in the member state. In the case examined, this must be considered unsuccessful as the damages to the Rule of Law in Poland was not repaired.

Transferability: The recommendations of the Commission do not consist in a binding decision but are in fact simply "recommendations". There are no sanctions if they are not followed. They were also given on the basis of the specific situation in Poland and can therefore not be transferred to another case in another member state. However, the recommendations acted

[257] W. Tornøe, C. Wegener, 2020. What should EU do about Poland's populist PiS?, master's thesis, University of Copenhagen, pp 36-41
[258] COM 2014, 158 final
[259] W. Tornøe, C. Wegener, 2020. *What should EU do about Poland's populist PiS?,* Master's thesis, University of Copenhagen, pp. 41-42
[260] Ibid., pp. 83-84.

as the foundation of the proposal for decision by article 7 (1) of the Commission[261]. The recommendations' transferability evaluation is therefore mainly to be found not to other, similar cases but limited only in its capacity to inform the other tools employed to restore the Rule of Law in Poland. In that sense, the transferability ability results rather poor.

	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency	RoL Framework		
Effectiveness	RoL Framework		
Transferability	RoL Framework		

Despite the great expectations on the efficiency and effectiveness of the RoL Framework to address early and adequately populist challenges, in the case examined the tool revealed itself unable to produce concrete-changing suitable outcome. Yet, the possibility to initiate an inter-institutional dialogue on the national and the EU level is appreciated as a preparatory phase to further actions.

Overall evaluation

Pros:

1. The RoL Framework offers a compelling definition of the rule of law, allowing to legally support better the EU political system (inside) while clarifying this choice for the western liberal EU states (outside-international community). The RoL Framework has established a meta-principle with formal and substantive components which guide and constrain the exercise of public authority and protect against the arbitrary or unlawful use of public power. **Furthermore, a missing consensual element of Europe's legal space is now more properly filled up**, adding an element to the EU constitutional heritage, and perhaps even tackling further the integration process in this constitutionalisation of the EU RoL principle, and through the common "legal identity of belonging" of the EU MS[262]. A strong common legal value further strengthens the rights of both citizens and businesses, while legal literacy and EU principles and values may be enhanced **in the long term**[263]**.**
2. The EU RoL Framework and the related activities-products (institutionalised dialogue, periodic reports, Opinions, Recommendations) establish a stronger **competence of the Commission, while deepen the legal base** for the eventuality of a call for CJEU decision, that can now better and easier motivate its censures. Indeed, a breach of EU

[261] COM (2017) 835 final.
[262] https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf
[263] https://reconnect-europe.eu/blog/doing-more-harm-than-good-a-critical-assessment-of-the-european-commissions-first-rule-of-law-report/

Rule of Law has been always possible to be identified; however, beyond that identification, the specific legal base for Commission to actually act as "the guardian of the Treaties" was weak. The infringement procedure and the "nuclear option" of Article 7 of the Treaty of the European Union (TEU) are not sufficient to tackle such issues by themselves. Acknowledging that a bridge should be made between these two procedures, the idea resulted in the so-called 'Rule of Law Framework'[264]. Indeed, the eventual denial of the Commission Communications by the involved Member-States can strengthen the legal argument in the subsequent infringement procedures. Making public and uncovering these legal problematics in an early stage, allows both national (the Member state itself) and supranational institutions (CoE, Venice Commission) but also political actors and civil society (critical mass of citizens, NGO's, independent authorities) to activate.

3. The first monitoring cycle (2020) has helped the EU developing "a stronger awareness and understanding of developments in the individual Member States" so as to "facilitate cooperation and dialogue in order to prevent problems from reaching the point where a formal response is required"[265]. It has delivered a new **strongly cooperative** instrument including input from more than 200 stakeholders, independent experts, a variety of EU agencies, European networks, national, European civil society organisations and professional associations and international and European actors (horizontal effect)[266]. In the long period, this can be **fruitful in forging a basis** for strengthening bottom-up democracy and cooperation, but can also provide insight, reliable national data and fact-based, "genuine" annual stocktaking of the state of the rule of law in the EU. It also initiates (vertical effect) **an essential, direct dialogue between EU, Member States, Stakeholders and Society**, placing it within a structured process: this increases the chance that the resulting action has the required focus and direction.

Cons:

1. There seems to be a **legal-political overlapping in the provisions regarding the RoL Framework tool**: the *political* element dominates over the *legal* one, as much of the Framework is owned by the EU Member States and the initiative relies on the Commission rather than by, i.e., a politically unbiased body[267].

2. From a practical point of view, the RoL Framework opinions and recommendations lay in all cases defenceless against refusal, rejection or disregarded communications. The mechanism does not provide any obligatory compliance effects nor does it foresee

[264] http://www.diva-portal.org/smash/get/diva2:726975/FULLTEXT01.pdf
[265] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0343&from=EN
[266] The report is the result of months of consultations with Member States, both at the political level in the Council and through political and technical bilateral meetings, from a variety of sources. Prior to the adoption of the Report, Member States were also given the opportunity to provide factual updates on their country chapters. The methodology also recalls the EU law provisions relevant for the assessment for each pillar, including the case-law of the CJEU, and refers to opinions and recommendations from the Council of Europe, which provide useful guidance.
[267] https://link.springer.com/chapter/10.1007/978-3-662-62317-6_12

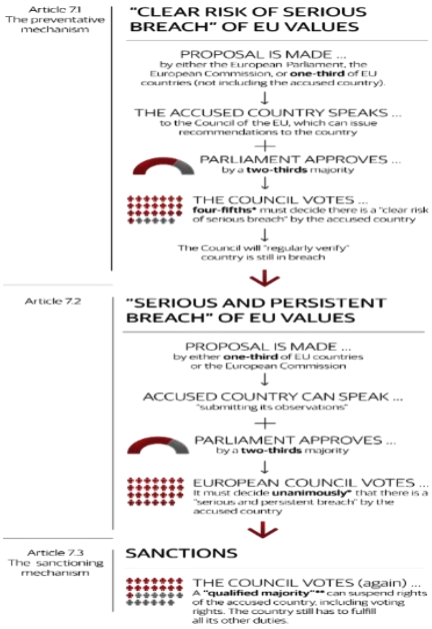
sanctions (real or symbolic whatsoever), and there are neither qualified incentive provisions for complying. The RoL tool is not included in the list of binding legal acts specified in the Treaties since, it is not covered by Article 288 TFUE, which provides that regulations, directives and decisions have binding force in the EU legal system, thus, the RoL communication should be considered as an **act of soft law**[268], whose effects **cannot not go beyond the narrow level** of "suggestion, diplomatic capacity, discursive persuasion, warning" etc. Under these considerations, the RoL Framework can produce very limited immunisation effects against eventual, future, new or reiterated breaches.

3. In the list of tools, the structure of the RoL Framework is consultative, based mostly in a 'naming and shaming' procedure that can produce **no distinct legal consequence**[269], therefore it should be considered merely as a legalistic, formal-procedural step: the formal conception of the rule of law -as a process of balancing between different formal sources of positive law- diverge from the substantive requirements of supervision and control over the compliance to the principles of the rule of law[270]. The limitation of the RoL Framework displays especially when dealing with serious illiberal populist drifts, in which the probability to be able to stimulate the "good will" for interinstitutional cooperation and compliance, or to enact the "mutual trust" principle, appear even more unlike, fragile and rather superficial.
4. Furthermore, the limitation of the implementation of the RoL Framework in the cases representing a threat/violation of a "**systemic" nature**" limits ulteriorly its field of action and its effectiveness capacity[271]. Treating with serious cases of Rule of Law backsliding, **dialogue does not seem to be the most fitted**, most efficient, most effective tool with autocratic governments that openly implemented illiberal constitutional reforms and have breached the very basics of the Rule of Law principles[272].
5. **The RoL Report and Communications** have been **criticised for their "euphemistic language"**[273], which may result actually counterproductive, inducing to the risk of "normalisation" of evident violations of the rule of law[274]. Furthermore, there is no

[268] Ibid.
[269] C. Closa, 2016. 'Reinforcing EU Monitoring of the Rule of Law', in C. Closa and D. Kochenov (eds.), Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press, pp. 15-35
[270] G. Palombella, 2016. 'Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two-Level System', pp. 36-58 and P. Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law. Sociological Reflections, pp. 249-269 in C. Closa and D. Kochenov (eds.), Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press
[271] The EU Parliament passed a resolution condemning Viktor Orbán's statement on the reintroduction of the death penalty in Hungary and his anti-migration political campaign: https://www.europarl.europa.eu/news/en/press-room/20150605IPR63112/hungary-meps-condemn-orban-s-death-penalty-statements-and-migration-survey
[272] https://visegradinsight.eu/breathing-new-life-into-old-values/; https://verfassungsblog.de/the-commissions-rule-of-law-blueprint-for-action-a-missed-opportunity-to-fully-confront-legal-hooliganism/; https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf
[273] https://eulawlive.com/op-ed-you-cant-fight-autocracy-with-toothless-reports-by-roger-daniel-kelemen/#
[274] https://reconnect-europe.eu/blog/doing-more-harm-than-good-a-critical-assessment-of-the-european-commissions-first-rule-of-law-report/

guarantee that what the national authorities declare in their "National Review Report" is actually corresponding to truth: the problem with this 'benevolent Member State paradigm' is that it does not reflect at all the reality of the rule of law backsliding Member State[275]. More problematically, the Commission's set of actions and proposals outlined appear disconnected from the reality of the authoritarian developments in Hungary and Poland[276].

Tool N. 2. The Art. 7 procedures



Article 7 of the Treaty on European Union (TEU), incorporated with the Nice Treaty, is designed to ensure respect of the EU 'common values' and to handle systemic threat to the rule of law. The main decision and responsibility for the art. 7 procedures is entrusted to the Member States (MS) who may act as political actors. According to the EPRS (European Parliamentary Research Service) Report on the Protection of EU common values within the Member States,[277] the art. 7 preventive and monitoring mechanism can be activated after a threat is already manifestly alarming, whilst Art. 7 (3) sets out a post-breach sanctioning procedure, that authorizes the European Council to suspend certain rights of a MS, in case a violation of the principles of democratic governance set out in Article 2 TEU is found.[278] Here is why art. 7 can be qualified as a **two-fold mechanism**, from one side consisting of a preventive arm (determining a clear risk of a breach of the rule of law) aiming mainly to persuade member states from backsliding on European values and the rule law, and on the other side providing sanctions and aiming to remedy-correct a serious and persistent breach occurring.

Art. 7 configures **three possible actions**, not necessarily to be triggered consecutively:[279]

1. based on Art. 7(1) TEU, a procedure intended **to declare the existence of a 'clear risk of a serious breach'** of the values referred to in Article 2 TEU, foresees the opening of the

[275] https://euobserver.com/opinion/145545
[276] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440957
[277] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS_STU(2020)652088_EN.pdf
[278] Literature on art. 7 procedure is vast: L. Besselink, 2017. 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in Jakab and Kochenov (eds), The Enforcement of EU Law and Values, Oxford University Press; G. Wilms, 2017. Protecting Fundamental Values in the European Union through the Rule of Law, EUI RSCAS; B. Bugarič, 2016. 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in Closa and Kochenov (eds), Reinforcing the Rule of Law Oversight in the European Union, Cambridge University Press; D. Kochenov and L. Pech, 2016. 'Better Late Than Never?', 24 Journal of Common Market Studies, pp. 106
[279] https://www.nhc.nl/the-european-union-and-the-rule-of-law-a-new-instrument/#_ftn5

dialogue with the Member State involved **and provides the possibility to adopt recommendations on how to remedy** the situation addressed to the Member States in breach. There is a broad array of actors that can undertake this action: one-third of the member states, and the European Parliament or the European Commission can call upon the responsibility of the Council of Ministers, which may, by a qualified majority of four fifths of its members – excluded the Member State concerned – adopt a decision stating that a clear risk of a serious breach of the rule of law (or any other EU value, enshrined in Article 2 TEU) has occurred by a given Member State. **No specific sanctions are attached in this phase:** the purpose is limited to raise awareness and admonish the Member State that a risk of serious breach has been identified. The essence of 7(1) seems to focus on engaging the MS in a dialogue with the EU Institutions in order to prevent the realisation of the potential breach. However, the adoption of a recommendation does not consist in an especially slim and easy procedure: the same process – with a 4/5 majority in the members of the Council and requiring the final consent of the European Parliament- is used both for the adoption of the recommendations to address the Member State on the brink of breaching the values and for the statement of the existence of a serious risk of breach (art. 7.2).

2. based on Art. 7(2) TEU, an action is envisaged to **establish** and **state the existence of a serious and persistent breach of values.** The European Commission, or one-third of member states can call on the European Council to declare that a breach has occurred; the Council must deliberate unanimously before issuing a ruling, including the expressed approval from the European Parliament. Additionally, basic requirements of the rule of law have to be observed (i.e. the Member State subjected to the procedure has to be heard). This mechanism is primarily **of political nature**, even if it can potentially lead to concrete legal effects through the "sanctions mechanism", which can be also triggered independently of Article 7(1). However, the "*threat of actual sanctioning ... remains hardly credible*",[280] especially due to the condition of the required unanimity reached, presupposing a strong political unanimity amongst the MS, which constantly has proven difficult to be achieved.

However, there is a major difference between a mere serious threat and a serious breach of values, explaining the existence of a separate procedure in Article 7 TEU for stating such a breach, as well as the higher thresholds required by this procedure: unanimity in the European Council and consent of the European Parliament. Unlike 7(1), procedure of 7(2) cannot be initiated by the European Parliament, even though the European Parliament can, under its own Rules of Procedure, call on others to act in the context of both paragraphs in question.[281] Even considering the fact that unanimity does not imply that each member of the European Council has to vote in favour of triggering the procedure[282] however stating the existence of a serious breach remains procedurally difficult. What practically is required is the constitutional capture of the Member State institutions resulting in the paralysis of the liberal democracy and its

[280] M. Blauberger, V. van Hűllen, 2020. 'Conditionality of EU funds: an instrument to enforce EU fundamental values', Journal of European Integration, 8 January, p. 2

[281] Rule 83, European Parliament 'Rule of Procedure' [2014] (10296/14)

[282] Article 7 TEU does not limit its activation to one MS per time, so in a situation where more than one MS is suspected of a breach of Article 2 values the activation of Article 7 against both states is indispensable to avoid the blockage of Article 7 procedures by the backsliding MSs supporting each other

institutions, thus making auto-corrections, on national level, impossible.[283] This is why the core significance of 7(2) procedure seems to lie in the fact that **opens the way to the triggering of 7(3)** by the Council, **hence making sanctions imposition possible.**

3. ultimately, the art. 7(3) TEU foresees a proper sanctioning mechanism, providing the suspension of the MS's voting rights in the Council. Concretely, this would mean silencing the MS's power within the EU: the country in question would remain subjected to EU rules but would be excluded from the decision-making process. Article 7(3) does not, in all cases, authorise the exclusion of the Member State from the Union.

This third apparatus of the art. 7 procedures, initiated by the Council and having reached a reinforced QMV, seems to be going beyond the intention to "publicly shame" a MS for its internal degrading state of the democracy and disqualifying status of human rights, or as results from the deployment of 7(1) and 7(2) to expose its rule of law irregularities. Art. 7(3) instead implies actual "disciplining", by coercing and punishing.

Article 354 TFEU[284] makes a reference to the requirements of Article 238(3)(b), thus implying the necessary support of at least 72% of the participating Council Members comprising 65% of the Union population, but again with the Member State representative subjected to the procedure not taking part in the vote. Yet, despite the potency of art. 7(3) option to intervene in a serious breach of law effectively, the requirements to its activation significantly weaken it: the procedural threshold is very high, the time required to reach that is considerable, especially adding to that the fact that article 7(3) TEU cannot be substantially initiated without a successful deployment of Article 7(2) TFEU. While the provision speaks of the suspension of 'certain rights deriving from the application of the Treaty', it is rather clear that the sanctions invoked can be both of economic and of non-economic nature, therefore both access to EU funds and voting of the Member State in breach in the Council can be affected. The provision is vague also in allowing the Council to adapt the exact span of sanctions, as it sees fit with a view of maximizing the likelihood of compliance in the Member State concerned.

General considerations

1. Art. 7 as a "nuclear option":

The most popular representation of Article 7 TEU today – a consequence of the post-Austria chilling effect of the so called 'Haider Affair'[285] – is to refer to Article 7 as a '*nuclear option*'.[286]

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[283] J. W. Müller, 2015. 'Should the EU Protect Democracy and the Rule of Law inside Member States?', 21 European Law Journal, p. 141

[284] "…For the adoption of the decisions referred to in paragraphs 3 and 4 of Article 7 of the Treaty on European Union, a qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty. Where, following a decision to suspend voting rights adopted pursuant to paragraph 3 of Article 7 of the Treaty on European Union, the Council acts by a qualified majority on the basis of a provision of the Treaties, that qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty, or, where the Council acts on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, in accordance with Article 238(3)(a). 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."

[285] https://penguincompaniontoeu.com/additional_entries/haider-affair/

[286] President Barroso, 'State of the Union Address' (Speech/12/596), EP, Strasbourg, 12 September 2012

This idea is based on the assumption that invoking the provision is extremely challenging not only for the concerned MS's but also for the EU Institutions, and that the results of its application with the sanctions may result politically too devastating to even make this practicable. Under this perspective, the employment of the Art. 7 should be, therefore, considered an **exceptional tool destined to address exceptional situations**.

However, this view is mostly based on the "political approach" of art. 7 seen as a unique procedure composed of three steps, a picture which seems to overlook the formal and legally relevant differences between the three actions. Indeed, a significant fact often misunderstood is that the provisions of art. 7(1) do not legally exclude the possibility of starting directly the procedure laid down in Article 7(2) TEU and the following. Furthermore, on a second glance, considering the conditions under which the 7 (1) procedure can be triggered, the Commission, the European Parliament and 1/3 of the Member States, the prevailing opinion on Article 7 "nuclear" nature appears probably exaggerated. Likewise, the 4/5 majorities of the members of the Council are not as difficult to reach: this threshold, however high it seems to be, is clearly far below unanimity in the European Council required for the statement of an actual breach under Article 7(2) TEU. It is notable in this regard, that Article 7, which compels the opinion behind the initiation of 7(1) to be 'reasoned', it also requires the initiating actors to do their 'homework' and prepare the case by collecting and systematising the necessary information and evidence. Such preparatory work is clearly implied, for example, in the text of the provision on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP)).[287] In this perspective, art. 7 can be considered a feasible tool to address threats and violations of the rule of law as a quasi-standardised procedure that sets the legal premises for further actions to be taken.

2. The politically-dependant nature of Art. 7

As one of the latest Parliament's resolutions (2020)[288] emphasizes, the Article 7 TEU is a process on assessing risks, asking all EU institutions to use their powers to the best of their abilities.[289] However, given the limited involvement of the judicial power and the fact that the 3 procedures rely on politically powered actors, Article 7 TEU, even in its sanctioning version, remains mostly a tool blended of law and politics.[290]

Some have considered the employment of art. 7 as "*an outright abuse […] for uncertain political ends. Such abuse is particularly unhelpful if it is committed over and over again by the institutions destined to defend the values of the Union and entrusted with the right of initiative to trigger the different procedures of Article 7 TEU, especially the European Commission and the Council*".[291] The above considerations are probably to be linked to those who question the legal validity of the introduction itself of art. 7 mechanism: seen as *equivocal* legal tool, art. 7 appears to have been perceived more as an attempt to bridge the gap existing

[287] https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2021/2557(RSP)
[288] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.html
[289] R. Uitz, 2020. EU Rule of Law Dialogues: Risks – in Context, VerfBlog, 2020/1/23, https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-incontext/
[290] A. Williams, 2006. 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq', 31, European Law Review, pp. 3-27
[291] https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf?sequence=1, p. 11

between the naïve presumption that all the Member States shall not fall short on the achievement of the values baseline, and from the other side, to the need to somehow impose the values of the Union not sufficiently and not adequately safeguarded.[292] The scope of the art. 7 provision, which is, like with Articles 2 and 49 TEU, necessarily broader than what has been conferred on the EU under Article 5(1) TEU, is probably the key for the better understanding of the mechanisms the Article contains.

It must be further noted that Article 7 TEU is explicitly based on the principle of equal treatment for all Member States, even if evidently designed with the newest Member States in mind. This sort of stated "political equidistance", impartiality, and "fairness" of treatment of all EU Member States, may however result as a weakness for promoting Art. 7 procedures, rather than a virtue, especially when dealing with populist challenges, thus preventing from the implementation of Art. 7. While admittedly Art. 7 must not be triggered for ideological reasons, nor when the standards of the common values are formally abided, there is always the counterbalance principle of respect of the national constitutional identities, which prevails by generally assuming that the strictly national political choices are the legitimate result of a democratic debate.[293] Art. 7 requires, instead, to move the mechanism with a focus on the specific characteristics of a country, in order to result more efficient than other generalised warnings.

Considering that the major responsibility in enforcing the rule of law and ensuring success of art. 7 procedure is substantially reserved to the MSs, there is no clear opinion or positioning of the MSs against or forth the Art. 7 procedures. The views expressed may appear different from time to time, while governments seldom communicate their views in isolation and more often by means of collective statements and groupings (i.e. Visegrad group, Friends of the Rule of Law group). Conflicting positions have been heard both against (i.e. UK, Bulgaria, or Hungary, Poland, Slovakia in their 2018 V4 Statement on the Future of Europe) and in favour (i.e. Germany, Luxemburg, Sweden) of a stronger enforcement.[294] This is an indication of the **political dependence of the art. 7 procedure, which may weaken its enforcement role.**

3. The uneasy application of art. 7 mechanism

The breach of values, a preliminary necessary step in order to apply the Article 7 sanctions mechanism, must be **serious, systematic and persistent**, and must therefore go beyond individual violations of fundamental rights. The Commission affirmed in a Communication (2003) that Article 7 "*seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust*

[292] Ibid.

[293] A. Nilsson, 2019. Application of National Identity in EU law, in https://www.diva-portal.org/smash/get/diva2:1338224/FULLTEXT01.pdf; Understanding the EU Rule of Law Mechanisms, 2016. https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI(2016)573922_EN.pdf

[294] C. Closa, Annex. Art. 7-mapping Member States' positions, in Understanding the best practices in the area of the rule of law, Reconnect H2020, www.reconnect-europe.eu

between its members, whatever the field in which the breach occurs".[295] According to this approach, Art. 7 may act as a *lex specialis* with a very broad scope of application, not precluding the application of Articles 258, 259 and 260 TFEU in the area of the defence of EU values. While some value-violations can clearly fall within, or be paralleled by a breach of the *acquis*, a series of systemic *acquis* violations could also amount to a serious breach of values.[296] **This is why the Commission in its 'Rule of Law Mechanism' insists on approaching Article 7 and standard infringement proceedings as deployable side by side.**[297]

There seem to be further objective difficulties surrounding the provision: Art. 7 TEU does not per se guarantee any successes, either because of the formal difficulties in the employment of the sanctions or because of the complex coordination between the majorities required. At the same time, the very logic of the internal market construction, based on the interdependence of the MS's collaboration of economies, policies and markets, implicitly also explains why art. 7 has required so many years to be triggered.[298] More considerations on the delicate issues surrounding the triggering of art. 7 are, therefore, related to the EU's very nature: an informal non-federal governmental organisation of countries, nonetheless with a strongly "federalised" and closely interdependent political structure, and the democratic deficit issues that have been often raised within the EU's legal-institutional structure.[299]

The art. 7 procedure was in recent years mentioned against the French government in 2009 (Roma expulsion case),[300] and against Romania in 2012 (political crisis),[301] but has been *concretely triggered twice against populist challenges*, in Poland and Hungary.

The Polish case: As a result of a long and fruitless dialogue launched in 2015 between the EU institutions and the Polish government, the Article 7 procedure was triggered in 2017 against Poland. The Commission substantiated its concerns issuing a Rule of Law Opinion and three Rule of Law Recommendations, exchanging more than 25 letters and a number of meetings between the Commission and the Polish authorities, both in Warsaw and in Brussels, mainly before the issuing of the first Rule of Law Recommendation. On 15 November 2017, it adopted a resolution on the situation of the rule of law and democracy in Poland where it "believes that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU".[302] On 1 March 2018, the Parliament also adopted a resolution

[295] European Commission, 'Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based' [2003] (COM(2003) 606 final), 5

[296] Scheppele, 'The Case for Systemic Infringement Actions', in Closa and Kochenov (eds), 2016. Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press

[297] European Commission, 'A New EU Framework to Strengthen the Rule of Law' [2014] (COM(2014)158)

[298] Member States' economies are strongly interrelated with the scope to ensure a lasting peace and common prosperity. The internal market logic is poorly equipped to deal with the backsliding states due to the overwhelming economic costs any serious intervention is prone to generate on the businesses of all Member states.

[299] J.H.H. Weiler, 2015. Living in a Glass House: Europe, Democracy and the Rule of Law, in C. Closa, D. Kochenov (eds.), supra n-73, pp. 313-326; D. Kochenov, 2015. EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?, 34(1) Yearbook of European Law 74

[300] https://www.bbc.com/news/world-europe-11027288

[301] https://www.theguardian.com/world/2012/aug/14/victor-ponta-romania-president-impeachment

[302] European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931RPS)), paragraph 16, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&language=EN

2018/2541(RSP) on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland.

In its resolution, the Parliament welcomes the Commission's decision of 20 December 2017[303] to activate Article 7(1) TEU as regards the situation in Poland and supports the Commission's call on the Polish authorities to address the problems regarding primarily the Polish Constitutional Court and the independence of the judiciary of Poland. It calls on the Council to take swift action in accordance with the provisions set out in Article 7(1) TEU, and asks the Commission and the Council to keep the Parliament fully and regularly informed of progress made and action taken at every step of the procedure.

On 03/03/2021 the EU Parliament presented a "Motion for a Resolution to wind up the debate on the statements by the Council and the Commission pursuant to Rule 132(2) of the Rules of Procedure" reminded the resolution of 17 September 2020 on the 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[304] and the resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.[305]

Even though the Commission triggered article 7 (1) in December 2017 and the Parliament has presented its own statements as well, the Council has yet to make a final decision.

Evaluation of the Polish Case

Efficiency: In the Polish case article 7 has not been efficient as it has not had a specific and/or legal effect on the status of the Rule of Law in Poland.[306] Theoretically the tool should be able to contribute to an elimination of the systemic threat of the values - especially if 7 (2) was evoked as the elimination of voting rights might be too valuable for Poland.

One could argue that a certain political pressure towards Poland and the status of the Rule of Law has been created by both the Commission and the Parliament involving themselves in the case. This pressure might increase with a decision according to article 7 (1) and thereby change Poland's perspective. Nonetheless, this is not certain as article 7 (1) does not have specific sanctions and article 7 (2) requires unanimity in the Council.[307] Article 7 as a tool in the Polish case has therefore not had the skill to solve the situation.

Effectiveness: Article 7 (1) should in theory be able to create or initiate a process towards restoring the Rule of Law in Poland, if a) the decision had been made in time by the Council and b) we assume Poland would have listened to the EU stating there being a clear risk of breach. The experience with the Rule of Law Framework does not support this theory though, as Poland made minimal changes according to the recommendations of the Commission. In the experience of the Polish case, Article 7 is possibly more effective as a reactive and maybe even penalising tool than a restorative tool and has not been effective in repairing or restoring the

[303] COM (2017) 835 final
[304] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0225_EN.html;
[305] OJ C 433, 23.12.2019, p. 66
[306] W. Tornøe, C. Wegener, 2020., Ibid., p. 84.
[307] Ibid., p. 84.

Rule of Law in Poland.

Transferability: As the decision of a case being a clear risk is a specific assessment of each case, the transferability is not direct. A decision on the Polish case would not have been useful directly towards other member states' specific challenges with the Rule of Law or other values of article 2 TEU. Transferability might be present as a precedent or just as a basis for interpretation of article 7 going forward if new cases arise. Even if very few cases regarding article 7 have occurred so far, these first cases are however expected to create a strong precedent going forward. Theoretically the transferability can result potentially high – especially in EU law – and if decisions were made, they would probably act as important precedence in other case. But this hasn't yet happened.

The Polish case	**POOR**	**FAIR - GOOD**	**VERY GOOD - BEST**
Efficiency	Art. 7		
Effectiveness	Art. 7		
Transferability	Art. 7		

The Hungarian case. Proceedings were launched not only for Poland (December 2017) by the Commission, but also a year later (September 2018) for Hungary by the European Parliament.[308] https://www.nhc.nl/the-european-union-and-the-rule-of-law-a-new-instrument/ - _ftn4As a result of the 'reforms' of the Fidesz party (second Orbán government),[309] the functioning of the constitutional and electoral system, the independence of the judiciary and the rights of judges with respect to the corruption, conflicts of interest and a broad spectrum of fundamental freedoms and rights were severely undermined,[310] with a view to building an 'illiberal democracy' (*à la Putin*),[311] and according to Venice Commission, the Constitution turned into a political tool of one-party rule.[312]

Starting early, the EU institutions employed a lot of efforts to find an arrangement through dialogue, as evidenced by the numerous resolutions adopted: on 10 March **2011**, the EP had adopted a resolution on media law in Hungary (OJC 33 E, 5.2.2013, p. 17); on 5 July **2011**, a resolution on the revised Hungarian Constitution (1 OJ C 75, 26.2.2016, p. 52 (cf. 2012/2130 (INI)); on 3 July **2013**, pursuant a previous resolution of 16 February 2012 had adopted a resolution on the situation of fundamental rights: standards and practices in Hungary. (2012/2511(RSP)); on 16 December **2015**, the Parliament, follow-up a previous Resolution of

[308] See page 25 of the 2020 Rule of Law Report of the European Commission of 30 September 2020, COM (2020)580 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN

[309] The common pattern of all these illiberal changes was that the executive of legislative powers had been systematically enabled to interfere significantly with the composition, powers, administration and functioning of these bodies.

[310] Such as data protection and privacy, freedom of expression, association, religion, academic freedom, the right to equal treatment, the rights of persons belonging to minorities, the rights of migrants, asylum-seekers and refugees or economic and social rights

[311] K. L. Scheppele, 2017. 'Constitutional Coups in EU Law', and G. A. Tóth, 'Illiberal Rule of Law: Changing Features of Hungarian Constitutionalism', in Adams, Meeuse, Hirsch Ballin (eds), Constitutionalism and the Rule of Law: Bridging Idealism and Realism, Cambridge University Press

[312] B. Bugarič, 2015. 'A Crisis of Constitutional Democracy in Central and Eastern Europe. "Lands In-Between", Democracy and Authoritarianism, https://academic.oup.com/icon/article/13/1/219/689918?login=true

10 June 2015 having regard to the Council´s first annual rule of law dialogue (held on 17 November 2015, (2015/2700 (RSP)), had adopted a Resolution on the situation in Hungary (2015/2935 (RSP)); on 17 May **2017**, the Parliament adopted a resolution on the situation in Hungary, after a previous hearing held on 27 February 2017 by its Committee on Civil Liberties, Justice and Home Affairs and the plenary debate of 26 April 2017 (2017/2656 (RPS)).

On 12 September **2018**, the **Parliament has passed a proposal calling on the Council to determine, pursuant to Article 7(1)**, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)).[313] **Budapest appealed to the CJEU in 2018**, requesting that the Parliament resolution declaring that Hungary is at risk of breaching the EU's core values and triggered Article 7 disciplinary proceedings was annulled. According to the Hungarian government, the Parliament resolution "seriously infringed" EU treaty provisions and violated the legislature's own rules of procedure. Advocate General Michal Bobek (2020) rejected Hungary's argument and advised the court to dismiss the case as "unfounded".[314] The discussions and mediation efforts continued until, finally, on 16 January **2020** the European Parliament voted to continue the Article 7 proceedings launched against both Poland and Hungary. According to the EP position statement, the standing of the rule of law had deteriorated in both countries, and neither member had taken any meaningful steps to ensure its re-establishment. The EP requested the Council to prepare specific recommendations for the countries to follow, and also to set strict deadlines by when they had to be complied with. The suggested included that the use of EU funding in the future should be tied to compliance with the rule of law.[315] The Parliament highlighted developments which not only undermine the values recognised in Article 2 TEU, generating mistrust in the country's relationship with other Member States but also pose threat to the rights of that country's own citizens.[316] This was the first time that Parliament has called on the Council of the EU to act against a member state to prevent a systemic threat to the Union's founding values.

By today, despite the Hungarian authorities' readiness to discuss the legality of any specific measure, they have not addressed the situation and many concerns remain, triggering the EU Parliament to recall that Hungary's accession to the EU "*was a voluntary act based on a sovereign decision, with a broad consensus across the political spectrum*".[317]

On **14 January 2020**, the Advocate General Campos *Sánchez-Bordona*[318] proposed that the CJEU declares the Hungarian legislation that restricts the financing of civil organisations from

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[313] https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act

[314] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200151en.pdf

[315] https://index.hu/kulfold/eurologus/2020/01/15/ep_hetes_cikk_elorelepes_hatarozat_magyar_lengyel_fejlemenyek/

[316] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340 +0+ DOC +XML +V0 //EN&language=EN

[317] Key concerns relate to the functioning of the constitutional and electoral system; the independence of the judiciary; corruption and conflicts of interest; privacy and data protection; freedom of expression, academic freedom, freedom of religion, freedom of association; the right to equal treatment, the rights of persons belonging to minorities, including Roma and Jews, the fundamental rights of migrants, asylum seekers and refugees, and economic and social rights

[318]https://curia.europa.eu/juris/document/document.jsf;jsessionid=16145D84B5C5EB64F1335049FB9E52E7?text=&docid=222223&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7894143

abroad to be incompatible with EU law,[319] while on **16 January 2020**, the European Parliament stressed that "the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1)".[320] The resolution states that "*the failure by the Council to make effective use of Article 7 of the TEU continues to undermine the integrity of common European values, mutual trust, and the credibility of the Union as a whole*." The Council is called to determine the existence of a clear risk of Hungary's serious breach of the values on which the Union is founded. The EP also criticizes the modalities of the procedure and shortcomings in the proper involvement of the EP in the Article 7 procedure.

On **March 2020**, the EP's Civil Liberties Committee (LIBE) issued a reminder[321] which did not prevent the Hungarian government to pass the contentious "state of emergency extension" bill[322] ('Enabling Act').[323] In the **17 April 2020 resolution EU coordinated action to combat the COVID-19 pandemic and its consequences,**[324] the Commission is called on to make use of all available EU tools and sanctions (art. 7.3) to address this serious and persistent breach; including budgetary cuts, as resulted from an open letter of 75 European personalities calling on the EU to swiftly adopt sanctions against the latest "democratic backsliding" lead by the Hungarian government.[325]

Evaluation of the case of Hungary

Efficiency: Art. 7 tool has been triggered with delay, and long periods of irresponsiveness from the Hungarian part and indecisiveness from the EU to proceed further have been observed. Moreover, when applied, it has not produced any immediate nor direct modification of the multiple threats investigated and declared. Some broader and poor (indirect, minor or collateral) effects may be observed in regard to the fight against populism in Hungary: political mobilisation and collective indignation, civic awareness rose through the triggering of Art. 7 against Hungary, with the merit to have temporarily delayed the implementation of the problematic law in 2018,[326] while the political agenda has promoted intense interinstitutional dialogue focusing on the enforcement of the EU Rule of Law policies and mechanisms. Other

[319] The Hungarian legislation imposes several obligations of registering, providing certain pieces of information and publication on civil organisations if they receive donations above a certain threshold from abroad. The case was brought to the CJEU in an infringement action by the Commission (Case C-78/18). The AG argues that the legislation is contrary to the principle of free movement of capital in that it includes provisions amounting to unjustified interference with the fundamental rights of respect for private life, protection of personal data, and freedom of association as protected by the Charter. Objectives, such as the protection of public policy and the fight against money laundering and terrorist financing, cannot justify the Hungarian legislation.

[320] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.pdf

[321] https://www.europarl.europa.eu/news/en/press-room/20200324IPR75702/ep-stands-up-for-democracy-in-hungary-during-covid-19

[322] https://www.parlament.hu/irom41/09790/09790.pdf< https://www.dw.com/en/hungary-passes-law-allowing-viktor-orban-to-rule-by-decree/a-52956243

[323] https://verfassungsblog.de/pandemic-as-constitutional-moment/; https://transparency.eu/ruleoflaw-open-letter/

[324] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.pdf

[325] https://civico.eu/news/by-surrendering-to-autocracy-in-the-fight-against-covid-19-hungary-poisons-european-ideals/

[326] The law would install a separate branch of administrative courts nominally within the Hungarian judiciary, yet placed under the direction of a separate, newly established Supreme Administrative Court (Közigazgatási Felsőbíróság) alongside the existing Supreme Court (Kúria) (Act no. CXXX of 2018). https://index.hu/english/2019/06/03/administrative_courts_postponed_hungary_fidesz_government_eu_epp/

than that, nothing else has been achieved because of art. 7.

Even if the rule of law challenges in Hungary and Poland have been qualitatively very similar and closely interrelated, in many respects even mimicking each other, the decision for action has been delayed significantly.

Effectiveness: Art. 7 did not have direct, nor did it explicate indirectly, any concrete, legally relevant outcome as to the means of preventing, persuading, correcting or discipline the government over the situation of the breaches of the EU values. The most important effect achieved by today has been that of making manifest the breach and exposing the problematic situation of the Member state to the EU (and the international) community. The grade of efficiency of the admonish-warn potential appears weak or irrelevant, and the situation in 2020 has deteriorated since the triggering of Article 7(1). What can be attributed to art. 7 action is that it has generated and spread legal knowledge on the Hungarian case and turned the political focus on applying some political pressure ("public shaming"). The opening of a path to sanctions has been achieved, but the potential remedy deriving from the temporary loss of EU Council voting rights (7.3) has not been yet implemented.

Transferability: The Art. 7 tool did not require any specific adaptation for the case of Hungary; the tool appears to be designed and implemented through a commonly applied methodology and praxis. A decision on the Hungarian case would not have been useful directly towards other member states' specific challenges with the Rule of Law or other values of article 2 TEU, apart from eventually establishing a "precedent" which, with the passing of time and of cases could built a more robust legal platform of cases where art. 7 is successfully triggered, achieving in attributing to this tool a stronger remedy nature, and horizontally applicable, capacity. However, none of this has by now been achieved.

	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency	ART. 7		
Effectiveness	ART. 7		
Transferability	ART. 7		

Overall evaluation of Art. 7

	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency	Hungarian and Polish case		
Effectiveness	Hungarian and Polish case		
Transferability	Hungarian and Polish case		

Pros:

1. The legal base of Art. 7 acts as a "political quarantine" and scrutiny over a Member

State's compliance with the EU Rule of Law principles and values.

2. Article 7 involves the concerned member state in a dialogue regarding the values of article 2 TEU, in line with the general effort (and within the logic of the legal-political integration process) of the EU to promote a closer dialogue and collaboration in the EU. Triggering the interinstitutional and inter-governative dialogue may establish and promote the idea of creating a common legal standard, a platform for dialogue on the EU legal culture, which in the depth of time can reveal useful in changing or discouraging certain populist tendencies, or the political mindset in regard to the status of the Rule of Law, rather than attacking specific legal issues with hard sanctions right away. However, up to the present moment, the success of this dialogic method does not seem to obtain the desired outcome.

Cons:

1. It is significant to notice that the sanctioning procedure of Art. 7 has never been triggered so far. Beyond that, as a preventive legal tool, art. 7 has a legally unproductive nature because of its non-binding effects.
2. The Art. 7 actions appear slow and sort of burdensome for the EU institutions, or at least disproportionally onerous when confronted with their inherent capacity of effectively achieving concrete legal results. Art 7 has been described as 'useless' due to the large majorities needed in the Council and in Parliament, Member States' governments' general reluctance to take action against each other is driven by the fear of having themselves to face an assessment of their compliance with EU values[327].
3. While not effective on compliance terms, Art. 7 seems to be rather capable of mobilising political interest and awareness on the rule of law and the democratic principles safeguard in the MS's. Indeed, it has been characterised as a "too political" tool, in regard to 1. the solutions it can provide for, 2. regarding the actors (Parliament, Commission or majority of MS's) that can trigger the request for investigation, but also 3. for the instigation itself and 4. significant political discretion granted to the Council's hands the final assessment in. There is no space for judicial scrutiny, and no role is attributed to the CJEU[328].
4. What the concrete cases examined allow us to see is that the use of Art. 7 procedures, as performed by now, doesn't seem to be a fitting response neither for obtaining lawful compliances nor for stopping/remedying political illiberal manifestations, such as those proposed by illiberal populist drifts: while Art. 7(1) TEU is about "systemic threats" to values, and the assault on the values in Poland and Hungary are way beyond the "threat" point, triggering the question on the appropriateness of the art. 7 legal basis tool chosen[329].

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[327] https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI%282016%29573922_EN.pdf

[328] https://www.ceps.eu/ceps-publications/european-parliament-vote-article-7-teu-against-hungarian-government-too-late-too-little/

[329] D. Kochenov, 2019. Article 7 TEU, in M. Kellerbauer, M. Klamert, J. Tomkin (eds.), The Treaties and the Charter of Fundamental Rights – A Commentary, Oxford University Press, p. 88

Tool N.3. Art. 267 TFEU. Preliminary references

Preliminary ruling proceedings have been qualified as the "keystone of the EU judicial system",[330] representing therefore an important legal tool in the fight against the rule of law violations. The CJEU in the "Recommendations to National Courts and Tribunals, in Relation to the Initiation of Preliminary Ruling Proceedings", clarifies that: "*1. The reference for a preliminary ruling, provided for in Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), is a fundamental mechanism of EU law. It is designed to ensure the* ***uniform interpretation and application*** *of that law within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union ('the Court') for a preliminary ruling question concerning the* ***interpretation*** *of EU law, or the* ***validity*** *of acts adopted by the institutions, bodies, offices or agencies of the Union."*[331]

Preliminary references can be defined as an established and institutionalised mechanism of judicial dialogue between the EU (CJEU) and national level (Courts), meant to provide judicial support and offer clarity on questions regarding the interpretation of EU law, in the view of contributing to the uniform application of EU law across the Union, from one side, and from the other side to create an additional mechanism,– on top of the action for annulment of an EU act (set out in Article 263 TFEU) – for an *ex post* verification of the conformity of acts of the EU institutions with primary EU law (the Treaties and general principles of EU law).[332] The scope of the preliminary reference procedure covers the entire body of EU law with the exclusion of acts under common foreign and security policy and certain limitations in the area of cooperation in criminal matters (judicial and police).

Preliminary references' valuable employment have been applying since the landmark case of *Van Gend en Loos* (CJEU judgment of 5.2.1963, Case 26/62) through which the CJEU *"****widened the scope of the preliminary reference procedure****"* reaching the *"practical outcome as the one that would be obtained through a direct invalidation of Member State law*".[333]

The procedure provides an invaluable link between national legal systems and EU law. It helps the CJEU control how the national courts apply EU law and also gives national courts a chance to affect the uniform interpretation of EU law.[334] The **jurisdiction of the CJEU** to give a preliminary ruling is exercised exclusively upon the initiative of the national courts and tribunals, whether the parties to the main proceedings have expressed the wish that a question be referred to the Court. However, **if it is a court of last instance** asking the interpretation of EU law or the validity of an act of the EU institutions, that court instead **is bound** to submit the question, under penalty of holding the MS concerned liable for a breach of EU law.[335]

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[330] CJEU, Case C-619/18, Commission v. Poland, para. 45, supra note 12.

[331] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016H1125%2801%29; https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001

[332] Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings(2016/C 439/01).

[333] K. Lenaerts, 1990. 'Constitutionalism and the Many Faces of Federalism', American Journal of Comparative Law, Vol. 38(2), p. 256

[334] https://www.ejtn.eu/PageFiles/17294/WR%20-%20TH-2018-3%20-%20CZ.pdf

[335] https://static-curis.ku.dk/portal/files/176858941/National_Courts_of_Last_Instance_FailingMorten_Broberg.pdf

To sum up, the preliminary ruling tool serves four important **purposes**:

1. **It is a tool intended to guarantee legal unity in EU.** The application of Union law occurs in a decentralised mode through the judges of the individual Member States: The national judge is the ordinary judge of Union law. This decentralisation entails the risk of divergent rulings. Pursuant to Article 19 (1) Sentence 2 of the Treaty on European Union ("TEU"), it is the CJEU's duty to ensure compliance with the law when interpreting and applying the Treaties. It performs this duty by deciding in preliminary ruling procedures pursuant to Article 267 (1) TFEU on the - uniform interpretation and - uniform application of Community law. ECJ's rulings on interpretation take effect at the time the law entered force, not the time of the judgment — so interpretation applies to legal relationships before the ruling was given. This has implications for the finality of national courts decisions — e.g. where a national court gave the law one interpretation in a case in which a PR was not made, that is subsequently incompatible with a later decision of the ECJ.
2. The preliminary ruling procedure is an **instrument to further develop the law through the CJEU's work.**[336] In its recommendations to the national courts with regard to the initiation of preliminary ruling proceedings, the CJEU expressly states that a reference could, inter alia, prove particularly useful when - a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law or - where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.[337] Although a preliminary ruling is primarily directed to the national court which made the reference, it should be relied on by other national courts before which the matter arises. **CJEU rulings have a multilateral effect and "precedential" impact**.
3. The preliminary ruling procedure is also an **instrument to protect individual rights,**[338] even if options for the individuals to directly seek legal protection through the CJEU are subject to strict limitations. Despite the right for individual natural or legal persons to institute proceedings pursuant to Article 263 (4) TFEU ("annulment action"), individuals cannot directly institute proceedings at the CJEU against generally applicable legal acts within the meaning of Article 289 TFEU. As a general rule, parties only indirectly affected by legal acts of Union law can only seek recourse with the national courts. With the preliminary ruling procedure, it is possible that the referring court submits the decision relevant issues pertaining to Union law to the CJEU for preliminary ruling. Thus, the preliminary ruling procedure is assigned the role of "**indirect legal proceedings**".[339]
4. Preliminary ruling procedure also serves as an **instrument for time-unlimited indirect**

[336] Revisionsgericht, cf. § 543 (2) Sentence 1 No. 2 Alternative 1 ZPO [German Code of Civil Procedure]
[337] Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, Official Journal of the European Union 2016, C 439/01 No. 5
[338] Wegener in Callies/Ruffert, EUV/AEUV, 5th Edition, Article 267 TFEU marginal note 1
[339] https://www.ejtn.eu/Documents/EJTN_SKRIPT_DETTMERS_final.pdf;
https://curia.europa.eu/juris/document/document.jsf?docid=220770&doclang=EN

control of validity of EU laws, as opposed to the procedure for review of legality (art. 263 TFEU), which must be launched within two months of the publication of questioned measure.

The "eligibility" for asking a preliminary ruling relies on the "Courts".

The CJEU's approach to the definition of a 'court or tribunal' can be described as combining *functional* factors (focusing on the judicial function of the referring body) and *institutional* factors (focusing on whether the referring body is established by law, permanent and independent), where the formal classification of a given body as a court under national law is irrelevant for the CJEU. **The relevant criteria** (laid down in Abrahamsson (C-407/98)) to be taken into account when determining whether a given national body is a *'court'* under Article 267 TFEU or not can be summarised in the following: (1) whether the referring body is established by law, (2) whether the referring body is permanent, (3) whether the referring body's jurisdiction is compulsory, (4) whether the referring body applies rules of law (as opposed to mere *ex aequo et bono* adjudication), (5) whether the referring body is considered to be an independent judicial entity. Importantly, the CJEU does not analyse whether the referring court *actually* has jurisdiction to hear the case under national law (WWF, C-435/97). It is not sufficient for a national court that considers that one or more of the values enshrined in Article 2 TEU has been breached by the national authorities (e.g. government, parliament, public administration) to trigger Article 267 TFEU. This point was further clarified by the recent judgment in the Miasto Łowicz case[340] in which two Polish courts submitted references asking for interpretation of Article 19(1) TEU in the context of disciplinary proceedings triggered on the basis of the new national legal framework on the disciplinary regime applicable to judges established by Polish authorities (i.e. in the context of the value – 'rule of law', as enshrined in Article 2 TEU). The ECJ rejected the reference as lying outside the scope of Article 267 TFEU.

The CJEU makes no statement concerning the question of interpreting a national provision and its application to the specific case, nor does it have the task to solve the specific case by interpreting and applying the national provision "correctly". The CJEU has no jurisdiction to decide on the validity or interpretation of national rules.[341] However, it is endowed with the power to issue the referring court with all criteria for the interpretation of Community law, will decide how a specific rule of Union law is to be interpreted, which allows to judge the compatibility of the [national] legal rule with the Community regime.[342] It is then the task of the judge at the national level to apply the interpretation of Union law as rendered by the CJEU to the specific case and, if necessary, to "correctly" construe the national rule in accordance with the interpretation provided by the CJEU. It is not the duty of the CJEU to draft opinions

[340] ECJ judgment of 26 March 2020, Miasto Łowicz, C-558/18 and C-563/18.
[341] As a fundamental rule CJEU, C-6/64, ECR [1964] 1259 1268 60 "Costa/E.N.E.L.", cf. also judgment of 15 December 1993, C-292/92 marginal note 8; Streinz/Ehricke, TEU/TFEU, 2nd Edition, Article 267 marginal note 14; CJEU, judgment of 01/12/1998, C-410/96 marginal note 19; Koenig/Pechstein/Sander, EU-/EGProzessrecht, 2nd Edition, marginal note 767
[342] CJEU, judgment of 15/12/1993, C-292/92 marginal note 8; Streinz/Ehricke, TEU/TFEU, 2nd Edition, Article 267 marginal note 14.

on general or hypothetical questions,[343] with a few exceptions to this general rule[344]: the ruling is meant to legally assist, clarify, guide and facilitate the national court on its *specific* decision making. However, **when questions of EU law arise before the courts of different Member States, the function of the preliminary reference procedure is to ensure a uniform interpretation and validity of EU law across all the Member States**.

The significance of the preliminary ruling procedure responds to the increased need for judicial control of **compliance** with Union law, which goes hand in hand with the extension of the geographical applicability due to the ascension of new Member States, the incremental transfer of national legislative powers to the Union, and the ongoing legal harmonisation and increasing regulatory density. Indeed, as the EU Court has stated in several cases, the Treaty has created for these reasons a **complete system of remedies.**[345] Preliminary ruling procedure is also important as a mechanism **widely used in development of the EU law.**[346] The most remarkable concepts of EU law, such as supremacy of community law[347] and direct effect,[348] had been determined in preliminary rulings and play since then a pivotal role in the European integration**.**

The legal effects preliminary references are able to produce, these are generally binding from the moment of their publication for the country that issued the request[349] and, in principle, *ex tunc* (with retroactive force),[350] unless the Court explicitly provides otherwise. In exceptional cases the CJEU may limit the effect of a preliminary reference in time, for example because legal certainty requires so or the practical implications of ex tunc application would be severe.[351] CJEU case-law[352] and legal scholars generally agree that the court that submitted the reference is bound by the CJEU's answer (*inter partes* effects). This extends also to other courts deciding the same case (in the same proceedings), whether in higher or lower instance.

Preliminary rulings are however binding **on all other national courts** to the extent that they provide the authoritative interpretation of EU law[353] and in that perspective they acquire an ***erga omnes* binding effect**, and **function as legal precedents**. However, the debate on the

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[343] CJEU, judgment of 15/12/1995, C-415/93 marginal note 60

[344] In reference to some legal dispute, Judge R raises the question to the CJEU whether he is independent within the meaning of Union law despite his statutory liability pursuant to national law. In these exceptions, the CJEU will declare that it has no jurisdiction and will reject the reference for preliminary ruling as inadmissible. CJEU, judgments of 15/12/1995, C-415/93 marginal note 61; of 16/01/1997 - C-134/95 marginal note 12 and of 09/10/1997 - C-291/96 marginal note 12; cf. also Karpenstein in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 60. EL 2016, Article 267 TFEU marginal note 26 with further reference

[345] Case 294/83 Parti écologiste' Les Verts' v Parliament [1986] ECR 1339; Case C-50/00 P Unión de Pequeños Agricultores v Council (UPA) [2002] ECR I-6677; Case C-263/02 P Commission v Jégo-Quéré & Cie SA [2004] ECR I-3425

[346] Craig, P., De Búrca, G. EU Law. Text, cases, and materials. 3rd ed. New York, Oxford University Press, 2003. P. 433

[347] Case 6/64. Costa/ENEL (1964)

[348] Case 26/62 Van Gend en Loos (1963)

[349] Case 52/76 Benedetti (1977)

[350] J. Komarek, 2005. 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal System', 42 CMLRev9

[351] In Defrenne, for example, the CJEU limited the effects of its ruling on equal pay between men and women based on (now) Article 157(1) TFEU, as full retroactive effect would require governments and companies to compensate lower wages going back for more than a decade. 43/75 Defrenne v SABENA (Defrenne II), (1976), 56. Also see Case C-262/88 Barber (1990), 209.

[352] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61985CO0069

[353] Article 4(3) TEU. See also Joined Cases 28–30/62 Da Costa ECLI:EU:C:1963:6

efficacy and grade of binding effect of the CJEU preliminary rules is not completed.[354] Opinion is mostly divided on the question of *erga omnes* effects of a judgment interpreting EU law.[355] CJEU rulings in preliminary references are declaratory in nature as they explain the correct interpretation of existing EU law, and they do bind Member States, and not only the Member State from which the preliminary reference came but all Member States, as they are given general validity and binding force throughout the EU.[356] The legal force of a judgment given under Article 267 TFEU, from the perspective of the Member State's duty to implement it, is no different from the force of a judgment given under Article 258 TFEU, therefore, the effectiveness of the preliminary reference procedure is comparable to that of infringement proceedings or other mechanisms producing legally binding effects. However, even if, in a preliminary ruling, the CJEU may only rule on the validity of EU law or provide the correct interpretation of a rule of EU law, there is a remaining margin of discretion to the national court to apply the interpretation given by the CJEU to the case at hand.

What the CJEU can do, however, is to provide an interpretation of EU law that is so specific and so closely linked to the facts of the case, that it *de facto* determines the decision the national court should take.[357]

Preliminary references are normally to be considered **slow-developing procedures**. In order to ensure that cases can be dealt more expeditiously if required, Article 23a of the Statute of the Court of Justice of the European Union[358] establishes the *expedited or accelerated procedure* and, for references for a preliminary ruling relating to the area of freedom, security and justice, *an urgent procedure.* Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.[359]

Preliminary references on the "rule of law" and connection to art. 2 TEU challenges.

Even if the admissibility criteria of preliminary references restrict the use of this mechanism as a tool to enforce EU values, the values enshrined in Article 2 TEU have been the object of preliminary references in various cases. The preliminary reference procedure can be used to address EU values deficiencies that are not necessarily 'systemic' (as required by Article 7

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[354] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61980CJ0066; C.H. Beck, 2015. European Union Treaties. A Commentary, p. 901

[355] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62000CJ0453. Some firmly declare that the CJEU decision 'does not have erga omnes effects and CJEU cases are non-binding guidelines for other courts on how to interpret EU law; others claim that EU law does know a doctrine of binding precedent, introduced already either in Da Costa or in Kühne & Heitz (C-453/00). CJEU's interpretation of EU law, 'although not binding directly, enjoys, due to its "leading function in the application of Community law" … a "de facto law-making power". Wägenbaur, B., 2013. Court of Justice of the European Union: Commentary on Statute and Rules of Procedure.

[356] T. Tridimas, 2011. 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction', IJCL, Vol. 9, p. 739 M. Broberg, 2017. 'Preliminary References as a Means for Enforcing EU Law' in Jakab, Kochenov (eds.), The Enforcement of EU Law and Values: Ensuring Member States' Compliance, Oxford University Press, p. 107

[357] Case C-180/04 Vasallo (2006), 518. In other cases, the CJEU may only provide a more general interpretation of EU law, and thereby leave a broad discretion to the national court, for example to determine the proportionality of a measure

[358] https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf

[359] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/tra-doc-en-div-c-0000-2019-201906086-05_00.pdf

TEU), but can arise in individual, sometimes even isolated cases.[360] The most prominent example of Rule of Law crises[361] was the Hungarian government's attempt to undermine the independence of the judiciary through the implementation of a mandatory early-retirement policy in 2011.[362] Subsequently, there have been several equally alarming examples, most notably the Polish Government's introduction of legislative acts to abolish the independence of the Polish Supreme Court.[363]https://harvardhrj.com/2019/11/enforcing-the-rule-of-law-in-the-european-union-quo-vadis-eu/ - _ftn8 Other cases regarded the European Arrest Warrant,[364] connecting it to the emerging jurisprudence on independence of courts and, in some cases, administrative actors with the potential to unravel the EU's system of integrated administration because, as a matter of law and not simply practice, Member State actors can refuse to cooperate with their counterparts in other Member States if there are reasons to suspect their rule-of-law bona fides. The most prominent illustration of this point comes the recent preliminary reference in which the Irish court maintained that it did not have a duty to execute a European arrest warrant originating in Poland and return the suspect to Poland to face trial[365]. The most evident cases related to art. 2 are those regarding the Independence of national courts for ensuring effective judicial protection,[366] cases regarding the effective judicial review[367], and cases regarding the mutual trust,[368] with the independence of the prosecution with regard to the executive for the capacity to fight crime and corruption.

Some of recent examples of preliminary references regarding aspects related to Art. 2 of the TEU

Date of judgment, case number(s), case name	**Type of procedure**	**Norms of EU law interpreted/violated**	**Topic**	**Article 2 TEU founding EU value referred to**	**Interim measures and/or expedited or urgent procedure**

[360] The Jawo case illustrates the cross-border aspect of the preliminary ruling mechanism as an instrument for upholding Article 2 TEU values: national courts, whenever facing a cross-border situation involving the duty to deport or extradite a person to another EU Member State may enquire about the state of EU values, such as human rights or the rule of law, in that specific Member State. The German-Italian case of Jawo is not isolated, mention can be made of the GermanRomanian case of Dorobantu, where a German court, requested to surrender Mr Dorobantu to Romania, had doubts about the compatibility of prison conditions in the latter Member State with the Charter of Fundamental Rights, or the well-known Celmer case concerning an Irish court's doubts as to whether a Polish citizen would be judged by an independent and impartial tribunal, which is a prerequisite for a fair trial, if surrendered to Poland in the context of the Commission's investigation into the alleged rule of law deficiencies in that country

[361] Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, European Parliament Press Conference: A new Rule of Law initiative (Mar. 11, 2014), speech on September 4, 2013

[362] http://hungarianspectrum.org/2015/07/18/chief-justice-lenkovics-on-the-fideszconstitutional-court-part-i/

[363] Grezgkorz Ekiert, 2017. How To Deal With Poland And Hungary, 13 Social Europe Occasional Paper 7

[364] Judgment of 27 May 2019, OG and PI, Joined C-508/18 and C-82/19 PPU, (2019) 56

[365] Case C-216/18 PPU, Minister for Justice and Equality v. LM, (2018)586

[366] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0824&qid=1618663541126

[367] Judgement of 28 March 2017, Rosneft C-72/15, (2017) 236, paragraph 73; Judgement of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, (2018) 117, paragraph 36; Judgement of 25 July 2018, LM, C-216/18, (2018) 586, paragraph 51; Judgement of 24 June 2019, Commission v Poland, C-619/18, (2019) 531, paragraph 46; Judgement of 19 November 2019, A.K., C-585/18, C624/18, and C-625/18, (2019) 982 paragraph 120

[368] Judgement of 25 July 2018, LM, C-216/18 (2018) 586, paragraph 49. Even matters of less consequence for liberal rights can be affected by a lack of trust in the independence and integrity of the cooperating authorities. For instance, short-term visas and long-term residence permits give foreign nationals the right to travel anywhere within the Schengen Area

2019.12.19; Case C-502/19 *Oriol Junqueras Vies*	Preliminary reference (Spain)	Art. 10(1) TEU	Immunities enjoyed by MEPs (EU elections)	Democracy	No/2019.7.19
2019.11.19; C-585/18, C-624/18, C-625/18 *A.K.* v *Krajowa Rada Sądownictwa*	Preliminary reference (Poland)	Art. 47 CFR, Art. 19 (1) TEU; Art. 9(1) Dir. 2000/78	Lowering of the retirement age of Supreme Court judges; independence and impartiality of the Disciplinary Chamber of the Supreme Court	Rule of law	No/2018.11.26
2019.10.15, C-128/18 *Dorobantu*	Preliminary reference (Germany)	Art. 4 of the CFR; Art. 1(3) FD 2002/584/JHA	Detention conditions in the issuing MS of a European Arrest Warrant (Hungary) that may be contrary to the prohibition of inhuman and degrading treatment and grounds for non-execution.	Fundamental rights	No/no
2019.3.19 C-297/17,C-318/17, C-319/17 and C-438/17 Bashar Ibrahim v Germany	Preliminary reference (Germany)	Art. 4 CFR, Art. 33(2)(a) and 52 of Directive 2013/32	Inadmissibility of an asylum claim in a MS because of the prior granting of subsidiary protection in another MS (Bulgaria and Poland) and systemic flaws in the asylum procedure and living conditions of those granted subsidiary protection in that other MS that may violate the right to human dignity and the prohibition of inhuman and degrading treatment	Fundamental rights	No/2017.7.14
2019.3.19 C-163/17 Abubacarr Jawo v Germany	Preliminary reference (Germany)	Art. 4 CFR; Arts. 27(1) and 29(2) of Regulation (EU) No 604/2013	Obligation to transfer an applicant for international protection to the MS responsible for processing his application under the Dublin III Regulation (Italy) and living conditions of beneficiaries of international protection in that MS that may violate the right to human dignity and prohibition of inhuman and degrading treatment	Fundamental rights	No/Rejected on 2017.4.24
2019.01.17 C-310/16 Dzivev	Preliminary reference (Bulgaria)	Arts. 7, 47, 52 (1) CFR; Art. 325(1) TFEU; Art. 1(1)(b), Art. 2(1) PIF Convention	Exclusion of evidence obtained through an interception of telecommunications initiated on the basis of authorisations granted by a court lacking jurisdiction in a criminal	Rule of law, fundamental rights	No/no

			proceeding instigated for VAT offences (principle of legality, rights to private life and fair trial)		
2018.07.25, C-220/18 PPU ML	Preliminary reference (Germany)	Art. 4 CFR; Art. 1(3), Art. 5 and Art. 6(1) FD 2002/584/JHA	Detention conditions in the issuing MS of a European Arrest Warrant (Hungary) that may be contrary to the prohibition of inhuman or degrading treatment and grounds for non-execution.	Fundamental rights	No/2018.4.17
2018.07.25 C-216/18 PPU Artur Celmer	Preliminary reference (Ireland)	Art. 47 CFR; Art. 7 (1) TEU; Art. 1(3) FD 2002/584/JHA	Independence and impartiality of the judiciary in the issuing MS of a European Arrest Warrant (Poland) and grounds for non-execution	Rule of law	No/2018.4.12
2018.02.27 C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas	Preliminary reference (Portugal)	Art. 19(1) TEU	Reduction of remuneration in the national public administration, including the judiciary, as a consequence of budgetary austerity measures (Independence of the judiciary)	Rule of law	No/no

Associação Sindical dos Juízes Portugueses v Tribunal de Contas: The Portuguese Law No. 75/2014 temporarily reduced the remuneration of the personnel working in the public sector, including the judges of the Court of Auditors. The ASJP, an association of Portuguese magistrates, acting on behalf of the Court of Auditors' judges, brought an action for annulment against the implementing measures to the Supreme Administrative Court, which agreed that **the independence of judicial bodies depends on the guarantees that are attached to their members' status, include terms of remuneration**. Hence, in the Court's view, Portugal must ensure that its judges enjoy a sufficient level of independence required under Art. 19, para. 1, TEU (par. 39-40) and held that an independent court is one that exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint and without taking orders from anybody, enjoying protection against external interventions and pressures (par. 47). The referring court asked the CJEU whether the principle of judicial independence, as stated in Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights (hereafter "the Charter") as well as in the case-law of the Court, must be interpreted as precluding salary-reduction measures such as those applied to the judiciary in Portugal. The CJEU ruled that the principle of judicial independence does not preclude measures like the ones at issue, and, since the reduction of the salary was only temporary and broadly addressed to the employees of the public sector, this could not impair the independence of the judges of the Courts of Auditors.[369]

[369] C. Kilpatrick, 2017. The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality, Current Legal Problems, Vol. 70, No. 1, pp. 337–363.

Nonetheless, the reasoning adopted is particularly significant as it goes well beyond the practical conclusion.

There are two main points on which the CJEU relied on that we should pay attention to: the **jurisdiction of the Court to rule on the case** and the **strong reference to European values**. The rule of law backsliding in EU Members resulted in numerous preliminary references dealing mostly with judicial independence, while the CJEU grants legal protection to the common values of the Union. It was the revolutionary interpretation of art. 19 in ASJP case in which the CJEU found that every MS must ensure that the courts and tribunals withing the meaning of EU law enter the judicial system of the EU in the fields covered by that law, therefore meeting the requirements of "effective judicial protection" (see case LM (2018) C-216/18). From this case and on, art. 19, para. 1, TEU, in the Court's words, "gives concrete expression to the value of the rule of law stated in Article 2 TEU", while the very existence of effective judicial review by independent courts designed to ensure compliance with EU law is of the essence of the rule of law.[370] For this reason, Art. 19, para. 1, TEU imposes on the Member States obligations regarding the organisation of their judicial systems, even though it leaves them considerable discretion in the choice of concrete institutional and procedural arrangements. Importantly, the principle of national authorities' "procedural autonomy" – which is oftentimes understood as a national prerogative or an expression of national sovereignty[371] – in the ASJP judgment is rather a set of obligations regarding access to justice, fair procedures and judicial independence.[372] Art. 47 of the Charter is ill-suited to remedy systemic violations of the rule of law,[373] which permeate the entire national judicial system, and not only concern selected remedies and procedures. Meanwhile, Art. 19, para. 1, TEU relieves the EU institutions from the formal restraints of Art. 51 of the Charter, it can serve as an autonomous basis for actions for infringement by the Commission. Arguably, also a national court could invoke Art. 19, para. 1, TEU to ask the Court of Justice about the independence of another State's courts, while hearing the case regarding the mutual recognition of judicial decisions.[374]

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[370] R. Barents, 2016. EU Remedies and Procedures before the EU Courts, Alphen aan den Rijn: Wolters Kluwer International, p. 116; D. Anagnostou (ed.), 2014. Rights and Courts in Pursuit of Social Change. Legal Mobilisation in the Multi-Level European System, Oxford University Press, p. 117; D. Kochenov, L. Pech, Better Late than Never?, Ibid., pp. 1062-1074, p.1065.

[371] C. N. Kakouris, 1997. Do the Member States Possess Judicial Procedural "Autonomy"?, Common Market Law Review, pp. 1389-1412; M. Bobek,2012. Why There is No Principle of 'Procedural Autonomy' of the Member States, in B. de Witte, H.-W. Micklitz (eds), The European Court of Justice and the Autonomy of the Member States, Intersentia, pp. 305-323

[372] D.U. Galetta, 2010. Procedural Autonomy of EU Member States: Paradise Lost? A Study on the 'Functionalised Procedural Competence' of EU Member States, Springe; E. Cannizzaro, 2008. Sui rapporti fra sistemi processuali nazionali e diritto dell'Unione europea, Il Diritto dell'Unione europea, pp. 447-468; N. Półtorak, 2015. European Union Rights in National Courts, Wolters Kluwer; A. Wallerman, 2016. Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy, Common Market Law Review, pp. 339-360

[373] To enforce Art. 47 of the Charter within the action for infringement under Art. 258 TFEU, the Commission must indicate a precise provision of substantive EU law which cannot be effectively enforced at the national level due to the lack of independent courts or fair procedures. Alternatively, the EU institutions can wait for an individual to initiate litigation before a national court and to invoke rights under Art. 47 of the Charter. In both cases, the impact of the Court's judgment will be limited to this particular type of procedure before national courts within which the indicated provisions of substantive EU law are being enforced

[374] Judgment of the Irish High Court of 12 March 2018, Record No. 2013 EXT 295, 2014 EXT 8, 2017 EXT 291, The Minister for Justice and Equality v Artur Celmer, invoked Art. 6 of the European Convention of Human Rights and Art. 2 TEU, and not Art. 19, para. 1, TEU

The way the Court of Justice interpreted the scope of application of Art. 19, para. 1, TEU finds also support in the effective judicial protection through judicial review in the EU legal order, as a two-fold (subjective-objective) function.[375] **Not only does the Court protect the rights and freedoms of EU citizens but also what it has been traditionally called the "autonomy" of EU law.**[376] National litigants should systematically request from national courts that they refer questions to the CJEU to enable the rule of on whether the national measures at issue in each case can be considered to impair the independence of the members of the national courts.[377] Impairing the independence of their own courts, Member States automatically compromise the Court of Justice's ability to receive preliminary references. Undoubtedly, the ASJP judgment accentuates the potential of EU law to consolidate and defend the rule of law structures in EU Member States.[378] **The Court took advantage of this case to emphasise the potential of EU law to consolidate and defend the rule of law structures in the Member States.**[379]

Evaluation of the ASJP case

Efficiency: The case was solved in 2 years' time (generated with C-64/16 and solved in 2018), amounting to the "ordinary" time for the preliminary reference to be delivered. On the grounds of the impact it produced, since the Court did not find justifiable and legitimate the complaints of the applicants, the pleas of the Portuguese judges did not find solution through the preliminary reference interpretation, and this case cannot be considered as an emblematic "success-story" for the specific judges. It has, on the contrary, left open arguments for justifying in other cases (i.e. Polish and Hungarian judges) the application of salary reductions of judicial organs. However, the CJEU put in its centre not as much the issue of the temporary decrease of remuneration of the judges, considering it a reasonable transitory measure, but uplifted the issue of the judicial independence as a broader matter, offering a very important reference which produced an indirect impact on the backsliding of rule of law through the judicial independence threats, and thus strengthening the field of judgment for the CJEU, while interpreting art. 19 (1), the Court stretched the reach of EU law to an extreme, bringing virtually the entire national judicial organisation under its purview. Indeed, the decision suggests that Article 19(1) TEU, which states that 'the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', brings all legislation affecting those national judges who may be asked to apply EU law under the purview of the Court of Justice. Accordingly, the Member States must ensure those judges' judicial independence, a principle that is said to be inherent to Article 19 TEU. That provision thus

[375] As concerns the subjective function, it ensures the legal protection of rights and freedoms guaranteed to individuals by EU law, an aspect of the citizen's right to have her case settled objectively and impartially. As concerns the objective function, effective judicial protection enables the effective enforcement of EU provisions and their uniform interpretation in national legal orders

[376] Court of Justice, judgment of 28 March 2017, case C-72/15, Rosneft, paras 66-75.

[377] B. Grabowska-Moroz, D. Kochenov, C. Closa, 2020. Understanding the best practices in the area of the rule of law, Report RECONNECT H2020, p. 26

[378] https://www.europeanpapers.eu/en/europeanforum/associacao-sindical-dos-juizes-portugueses-court-of-justice-and-athena-dilemma#_ftn1

[379] D. Kochenov, 2017. The EU and the Rule of Law – Naïveté or a Grand Design?, Ibidem, pp. 419-455

serves two aims: it brings national judiciaries that may potentially act as European judges under the jurisdiction of the Court, and it sets the standard for review, i.e. it is the source of the principle of judicial independence.[380] In the part of the efficiency of the preliminary reference to enhance the EU rule of law, this ruling is then to be very successful.

Effectiveness: When the case is read under the lenses of the contribution offered in the field of the preliminary reference as a tool to combat in favour of the rule of law and against threats and violations, such as those guiding our research and posed by "populist drifts", then the actual effectiveness of the tool is revealed.[381] The preliminary reference interpretation did not only achieve to affirm the competence of the CJEU on these fields, but it also increased the prestige and effectiveness of the tool, can this case be appreciated as a high value contribution against populist drifts that attack the judicial independence. It offers a neat digest of the essential functions and features of what Article 2 TEU; it also offers one of the most innovative and welcome aspects of the Court's ruling in the conclusion drawn from a combined reading of Article 2 TEU, Article 4(3) TEU (principle of sincere cooperation) and Article 19(1) TEU (principle of effective judicial protection of individuals' rights), legally and factually expanding the role of the CJEU, the scope of the EU RoL framework and of the preliminary reference itself, as well as of the infringement procedures, to the essentiality of the protection of [a national] court or tribunal's independence.[382]

Transferability: The Court transformed what at first seemed to be an austerity case into a 'rule of law' one and Judicial independence as an obligation deriving from Article 19 TEU. The case, which has been called ground-breaking and the correction of design error in the EU,[383] opened the way to the significantly improved enforcement of the EU RoL within national judicial environments through an interpretation that creates a precedent for all Member States, and further allowed the extension of the scope and field of application of the "judicial control" upon threats or breaches of the principle judicial independence. The Court discovered a justiciable rule of law clause in Art. 19, para. 1, TEU, which enshrines the principle of effective judicial protection before national courts, and complemented with a reference to the principle of sincere cooperation in Article 4(3) TEU (par. 34): the organisation of the national judiciaries is not exclusively a matter for each of the Member States separately, but that Member States are under an obligation, contained in primary EU law and supervised by the Court of Justice, to ensure that their courts and judges are independent 'in the fields covered by EU law'. This provision makes the enforcement of rule of law standards *vis-à-vi* the Member States more straightforward as compared to the enforcement of Art. 47 of the Charter of Fundamental Rights of the EU. In the future, Art. 19, para. 1 TEU will be enforced by means of infringement proceedings under Art. 268 TFEU to counteract the undermining of judicial independence at the national level.[384] And it must have been in this perspective that the Court chose to rely the

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[380] https://www.cambridge.org/core/journals/european-constitutional-law-review/article/judicial-serendipity-how-portuguese-judges-came-to-the-rescue-of-the-polish-judiciary/AF6FCB0BD6A8B46183CD56826281DE42

[381] http://aei.pitt.edu/33155/1/vink._maarten.pdf

[382] https://journals.sagepub.com/doi/full/10.1177/1023263X19892185

[383] D. Kochenov, 2017. The EU and the Rule of Law – Naïveté or a Grand Design?, Ibidem, p. 425

[384] M. Taborowski, 2018. CJEU Opens the Door for the Commission to Reconsider Charges against Poland, Verfassungsblog; D. Sarmiento, 2018. On Constitutional Mode, in Despite Our Differences Blog, despiteourdifferencesblog.wordpress.com; M. Ovádek, 2018. Has the CJEU just Reconfigured the EU Constitutional Order?, Verfassungsblog.

response solely on Art. 19, para. 1, TEU, connecting the national obligation of ensuring effective judicial protection to the fields covered by EU law. Judicial independence may be *directly* relied upon to challenge national authorities which are seeking to fundamentally undermine the principle of separation of powers.[385] With this judgment it is established the Member States' obligation to guarantee the judicial independence of virtually the whole national judiciary irrespective of any specific link to EU law and applies 'irrespective' of whether the Member States are implementing Union law, within the meaning of Article 51 (1).[386]

The CJEU, however, missed the opportunity to specify whether the Charter was applicable to the case and to rule on the application of the Charter in the context of austerity measures and financial assistance conditionality, and in particular to enable judicial scrutiny of national austerity measures adopted in the context of the European Financial Stabilization Mechanism.[387]

"ASJP Case"	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency		Art. 267	
Effectiveness		Art. 267	
Transferability			Art. 267

The Hungarian Case C-564/19 (pending): A preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice,[388] which triggered later disciplinary threats against the referring judge of the case, Judge Vasvári,[389] was raising concerns regarding compliance with the principle of judicial independence under Article 19.1 of the Treaty of the European Union (TEU). In particular, the case regarded the appointment procedures for court presidents and remuneration for judges, as well as questions regarding the right to request interpretation in court.

More in detail, the preliminary request was raised in the "Criminal proceedings before the Pesti Központi Kerületi Bíróság (Central District Court, Pest) against IS, a Swedish national, for the offence of misuse of firearms and ammunition",[390] The criminal proceeding has been

[385] Krajewski, 2018. "Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's dilemma", European Papers/European Forum, https://www.europeanpapers.eu/en/europeanforum/associacao-sindical-dos-juizes-portugueses-court-of-justice-and-athena-dilemma

[386] Ibidem

[387] M. Markakis, P. Dermine, 2018. 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: Florescu', 55 Common Market Law Review, p. 643-672, 664-665.

[388] https://curia.europa.eu/juris/showPdf.jsf;jsessionid=27755EE3987792FED39DB274DA850CBC?text=&docid=220134&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1993330

[389] https://www.icj.org/hungary-disciplinary-action-against-judge-for-recourse-to-eu-court-must-cease/

[390] The pending criminal proceeding was generated on the charge against a Swedish national with the criminal offences on

suspended on request of the defendant's attorney, to ask the CJEU about the judicial independence of the proceeding Court.[391]

Three broad, and apparently not strictly related to the case, preliminary reference questions were submitted to the CJEU on (1) the interpretation of the right to a fair trial in relation, first, to the adequacy of language interpretation, in accordance with Directive 2010/64/EU, considering that there is no register of independent interpreters and translators in Hungary, as required by the Directive, and that no effective quality system for translators and interpreters is ensured; (2) whether the practice of the OBH – Országos Bírósági Hivatal (National Office of the Judiciary, 'OBH') who also happens to be a close ally of the government – of sidestepping the rules for applying for court leadership positions, disregarding the opinion of the judges, and filling positions through temporary mandates, was in line with the rule of law and judicial independence as guaranteed by the Lisbon Treaty (Article 19(1) TEU and Article 47 Charter of Fundamental Rights); and, (3) whether the fact that judges' salaries have not changed in the last 15 years, and since September 2018 they earn less than prosecutors of equivalent rank, while court presidents have the discretionary power to give bonuses, was in line with judicial independence.[392] Hungary's Supreme Court stepped in and ruled that the reference was illegal, essentially arguing that preliminary references are not the right *fora* to discuss such claims.[393]

The Hungarian Kúria agreed with the Prosecutor General without reservations and held that a suspension of a criminal case and a request for preliminary ruling is illegal, if the matter of the request is not the interpretation or validity of EU law but concerns questions irrelevant from the viewpoint of the outcome of the pending case, while the National Judicial Council emphasized that procedural acts must not be abused for the realization of institutional interests.[394] The Kúria stated that the judgment did not jeopardize the alienable right of Hungarian judges to turn to the CJEU in the form of preliminary references: while this may be true, nobody can deny the "chilling effect" of the judgment, which will most likely intimidate judges and prevent them from referring similar questions to the CJEU in the future.

The case is certainly more than what it seems to be: it is rather unusual for a judge to asks the Luxembourg court whether he – as a member of a captured judiciary – is independent enough to pass a judgment. Unusual as well is that the attorney of the defendant puts forward a request of suspension of the process knowing that eventual irregularities in relation to procedural guarantees and violations of judicial independence would only benefit his client. It seems more likely to admit **that both the attorney and the national judge were concerned about the dire state of human rights and the rule of law in Hungary *in general.***[395] Indeed, the domestic setting to file a claim before the Hungarian Constitutional Court seemed unfitting

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firearms, in particular for bringing weapons, lawfully held in his home country, but without the requisite permission to the territory of Hungary.

[391] https://index.hu/english/2019/07/17/hungary_judicial_independence_european_court_of_justice_suspended_case/

[392] https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/

[393] A büntetőeljárás menetének megakasztása a jogszerű és alapos érdemi döntés meghozatalának előmozdítása érdekében történhet | Kúria (kuria-birosag.hu)

[394]https://index.hu/english/2019/09/11/curia_european_court_of_justice_preliminary_ruling_judicial_independence_prosecutor_general_peter_polt/

[395] https://reconnect-europe.eu/blog/politics-newep-krum-2/#_ftn1

because this institution has been captured by the government and is not in the position to rule on a matter involving judicial independence or separation of powers.[396] A **preliminary ruling procedure as a tool to discuss systemic rule of law backsliding** involving disputes where the judges are themselves parties to the cases, **would mean challenging the rules applicable to them:**[397] this had recently happened before (see, the Portuguese case above), but other preliminary rulings on criminal judgments and their recognition by foreign courts were, in several aspects, different from the one at issue[398]. This preliminary reference had no grounds to stand without necessarily innovating profoundly the legal base of the tool itself.[399]

In the meanwhile, in January 2021, the public prosecutor submitted **an extraordinary appeal,** 'an appeal in the interests of the law', expressly because the reference for a preliminary ruling had been rendered unlawful by the Kúria, and that initiated a disciplinary proceeding against the referring Judge Vasvári. In light of the above circumstances two more questions were added to the preliminary request by the referring court: whether it was in line with EU law to declare a preliminary reference unlawful, and whether it was permissible to start disciplinary proceedings against a judge for filing preliminary references. The case was amplified by the governments of the Netherlands and Sweden, which joined in to express their concerns about the state of rule of law in Hungary.[400]

On 15 April 2021, the Advocate General Pikamäe stated that on the basis of the primacy of EU law, a national judge must disapply any national legislation or judicial practice which undermines its power to refer questions to the Court of Justice. He also recalls that the

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396 https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/; https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/11/Bocconi_HCC_Halmai.pdf; https://link.springer.com/chapter/10.1007/978-94-6265-273-6_31

397 Polish preliminary references tackling rule of law backsliding, https://curia.europa.eu/juris/document/document.jsf?text=&docid=215565&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=638147

398 The recent Joined Cases C-508/18 and C-82/19 PPU OG (Public Prosecutor's office of Lübeck) and PI (Public Prosecutor's office of Zwickau) where the CJEU held that German public prosecutor's offices do not amount to an 'issuing judicial authority' due to the fact that there was a risk of being influenced by the executive in their decision, seem to open a more promising path. The CJEU held that the sheer potentiality of such an influence bars German prosecutor from qualifying as "judicial authorities", and the suspects did not have to show how their individual rights would be jeopardized in the given case. The case is different from the Hungarian one and is less of a rule of law controversy. As the Venice Commission put it: "While the independence of judges and the judiciary in general have their origin in the fundamental right for persons to a fair trial […] the independence of prosecutors and the prosecution system does not have such a common standard." So, the German system of prosecutors was not criticized from a rule of law perspective, but for an implementation mistake: prosecutor's offices should not have been acknowledged as 'issuing judicial authorities' for the sake of the mutual recognition-based law in question, i.e. the European Arrest Warrant. Thus, reading the different cases in conjunction, we have an absurd outcome: defendants tried by a captured judiciary in a state systemically violating the rule of law would need to show how they will be individually affected, whereas in a democracy based on the rule of law, the sheer potentiality of a pressure by the executive on prosecutors is sufficient to determine a violation of EU law, without any need to demonstrate individual concern. In order to make the case-law coherent and fundamental rights- and rule of law friendly, the CJEU's approach in OG and PI would need to be extended to cases where the judiciary on paper is free from pressures by the executive, but conclusive evidence shows the opposite. However, we are not yet there, and the Aranyosi and LM jurisprudence applies to the Hungarian case in question, meaning that the defendant will have to show how his/her right to an effective judicial remedy in a case which involves an ordinary crime and which has no political undertones whatsoever would be jeopardized by attacks against judicial independence.http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=14619759; https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-216/18%20PPU

399 https://verfassungsblog.de/luxemburg-as-the-last-resort/

400 https://www.politico.eu/article/miklos-feher-hungary-feels-the-heat-eu-court-hearing/

admissibility of a question referred for a preliminary ruling implies that the decision sought from the Court of Justice must be *necessary* to enable the referring court to give judgment in the case before it. He takes the view, first of all, that the questions relating to the direct appointment by the President of the NOJ of temporary senior judges and to judges' pay are **irrelevant** to the outcome of the criminal proceedings at issue and are therefore inadmissible. At the same time, however, **the contested decision of the Kúria, and the national legislation underlying it, undermine the power of the national court to refer questions to the Court for a preliminary ruling and therefore undermine the operation of the preliminary ruling mechanism.**[401] AG Pikamäe underlined the importance of a free dialogue between independent national courts for EU law. But the opinion also shows that the preliminary ruling mechanism cannot remedy the Commission's inaction to address systemic problems through its rule of law tools (art. 7, infringement procedures).

Hungarian legislation enabling the public prosecutor to bring an action before the Supreme Court (Kúria) for a declaration of unlawfulness of an order for reference made by a lower criminal court and the decision of the Supreme Court establishing that unlawfulness, which undermine that power, are incompatible with EU law

Evaluation of the Hungarian case (pending, based on the AG Opinion).

Efficiency: In this case, the expected efficiency of the CJEU may be of high importance especially if the questions are dealt according to the Opinion of the AG. What is evident is that the reactions from the judicial authorities in Hungary on the request itself of a preliminary reference have had the immediate and direct effect of deteriorating and worsening the judicial independence, which actually confirms the reasons for which the preliminary reference itself has been asked, raising concerns about the irresistible populist-illiberal turn the Hungarian judicial system is subjected to.[402] The AG Opinion offers a valuable interpretation as a direct and clear message to the Hungarian government, but it is unfortunately non-binding. In case the final judgment of the CJEU follows these arguments in finding that the Hungarian legislation in question – allowing the public prosecutor to bring an action before the Kúria to declare a lower criminal court's order for reference to the Court of Justice unlawful – is incompatible with EU law, the case produce serious consequences for Hungary, given that the European Commission considers any restriction on the wide discretion of a national court to seek a preliminary ruling from the Court of Justice a violation of the independence of the judiciary and the right to a fair trial, which are among the possible grounds for bringing proceedings against Member States under the new EU rule of law mechanism.

Effectiveness: We can hardly evaluate any direct effect of the preliminary request since there was left no grounds to address *specifically* the judicial independence in question. *Indirectly*, however, the Opinion stresses that 1. free dialogue between independent national courts and the CJEU is actually compromised or at least not fully guaranteed; 2. the questions may be

[401] https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/cp210060en.pdf

[402] https://birosag.hu/sites/default/files/users/2018.%20j%C3%BAlius_Crisis%20in%20the%20Hungarian%20Judicial%20Administration%2012.07.2018%20vadaszv.pdf

irrelevant and thus inadmissible, but the CJEU insists to retain the right to determine this, thus attributes to the CJEU a "judicial primacy" among the "European judges" of all levels; 3. that – in line with the principle of the primacy of EU law –, Judge Vasvári must set aside the illegality decision and disapply the national legislation, which led the Kúria to hold that his reference was unlawful; 4. on the previously raised questions of the preliminary reference, found irrelevant, we can appreciate the impartiality guaranteed with the self-limitation of the CJEU on the expansive application of this tool in order to maintain a balanced distance and credibility.

Transferability: The persistent weakness of the preliminary reference to reach all domestic channels of rule of law backsliding makes this preliminary reference revealing that "all other means to effectively challenge the rule of law backsliding in Hungary have failed".[403] The Opinion is clear about the need to guarantee the free and undisturbed access of **all** national judges to the CJEU preliminary reference tool: national legislation or judicial practice precluding judges from referring questions to the Court of Justice is incompatible with EU law.[404]

"Case"	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency			Art. 267
Effectiveness		Art. 267	
Transferability			Art. 267

The cases of Poland

During the Rule of Law crisis in Poland, more than one preliminary ruling could be relevant. In this report we have chosen to focus on two cases; one with a Polish national case and one with a national case from another member state (Ireland) to show the impact of preliminary rulings on the "same" Rule of Law "problem" from different angles.

Minister of Justice and Equality v. LM – C-216/18

The national case originated from the Hight Court of Ireland. The court decided on March 23rd 2018 to ask the ECJ questions regarding the European Arrest Warrant, as the national case was a question of possible extradition of a Polish citizen.

According to the rules of the European Arrest Warrants, such a warrant can be suspended when the member state issuing the warrant is in conflict with the values of article 2 TEU and a systemic threat according to article 7 (2) TEU has been identified.[405] When the national case came before the High Court, the proposal for decision regarding article 7 (2) about a threat to the Rule of Law in Poland had been issued by the Commission to the Council. The questions in the preliminary case were:

[403] https://verfassungsblog.de/luxemburg-as-the-last-resort/
[404] https://publicgoods.eu/advocate-general-national-legislation-or-judicial-practice-precluding-judges-referring-questions
[405] European Arrest Warrant art. 1 (3)

1) if the rules on the European Arrest Warrant requires a specific assessment on the status of the Rule of Law when information such as those in the proposed decision was present? And

2) if yes, what were the conditions of such an assessment?[406]

The CJEU stated that due to the principle of mutual recognition in EU law a member state should as a rule always extradite on the basis of an European Arrest Warrant unless special circumstances are present such as a risk of breach of the arrested' s rights.[407] As there was not identified a threat according to article 7 (2) TEU, the Irish court had an obligation to assess the status of the Rule of Law and the arrested' s access to a fair trial in independent courts on the basis of *"objective, reliable, specific and properly updated"* information.[408] If assessment should be specific to the arrested in the specific national case and could be performed by asking for contribution from the Polish courts.[409]

After asking Polish courts, the High Court decided to extradite the Polish citizen to Poland.[410] The court did not take into account that Polish politicians had spoken on the case in public, and as the Polish courts had stated this was to be considered normal. Because hereof, the High Court believed, that the right to a fair trial would not be compromised in the specific case in Poland, even though the worries from the proposal for decision regarding article 7 (1) were still present.[411]

The case was recently considered under the doctrine of the "Triangular Solange", where three actors (EU, Poland, Ireland) operate in triangle composition. Spieker argued that such a system allows for "an indirect harmonisation of autonomous MS policies" [412] and creates indirect pressure in a MS which does not comply with essential EU standards, therefore making the art. 2 TEU operational through interpretation of parts of the art. 47 of the Charter. In that way, the EU Commission is prevented by getting involved, and the national actors are empowered to lead through effective intra-state cooperation. It is emblematic the fact that after the LM ruling numerous references were submitted by the Polish Supreme Court and by common courts, asking whether the interpretation of the EU Art. 19 and of secondary law (directive 2000/78) is coherent and fitting the new Polish legislation on the Supreme Court and the National Council for the Judiciary.[413]

A.K. – C-585/18

This case originated in two national cases from Poland's Supreme Court. Both cases regarded the early retirement of judges at the Supreme Court following the judicial reforms by the Polish government. Two judges were automatically retired after turning 65. One judge had applied

[406] C-216/18, par. 33-34
[407] Ibid., par 38-48
[408] Ibid., par. 60-61
[409] Ibid., par. 76
[410] National case number, 2018 IEHC 639
[411] C-216/18, par. 98-123
[412] L. D. Spieker, 2019. Breathing life into the Union's Common Values: on the judicial application of Article 2 TEU in the EU value crisis, 20 (8) German Law Journal, 1194
[413] https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/

for elongation of his time in office, which had been denied.[414] The two chambers for the Supreme Court asked the ECJ four preliminary questions.

The ECJ ended up rephrasing and answering two:

1) if the new disciplinary chamber of the Supreme Court of Poland (which decided on cases regarding elongation of offices) was an independent court according to art. 47 EUC, art. 2 and 19 (1) TEU and art. 267 TFEU? And

2) if no, should the asking chambers of the Supreme Court disregard the competence of the disciplinary chamber and decide on the cases themselves?[415]

The ECJ did not specifically answer the first question but gave their interpretation of an independent court and emphasized the national court's duty to make the assessment itself – but according to EU law.[416] Regarding the second question, the ECJ stressed the importance of the precedence of EU law and answered, that if the Supreme Court should, by its own initiative, set aside the competences of the disciplinary chamber, to ensure the full and effective effect of EU law.[417]

In both national cases the courts found that the disciplinary chamber was not an independent court in light of EU law, because of the recent changes in the composition of judges in the National Council of the Judiciary, which had appointed judges to the disciplinary chamber. As the council was not independent, the disciplinary chamber wasn't either. The Polish government has not changed the rules of the composition of either the National Council of the Judiciary nor the disciplinary chamber. The chamber is therefore still in function, even though the Supreme Court found in December 2018 that it is not an independent court. [418]

Evaluation of the Polish cases

Efficiency: The preliminary rulings have a fair amount of capacity to solve the possible threats towards the Rule of Law, as they examine how the ECJ sees the situation and give the ECJ an opportunity to suggest a possible solution in accordance with EU law. The efficiency is quite specific in the national cases, as the national court usually – and in the Polish cases – conclude in accordance with the ruling of the ECJ.

Effectiveness: On a theoretical level the rulings should also be capable to restore the issues, as the rulings are binding EU law. This entails that the governments of the member states make changes to the law according to the ECJ ruling and/or the national case. As the Polish government has not changed the rules of the disciplinary chamber in connection to the A.K.-case, this has not happened in praxis. The effectiveness on a practical level has therefore proven to be poor in these cases.

Transferability: As preliminary rulings act as a part for the foundation of interpretation of EU

[414] C-585/18, par. 38 and 40-47
[415] Ibid., par. 72
[416] Ibid., par. 153-154
[417] Ibid., par. 156-166
[418] Tornøe, Wegener, Ibidem, p. 55

law, their transferability is high. Several cases were brought before the national courts and some to the CJEU too regarding the European Arrest Warrant and extradition to Poland. These cases referred to the Irish case.[419] Furthermore, the definition of independent courts in A.K. has been referenced in other cases regarding the independence of the courts in Poland and the definition hereof according to EU law[420].

Polish cases	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency		Art. 267	
Effectiveness	Art. 267		
Transferability			Art. 267

Overall evaluation of preliminary reference's cases

Art. 267 Preliminary reference	POOR	FAIR – GOOD	VERY GOOD – BEST
Efficiency		ASJP case The Polish cases	The Hungarian case
Effectiveness	The Polish cases	ASJP case The Hungarian case	
Transferability			ASJP case The Hungarian case The Polish cases

The preliminary references as a tool to respond to judiciary threats/violations seems to work rather well: in most of the cases the use of the preliminary reference is a fairly-good or even "best" way to address efficiently and effectively populist challenges risen, generating a certain degree of consistency and confidence that when issues are referred through art. 267 the restoration of the rule of law can (most probably) be ensured.

A last consideration is worth mentioning, from an EU legal-constitutional integration process point of view. Even if the CJEU maintains that preliminary references are **based on judicial cooperation** between national courts and the CJEU, it seems, though, that in reality the CJEU owns the control of this cooperation and sets its conditions and terms. The relationship was originally horizontal and bilateral, but CJEU has used Art. 267 to develop a more hierarchical, multi-lateral relationship. CJEU is "superior" to national courts and the CJEU's decisions are increasingly held to be binding on all national courts of all MS, not just the one which made the reference. Furthermore, if the CJEU decides that an act of the EU institutions is illegal, no national court may change that act in legal.[421] Within this picture, the preliminary rulings that

[419] Ibidem, p. 50
[420] C-791/19 R
[421] See for exception: https://binghamcentre.biicl.org/comments/93/squaring-the-pspp-circle-how-a-declaration-of-incompatibility-can-reconcile-the-supremacy-of-eu-law-with-respect-for-national-constitutional-

we have examined show a levelling tendency between the two judicial levels, occurring through the recurrent use of the preliminary references mechanism, that is further developing with the CJEU's invitations to the national courts to act as "European instances" positioned in the broader multilevel, thus rather integrated, European judicial system.

Tool N.4. Articles 258-260 TFEU. Infringement Procedures

According to Articles 258-259 TFEU, a Member State that has failed to fulfil a legal obligation according to the EU law, risks that **the Commission**, under its own initiative and investigation, **or/and other Member States initiate an infringement** procedure against it:[422] "*If the EU country concerned fails to communicate measures that fully transpose the provisions of directives, or doesn't rectify the suspected violation of EU law, the Commission may launch a formal infringement procedure*".[423]

Infringement procedures exist since the dawn of the European Communities and were visibly strengthened with the possible imposition of financial sanctions by the ECJ under Article 260 TFEU since the Maastricht Treaty.[424] These procedures do not aim to prevent violations of EU law as they can only intervene once a violation has taken place (**ex post**). However, any infringement of an EU law provision (primary or secondary law) allows the Commission to initiate the procedure, no matter whether it is caused by action or inaction of a Member State[425], or for the reasons eventually justifying the Member States' action/inaction, no matter whether there is a mere technical error, guilt or legal responsibility of the concerned Member State or whether the infringement is relatively irrelevant or else limited in its scope.[426] A Member State will respond for actions or inactions contradicting EU law no matter if the author of the infringement is the executive[427] the legislature[428] the judiciary − including High or Supreme Courts[429] − or an autonomous body[430] and regardless of whether the authority that committed the alleged breach belongs to the central government, or regional or local entities in decentralised states[431] or private entities when their actions can be imputed to the Member State.[432] The scope of the infringement procedures extends to national legal act or for not

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[422] D. Kochenov, '2015. Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', NYU School of Law JMWP, Vol. 11, p. 5

[423] https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

[424] "According to the EU treaties, the Commission may take legal action – an infringement procedure – against an EU country that fails to implement EU law. The Commission may refer the issue to the Court of Justice, which in certain cases, can impose financial penalties": https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

[425] https://www.cambridge.org/core/journals/european-constitutional-law-review/article/abs/dialogue-of-unequals-the-european-court-of-justice-reasserts-national-courts-obligations-under-article-2673-tfeu/ACFA0D36C517F8EAB6FABB617961F7A1

[426] L. Prete, 2017. Infringement proceedings in EU law, Wolters Kluwer, Ch. 2

[427] ECJ judgment of 2 April 2020, Commission v Hungary, Poland and Czech Republic, C-718/17, C-715/17 and C-719/17

[428] ECJ judgment of 5 May 1970, Commission v Belgium, Case 77/69, para. 15

[429] ECJ judgments of October 2018, Commission v France, C-416/17 (Conseil d'Etat); of 12 November 2009, Commission v Spain, C-154/08 (Supreme Court)

[430] ECJ judgment of 26 June 2001, Commission v Italy, C-212/99 (public universities)

[431] ECJ judgments of 25 February 2016, Commission v Spain, C-454/14; of 19 December 2012, Commission v Italy, Case C-68/11

[432] ECJ judgment of 24 November 1992, Commission v Ireland, C-249/81, esp. paras. 10-15

repealing a legal act that contradicts EU law,[433] but also at the implementation stage and consistent administrative practices.

The CJEU has already decided several infringement procedures against Member States making an express reference to Article 2 TEU, together with some other Treaties or secondary EU law provisions.[434] In this perspective, according to the CJEU Article 19(1) TEU gives *'concrete expression to the value of the rule of law stated in Article 2 TEU'*, as it imposes on Member States the obligation to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" and the rule of law requires the existence of effective judicial review. For the CJEU, the independent and impartiality of the judiciary is an essential element of the right to fair trial and is key to guarantee effective judicial protection in the fields covered by EU law. Infringement procedures can and have been used by the Commission and the CJEU to enforce Article 2 TEU values, though sometimes in the absence of express reference to that provision.

Infringement procedures can be described as a multi-stage enforcement tool, in which the Commission assumes a major role in the **informal stage**, as well as in **the first, pre-judicial administrative stage**. During **the second, judicial stage**, it is mainly the CJEU which determines whether the Member State has failed to fulfil its obligations under the Treaties.

The administrative stage and, before that, the exchange of **informal communications** between the Commission and the concerned Member State, provide space for dialogue and interaction between national authorities and the Commission, with the aim of discussing and finding a way to address the infringement before the action is filed.[435]

If voluntary compliance is not achieved informally, the Commission may decide to launch the administrative phase of the procedure by sending a **letter** of formal notice to the Member State concerned. If the Commission considers the Member State's reply to be unsatisfactory, it may then issue a **reasoned opinion**. The latter frames the subject matter of a possible judicial action before the CJEU. However, before the case reaches the judicial stage, the Member State is again allowed to reply and comply with the Commission's suggestions within the deadline set in the reasoned opinion. If the country still doesn't comply, the Commission may decide to refer the matter to the **Court of Justice**. If an EU MS fails to communicate measures that implement the necessary provisions in time, the Commission may ask the CJEU to intervene with a judgment. Most cases are settled before being referred to the CJEU. If, despite the court's judgment, the country still doesn't rectify the situation, the Commission may refer the country back to the court. When referring an EU country to the court for the second time, the Commission proposes that the court impose financial penalties, which can be either a lump sum and/or a daily payment.

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[433] ECJ judgment of 18 June 2020, Commission v Hungary, C-78/18; ECJ judgment of 21 January 2016, Commission v Cyprus, C-515/14

[434] Following its line of reasoning in the Associação Sindical dos Juízes Portugueses case, the CJEU has already decided two infringement actions against Poland (case concerning the lowering of the retirement age of the Supreme Court judges (C-619/18) and to the establishment of differentiated pension ages for male and female ordinary judges (C-192/18)) making a clear link between the second subparagraph of Article 19(1) TEU and Article 2 TEU

[435] M. Smith, 2015. 'The Evolution of Infringement and Sanction Procedures: Of Pilots, Diversions, Collisions, and Circling', in D. Chalmers, A. Arnull (eds.), The Oxford Handbook of European Union Law, OUP, pp. 350-375

The Commission is not legally obliged to initiate (ex officio) an infringement procedure, nor to continue it to its final stages, thus enjoying a great deal of **discretion** in the management of infringement procedures, and a wide margin of manoeuvre to determine the deadlines to be respected by national authorities for replying to the letter of formal notice and the reasoned opinion for putting an end to the breach of EU law. The Commission also decides the moment to send the letter of formal notice and the reasoned opinion to the Member State, as well as when to refer the case to the Court, being able to speed up or slow down the procedure as it sees fit.[436] As an ulterior sign of the Commission's ample discretion, some actions can be withdrawn by the Commission itself during the judicial stage.[437] The same discretion applies to the delimitation of the matter of a possible infringement procedure: the Commission can strategically decide the type of infringements to which it will dedicate more time and resources and how it will try to frame the case legally (Case C-531/06, paras. 23-24). In this vein, in 2017 the Commission expressed its intention to make a more strategic use of infringement procedures, **prioritising the cases 'that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework'.**[438]

_bookmark334The **CJEU has tried to put some limits on the Commission's discretion** that may restrict too much the pre-litigation stage, stating that an action brought under Article 258 TFEU can be declared inadmissible if the unreasonable duration of the administrative stage made it more difficult for the Member State to refute the Commission's arguments, thus infringing the state's rights of defence. The Commission pointed out that "statistics confirm that Member States make serious efforts to settle their infringements before the ECJ hands down its ruling".[439] _bookmark339 The Commission's demands may lead however to refer the case to the CJEU under Article 258 TFEU,[440] with a binding Court's decision, and further warning with possible financial sanctions for not implementing a judgment of the Court (Article 260 TFEU), in case a second judicial procedure takes place later on (Article 260(2) TFEU).[441] Only after all those steps, indeed, is the Commission allowed to refer the issue back to the Court, specifying the penalty it considers appropriate.[442] Indeed, the penalty imposed by the Court can potentially consist in economically high amounts, therefore acting as an effective deterrent for non-compliant Member States, and Member States tend to comply with EU

[436] ECJ judgment 19 May 2009, Commission v Italy, Case C-531/06, par. 23-24

[437] The Commission withdrew 9 cases from the ECJ in 2019 before the latter handed down its ruling as the Member States concerned took the necessary measures to comply with EU law, as the Commission itself explained in its report Monitoring the application of Union law. 2019 Annual Report, Part I: general statistical overview, July 2020, p. 23

[438] Commission communication on EU law: Better results through better application, 2017/C 18/02, 19 January 2017, par. 3; Commission communication on Strengthening the rule of law within the Union: A blueprint for action, COM(2019) 343 final, 17 July 2019, p. 14

[439] As such, for example, in 2019, the Commission closed 604 infringement procedures after sending a letter of formal notice, 160 procedures after sending reasoned opinions and 13 after deciding to refer the case to the ECJ. In that same year, only 31 infringement actions were submitted by the Commission to the ECJ under Article 258 TFEU, although a total of 1 564 infringement procedures remained opened at the end of the year: Commission, Monitoring the application of Union law. 2019 Annual Report. Part I: general statistical overview, 2020

[440] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524

[441] P. Wennerås, 2012. 'Sanctions against Member States: alive, but not kicking', CMLR 49/2012, pp. 145-176

[442] For the guidelines for calculating lump sums and penalty payments used by the Commission, see Commission communication, Application of Article 228 of the EC Treaty, SEC/2005/1658, as updated for the last time by Commission communication, Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, 2019/C 309/01.

obligations before financial sanctions are due.[443]

However useful for ensuring Member States' compliance with EU law, the Commission has been long hesitant to consider infringement procedures as the most fitting tool to address "systemic deficiencies" relating to EU values[444]. Debates on the adequacy of such a tool to enforce Article 2 TEU values are evolving, often emerging as criticism on the inefficiency of infringement compliance. The long interval required for action due to the overall design of Articles 258-260 TFEU, from one side, and the partially addressed focusing on individual violations of EU law while disregarding the pattern of generalised shortcomings lying underneath,[445] from the other, are the most frequent critiques. A more targeted use of the possibility to request the expedited procedure (Article 23a of the Statute of the CJEU and Article 133 of the Rules of Procedure of the Court) has been proposed to avoid excessive delays, and a more frequent use of the possibility to request the CJEU to order interim measures to the concerned Member State (Article 279 TFEU), to avoid possible serious and irreparable harm, while the CJEU is deciding on the substance of the case.[446]

Some consider instead the recourse to CJEU case law on 'general and persistent' or 'structural and general' infringements as a way of departing from infringements of specific law provisions with EU values dimension and addressing the structural deficiencies relating to those values in a Member State.[447]

The case of Poland: On 20 December 2017, the Commission triggered the procedure provided for in Article 7(1) TEU for the first time, submitting a reasoned proposal[448] for a decision of the Council on the determination of a clear risk of a serious breach of the rule of law by Poland (2017/0360 (NLE)), and simultaneously issuing detailed recommendations.[449] The triggering of the procedure was preceded by three detailed recommendations adopted by the Commission under its Rule of Law Framework (2016/1374, 2016/146 and 2017/1520). The European Parliament backed the Commission's move in a resolution of 1 March 2018, having already expressed criticism of the situation in Poland in its resolutions of November 2017,[450] September 2016[451] and April 2016.[452] Council discussed the situation in Poland in April 2018,[453] and held a hearing on the issue in June 2018.

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[443] B. Jack, 2013. 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?', ELJ 19/2013, pp. 404-421

[444] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=NL; cases C-286/12 Commission v Hungary; C-518/07 Commission v Germany [2010] ECR I-01885 and C-614/10 Commission v Austria

[445] K. L. Scheppele, 2016. 'Enforcing the basic principles of EU law through systemic infringement procedures', Ibidem, pp. 110-111

446; O. De Schutter, 2017. Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union, Open Society Foundations, October 2017, p. 16-17

[447] M. Schmidt, P. Bogdanowicz, 2018. 'The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU', CMLR, Vol. 55, pp. 1061-1100; L. W. Gormley, 2017. 'Infringement proceedings', in Jakab, Kochenov (eds.), The Enforcement of EU Law and Values, OUP, pp. 65-78

[448] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0835

[449] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H0103

[450] https://www.europarl.europa.eu/doceo/document/TA-8-2017-0442_EN.html?redirect

[451] https://www.europarl.europa.eu/doceo/document/TA-8-2016-0344_EN.html?redirect

[452] https://www.europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html?redirect

[453] https://data.consilium.europa.eu/doc/document/ST-8046-2018-INIT/en/pdf#page-3

The Independence of the Judiciary I: The Supreme Court

The first infringement procedure against Poland concerning the rule of law to be decided concerned the law on the Supreme Court which entered into force on 3rd of April 2018, and the proceedings was launched on the 24th of September 2018 following the comments from Poland concerning the reasoned opinion of 14th of august 2018 and the letter of formal notice of 2nd of July 2018.[454] On the 24th of June 2019 the Court of Justice ruled that Poland had infringed Art. 19 (1), 2nd subparagraph, TEU by having lowered the retirement age of judges in office and by granting the president powers to extend the term of supreme court judges beyond the new retirement age.[455] As a side note, the provisions in question were also part of the previously mentioned article 7-procedure.

During the proceedings, the Commission applied for interim measures, which resulted in the amendment of the challenged provisions in November of 2018 prior to the final judgment.[456] Furthermore, the case was subject to the expedited procedure. [457]

Evaluation of the Polish case

Efficiency: Concerning efficiency, it is apparent that in this case the proceedings did not take a very long time. The provisions entered into force in April 2018, the case was brought before the Court of Justice in September 2018, and finally the Court of Justice ruled on the case in June 2019. Thus, the proceedings before the Court of Justice amounted only to 9 months. This is well below the usual time frame of 14.4 months.[458] However, as it is clear from the previous article 7-proceedings, the Commission was already aware of the challenged provisions upon their adoption in December 2017.[459] When departing from this date the processing time was closer to 18 months than 9. Following that, to achieve the best efficiency, the Commission should have initiated its proceedings (formal notice) following the adoption of the challenged provisions.

A further dimension can be added. It is clear from the preceding that in this case both the expedited procedure and interim measures were applied. The expedited procedure allowed for the case to be handled at the Court of Justice significantly faster than usually. More importantly, the interim measures entailed that the challenged provisions ceased to be applied significantly earlier than the judgment was delivered. When this is taking into consideration the degree of efficiency is increased as the effect of the judgment was ensured prior to the delivery of the judgment itself.

Effectiveness: When it comes to effectiveness, the proceedings have proven to be very effective. No subsequent procedure under Art. 260(2) TFEU have been initiated, the Supreme Court judges have been reinstated and through "legal fiction" has been treated as if they were

[454] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5830, accessed on 22nd of april 2021
[455] Ruling of 24th of June in Case C-619/18
[456] Order of 17th December 2018 in C-619/18; https://www.nytimes.com/2018/12/17/world/europe/poland-supreme-court.html
[457] Order of 15th November 2018 in C-619/18
[458] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf, page 55
[459] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-835-F1-EN-MAIN-PART-1.PDF, section 4.1

never dismissed. No similar legislation has been passed. Only if a broader or more political view is applied the effectiveness can be criticised as it has not compelled Poland to cease its legislative actions generally endangering the independence of the judiciary. However, as this is not the aim of the infringement procedure, these considerations are disregarded.
Lastly, consideration should be given to the interim measures. The interim measures did not alter the final effect of the judgment. However, through the application of the measures a sort of pre-emptive effect was achieved as the application of the provisions was halted and the judges reinstated.

Transferability: The case does not seem to have required any particular adaptation of the art. 258-259 to the goals of safeguarding the Rule of Law, democracy, and human rights. However, it may be argued that it extended the applicability of the infringement procedure as it was the first infringement procedure where the Commission based its legal reasoning on Art. 19 (1), 2nd subparagraph, TEU, setting a precedent for following cases.

"The Supreme Court"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency			Art. 258-259
Effectiveness			Art. 258-259
Transferability		Art. 258-259	

The case of the Independence of the Judiciary II: The Ordinary courts

The second judgment in a case concerning the independence of the Polish judiciary was delivered on 5th of November 2019. The infringement procedure was decided by the Court of Justice on 15th of March 2018,[460] but the Commission decided to refer the case to the Court of Justice on 20th of December 2017[461] following the letter of formal notice of 29th of July 2017 and the reasoned opinion of 12th of September 2017.[462] The Court of Justice found that Poland had infringed Art. 19 (1), 2nd subparagraph, TEU, by granting the Minister of Justice the power to extend the term in office for Polish judges in the ordinary courts beyond the new retirement age.[463] Similarly to case C-619/18, the Commission was aware of the provisions prior to the launching of the infringement proceedings. The provisions were adopted in 2017 and entered into force on 12th of august 2017.[464] This case was neither subject to the expedited procedure nor interim measures. Prior to the ruling the Polish legislator changed the provisions. However, the provisions had been applied throughout the course of the infringement proceeding. Some sources imply that several judges were relieved from duty, but they were not reinstated following the judgment.[465] Additionally, the amended provisions appear rather alike the challenged provisions, except that now it is up to the National Council of the Judiciary to extend a judge's term in office and the considerations which shall be considered are amended slightly,

[460] Judgment of 5th of November 2019 in C-192/18
[461] https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367
[462] https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2205
[463] Ruling in case C-192/18.
[464] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-835-F1-EN-MAIN-PART-1.PDF, section 4.3
[465] https://www.theguardian.com/world/2019/nov/05/poland-broke-eu-law-trying-lower-age-retirement-judges-says-court; Helsinki Foundation for Human Rights' Report of April 18, 2018 'It starts with the personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018'

even though there still is not any obligation to state the reasons behind the decision.[466]

Efficiency: The Commission had knowledge of the provisions on a very early stage. However, from the time when the provisions entered into force and the Court of Justice ruled on their legality more than 2 years passed. The processing of the case at the Court of Justice in itself amounted to approximately 20 months. Further considering the fact that Poland was able to act in accordance with the provisions in the meantime the proceedings appear even less efficient.

Effectiveness: When first evaluating the case, it appears that the procedure has had a sufficient effect as the challenged provisions have been amended, and no procedure in accordance with Art. 260(2) TFEU has been initiated. However, as stated, the amendments to the provisions have resulted in a very similar power being granted to the National Council of the Judiciary. Notably, the independence of this council has been problematized in other cases[467] and implies that this may pose an issue concerning whether this new construction also endangers the independence of the judiciary. Nonetheless, the specific provisions have been amended and which was the goal of the procedure. However, the fact that the consequences of the illegal provisions has not been remedied implies a lower degree of effectiveness.

Transferability: The case did not require any specific elaboration; it did not extend the subject, nor does it seem to imply any particular interest for other MS's.

"The Ordinary Courts"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency	Art. 258-259		
Effectiveness		Art. 258-259	
Transferability	Art. 258-259		

The cases of Hungary: Hungary is under EU scrutiny for rule-of-law concerns on a clear risk of a series breaches of EU values, as the resolutions of the EU Parliament demonstrate[468], but also by the number of infringement procedures initiated.

List of active infringements against Hungary

Decision_type	Press_ release	Memo	Policy area Department in charge	Title
Formal notice Art. 258 TFEU	IP-17-1607		Home Affairs	FAILURE TO IMPLEMENT CORRECTLY BY HUNGARY COUNCIL DECISION 2015/1601 ON RELOCATION
Formal notice Art. 258 TFEU	IP-17-1982		Justice, Fundamental Rights and Citizenship	VIOLATION OF EU LAW BY THE ACT ON THE TRANSPARENCY OF ORGANISATIONS

[466] https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-cjeu-issued-two-landmark-judgments-on-the-polish-judicial-system/, and http://dcubrexitinstitute.eu/2019/11/the-independence-of-judges-in-polishs-courts-the-cjeu-judgement-in-commission-v-poland-c-192-18/

[467] E.g. C-791/19 R and Commission's reasoned proposal under Art. 7 TEU

[468] https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html?redirect; https://www.europarl.europa.eu/doceo/document/TA-7-2011-0094_EN.html?redirect; https://www.europarl.europa.eu/doceo/document/TA-8-2017-0216_EN.html?redirect

				SUPPORTED FROM ABROAD (ACT LXXVI/2017) ADOPTED ON 13 JUNE 2017
Formal notice Art. 258 TFEU		MEMO -17-234	Internal Market, Industry, Entrepreneurship, SMEs	UNFAIR DISTRIBUTION PRACTICES LEGISLATION INFRINGING INTRA COMMUNITY TRADE RULES
Reasoned opinion Art. 258 TFEU	IP-17-2103		Home Affairs	FAILURE TO IMPLEMENT CORRECTLY BY HUNGARY COUNCIL DECISION 2015/1601 ON RELOCATION
Additional reasoned opinion Art. 258 TFEU		MEMO -17-3494	Internal Market, Industry, Entrepreneurship and SMEs	VIOLATION OF EU LAW BY AMENDMENTS OF THE HUNGARIAN HIGHER EDUCATION ACT (CCIV), ADOPTED ON 4 APRIL 2017, AFFECTING FOREIGN HIGHER EDUCATION INSTITUTIONS
Additional formal notice Art. 258 TFEU	IP-17-1285		Home Affairs	INCORRECT IMPLEMENTATION BY HUNGARY OF EU ASYLUM AND MIGRATION ACQUIS
Reasoned opinion Art. 258 TFEU	IP-17-3663		Justice, Fundamental Rights and Citizenship	VIOLATION OF EU LAW BY THE ACT ON THE TRANSPARENCY OF ORGANISATIONS SUPPORTED FROM ABROAD (ACT LXXVI/2017) ADOPTED ON 13 JUNE 2017

Source:https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?r_dossier=&noncom=0&decision_date_from=01%2F01%2F2017&decision_date_to=31%2F10%2F2017&active_only=1&EM=HU&title=&submit=Search&lang_code=en

"NGO funding" Case: The **first infringement procedure launched on this case was on July 2017.**[469] As a consequence of the non-compliance, the case was **brought later to the CJEU in an infringement action by the Commission (Case C-78/18)**[470] ruling that the Hungarian government "introduced discriminatory and unjustified restrictions, in breach of its obligations under Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union". On 14 January 2020, the AG Campos *Sánchez-Bordona* proposes that the CJEU declares the Hungarian legislation to be incompatible with EU law,[471] contrary to the principle of free movement of capital in that it includes provisions amounting to unjustified interference with the fundamental rights of respect for private life, protection of personal data, and freedom of association as protected by the Charter. Objectives, such as the protection of public policy and the fight against money laundering and terrorist financing, cannot justify the Hungarian legislation.

In February 2021, the European Commission has begun **a new infringement procedure against Hungary for its law on NGOs commonly known as 'Stop Soros'**, which bans foreign-funded organizations from providing assistance to migrants.[472] Under the current law, these NGOs are considered a risk to national security. In the formal letter of notice the Commission noted that Budapest **had not complied with a sentence handed down by the CJEU in June 2020**. The government did not provide a thorough explanation by the deadline

[469] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1935
[470] https://curia.europa.eu/juris/documents.jsf?num=C-78/18
[471] The Hungarian legislation imposes several obligations of registering, providing certain pieces of information and publication on civil organisations in case they receive donations above a certain threshold from abroad: https://curia.europa.eu/juris/document/document.jsf;jsessionid=16145D84B5C5EB64F1335049FB9E52E7?text=&docid=222223&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7894143
[472] https://www.infomigrants.net/en/post/30384/eu-takes-legal-action-against-hungary-over-ngo-law

(April 18), thus, with a **letter** *of formal notice on Art. 260***, the Commission is now calling on Hungary to implement the Court of Justice ruling on the Hungarian law on foreign-funded NGOs and** for failing to comply with the ruling of CJEU in Case C-78/18 Commission v Hungary. This is an **infringement procedure based on Article 260 (2) TFEU**, meaning that the Commission can refer the matter back to the Court and ask for financial sanctions, after giving the Member State the opportunity to explain itself. In its ruling of 18 June 2020, the Court found the Hungarian law on NGOs ("Transparency Act") to be in breach of EU rules on the free movement of capital (Article 63 TFEU) and the fundamental rights to protection of personal data and freedom of association, protected by the EU Charter of Fundamental Rights. The Court concluded that the Hungarian legislation threatens the role of civil society as an independent actor in democratic societies, undermining their right to freedom of association, creating a climate of distrust towards them as well as limiting the privacy of donors. **Despite repeated calls from the Commission** for compliance as a matter of urgency, Hungary has not repealed the Transparency Act, which was found contrary to EU law. The law is still in force.[473]

The evaluation of the "NGO funding" case

Efficiency: The procedures have been generally slow and inefficient. The "Transparency Act" entered into force on 27 June 2017 and the Commission sent Hungary a letter of formal notice as early as on 14 July 2017, but only on 7 December 2017 did the Commission bring the action to the Court, which took further 2.5 years to arrive at the June judgment. During this time, many NGOs were listed as "supported from abroad", putting a stigma and shaming their name. The whole infringement procedure, communication and ruling had no evident impact, nor any immediate - direct or indirect modification of the legislation. The answers provided by the Hungarian government were inadequate and unsatisfactory. The government has still not repealed the law even after the first CJEU ruling.

Effectiveness: The infringements did not produce any effect to the legislation, while up to the present moment the final goal of the infringement tool has not been achieved. the Government has not done anything to implement the Court's judgment since it was delivered earlier this June; in response to a judgment from the EU's top court stating that a Hungarian law is in breach of EU *acquis*, Hungary has begun applying the unlawful legislation to the distribution of EU funds.

Transferability: The case of the NGO-funding did not require nor initiated any particular adaptation of the art. 258-259 to the goals of safeguarding the Rule of Law, democracy, and human rights. It did not extend the applicability of the infringement procedures beyond their basic legal base.

"NGO funding"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency	Art. 258-260		
Effectiveness	Art. 258-260		

[473] https://autocracyanalyst.net/hungarian-ngo-foreign-agent-law/

Transferability	Art. 258-260		

"Asylum" and Residence Cases: Hungary is facing the **fifth infringement procedure** related to asylum since 2015, including also non-compliance with the compulsory relocation scheme of 2015,[474] the automatic and unlawful detention[475] and the deprivation of food[476] of over 30 detainees in the now abolished transit zones, and the "Stop Soros" legislative package[477] with inadmissibility ground to dismiss practically all asylum applications without having to examine them and criminalising human rights activities. Followed the July 2018 letter of informal notice[478], on 25 July 2019, the Commission decided to launch another **action before the CJEU against Hungary** for not fulfilling its obligations under EU law, because Hungary has not changed its so-called "Stop Soros" legislation.[479] After having examined Hungary's replies to a reasoned opinion, the Commission found that Hungary has not sufficiently addressed the concerns raised, in particular the incompatibility with the EU's asylum law. The Commission finds that Hungarian legislation is incompatible with EU law in the following respects: -criminalisation of support to asylum applicants: The Hungarian legislation curtails asylum applicants' right to communicate with and be assisted by relevant national, international and non-governmental organisations by criminalising support to asylum applications. This is in violation of the Asylum Procedures Directive and the Reception Conditions Directive.

Unlawful limitation of the right to asylum and introduction of new non-admissibility grounds for asylum applications: The new law and the constitutional amendment on asylum have introduced new grounds for declaring an asylum application inadmissible, restricting the right to asylum only to people arriving in Hungary directly from a place where their life or freedom are at risk. These additional inadmissibility grounds for asylum applications exclude persons who entered Hungary from a country where they were not persecuted but which does not fulfil the criteria of a safe-third-country. Therefore, these inadmissibility grounds curtail the right to asylum in a way that is not compatible with EU or international law. As such, the national rules are in violation of the EU Asylum Procedures Directive, the Asylum Qualifications Directive and the Charter of Fundamental Rights of the European Union.

The judgment of April 2020[480] in the joint cases of the Commission v Poland, Hungary and the Czech Republic concluding that all three EU member states had failed to fulfil their obligations under the Relocation Decisions (Article 5(2) 2015/1601 and 2015/1523) **did not seem to have any effect**. In addition, the Commission **filed an action against Hungary at the CJEU** for

[474] https://www.ecre.org/cjeu-poland-hungary-and-czech-republic-failed-to-fulfil-obligations-under-council-relocations-decisions/
[475] https://www.helsinki.hu/en/hungary-unlawfully-detains-people-in-the-transit-zone/
[476] https://docs.google.com/spreadsheets/d/10V84xAVREKSscFwz4ME_2kfpBRV_CPqCr7SUKitE2o8
[477] https://www.ecre.org/global-outcry-against-attack-on-civil-society-in-hungary/
[478] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522
[479] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4260
[480]https://curia.europa.eu/juris/document/document.jsf?docid=224882&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=4558391

excluding non-EU nationals with long-term resident status from exercising the veterinary profession. This is considered an incorrect implementation of the Long-Term Residents Directive.

On 30 October 2020, the Commission sent another letter of formal notice to Hungary concerning the new legislation. The response from the Hungarian authorities did not adequately address the Commission's concerns. The Commission continues to consider that such a legislation breaches EU law, as it precludes persons who are currently on Hungarian territory, including at the border, from applying for international protection. Hungary is ignoring an EU court ruling on asylum, according to a rights NGO: "Since the judgement came out almost 2,500 push backs took place," said András Lederer of the Budapest-based Hungarian Helsinki Committee.

In February 2021, the Commission decided to send a reasoned opinion to Hungary concerning legislation which unlawfully restricts access to the asylum procedure.[481] The Hungarian authorities have two months to notify the Commission of actions taken to address these concerns. Otherwise, the Commission may refer the case to the Court of Justice of the European Union. The move follows reports by a Budapest-based NGO, the Hungarian Helsinki Committee, that Hungary is continuing to force potential asylum seekers back into Serbia.[482]

The evaluation of "Asylum" and Residence Cases

Efficiency: the procedures have been slow and inefficient. The asylum-related legal issues and serious violations of EU directives on procedures, reception, and return start back in 2015, and until 2021 have yet not been solved and violations are perpetrated. The answers provided by the Hungarian government are inefficient, inadequate and unsatisfactory. Infringement procedures on all stages are failing, since the government has still not repealed the incriminated laws, even after the CJEU ruling.

Effectiveness: The infringements did not produce any direct/indirect effect to the legislation, while up to the present moment the final goal of the infringement tool has not been achieved. Hungary has failed to fulfil its obligations to ensure effective access to the procedure for granting international protection, it has failed to fulfil its obligations under the Return Directive, in so far as the Hungarian legislation allows for the removal of third-country nationals who are staying illegally in the territory without prior compliance with the procedures and safeguards provided for in that directive. Hungary has not respected the right, conferred, in principle, by the Procedures Directive on any applicant for international protection, to remain

[481] According to the legislation, before being able to apply for international protection in Hungary, non-EU nationals must first make a declaration of intent stating their wish to apply for asylum at a Hungarian Embassy outside the European Union and be issued with a special entry permit for that purpose, delivered at the discretion of the Hungarian authorities. The Commission considers that new asylum procedures set out in Hungarian law are in breach of the Asylum Procedures Directive interpreted in light of the Charter of Fundamental Rights of the European Union

[482] https://euobserver.com/migration/150582; https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act; https://helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf

in the territory of the Member State concerned after the rejection of his or her application, until the time limit within which to bring an appeal against that rejection or, if an appeal has been brought, until a decision has been taken on it. The warnings of the infringements and of the CJEU rulings have sorted no effect.[483]

Transferability: The cases did not involve nor initiated any particular adaptation of the art. 258-259 to the goals of safeguarding the Rule of Law, democracy, and human rights. It did not extend the applicability of the infringement procedures beyond their basic legal base and do not seem to have sorted any valuable transferability effect.

"Asylum case"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency	Art. 258-260		
Effectiveness	Art. 258-260		
Transferability	Art. 258-260		

The "CEU" Case: On 5 March 2020, in the infringement Case C-66/18, Advocate General Juliane Kokott voices her belief that the **2017 amendments of the Hungarian law on Higher Education do not comply with EU and WTO law.[484]** The Grand Chamber of the CJEU in its judgment in Commission v Hungary (Higher education) C-66/18, on 6 October 2020,[485] upheld the action for failure to fulfil obligations brought against Hungary by the European Commission. The Court held that by subjecting the exercise of teaching activities leading to a qualification by higher education institutions situated outside the European Economic Area (EEA) to the existence of an international treaty between Hungary and the third country in which the institution concerned has its seat, Hungary has failed to comply with the commitments under the General Agreement on Trade in Services (GATS), concluded within the framework of the World Trade Organisation (WTO). However, that requirement is also contrary to the provisions of the Charter of Fundamental Rights of the EU relating to academic freedom, the freedom to found higher education institutions and the freedom to conduct a business.[486] The CJEU found that the Hungarian law imposes unacceptable restrictions on internal market freedoms such as freedom of establishment (Article 49 TFEU) and the free movement of services (Article 16 of Directive 2006/123/EC) and as such violates several Charter rights, among them academic freedom (Article 13 CFR) and the freedom to find such institutions (Articles 14(3) and 16 CFR). Notwithstanding the victory before the Court, the CEU had to move most of its operations to Austria, incurring massive expenses.[487]

The law was seen as a move against Hungarian-born US businessman George Soros – an opponent of Hungarian Prime Minister – because his funded Budapest-based Central European

[483] https://www.schengenvisainfo.com/news/commission-sends-hungary-last-warning-to-comply-with-eu-asylum-law-before-taking-the-matter-to-court-of-justice/

[484] https://curia.europa.eu/juris/document/document.jsf?text=&docid=224125&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3755802

[485] https://curia.europa.eu/juris/document/document.jsf?text=&docid=232082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13920786

[486] https://bridgenetwork.eu/2020/10/07/1714/

[487] https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/

University (CEU) was the only active foreign higher education institution in Hungary that did not meet the new requirements. This case, even if wrapped in trade law, it had nothing to do substantially with international trade: it is instead an EU rule of law dispute between the European Commission and Hungary. The reason why it was not presented as such was that the EU reckoned that it had no power to address the rule of law issue directly and, hence, had resort to some "legal finesse", reaching to the core of the issue, which is the violation of core principles of the rights, values and principles of the EU law, strictly related to the EU Rule of Law safeguard.

The evaluation of the "CEU case"

Efficiency: The procedures moved in three years' time, achieved the desired legal effect of reforming the incriminated Hungarian law. However, the outcome did not really prevent from the "de facto" realisation of the unsought effect (transfer of CEU in Vienna). The efficiency from a strictly formal point of view may appear *prima facie* high, but when examined in the substance of the case and compared to the final achieved result it reveals rather weak, since it did not inadequately address the situation in terms of rapidity. The efficiency was partial. The "moral victory" of the case from the EU point of view over the backsliding of law did not really have the desired legal effects.

Effectiveness: The assessment of the ruling hinges on one's expectations and counter factual. If compared to the EU's very weak rule-of-law powers, the CJEU's ruling is a great success, and a success of the Commission's uphill battle: it is a prime example of the effectiveness of infringement action against illiberal practices undermining the rule of law.[488] Finally, the judgment sheds light on the prospects of a new line of action championed by the Commission, seeking to bring more life into the Charter in the member states — to affect the daily lives of European citizens. If compared to the ideal outcome featuring an effective remedy, the ruling is instead rather disappointing. The judgment marks a significant victory in the rule-of-law debate; however, it also showcases its limits to populist tricks. After the CJEU's ruling, Hungary's justice minister announced that "as always, Hungary will implement the judgment of the European Court of Justice in the interest of the Hungarian people." This may mean either that the judgment will be implemented because this is the interest of the Hungarian people, or it will be implemented in a way that it is in accordance with the interest of the Hungarian people, or it will be implemented to the extent this is in the interest of the Hungarian people. It will be seen soon which option is correct. Nonetheless, whatever the meaning of this statement is, one thing remains certain: The operation apparently was successful, but "the patient died".[489] The case shows that an infringement *can actually* constitute a valuable tool, but only under conditions. Perhaps the situation could have been avoided if the Commission had requested an interim Court measure requiring Hungary to suspend the application of the law at the heart of the dispute.

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[488] https://bridgenetwork.eu/2020/10/07/1714/

[489] https://www.researchprofessionalnews.com/rr-news-europe-universities-2020-3-ceu-still-shifting-to-vienna-despite-top-judge-s-backing/; https://verfassungsblog.de/the-commissions-al-capone-tricks/; https://balkaninsight.com/2020/10/06/legal-victory-for-central-european-university-is-too-little-too-late/; https://verfassungsblog.de/loyalty-opportunism-and-fear/

Transferability: The Commission has introduced a "pioneer-approach", extending and enlarging its competence in a case apparently involving only market or competition-related issues into Rule of Law concerns, in order to include the present case, and used the "supportive by-effects" of apparently unconnected EU norms.[490] The CJEU's intellectual challenge was to establish an EU competence without exposing the EU and its Member States to WTO-law-based claims, in particular claims for damages. The "transferability" effect has been significantly enhanced and extended to more areas

"CEU Case"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency		Art. 258-260	
Effectiveness		Art. 258-260	
Transferability			Art. 258-260

The "Judicial Independence" case: The judicial independence in Hungary faced concerns of discrimination based on age,[491] following a normative reform that lowered the retirement age, which regarded more than one hundred prematurely retired judges. These decided to bring their cases to the Constitutional Court, and in July 2012, the Constitutional Court declared, *inter alia*, that the law in question was unconstitutional and therefore retroactively null and void, and that the lowering of the retirement age violated the independence of judges because it was an arbitrary change in their status. In a press conference the day after the Constitutional Court ruling, the Prime Minister Orbàn insisted that the system would remain in place even after it had been declared unconstitutional.[492]

Taking the view that the changes in the judges' retirement scheme constituted a breach of the EU age discrimination provisions of Directive 2000/78/EC, the European Commission sent a letter of formal notice and a reasoned opinion to Hungary. After the Hungarian government disputed the violation, the Commission **referred the case to the Court of Justice** and was granted with the **accelerated procedure.**[493] The Court ruled in November 2012 that Hungary had failed to fulfil its obligations under the Directive, since the national compulsory retirement scheme gave rise to a difference in treatment on grounds of age, which was not proportionate in regard to the objectives pursued.[494] *Commission v. Hungary* was the first judgment where the Court of Justice found a standard national statutory retirement measure to be in violation of EU law, while another peculiarity of the case was that the application of a strict proportionality test, a "balancing approach," which actually changed the outcome of the case. Acknowledged the right of Member States to use pensionable age to manage the labour market as such, thus recognising that national laws encouraging retirement at a certain age are still in principle presumptively proportionate, it was found however that the provisions are illegal if

[490] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053372
[491] G. Halmai, 2017. 'The Case of the Retirement Age of Hungarian Judges', in F. Nicola and B. Davies (eds.), *EU Law Stories*, Cambridge University Press, pp. 471-488.
[492] "Döntöttek: Alkotmányellenes a Bírók Kényszernyugdíjazása." Stop, 16 July 2012; hwww.stop.hu/belfold/dontottek-alkotmanyellenes-a-birokkenyszernyugdijazasa/1065707/
[493] Order of the President of the Court of Justice of 13 July 2012 in Case C-286/12
[494] ECJ, 6 November 2012, Case C—286/12, Commission v. Hungary

they abruptly and significantly lower the age limit for retirement without introducing transitional measures to protect the legitimate expectations of the persons concerned. This means that the strict proportionality analysis applies to the execution of such changes; in other words, if a Member State wants to change the age limit, it has to provide a sufficient anticipation period.

On 20 November 2013, the European Commission formally closed the legal proceedings launched against Hungary in January 2012 over the country's forced early retirement of around 274 judges. According to the press release, the Commission is satisfied that Hungary has brought its legislation in line with EU law.[495] Those who praise the judgment of the CJEU argue that it is understandable that the judges in Luxembourg did not touch upon the issue of judicial independence, since it concerns the constitutional order of Member States, which is arguably part of their national identity that the Court of Justice has to respect under Article 4(2) of the Treaty of the European Union (TEU).[496] But one can wonder why this Article is more important than Article 2 TEU, which guarantees the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

The European Parliament Resolution of 3 July 2013 on the "Situation of Fundamental Rights: Standards and Practices in Hungary", regrets "that not all unlawfully dismissed judges are guaranteed to be reinstated in exactly the same position with the same duties and responsibilities they were holding before their dismissal".[497] Since this aim has been fulfilled, and with this the independence of the judiciary is undermined, the judgment cannot be deemed as a success of the rule of law in a Member State of the European Union. The Commission was "legally" successful in *Commission v Hungary*,[498] but the judgment was unable to reinstate the dismissed judges into their original positions and stop the Hungarian government from further seriously undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms.[499] Indeed, as another Hungarian case in 2012 has shown, **infringement actions are usually too narrow** to address the structural problem which persistently non-compliant Member States pose.[500]

However, next to Poland, Hungary is currently subject to an Article 7 TEU procedure, which may eventually lead to sanctions against an EU Member State if the Council states a clear risk of a serious breach of EU values. The procedure against Hungary was triggered by the European Parliament in September 2018, concerning mainly issues on the judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees. As in the case of Poland, Hungary faces several infringement actions before the CJEU.

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[495] Commission Press Release, IP/13/1112 (Nov. 20, 2013), http://europa.eu/rapid/press-release_IP13-1112_en.htm

[496] T. Gyulavári, N. Hős, 2013. "Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts," Indust. L.J., Vol. 42, No. 3, September 2013, 289–97

[497] "Tavares Report": European Parliament Resolution on the Situation of Fundaments Rights: Standards and Practices in Hungary, www.europarl.europa.eu/sides/ getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315

[498] https://curia.europa.eu/juris/liste.jsf?num=C-286/12

[499] https://verfassungsblog.de/much-ado-about-nothing-legal-and-political-schooling-for-the-hungarian-government-on/

[500] K. L. Scheppele, in Closa, Kochenov (eds.), 2016. Ibidem, pp. 105-132.

The evaluation of the "Judicial Independence" case

Efficiency: The case was granted with the accelerated procedure, managing to fulfil directly and fast its goal (within a year) while reaching its desired legally objective: the Hungarian legislation was reformed. On a strictly legalistic level of evaluation, the infringement reached formally its goal, demonstrating a highly efficient potential to solve such cases. Efficiency must be considered fully obtained in this case.

Effectiveness: Whether the specific aim has been fulfilled (reform of the law), however the independence of the judiciary still reflects the reform (judges did not return in their offices) and must be considered as if it was still undermined: the "degree" to which the infringement "repaired" or "restored" independence cannot be deemed as a real success of the rule of law in a Member State of the European Union. "Legally" successful in *Commission v Hungary*,[501] however the judgment was unable to reinstate the dismissed judges into their original positions and stop the Hungarian government from further seriously undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms.[502] Further threats and violation of the independence of the Court rising on the same field of the EU action demonstrate that the short term and formally illegal provisions were settled but the populist threat has not been eradicated. The success of the ultimate intent, to re-establish a judicial system in plain independence, does not correspond to the highest rank.

Transferability: Considering these where the first infringement actions addressing populist backsliding of the EU rule of law, it must be considered reasonable the rather narrow capacity to create a more systemic and "expanded" transferability potential of the infringement tool. The persistent deeper structural problems which non-compliant Member States (included Hungary) pose, reveal the evident difficulty to apply to the broader meaning of Article 2 TEU. This case looks like a missed opportunity to significantly increase the transferability capacity of the infringement procedures, but the dilatation fairly allowed to address the specific case and offered a "precedent" for the future ones.

"Judicial independence case"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency			Art. 258-259
Effectiveness		Art. 258-260	
Transferability		Art. 258-260	

"**Enabling Act" Case (pending)**: On 24 March 2020, given the plans of the Hungarian government to expand the "state of danger" measures due to the COVID-19 pandemic and to rule with executive decrees, the EP's Civil Liberties Committee (LIBE) issues a reminder that all Member States have a responsibility to respect and protect fundamental rights, the rule of

[501] https://curia.europa.eu/juris/liste.jsf?num=C-286/12
[502] https://verfassungsblog.de/much-ado-about-nothing-legal-and-political-schooling-for-the-hungarian-government-on/

law, and democratic principles, even in difficult times.[503] On 30 March 2020, however, the Hungarian Parliament passes the contentious "state of emergency extension" bill,[504] or "Enabling Act",[505] which gives the Hungarian government the right to pass special executive decrees in response to the coronavirus outbreak, it changes the Hungarian criminal code by introducing jail terms of up to five years for people who spread "fake news" about the virus or measures against it and introduces severe penalties for the breach of quarantine ordered by authorities.[506] Actions from EP, civil society and media have called the Commission and the Council for "swift and decisive actions" against Hungary,[507] while further, on 17 April 2020 a resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences, the EP voices deep concern over the steps taken by Hungary to prolong the state of emergency indefinitely, to authorise the government to rule by decree without a time limit, and to weaken the emergency oversight of the parliament.[508] The Commission is called on to make use of all available EU tools and sanctions to address this serious and persistent breach; the sanctions could include budgetary cuts. The resolution was followed by another open letter of 75 European personalities, including former European Commission president Jean-Claude Juncker, former heads of state and government, and major figures from European civil society publish an open letter against the latest "democratic backsliding" by the Hungarian government and call for action without further delay.[509]

By today, however, there is no sign from the Commission for taking action with an infringement procedure against Hungary,[510] apart from a letter of informal notice issued in February 2021, which vaguely refers to the context of the problematic pandemic legislation and specifically regards other issues (the restrictions of access to the asylum procedure), no other specific action has been so far undertaken.[511] Will the EU proceed in an infringement

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503 https://www.europarl.europa.eu/news/en/press-room/20200324IPR75702/ep-stands-up-for-democracy-in-hungary-during-covid-19; The chair of the committee called on the Commission to assess whether the proposed bill complies with the values enshrined in Article 2 of the Treaty on European Union: https://www.europarl.europa.eu/meps/en/96812/JUAN+FERNANDO_LOPEZ+AGUILAR/home

504 https://www.parlament.hu/irom41/09790/09790.pdf

505 https://www.dw.com/en/hungary-passes-law-allowing-viktor-orban-to-rule-by-decree/a-52956243

506 https://verfassungsblog.de/pandemic-as-constitutional-moment/. The law was heavily criticized by the opposition, the Council of Europe, and human rights organisations. They mainly disagree with the indefinite term of the expanded state of emergency and fear inappropriate restrictions on the freedom of press and freedom of expression. Another fear is that the "Enabling Act" cements the erosion of the rule of law in Hungary. In a letter of 24 March 2020 to Viktor Orbàn, CoE Secretary General *Marija Pejčinović Burić* stated: "An indefinite and uncontrolled state of emergency cannot guarantee that the basic principles of democracy will be observed and that the emergency measures restricting fundamental human rights are strictly proportionate to the threat which they are supposed to counter." CoE Human Rights Commissioner *Dunja Mijatović* commented the following on Twitter: "#COVID19 bill T/9790 in #Hungary's Parliament would grant sweeping powers to the gov to rule by decree w/o a clear cut-off date & safeguards. Even in an emergency, it is necessary to observe the Constitution, ensure parliamentary & judicial scrutiny & right to information."

507 https://transparency.eu/ruleoflaw-open-letter/

508 https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.pdf

509 https://civico.eu/news/by-surrendering-to-autocracy-in-the-fight-against-covid-19-hungary-poisons-european-ideals/

510 https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/

511 https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441. The informal notice in question rather regards another infringement procedure, the second one after the one opened in October, by sending a motivated opinion (second stage of the procedure) to Hungary on its national legislation on asylum rights passed during the pandemic, which has started in December 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6228. The EU holds that this legislation illegally restricts access to asylum procedures, since it precludes non-EU citizens inside of Hungarian territory, including the border, from filing requests for international protection. Budapest has two months to respond, or the case may end up in front of the EU court. https://ec.europa.eu/commission/presscorner/detail/LT/IP_18_4522

procedure early this time?

Poland: The case of the Judgment of the Polish Constitutional Tribunal, 7 October 2021

On the 22nd of December 2021, the European Commission has decided to launch an infringement procedure against Poland because of serious concerns with respect to the Polish Constitutional Tribunal and its recent case law. The Constitutional Tribunal, in its rulings of 14 July 2021 and 7 October 2021, considered the provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law. Poland has two months to reply to the letter of formal notice. "The Commission considers that these rulings of the Constitutional Tribunal are **in breach of the general principles of autonomy, primacy, effectiveness and uniform application of Union law and the binding effect of rulings of the Court of Justice of the European Union**."[512] Furthermore, the Commission considers that these rulings are in breach of Article 19(1) TEU, which guarantees the right to effective judicial protection, by giving it an unduly restrictive interpretation. Thereby it deprives individuals before Polish courts from the full guarantees set out in that provision. Finally, the Commission has serious doubts on the independence and impartiality of the Constitutional Tribunal and considers that it no longer meets the requirements of a tribunal previously established by law, as required by Article 19(1) TEU. As also highlighted by the Commission in its reasoned proposal under Article 7(1) TEU of 2017 and as held by the European Court of Human Rights in its judgment of 7 May 2021, the process of appointment to the Constitutional Tribunal of three judges in December 2015 occurred in breach of fundamental rules forming an integral part of the establishment and functioning of the system of constitutional review in Poland. The gravity of this breach gives rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judges concerned. This is also shown by other irregularities and deficiencies such as the election of the President and Vice-President of the Constitutional Tribunal, which raised serious concerns as to the impartiality of judges of the Constitutional Tribunal when handling individual cases. Whereas the Constitutional Tribunal is called upon to rule on questions relating to the application or interpretation of EU law, the Commission considers that it can therefore no longer ensure effective judicial protection by an independent and impartial tribunal previously established by law, as required by Article 19(1) TEU, in the fields covered by EU law.

Considerations on the case of the Polish Constitutional Tribunal[513]

On 7 October 2021 the Polish Constitutional Tribunal issued a controversial judgment (Ref. No. K 3/21) in which it declared its interpretation of certain provisions of the Treaty on European Union (TEU) – i.e. Article 1, first and second paragraphs, in conjunction with Article 4(3), Article 2 and Article 19(1), second subparagraph – to be partially unconstitutional under Polish law. More specifically, the Tribunal held that these provisions are unconstitutional to the extent they are interpreted as:

[512] Cfr. https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_21_7070
[513] The summary that follows is elaborated by CSS-HAS

- allowing the European Union (EU) authorities to act outside the scope of the competences conferred upon them by Poland in the Treaties; to operate in such a way that the Polish Constitution is not the supreme law of Poland, which takes precedence as regards its binding force and application; or to cause that Poland may not function as a sovereign and democratic state;
- vesting domestic courts with the competence to bypass certain provisions of the Polish Constitution in the course of adjudication, or adjudicate on the basis of provisions which are not binding, having been revoked by the Sejm and/or ruled by the Constitutional Tribunal to be inconsistent with the Constitution;
- vesting domestic courts with the competence to perform the test of 'appearance of independence' as provided by the Court of Justice of the European Union (CJEU) in the AK and others case (C-585/18), used by the Polish courts to control the effectiveness of appointments made with the participation of the new National Council of the Judiciary.

The Judgment was issued in the proceeding initiated by the Polish Prime Minister and must be seen as an element of the long-standing political battle between the current governing party Law and Justice (Prawo i Sprawiedliwość, PiS) and the EU over the so-called 'rule of law backsliding in Poland' (understood here as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party") .

In the above context, the Judgment appears to serve two political objectives; one external and one internal. First, it attempts to strengthen the position of the Polish government in its negotiations with the European Commission over the release of the post-COVID-19 recovery funds. Second, it is aimed at reversing the ongoing decay of the various judicial reforms introduced by PiS over last six years by discouraging Polish judges from relying on the CJEU's existing rule of law jurisprudence and/or referring new preliminary ruling questions to the CJEU pertaining to this area. It will do so not only by blurring the legal picture, but also by solidifying grounds for disciplinary proceedings against 'rebel' judges.

The Judgment is controversial inasmuch as it undermines some of the most basic principles of EU and international law, paving the way for the potential exit of Poland from the Union. In particular, the Constitutional Tribunal rejected the well-established idea of the primacy of EU law over domestic laws. While it is true that some highest courts of other Member States have in the past reserved their rights to review the constitutionality of EU law, the Judgment of the Polish Constitutional Tribunal stands out, as it constitutes the most general and blatant rejection of the principle of the supremacy of EU law. Although no formal justification has been issued yet by the Constitutional Tribunal, it appears that the Judgment is both factually and legally incorrect. The existing case law of the CJEU neither questions the supremacy of the Polish Constitution in the Polish legal order nor does it allow national courts to ignore its provisions. Moreover, the practice of the EU institutions does not confirm that these bodies operate outside the limits of the competences conferred by Poland on the EU in the EU treaties it signed.

Last but not least, it should also be noted the composition of the Constitutional Tribunal, when

deciding this specific case, included the so-called 'pseudo-judges', who were appointed to the Court in clear violation of the rules existing at the time of their appointment. This adds an additional layer of difficulty to this already complicated situation (e.g. can the decision of the Constitutional Tribunal be regarded as a proper Judgment at all?).

Romania. The case of "Corruption Legislation"

An **informal letter** written by Timmermans[514] was sent to the Romanian government in 2019, immediately following the European Council Summit in Sibiu (Romania) and a week before the elections to the European Parliament, discussing the "rule of law developments" and openly **warning** that if the Romanian government does not withdraw the legislative amendments undermining the effective fight against corruption in the country, the Commission would initiate procedures under the "Rule of law framework" which eventually can lead to triggering the Article 7 TEU procedure.

The case regarded three groups of issues: The **first** group deals with threats to the **independence of the Romanian judiciary**, affected by "a system of strict and extensive disciplinary and new liability of magistrates" and "special section in the prosecution office for investigating magistrates", which results in "chilling effects" among magistrates. The **second** threat deals with the "clear **trend to challenge the authorities**" such as High Court of Cassation and National Anti-Corruption Directorate, resulting from a "lack of loyal cooperation between state institutions" but also from "controversial nomination procedures", which have not been investigated **despite EU recommendations**. The **third** group consists of a number of adopted **legislative amendments to criminal law and procedures** which negatively impact the effective fight against corruption. The above amendments **threaten the requirement of "loyal cooperation between different powers of the state".**

The Council of EU after a debate on the latest reports adopted under the Cooperation and Verification Mechanism (CVM) concluded that Romania should deal with the expressed concerns[515] not only by fulfilling the recommendations set out by the European Commission, but also "through the adherence to the recommendations of the Council of Europe Venice Commission and GRECO".[516] **The Commission's decision on the CVM mentions the possibility to apply "safeguard measures", such as suspension of Member States' obligation to recognise and execute Romanian judgments and judicial decisions**: such a decision "would (…) **replace** the ongoing processes of the Cooperation and Verification Mechanism" and the CVM benchmarks and recommendations would be supervised under the Rule of law Framework. However, there seems to be no direct legal basis allowing for the suspension of CVM due to the introduction of the Rule of law framework. There is, however, no obstacle to conduct both procedures in parallel, especially in the light of the complementary nature of the rule of law framework. As correctly underlined in the letter, "the Cooperation and Verification Mechanism benchmarks remain open until they are fully

[514] https://cdn.g4media.ro/wp-content/uploads/2019/05/Scrisoare-Timmermans-Rule-of-law-Framework.pdf
[515] https://ec.europa.eu/info/sites/info/files/2018-st15187_en.pdf
[516] https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-/16807b7717

and satisfactorily met".[517]

Upon AG's Opinion on the Romanian Constitutional Court decisions,[518] on 4 March 2021,[519] the interim appointment of the Chief Judicial Inspector and the national provisions establishing a special public prosecutor's section with exclusive competence for offences committed by judges and prosecutors **are contrary to Union law**[520] (Joined Cases C-83/19, C-127/19 and C-195/19, Case C-291/19 and Case C-355/19). The Commission concludes that, in Romania, 42 controversial reforms enacted in 2017-2019 "with a negative impact on judicial independence continue to apply." However, the Commission also acknowledges: "In 2020, the Government continued to affirm its commitment to restore the path of judicial reform after the reverses of 2017-2019. This led to a significant decrease in tensions with the judiciary".[521]

The current Romanian centre-right government reiterates its plan to reverse the controversial reforms enacted by the previous Social Democrat Party (PSD). In particular, the current government aims to undo the Special Section for Investigating Crimes in the Justice System.[522] **The final rulings of the CJEU in these cases are still pending**. After the Romanian parliamentary elections at the end of 2020, there was renewed action in Romania towards EU-compliant judicial reforms. Concrete steps have already been initiated. **In mid-February 2021, the Romanian Justice Minister Stelian Ion (a member of the Union for the Rescue of Romania, USR) sent a relevant draft law to the government.** Nevertheless, it remains to be seen to what extent the current government will implement the requirements of the EU and whether the negative effects of the structural changes in Romania have not yet created other hidden problems in need of remedy. Ultimately, not only did the European Commission lose confidence in the stability of Romania's rule of law development, but the Romanian people also lost trust in the government and in the progress achieved in the fight against corruption at the highest level. It will take more than a law to restore the Romanian people's confidence in the judiciary.[523]

Attempt of early evaluation of the Romanian Corruption Legislation case (maintaining

[517] https://reconnect-europe.eu/blog/grabowska-moroz-rule-of-law-romania-timmermans/

[518] 7 November 2018, the Constitutional Court issued Decision 685/2018 stating that some panels of the national supreme court (High Court of Cassation and Justice, Romania, 'the HCCJ'), were improperly composed. This decision had enabled some of the parties concerned to introduce extraordinary appeals, which in turn raised potential issues not only concerning the protection of the financial interests of the EU under Article 325(1) TFEU, but also the interpretation of the concept of 'tribunal previously established by law' enshrined in the second paragraph of Article 47 of the Charter. On 16 February 2016 the Constitutional Court issued Decision 51/2016 declaring the participation of domestic intelligence services in the carrying out of technical surveillance measures for the purposes of acts of criminal investigation to be unconstitutional, leading to the exclusion of such evidence from criminal proceedings. On 3 July 2019, the Constitutional Court issued Decision 417/2019 declaring the failure of the HCCJ to comply with its legal obligation to establish specialist panels to deal at first instance with corruption offences. This leads to the re-examination of cases concerning corruption connected with the management of EU funds already adjudicated. By the different questions referred in the present cases, the HCCJ and the Tribunalul Bihor (Regional Court of Bihor, Romania) ask the Court to ascertain if Decisions 685/2018, 51/2016 and 417/2019 of the Constitutional Court are compatible with certain provisions and principles of EU law.

[519] https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-03/cp210033en.pdf

[520]http://curia.europa.eu/juris/fiche.jsf?id=C%3B83%3B19%3BRP%3B1%3BP%3B1%3BC2019%2F0083%2FP&oqp=&for=&mat=or&lgrec=en&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-83%252F19&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=9478230

[521] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0322

[522] https://balkaninsight.com/2020/09/30/harsh-words-on-eu-rule-of-law-but-will-action-follow/

[523] https://www.kas.de/en/country-reports/detail/-/content/romania-s-judiciary-before-the-ecj

this is a pre-judicial phase)

Efficiency: The case has been **promptly** addressed by the EU. The warning signals and communications seem to have been efficient since the Romanian government is seemingly willing to undertake all necessary actions to settle the EU threat of the Rule of Law. The way the issue is addressed clarifies that emergency measures should be adopted only when there is a real "emergency" (such as the one in Romania), and explicitly invokes an activation of the Rule of Law Framework "**without delay**", should the necessary improvements not been made shortly, or should further negative steps be taken, such as promulgation of the latest amendments to the criminal codes**. Explicit and direct** is also the **warning** that the Commission "will not hesitate to swiftly open proceedings under Article 258".

The formal letter has made clear that the effective punishment of crimes is a rule of law issue, hence establishing a link between the Romanian situation and EU Law, and therefore pre-empting any (ill-founded) accusation that it would be acting *ultra vires*, mentioning concretely various examples of crimes for which EU secondary law explicitly requires the Member States to impose such sanctions. This means that whilst the choice of penalties remains within their discretion, national authorities must ensure in particular that infringements of EU law are penalised under conditions which make the penalty effective, proportionate and dissuasive. Emphasis is given not only on the direct effect of national laws on judiciary independence, but also the indirect cumulative effect these might have on judges. For example, it is argued (correctly in our view) that the combination of a system of strict and extensive disciplinary and new liability of magistrates, the special section in the prosecution office for investigating magistrates and the recent track record of the Judicial Inspection, results in a *chilling effect* on magistrates when it comes to exercising their independence.

Effectiveness: The EU and the Council of Europe, through the CVM and reports from the Venice Commission, have been actively monitoring and regularly criticising Romania's justice "reforms". Timmermans' letter seems to have sorted particular effects, both for the diagnosis it offers but also the different legal answers it promises should Romanian authorities fail to heed the Commission's diagnosis. The new Romanian government has already activated to repeal the law and align with the EU obligations. We cannot disregard or underestimate, for the means of our research, that this change of actions attained mainly to the settlement of a new (non-populist) party in the government of the country.

Transferability: To this stage, we can appreciate the adoption in this case of the compelling working definition adopted by the Commission in its 2014 Communication, in which the rule of law is understood as set of core and interrelated components which "include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law". In the letter, "separation of powers and loyal cooperation between different powers of the state" are also mentioned.[524] An infringement action based on Article 325 TFEU is waging, coupled with Article 19(1) TFEU regarding aspects relating to judicial independence

[524] https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania/

as well as an application for interim measures to provisionally prevent the application of relevant national provisions. The transferability capacity of this case seems higher than the "ordinary" capacity of other formal letters, that usually precede infringement procedures: it combines early, clear, direct warnings to the audacity of calling to the EU RoL Framework and EU values to enhance the effectiveness of the notice

In the evaluation of the Romanian case it is necessary to keep in mind the exceptionality of VCM subjection

"Romania case" formal notices/letters as preparatory steps to infringement (however, not yet reached infringement)	**POOR**	**FAIR - GOOD**	**VERY GOOD - BEST**
Efficiency			Art. 258-259
Effectiveness			Art. 258-259
Transferability			Art. 258-259

Table 4 – Judgments concerning infringement procedures: outcome (2015-2019). Source: CJEU, Annual Report 2019. Judicial Activity. Luxembourg, 2020, p. 170.

	2015		2016		2017		2018		2019	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	2		1		1		2		1	
Bulgaria	2		1		1		1			
Czech Republic			1				2			1
Denmark	1							1		
Germany	3		1		4		2	1	3	
Estonia										
Ireland		1			1		1		2	
Greece	3		4		5		4		2	
Spain			3		2		3		1	1
France	4		1				1		1	
Croatia									1	
Italy	2		1				2		5	1
Cyprus			1							
Latvia	1								1	
Lithuania										
Luxembourg	2		1		1					
Hungary			1		1		1		1	
Malta				1			1			
Netherlands			1	1					1	
Austria				1			1	1	1	
Poland	3	1	2				4		3	
Portugal			6		2				1	
Romania			1				1			
Slovenia	1				1		1			
Slovakia		2					1			
Finland										
Sweden	1									
United Kingdom	1	1	1	1	1		2		1	
TOTAL	**26**	**5**	**27**	**4**	**20**		**30**	**3**	**25**	**3**

Overall evaluation of infringement procedures' cases

Art. 258-260 Infringement procedures	**POOR**	**FAIR - GOOD**	**VERY GOOD - BEST**
Efficiency	The "Ordinary Courts" case (Poland) The "NGO funding" case (Hungary) The "Asylum case" (Hungary)	The "CEU case" (Hungary)	The "Supreme Court" case (Poland) "Judicial independence" (Hungary) The "Romanian case"
Effectiveness	The "NGO funding" case (Hungary) The "Asylum case" (Hungary)	The "Ordinary Courts" case (Poland) The "CEU case" (Hungary) "Judicial independence" (Hungary)	The "Supreme Court" case (Poland) The "Romanian case"
Transferability	The "Ordinary Courts" case (Poland) The "NGO funding" case (Hungary) The "Asylum case" (Hungary)	The "Supreme Court" case (Poland) "Judicial independence" (Hungary)	The "Romanian case" The "CEU case" (Hungary)

The tool of the "infringement procedures" **does not provide a consistent answer to the "best practices" question**. The evaluation shows that it should be taken as a tool that applies "case-by-case", but it does not offer certainty on its capacity to enforce or prevent populist challenges and violations. In the two inefficient, ineffective and with poor transferability capacity cases, the contentious issues regarded delicate EU topics related to the failed governance of the migration crisis in EU (NGO and Asylum/residence cases) while constituting at the same time areas resenting the "internal affairs" area. The other two cases, instead, regarded well-established topics on the governance and safeguard of the EU rule of law directly (judicial independence) or indirectly (CEU case). It could be said, therefore, that a determining factor for the successful employment of the infringement procedures legal tool relies to the EU political opportunity of the topic: condemning a country for its bad governance of the migration crisis would inevitable link back to the EU responsibilities on the matter, while the purely legalistic aspects related to overall EU values (freedoms, judicial independence) are "safe" from indictment areas for the EU. To confirm the above assumption, it is worth noting that the most positive outcome has been obtained in the Romanian case, which is a country subjected to the special conditions of the CVM mechanism, which provides the infringement procedures with an underlying, thus explicit political "warning". "Politically relevant" assessments are also in this case possible factors that impede, in some cases, or on the contrary in other cases facilitate, reaching the highest potential of this legal tool.

Tool N. 5. Art. 278-279 TFEU. Interim Measures

The purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection afforded by the EU judicature. In this perspective, interim measures clearly belong to the **enforcement tools**[525] at disposition of the CJEU, however they are only partially regulated and require a combined reading of Art. 278 and Art. 279 TFEU. The first (Art. 278) prescribes that the Court may order the suspension of the application of a contested act as an exception to the general rule under which actions brought before the Court shall not have suspensive effect.[526]http://www.dirittounioneeuropea.eu/Tool/Evidenza/Single/view_html?id_evidenza=129 - _ftn5 For a declaration of failure to fulfil obligations, instead, the adoption of interim measures under Art. 279 TFEU is the only available option, since Art. 278 TFEU concerns the suspension of the execution of acts of the EU. Indeed, Art. 279 TFEU provides that the Court may prescribe *any* necessary interim measures, therefore, "*the range of possible measures is not predetermined*",[527] and it is at the discretion of the Court to indicate the most suitable measures to preserve the effectiveness of its future judgment.

Interim measures are provisional and consist in the order of suspension of the operation of a contested national measure[528] with the intent to prevent the realisation of an "irreparable damage" and to prevent from the spreading of the consequences. According to Art. 39 of the Statute of the Court,[529] it is the president or the vice-president to determine, "*under the conditions laid down in the Rules of Procedure*", and to adjudicate upon applications to suspend execution (Art. 278 TFEU) or to prescribe interim measures pursuant to Art. 279 TFEU, "*by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure*".[530]

Interim measures granted by the Court are, as can be assumed by their name and their very nature, **temporary and conditional**: in other terms, they are valid only for a limited period and shall not prejudice the final judgment in the main proceeding. The Art. 162, para. 3 of the Rules of Procedure of the Court (RP), specifies that the measures shall expire when the judgment which closes the proceedings is delivered, unless the order fixes a time-lapse date; furthermore, Art. 162, para. 4 expressly provides that "*[t]he order shall have only an interim effect, and shall be without prejudice to the decision of the Court on the substance of the case"*.[531]

The substantive requirements for ordering provisional measures provide that **i)** the application must establish a *prima facie* case (*fumus boni iuris*), consisting in a **well-founded or at least not manifestly without foundation** main procedure challenged before the Court (factual and legal arguments are well documented and autonomously standing); **and ii)** the application is **urgent**, which means that the duration of the main proceeding threatens to cause the part

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[525] https://ec.europa.eu/environment/legal/law/procedure.htm
[526] G. Borchardt, *The Award of Interim Measures by the European Court of Justice*, in *Comm. Market Law Rev.*, 1985, p. 203
[527] K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford, 2014, p. 566
[528] CJEU 10 December 2009, case C-572/08 R, *Commission v. Italy*, in which the Court ordered Italy to suspend the application of Art. 4 of the law of 30 July 2008, n. 24 adopted by the Lombardy region
[529] https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf
[530] Arts 10, 13 and 161 of the Rules of procedure
[531] https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf

seeking the relief a serious and irreparable damage (*periculum in mora*). This second element presupposes an preventive evaluation in order to verify whether the absence of the judgment in the main proceedings threatens to cause the party seeking the interim relief serious and irreparable damage (Art. 160, para. 3, RP). It is for that party to adduce sound evidence that it cannot wait for the outcome of the main proceedings if it is not to suffer personally harm of that kind. The prefiguring damage does not need to be imminent, but it should be considered "irreparable" when it could no longer be remedied by the Commission's final decision. The evaluation entails the scrutiny of "the balance of interests" and of proportionality, under which the Court is called to assess if the interest of the applicant for interim measures outweighs the interest of the defendant or of third parties in case the interim measures are allowed (see, CJEU 13 March 1963, case 15-63 R, *Claude Lassalle v. European Parliament*).[532]

Beyond these essential elements, other substantial-procedural conditions must be able to justify the necessity of interim measures and sufficiently ascertain that the main proceeding is not jeopardised (see AG Opinion 25 March 1980, Capotorti on *Commission v. France*)[533]. These can be summarised in **the "ancillary nature" of the interim measure**, the summary nature of the proceedings avoiding to affect the substance of the case or to seriously affect the rights of the parties, and the persistence of the main problem for decision after the resolution of the interim measures. The procedural aspects for the application and the suspension, variation, cancellation or further application of interim measures are further described in Artt. 160–164 RP.[534]http://www.dirittounioneeuropea.eu/Tool/Evidenza/Single/view_html?id_evidenza=129 - _ftn11

Interim relief before the CJEU constitutes possible incidental proceedings aimed at securing the full effectiveness of the action in the main case.[535] Still, interim measures have been rarely used, considering that the ruling of failure to fulfil obligations for a Member State in breach of EU law is only declaratory and fundamentally unable to re-establishing the *status quo ante*. The Court cannot essentially impose a certain conduct to the Member States, but only has the power to declare that a specific action or omission is contrary to EU law; with the exception of Art. 260, para. 3 TFEU, which allows to directly impose a lump sum or a penalty payment in case there is a failure in fulfilling the transposition of a directive adopted under a legislative procedurehttp://www.dirittounioneeuropea.eu/Tool/Evidenza/Single/view_html?id_evidenza=129 - _ftn3. The limited powers conferred to the Court may have consequences on the interim relief, since by the provisional measures the Court can actually order Member States to do what the main action cannot do.[536] Additionally, the Court of Justice have found that the provision also allows the Court of Justice to prescribe penalty payments to ensure the efficiency of the

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[532] J. G. Huglo, 1992. *Le référé*, in *Jurisclasseur Europe*, 390/ 1992; https://www.tandfonline.com/doi/pdf/10.1080/17441056.2020.1805697?needAccess=true; https://pure.uva.nl/ws/files/2005956/135951_11.pdf; https://link.springer.com/chapter/10.1007%2F978-94-6265-411-2_10

[533]http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90838&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3245; https://www.jonesday.com/en/insights/2019/07/european-commission-revives-interim-measures

[534] C. Amalfitano, M. Codinanzi, P. Iannuccelli (eds), 2017. *Le regole del processo dinanzi al giudice dell'Unione europea*, Editoriale Scientifica

[535] AG Tesauro delivered on 17 May 1990, case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)*, para. 18

[536] K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford, 2014, p. 571

Interim measures, even "ex officio" within the frame of an application of interim measures.

Interim measures have been applied normally in cases of EU antitrust and competition law infringements,[537] representing in those cases a highly incisive tool that ensures the effectiveness of ongoing investigations, specifically in circumstances where the grave nature of the infringement combined with the duration of the proceedings do not allow timely intervention, thus resulting in the risk of an irremediable damage to competition. Moreover, challenges before the Court will usually involve private applicants questioning the legality of, for example, Commission decisions. The scenario in which a Member State acts as a defendant to which an interim measure can be imposed, is basically limited to infringement procedures brought by the Commission or by another Member State on the grounds of Article 258 TFEU. Recently, however, the CJEU took a particularly "bold stance" by launching a "teleological interpretation" of the "interim measures tool" and ordered interim measures also on EU rule of law-related infringements.[538]

Interim measures in the "Rule of Law backsliding" in Poland

The Polish authorities disobeyed a previous order of the Court to stop their unlawful action logging in the the Białowieża Court, granting the Commission's request to impose a penalty payment of at least €100,000 per day of non-compliance within the framework of an application for interim relief.[539] More specifically, it is referred to the cases of **Commission v. Poland**, now culminating with the recent referral of Poland to the CJEU and the contextual request for interim measures (2021)[540] for protecting the judicial independence of Polish judges, art. 2 TEU and the primacy of the EU law (see also the reference to the latest infringement case, above in p. 148).

The case regards the 2019 Polish law (in force since 2020) that uses disciplinary proceedings and other means to prevent courts from directly applying certain provisions of EU law and from putting references for preliminary rulings on such questions to the CJEU; it allows the Disciplinary Chamber of the Supreme Court – the independence of which is not guaranteed – to take decisions which have a direct impact on judges and the way they exercise their function (lifting of immunity of judges with a view to bringing criminal proceedings against them or detain them, consequent temporary suspension from office, reduction of salary). These threats and violations to judicial independence seriously undermine the effective legal protection, and thus the EU legal order as a whole, and in that view, **interim measures are necessary to prevent the aggravation of serious and irreparable harm inflicted to judicial independence and the EU legal order.[541]**

The first time the Court made history ordering the Polish authorities to refrain from purging the Poland's Supreme Court, asking the immediate suspension of the application of the

[537] https://academic.oup.com/jeclap/article-abstract/11/9/487/5893074?redirectedFrom=fulltext
[538] https://link.springer.com/chapter/10.1007%2F978-94-6265-411-2_10
[539] http://eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html, and Tornøe and Wegener "What should the EU do About Poland's populist PiS?", pp. 60-61.
[540] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524
[541] https://audiovisual.ec.europa.eu/en/video/I-204025

legislation which retroactively lowered the retirement age for Supreme Court judges: the Polish authorities had to *restore* the Supreme Court to its situation *prior* to the entry into force of the law challenged by the Commission. Secondly, the CJEU ordered the immediate suspension of the activities of the so-called "disciplinary chamber" to prevent the arbitrary new disciplinary regime put in place by Poland's ruling party is built.[542]

These orders constitute, from a strictly legal angle, a ground-breaking precedent, because of their "exceptional" purposes, somewhat interfering with the amendment of a constitutional national provision, and because of their suspensive capacity of the effects of EU acts. Interim measures are hardly ever requested in these categories of issues, for the Commission is well aware of the reluctance of the Court to order Member States to act or refrain from acting in provisional terms. Article 279 TFEU allows however ample discretion and creativity on the kind of interim measure that the case deserves, but, in practice, they are scarcely requested and, as a result, hardly ever granted. The Article 160(7) of the Rules of Procedure has further been employed, allowing the Court to rule *prior to hearing the defendant Member State*, indirectly stating the *extreme urgency* and the underlying *immediate danger, with a retroactive effect*.[543]

As a general note, the requirements for the interim relief orders are satisfied by the fact that already, courts in Ireland, the Netherlands and Germany have refused to extradite to Poland on the grounds that fair trials are no longer guaranteed there. Such developments call into question as well the mutual recognition and legal certainty on which the Single Market is based.[544] The Court used broad discretion to adopt 'any ancillary measure intended to guarantee the effectiveness of the interim measures it orders'.[545]

The Case of the Supreme Court in Poland: In the case of the judges of the Supreme Court of Poland the Commission had applied for Poland to cease applying the challenged provisions and cease any actions taking in accordance with these. This essentially amounted to stop retiring judges and reinstate retired judges. The interim measures were successful as Poland indeed ended up reinstating the retired judges and did not facilitate more (illegal) retirements prior to the ruling in the case.[546]

The evaluation of the "Supreme Court" case

Efficiency: Concerning efficiency, the interim measures seem to have been very efficient. The provisions entered into force in April 2018, the case was brought before the Court of Justice in

[542]https://eucrim.eu/news/cjeu-confirms-interim-measures-against-polish-supreme-court-reform/; https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf; https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180204en.pdf; https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf

[543] http://eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html

[544] https://www.diritticomparati.it/on-disciplinary-chambers-judicial-remedies-and-the-rule-of-law-the-court-of-justices-ruling-in-miasto-lowicz-and-the-order-for-interim-measures-in-commission-v-poland-c-791-19-r/?print-posts=pdf

[545] 0ECJ 20 November 2017, Case C-441/17 R, Commission v Poland (Puszcza Białowieska), (2017) 877; Associação Sindical dos Juízes Portugueses judgment, ECJ 27 February 2018; Case C-284/ 16, Achmea, ECJ 6 March 2018, (2018) 158; Opinion of AG Tanchev in Commission v Poland (Independence of the Supreme Court), par. 48-51

[546] Tornøe, Wegener, "What Should the EU do about Poland's populist PiS?", pp.68-69

September 2018, and the Court of Justice prescribed interim measures in November 2018. The amending legislation was finalised in December 2018 and entered into force on 1st of January 2019.[547] It is however not clear when the judges were reinstated.

Effectiveness: When it comes to effectiveness, the interim measures have proven very effective. the Supreme Court judges were reinstated and through "legal fiction" treated as if they were never dismissed.[548] This had a pre-emptive effect, which limited the supposed damage of the provisions without interim measures. As this is the goal of the interim measures this amounts to a very high effectiveness score.

Transferability: The case does not seem to have required any particular adaptation of the art. 279 to safeguard the Rule of Law, democracy, and human rights. However, it may be argued that it extended the applicability of the interim measures as it was the first case concerning Art. 19 (1), 2nd subparagraph, TEU, setting a precedent for following cases, and what can merit interim measures, namely the fact the systemic threat to the legal order of the Union, the infringement of a fundamental right, and the impact that the provisions concerned the highest legal interpreter.[549]

"The Supreme Court"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency			Art. 279
Effectiveness			Art. 279
Transferability		Art. 279	

The Case of the Disciplinary Chamber: In its latest request for interim measures, the Commission asked the Court of Justice essentially to suspend the provisions empowering the Disciplinary Chamber of the Supreme Court to decide on requests for the lifting of judicial immunity, as well as on matters of employment, social security and retirement of Supreme Court judges, suspend the effects of decisions already taken by the Disciplinary Chamber of the Supreme Court on the lifting of judicial immunity, and suspend the provisions preventing Polish judges from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice as well as the provisions qualifying action taken by judges in that respect as disciplinary offences.[550] The Commission had in this case generally claimed that the same provisions were illegal as they infringed Art. 19(1), 2nd subparagraph, TEU.[551]

The Court of Justice granted these measures. However, Poland has not ceased applying the provisions and the Disciplinary Chamber remains active. No subsequent interim procedure requesting penalty payments has been initiated. [552]

[547] Ibidem, p. 70
[548] Ibidem, pp. 70-71
[549] Ibidem, p. 68
[550] C-791/19 R, par. 1
[551] C-791/19 R, par. 3
[552] Tornøe, Wegener, "What should the EU do about Poland's populist PiS?", p. 80

The evaluation of the "Disciplinary Chamber"

Efficiency: As was the case previously, the efficiency score is quite high. The provisions entered into force in April 2018, the case was brought before the Court of Justice in October 2019, and the Court of Justice prescribed interim measures in April 2020.[553]

Effectiveness: When it comes to effectiveness, in this case the interim measures have had no effect, as Poland did not comply with the Order.[554] This amounts to the lowest score. However, a consideration is worth mentioning: if the Commission were to apply for penalty payments it could be contemplated that this deficiency would be mitigated.

Transferability: The case does not seem to have required any particular adaptation of the art. 279 to safeguard the Rule of Law, democracy, and human rights. The order seems to be a continuation of the reasoning in C-619/18 R. The acknowledgment of the interim measures upgrades and makes clear that the seriousness of the "damage" in those cases is of high importance for the EU, demonstrating the determination to intervene and resolve any threat to the rule of law. The field of application of the interim measures has been expanded and widened, establishing the Court's jurisdiction to adopt periodic penalty payments at an early stage of the procedure for interim measures, and the jurisdiction to review the organisation of the national judiciary of the member states. This offers horizontal and vertical empowerment to the EU's decentralised judiciaries – now able to intervene – while also resolving the competences conundrum through a broad reading of the principle of judicial independence as a key element of the rule of law.[555] The Court's "holistic approach", which looks at the broader and systemic impact the seemingly lack of independence of the disciplinary chamber could have on ordinary courts and the Supreme Court as a whole, may be viewed as both warranted and compelling.[556]

"The Disciplinary Chamber"	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency			Art. 279
Effectiveness	Art. 279		
Transferability		Art. 279	

Overall assessment of Interim Measures' cases

Art. 278-279. Interim	POOR	FAIR - GOOD	VERY GOOD - BEST

[553] Ibidem, p. 77-78
[554] Ibidem, pp. 70-71
[555] D. Kochenov, P. Bárd, 2019. The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU, SSRN
[556] https://free-group.eu/2020/04/10/verfassungsblog-protecting-polish-judges-from-the-ruling-partys-star-chamber-the-court-of-justices-interim-relief-order-in-commission-v-poland-case-c-791-19-r/

Measures			
Efficiency			The "Supreme Court" (Poland) The "Disciplinary Chamber" (Poland)
Effectiveness	The "Disciplinary Chamber" (Poland)		The "Supreme Court" (Poland)
Transferability		The "Supreme Court" (Poland) The "Disciplinary Chamber" (Poland)	

The tool of the "Interim measures", albeit the limitation given by the restricted number of cases examined for the populist cause, seems to be the most efficient and effective mechanism of legal response: in most cases the interim measures adopted have produced a "fairly good" or even "best" outcome, reaching the maximum capacity of the envisaged response mechanism. From another point of view, however, the lack of a broad spectrum of cases examined from which to draw a definitive and qualitative evaluation of the tool, limits the certainty of the "success rate" of the tool.

Pros

1. In the Polish case (some forcibly retired judges were allowed to return to their posts and the retirement age of judges has been standardized before the final judgment) we can appreciate that to a certain extend the implementation of the reforms, thus the production of the harming effects has been temporarily stopped or delayed
2. The periodic penalty payment cannot be seen as a punishment but rather as an instrument to guarantee the effective application of EU law and a *fortiori* the rule of law in the EU legal order, prefiguring the "irreparable damages" (especially since Poland continued, i.e. logging the forest despite the Vice-President's order)[557]
3. The application of interim measures results in an increasingly important tool to protect the core values of the EU. The importance of this development can hardly be underestimated: In order to avoid a *fait accompli* situation as was the case after the Commission v Hungary judgment[558] interim measures combined with the possibility of

[557] L. Krämer, 2018. 'Injunctive Relief in Environmental Matters', 15 Journal for European Environmental and Planning Law, p. 259 and 262

[558] The Court found that Hungary failed to fulfil its obligations under EU law and Hungary allegedly implemented this judgment, the structural problems with regard to judicial independence were not resolved. The Hungarian government was able to replace the magistrates in office before the termination of their official term with magistrates whom the government preferred. See K.L. Scheppele, 2014. 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)', 23 Transnational Law and Contemporary Problems, p. 51.

invoking pecuniary sanctions allow a prompt reaction in order to prevent the harm that the rule of law violations will possibly cause to the legal system of the member state concerned.[559]

4. It adds enforcement value and sharpens the judicial validity of the infringement procedures, while restores the validity and effectiveness of the CJEU's activities and rulings.
5. it informs further the meaning of "serious and irreparable damage" bringing it into a broader context of "potentiality":[560] the "mere prospect" for Polish judges to "face the risk of a disciplinary procedure", which could bring them before a body whose independence would not be guaranteed, is likely to affect their independence *regardless* of how many proceedings may have been initiated or the outcomes of these proceedings to date.
6. The Court has suspended, for the first time to the best of our knowledge, the activity of a body masquerading as a court. The EU "primacy of law" is now enforced also with the EU "primacy of rule of law best interest", when the CJEU explained that the eventual budgetary as well as the limited practical consequences of the suspension of (arbitrary) cases pending before the non-court entity known as the disciplinary chamber,[561] cannot in any event prevail over the general interest of the EU in the proper functioning of its legal order.

Cons

1. This tool cannot fully prevent the implementation of dangerous reforms (i.e. in the Polish judicial system), abuses or pressures: the newly adopted amendments to the law on the organization of the Polish Supreme Court did not touch upon the standing of newly appointed judges, nor has the Constitutional Court so far returned to its previous functioning.
2. The adoption of pecuniary measures on the basis of Article 279 TFEU is ambiguous and cannot be considered self-evident, taking into account the scheme of the EU Treaties;[562] this was a hazardous decision, since the possibility to adopt financial sanctions is explicitly foreseen in the framework of infringement procedures. Instead of following this textual interpretation, the Court used its traditional teleological interpretation technique. It has been seen as 'judicial law-making' in response to a particular political context, however the Court's approach is consistent with other cases

[559] P. Bárd, A. Śledzińska-Simon, 2019. 'Rule of Law infringement procedures: a proposal to extend the EU's Rule of Law toolbox', 9 CEPS paper, p. 14

[560] https://free-group.eu/2020/04/10/verfassungsblog-protecting-polish-judges-from-the-ruling-partys-star-chamber-the-court-of-justices-interim-relief-order-in-commission-v-poland-case-c-791-19-r/

[561] https://www.barhumanrights.org.uk/bar-council-and-bhrc-write-to-the-polish-authorities-regarding-attacks-on-the-rule-of-law-in-poland/

[562] Pursuant to Article 260(2) TFEU, penalty payments can be adopted to sanction noncompliance with a judgment adopted on the basis of Article 258 TFEU. In addition, Article 260(3) TFEU envisages an explicit exception, which allows the direct adoption of financial sanctions under Article 258 TFEU for failing to transpose EU directives, without requiring a procedure under Article 260(2) TFEU

where respect for the rule of law is at stake.[563]

3. It still *could* be perceived as a punishment tool targeting specific countries and introducing "double standards", thus damaging the integration process and provoking a "boomerang effect" of growing sympathy and mounting solidarity for populist movements/parties/countries.

Tool N.6. The "Budget conditionality"

On the contrary to the extensive controls and conditionalities foreseen at the accession stage of a State in EU,[564] conditionalities and rule of law check-ups or inspection mechanisms at a later stage have resulted rather loose and ultimately quite inefficient, if not inadequate (too slow, too political, too complex, too restricted) to face threats or violations. The newly introduced "EU toolbox" mechanism in addressing rule of law shortcomings in the Member States, has primarily monitoring and assessment nature, but rather limited enforcement capacity.

As a result of the inefficiency of the tools-measures provided in the Treaties to effectively counteract risks or breaches and violations of the rule of law multiplying in recent years, the Commission (May 2018) presented a "**Proposal**" for a "Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States",[565] which was adopted as the "**Regulation on a general regime of conditionality for the protection of the Union budget,** 2020-2092", entering in force with the plenary Parliamentary approval of 16th of December 2020,[566] applied since January 2021, and endorsed by the ECOFIN **Multiannual financial framework for 2021-2027.**[567] In the "Consideration 11" of the Preamble to the Regulation it is stated that deficiencies concerning the proper functioning of public authorities and judicial review can seriously harm the financial interests of the Union,[568] clearly implying that the provisions of the Mechanism are capable of establishing such presumption.[569]

The so called "conditionality mechanism" represents a legal-political tool that may result of historical importance for the future of the EU: adopted under the German Council Presidency and the EU Parliament[570], it is envisaged to enable **concrete legal reactions** against (among others) dangerous populist drifts that undermine the EU Rule of Law. The actions to undertake

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563 P. Wennerås, 2019. 'Saving a forest and the rule of law: Commission v. Poland', 56 CMLRev, pp. 541 - 545

564 https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en

565 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 of 2 May 2018, COM/2018/324 final – 2018/0136 (COD), adopted under Art. 322(1) (a) TFEU and Art. 106 a Treaty Euratom

566 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.433.01.0001.01.ENG&toc=OJ:L:2020:433I:TOC

567 https://www.consilium.europa.eu/en/press/press-releases/2020/12/17/multiannual-financial-framework-for-2021-2027-adopted/

568 Consideration 11:" Generalised *deficiencies in the Member States as regards the rule of law which affect in particular the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union."*

569 Tornøe, Wegener" What Should the EU do about Poland's Populist PiS", pp. 94-96

570 Budget conditionality: Council presidency and Parliament's negotiators reach provisional agreement - Consilium (europa.eu)

are linked to an economic data: the protection of the EU's financial interests is being directly associated to rule-of-law compliance in the Member States.

Although the majority of people across the EU agree on the idea of putting the distribution of funds in the Member States under the condition of the respect of the EU Rule of Law and Democracy, as resulted in the survey on the "Public Opinion in the EU in times of Covid" (2021) with the 77% of the respondents,[571] the adoption of the final legal text hasn't been simple: the content of the aforementioned "Proposal" was subjected to an intense political debate and went under fierce negotiations (see the veto opposed by Hungary and Poland)[572], ultimately resulting in a text of a political compromise[573]. Until March 2021, reactions and complaints would continue: Hungary and Poland launched a legal action at the CJEU against the Regulation tying the disbursement of bloc funds to the rule of law situation in EU countries, and to examine whether the mechanism falls foul of EU treaties[574]. More precisely, the points on which this action took place were focusing on the alleged lack of legal basis for the mechanism in the EU Treaties; the interference with the competence of the Member States; the fact that the disbursement of EU funds can only be linked to objective and concrete conditions unequivocally established in a regulation; and the infringement of the principle of legal certainty.

The Proposal embraced the view of establishing a system capable to block access to EU funds in order to protect the Union's financial interests from the risk of financial loss in the event of "generalised deficiencies" as regards the rule of law.[575] Some of the concerns regarded the link between the proposed mechanism and Article 7 TEU[576]. Structural objections were expressed especially by Hungary and Poland, that consider the establishment of such a mechanism contrary to the Treaties.[577]

In a sign of a political compromise, the European Council accepted that Member States are allowed to launch an action for annulment of the regulation to the CJEU: although such an appeal has normally no suspensory effect according to Article 278 TFEU, the Commission will have to wait for the outcome of the Court proceedings before proposing budget conditionalities against individual Member States. The Commission was also compelled to adopt "guidelines"[578] in which the principles of subsidiarity and proportionality are ensured, and the Commission's own responsibility is assessed for the accuracy and relevance of the information on which its evaluation is based on.[579] However, strong reactions against the guideline's

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[571] https://www.europarl.europa.eu/resources/library/media/20201020RES89705/20201020RES89705.pdf

[572] https://www.euractiv.com/section/economy-jobs/news/eu-gives-24-hours-to-hungary-and-poland-to-lift-their-veto/; https://macmillan.yale.edu/news/after-eu-leaders-endorse-declaration-rule-law-poland-hungary-drop-budget-veto

[573] RuleofLaw-Draftconsolidatedtext_rev_EN.pdf (europa.eu)

[574] https://www.dw.com/en/poland-and-hungary-file-complaint-over-eu-budget-mechanism/a-56835979

[575] https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0324/COM_COM(2018)0324_EN.pdf, The Commission based its proposal on Article 322(1)(a) TFEU and Article 106a of the Treaty establishing the European Atomic Energy Community

[576] M. Rangel de Mesquita, 2018. 'European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027', ERA Forum, Vol. 19(2), pp. 290-292

[577] https://www.bbc.com/news/world-europe-54964858

[578] https://eucrim.eu/news/compromise-making-eu-budget-conditional-rule-law-respect/

579 Conclusions of the 10 December 2020 meeting of the European Council document EUCO 22/20 of 11 December 2020:

requirement have been expressed from a number of MEP's, arguing that these could not, should not be made in a way that restrict the law. According to this perspective, the compromise of the guidelines is unacceptable, the Commission does not have a legal mandate to proceed in such implementation, and that there is the risk of altering, expanding or restricting the scope of the budget conditionality regulation.[580] Therefore, to add any value, it must be instead clarified how the legislative provisions will be applied in practice, outlining the procedure, definitions and methodology. MEP's also call on the Commission to set out a "clear, precise and user-friendly system" for submitting complaints under the regulation.[581] The question has not yet been settled, with the Commission insisting on the necessity of the guidelines, and the European Parliament threatening (July 2021) to take the Commission in front of the CJEU for its delay and lack of action against serious and persistent breaches of the rule of law occurring in certain MS's, as the legal obligations on "the guardian of the Treaties" would impose.[582]

During the negotiations various other amendments were also tackled by the EU Parliament, such as that on the article 2(a) including reference not only to Article 2 TEU but also to Article 49 TEU which lays down the criteria of membership. The list of key elements of the rule of law was expanded to include the principle of non-discrimination, access to justice and impartiality of courts, and reference to the EU Charter of Fundamental Rights and international human rights treaties was added.

The definition in article 2(b) was expanded by adding explicit reference to the 'principles of sound financial management or the protection of the financial interests of the Union': a general deficiency of the rule of law occurs, according to article 2(b) when there is a 'widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law'. Therefore, the mechanism does not deal with individual breaches of the rule of law but can only be applied in case of systemic deficiencies, which ought to be utterly proven. In any case, its application can be only "subsidiary", in the sense that it will only be activated where other procedures do not allow the Union budget to be protected more effectively, thereby limiting the Commission's discretion in deciding when to activate the mechanism, while "the mere finding that a breach of the rule of law has taken place does not suffice to activate the mechanism". Instead, a "causal link between such breaches and the negative consequences on the Union's financial interests will have to be sufficiently direct and be duly established" (art. 4.1).

Drawing on article 3(2)(a)-(c) of the Commission's proposal, the **breach** refers to five elements: 1. **endangering** the independence of judiciary, including setting any limitations on the ability to exercise judicial functions autonomously by externally intervening in guarantees of independence, by constraining judgment under external order, by arbitrarily revising rules on the appointment or terms of service of judicial personnel, by influencing judicial staff in any way that jeopardises their impartiality or by interfering with the independence of

https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf

[580] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html

[581] https://www.europarl.europa.eu/news/en/press-room/20210628IPR07246/rule-of-law-start-applying-budget-conditionality-immediately

[582] https://the-president.europarl.europa.eu/en/newsroom/hungary-sassoli-letter-to-von-der-leyen---commission-must-apply-rule-of-law-regulation

attorneyship; 2. **failing to prevent, correct and sanction arbitrary or unlawful decisions** by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests; 3. **limiting the availability and effectiveness of legal remedies**, including through restrictive procedural rules or lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law; 4. **endangering the administrative capacity of a Member State to respect the obligations of Union membership**, including the capacity to implement effectively the rules, standards and policies that make up the body of Union law; 5. **measures that weaken the protection of the confidential communication between lawyer and client**.[583]

When on 16 December 2020[584] the EU finally adopted the new policy instrument, it stated again that this aims at **protecting the financial interests of the EU against breaches of the rule of law.**[585] If this is the focus of the Regulation, and the aim of the "rule of law mechanism" is the protection of the EU's financial interests, then the Regulation could be viewed as a "specialised tool" instrumental to the financial compliance. Under this perspective, it should not be considered a tool to combat breaches of the rule of law in general terms, as these are addressed by already existing instruments (Article 7 TEU, the infringement procedure, and the so-called preliminary procedure).

Furthermore, according to the conditionality mechanism, appropriate measures shall be taken when breaches of the principle of the rule of law in a Member State risk affecting the sound financial management of the EU budget, or the protection of the EU's financial interests "**in a sufficiently direct way**". Although it is not immediately clear what "sufficiently direct" may mean in practice, the breach apparently has to be **serious and systematic**. The Commission can then submit a proposal to the Council for an implementing act to be adopted by a qualified majority. In this perspective, the **conditionality mechanism** appears as a sort of disruptive legal tool through which it is possible to both **control** and **prevent** (admonish) States from operating against the Rule of Law, thus, managing to **circumvent future violation** cases, and also to raise a **defensive barrier** against the perpetration of illegal activities.[586]

The Regulation created another interlink between sound management of the long-term budget with respect for the rule of law adding to the existing funding and financial checks in place[587]. As further stated, the Regulation is aimed "**to protect the Union budget including the Next Generation EU, its sound financial management and the Union's financial interests",** and thus to guard it "from any kind of fraud, corruption and conflict of interest".[588] In that sense, it

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[583] https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630299/EPRS_BRI(2018)630299_EN.pdf

[584] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2020%3A433I%3AFULL#LI2020433EN.01000101.doc

[585] https://data.consilium.europa.eu/doc/document/ST-9980-2020-INIT/en/pdf; https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/conditionality-regime_en

[586] D. Lilkov, 2018. "A step too far? The Commission's proposal to tie EU budget payments to compliance with the rule of law", in London School of Economics: EUROPP Blog, http://blogs.lse.ac.uk/europpblog/2018/10/02/a-step-too-far-the-commissions-proposal-to-tie-eu-budget-payments-to-compliance-with-the-rule-of-law/

[587] https://www.europarl.europa.eu/factsheets/en/sheet/10/the-budgetary-procedure and https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/how-eu-monitors-national-economic-policies_en

[588] Perhaps the mechanism could be activated more in relation to Member States affected by corruption, than those breaching the rule of law; i.e. more towards Bulgaria, Romania, Czech Republic, Slovakia, Greece, Italy, Malta, than Poland,

could be as well described as a "**risk assessment**" legal tool, with inhibitive binding capacity.

The possible measures to be implemented in the event of breaches of the rule-of-law principles comprise the following:

- suspension of payments or of implementation of the legal commitment, or termination of the legal commitment
- a prohibition on entering into new legal commitments
- suspension of the approval of one or more programmes or amendment of such programmes; suspension of commitments
- Suspension of disbursement of instalments or the early repayment of loans
- reduction of commitments, including through financial corrections or transfers to other spending programmes
- reduction of pre-financing
- interruption of payment deadlines
- suspension of payments
- prohibition from concluding new commitments with recipients or from entering into new agreements on loans or other instruments guaranteed by the Union budget.

The Commission initiates **the procedure**: once established the existence of a breach, it can propose triggering the conditionality mechanism against a Member State government. The Commission could request additional information from the Member State concerned (article 5(3)), which the latter would be obliged to provide (article 5(4)). The Member State would be able to submit observations, which the Commission would have to take into consideration (article 5(5)). The Council will then have one month (or three in exceptional cases) to adopt the proposed measures by a qualified majority. The Commission will use its rights (e.g., under Art. 237 TFEU or the Council Rules of Procedure) to convene the Council to make sure the deadline is respected.

According to article 5(6a), while adopting the decision, the Commission will have to simultaneously submit to the Parliament and the Council a proposal to transfer to a budgetary reserve the amount equivalent to the proposed sanctions. This proposal will be considered approved within four weeks of its submission unless the Parliament, acting by a majority of votes cast, or the Council, acting by qualified majority, decide to amend or reject it (article 5(6b)). The decision imposing sanctions will enter into force if neither Parliament nor Council reject the transfer proposal within the four-week period (article 5(6c)). **The conditionality mechanism must be endorsed by the Council and EP's plenary**: while the conditionality mechanism can be adopted without the agreement of the opposing Member States, such as Poland and Hungary, the decision on own resources (which is quintessential for the adoption of the huge future EU budget package) must be adopted unanimously.

in view of a recent index of Transparency International: http://www.transparency.org/en/cpi/2020/table/pol

These procedural arrangements are a significant modification of the Commission's original proposal. The **Parliament is treated on equal footing with the Council and can veto the decision on sanctions acting by majority of votes cast.** Furthermore**, the decision on sanctions is now closely linked, in procedural terms, with the proposal to transfer the value of the sanctions to a budgetary reserve** (one of flexibility mechanisms proposed in the 2021-2027 MFF regulation). This means that the money are engaged and do not mix with other budgetary funds. There is also a **remedy-procedure for lifting the sanctions, according to article 6**: upon request of the sanctioned MS or on the Commission's initiative, the situation in that MS involved may be reassessed (Article 6(2)) partly or full. The Commission must also take into account any opinions of the panel, and should, within the indicative deadline of one month, come up with a reassessment. In that case, the same procedure as in article 5 would apply, meaning that both Parliament and Council could block the Commission's decision by a majority of votes cast (Parliament) or qualified majority (Council).

The EP and the Council Presidency also agreed on another contended issue: the **protection of final recipients and beneficiaries** – such as students, researchers, farmers, but also NGOs – **who must not be directly or indirectly "punished"** for the failure of their governments to respect the rule of law. According to article 4(2), unless the decision imposing sanctions provides otherwise, the final recipients or beneficiaries of programmes or funds should not be affected. The government entities or Member State in question must execute the payments despite the imposition of sanctions: the duty to make payments would be transferred from the EU budget to the national budget. Furthermore, the EP included a provision by means of which **final recipients-beneficiaries can file a complaint** to the Commission via a web platform, which will assist them in ensuring they receive the amounts due. The **protection** of end beneficiaries or final recipients would be made more realistic through the imposition of **concrete legal duties upon the Commission**, under article 4(3b), to *'ensure that any amount due from government entities or Member States ... is effectively paid to final recipients or beneficiaries'*. This is backed by effective additional sanctions against the non-compliant Member State, including the recovery of payments made to governmental bodies that have not made payments to the end beneficiaries or the transfer of an amount equivalent to that which was not paid to the end beneficiaries to the Union reserve.

A special panel of independent experts in constitutional law and financial and budgetary matters will assist the Commission in evaluating the situation in a Member State, appointed by the national parliaments and five experts by the EU Parliament. The assessment takes place on the basis of quantitative-qualitative criteria and taking into account all available information mentioned under Art. 5 PR RoL. The panel shall publish a summary of its findings every year.[589]

The Regulation has been defined as 'financially − the most powerful, legally − the most challenging, politically − the most important constitutionally − by far the most significant EU

[589] https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/conditionality-regime_en; https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/conditionality-regime_en; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1046

conditionality ever proposed in EU internal policies'.[590]

Overall evaluation of the "Budget Conditionality Mechanism"

(In the absence of concrete studies, this is an early evaluation, based on legal reasoning)

Pros:

1. Efficient and Fast: the decision can be adopted within 4 weeks (unless a preliminary reference is asked at the CJEU) and it can provide with a swift and very quick response. The time frame of adoption is still well under that of an infringement proceeding.
2. Effective and Direct: it directly addresses the threat on the EU rule of law by blocking funding, *de facto* obliging the country to be get involved in the processes that concerns it.
3. Transferable: it is a mechanism that can address equally all countries of the EU and provides for a defined spectrum of cases in which it can be activated.
4. "Democratic" (institutional equidistance-democratic legitimacy): the Rule of Law mechanism puts Parliament and Council on the same footing; it further avoids requirements of unanimity and lengthy proceedings, providing for adoption unless there is a reverse majority on the part of the EP and the Council. It also preserves and promotes the dialogue-structure, as the Commission must hear the member state before proposing a decision to the Council.[591]
5. Fair (not precluding to avoid the sanction) and Reasonable: It can run parallel to other procedures and does not prejudge the possibility to seek compliance through other (less sanctioning) methods; it also indirectly "shifts the burden of proof" for a time following the adoption of the decision, as the adopted measures are in force until the member state proves that the threats have been neutralised. It does not aim to "punish" but to redeem, since the financial measures will be lifted as soon as the deficiencies cease to exist in the Member State concerned.
6. It sends a clear message, that respect for the rule of law and other core EU principles is not negotiable. At the same time, it appears rather balanced: the conditionality is temporary and can be lifted once compliance is achieved. The eventual burden for the Member state will last as long as the breach is being perpetrated and portrayed. It targets the authorities and should not affect the citizens.
7. Accurate assessment: reduces the case of illegitimate or disproportionate measures; it also involves experts coming from the national contexts. It can be more efficient if ingeniously combined with other available instruments: Action to protect the rule of law and preserve the foundations of the EU more generally, should still be taken through other channels, and chiefly through a resolute and consistent recourse to the infringement procedure (Arts. 258–260 TFEU), and, where appropriate, combined with requests for interim measures, and penalty payment to prevent, and hopefully reverse the decline in compliance.

[590] V. Viţă, 2018. Research for REGI Committee - Conditionalities in Cohesion Policy, PE 617. 498
[591] Tornøe, Wegener "What Should the EU do about Poland's Populist PiS", pp. 97-99

8. The conditionality system is not totally new in the EU, since the EU enlargement process (Copenhagen criteria)[592]https://eucrim.eu/articles/compliance-with-the-rule-of-law-in-the-eu-and-the-protection-of-the-unions-budget/ - docx-to-html-fn16 provides conditions with regard to compliance with the excessive deficit prescriptions and also with regard to the major EU spending programmes, where the payments can be cut if the required conditions are not met. Under this view, there is no evidence that such a conditionality system may produce adverse effects for EU integration or cohesion.

Cons/Risks:

1. The introduction of the possibility to raise a "legitimacy test" before the CJEU involves the loss of the "direct-immediate" character, which subtracts from the full potential of "effectiveness and efficiency". This "legitimacy test" doesn't look necessary, since the mechanism can start only *after* an accurate assessment has already occurred on the existence of a systemic and serious breach.
2. Indirectly, it may be claimed to aim at affecting (posing conditionalities) the "sovereignty principle": considering international practices, it is rather unusual to link budget transfers to a transgression of value-based rules.
3. Margin of risk to "break" the integration process: it could be argued that it is a "targeting mechanism", by pointing against specific non-compliant governments. In the long run: these types of sanctions could have indirect counterproductive effects in relation to populism and anti-European feelings in the countries affected by these measures.[593]
4. Spill over-effect: the mechanism would be mostly efficient with those poorer countries that are net recipients of European funds and might instead enforce Euroscepticism and "cement economic disparities between Member States".[594] In that sense it may be also perceived as "asymmetric" and discriminatory, and therefore containing traits of illegitimacy, under the perspective of the real economic differentiation between Member States. Not all EU member states are equally vulnerable, i.e. they depend on EU funds to different degrees, and especially, not all Member states enjoy the same political determination within the EU context, as recent crises have demonstrated (migration crisis, economic crisis). The application of sanctions will have certainly a different way of acting in each country according to their financial-economic national conditions, thus resulting more "effective" to those countries with weak economies and hardly relevant for those countries with a strong internally economic balance.[595]
5. As in most cases, the causal link between erosion of the rule of law and a threat/breach of the EU's financial interests, may appear rather tenuous and thus difficult to uphold

[592] F. Schimmelfennig, U. Sedelmeier, 2004. "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", 11 Journal of European Public Policy, pp. 661–679

[593] F. Heinemann, the arguments against this conditionality system do not necessarily hold true; see "Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework", Intereconomics, Vol. 53, No. 6 (Nov.–Dec. 2018), pp. 297–298, https://archive.intereconomics.eu/year/2018/6/going-for-the-wallet-rule-of-law-conditionality-in-the-next-eu-multiannual-financial-framework/

[594] J. Selih, I. Bond, C. Dolan, 2017. "Can EU Funds Promote the Rule of Law in Europe?", Centre for European Reform, p. 12, https://cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf

[595] Some interesting considerations: https://www.tandfonline.com/doi/full/10.1080/07036337.2019.1708337

in Court. If that is to be considered the necessary direct/indirect relationship that fully proves and justifies the need for the application of the budget conditionality, it might create two adverse effects: either the mechanism will result weak or the mechanism will have to extend its field of application becoming potentially arbitrary.[596]

6. Concerns are raised in the case the state concerned has no alternative financial resources to substitute for the loss and that appropriate guarantees are adopted to ensure that a suspension does not punish directly or indirectly EU citizens.[597] A lot depends on the platform and guidelines the Commission will launch. Furthermore, it presupposes that the financial leverage of the EU budget in a given Member State is significant.
7. Doubts are raised also on the role of the Commission: The institutionalized relationship it entertains with the European Council, combined with the increased political profile it has developed both as result of Treaty reforms and policy developments, and allegedly to beef up its democratic legitimacy, beg questions about the way in which the Commission exercises its discretionary power.[598]

PART D. CONCLUSIONS

LEGAL RESPONSES TO POPULIST CHALLENGES ON THE RULE OF LAW, THE CONSTITUTION AND THE DEMOCRATIC PRINCIPLES	POOR	FAIR – GOOD	VERY GOOD - BEST
Efficiency (describes the "capacity" or "skill" to solve/restore the challenge/threat or violation)	The German case of militant democracy (Democracy and rule of law: party regulation) The political system of parliamentary democracy did not impede the erosion of democracy (Hungarian and Polish cases) RoL Framework	The Spanish case of decentralization (Democracy and rule of law: decentralization of governmental powers) Constitutional revision: 2/3 of qualified majority (The Hungarian case) Constitutional Courts: judicial appointments and duration of constitutional judges' mandate: a hybrid model in which different authorities including the Parliament by qualified majority	The Slovakian case (unconstitutional constitutional amendments) The Cypriot case of the Attorney General (Democracy and rule of law: neutral and control institution) Art. 278-279. Interim

[596] Rule of law and the Next Generation EU recovery – CEPS
[597] https://www.europarl.europa.eu/RegData/etudes/STUD/2018/617498/IPOL_STU(2018)617498_EN.pdf
[598] Case C-575/18 P, Czech Republic v. Commission, (2020) 530: "the Commission is not bound to commence infringement proceedings, but has a discretion in that respect"

	Art. 7 Art. 258-260 Infringement procedures (The "Ordinary Courts" case (Poland); The "NGO funding" case (Hungary); The "Asylum case" (Hungary)	and the judicial council determine the composition of the CC Art. 267 Preliminary reference (ASJP; Polish cases) Art. 258-260 Infringement procedures (The "CEU case" (Hungary))	Measures (Polish cases: Supreme court, Disciplinary Chamber) Art. 267 Preliminary reference (The Hungarian case) Art. 258-260 Infringement procedures (The "Supreme Court" case (Poland); "Judicial independence" (Hungary); The "Romanian case")
Effectiveness (describes the capacity of the tool to immediately and directly address the given threat/violation)	The German case of militant democracy (Democracy and rule of law: party regulation) The Spanish case of decentralization (Democracy and rule of law: decentralization of governmental powers) The political system of parliamentary democracy did not impede the erosion of democracy (Hungarian and Polish cases) Constitutional revision: 2/3 of qualified majority (The Hungarian case) Judicial appointments and duration of constitutional judges' mandate RoL Framework Art. 258-260 Infringement procedures (The "NGO funding" case (Hungary); The "Asylum case" (Hungary) Art. 7 Art. 267 Preliminary reference (The Polish cases) Art. 278-279. Interim Measures (Polish case: Disciplinary Chamber)	The Cypriot case of the Attorney General (Democracy and rule of law: neutral and control institution) Art. 267 Preliminary reference (ASJP; the Hungarian case) Art.258-260 Infringement procedures (The "Ordinary Courts" case (Poland); The "CEU case" (Hungary); "Judicial independence" (Hungary)	The Slovakian case (unconstitutional constitutional amendments) Art. 258-260 Infringement procedures (The "Supreme Court" case (Poland); The "Romanian case")
Transferability (describes the capacity of the tool to be "universally" applied to similar threats/violations, without delays or need of further adaptation, automatically)	The Cypriot case of the Attorney General (Democracy and rule of law: neutral and control institution) The Spanish case of decentralization (Democracy and rule of law: decentralization of governmental powers) RoL Framework Art. 7	The German case of militant democracy (Democracy and rule of law: party regulation) Art. 278-279. Interim Measures (Polish cases: Supreme court, Disciplinary Chamber) Art. 258-260 Infringement procedures The "Supreme Court" case (Poland); "Judicial independence" (Hungary)	The Slovakian case (unconstitutional constitutional amendments) Constitutional revision: 2/3 of qualified majority (The Hungarian case)

	Art. 258-260 Infringement procedures (The "Ordinary Courts" case (Poland); The "NGO funding" case (Hungary); The "Asylum case" (Hungary)		Constitutional Courts: judicial appointments and duration of constitutional judges' mandate: a hybrid model in which different authorities including the Parliament by qualified majority and the judicial council determine the composition of the CC Art 267 Preliminary reference (ASJP; The Hungarian and the Polish cases) Art. 258-260 Infringement procedures (The "CEU case" (Hungary); The "Romanian case")

CONCLUSIONS: Legal reactions to populism in the EU Member States with special regard to the European constitutional courts and other high courts and Member States' best practices according to national experts (CSS)

Our research on the populist use of **popular sovereignty shows that** it is mostly through the expansion of popular sovereignty that illiberal populism can be opposed, with citizens' initiatives, popular consultations and deliberations promote the democratic participatory principle and weaken the centralisation of power.

On the **antipluralism practices**: our research distinguished four different systems through which it is possible to identify antipluralist efforts. While in two of those areas (parliamentary system and press system) there could not be drawn significant conclusions that would lead to the formulation of a recommendation, we can however highlight the conclusions reached on the other two areas, namely the electoral system and the party system. On the **electoral system**, the pluralist system using proportionality, single transferable vote, fight gerrymandering and similar methods, result being the most effective. On the **party system,** the concept of "militant democracy" leads the most effective approach, which encounters solid and strong actions such as banning unconstitutional parties, limiting and reviewing party donations, banning political advertisements etc.

The research comprised the area as well of the fight against "**extreme majoritarianism**", including an examination on the concept of "**unconstitutional constitutional amendments**". Among the four different groups of possible measures in this legal area (set-up of new institutions, attribution of strong competences to independent institutions or authorities, adoption of procedures constraining populist powers and decentralisation) the approach of establishing **strong independent institutions** is the most effective. The reasons for this lay on the fact that the autonomy granted allows to disentangle from the (potential or real) manipulation of the political branch, guarantees an impartial and objective functioning of the institutions and thus disempower populist aspirations.

At the same time, the concept of the "unconstitutional constitutional amendments", where

present, either in the Constitutional text or within other relevant legal provisions, it constitutes a further guarantee of effectiveness of the ability to contrast populist unconstitutional amendments.

Finally, in the area of the fight against the **restriction of rights,** both the judicial and the political sphere were taken under examination, finding that while the political sphere is clearly more effective in taking action against populist threats on human rights, however the judicial sphere, and especially the constitutional courts, are effective as well to contrast restriction of rights.

CONCLUSIONS: Best Practices for Legal Reactions to anti-constitutionalist tendencies (UB)

The research was based on casuistic approach aiming at striking a fair balance between the need to ensure legal certainty of the constitutions and the need to allow their adaptation to societal changes. This approach showed that on the grounds of the constitutional-amendment procedures four areas related to constitutional revision were the key-aspects to look at: **initiative**, **parliamentary procedure**, **popular ratification**, **limits to the material scope** to constitutional amendments. While the "**initiative**", consisting in the triggering competence of the process, looks like the less relevant in the evaluation of the "best practice" approach, nonetheless aspects related to the powers of the Head of State (i.e. veto) must be examined when populist threats may jeopardise the separation of powers principle. Therefore the initiative should be entrusted either to the population of the parliament, rather than promoting an active role for the Head of State. Concerning the "**parliamentary procedure**", the qualified majority requirement (often 2/3) may be considered the "common model" in Europe, which can be seen also as the most efficient/effective quorum reserved to the parliament's role in the constitutional amendment procedure.

The referendum approval through the **popular ratification** of the constitutional amendment, should be celebrated only when the revision affects fundamental rights or the organisation of pawers, and in those cases the quorum for participating should be in general terms avoided.

The **Constitutional Court's involvement**, on the contrary to the belief that offers a qualified guarantee, is instead not considered a necessary element, while the judicial review of constitutional amendments is, in general, a non-essential step.

In the case study of the Hungarian constitutional reform (2010), the above evidenced findings were further refined, analysed and specified. The "practice" emerging as "fairly good" from the "efficiency" criterion point of view, here must be considered the centrality of the parliament and the 2/3 qualified majority, while from the "effectiveness" approach, the same elements qualified as "poorly" capable to guarantee the involvement of the opposition and a wide consensus.

On the grounds of the **Democracy** and related democratic principles, the hereby examined **electoral field by the VC** offered an overview of the various aspects that should accompany a electoral system.

A good (efficient/effective) electoral law should be stable, meaning unmodifiable for at least a year before the elections take place, thus offering a high credibility on the electoral process, especially when formulated as a statute, and/or preferably as an organic law.

A good (efficient/effective) electoral model should consider the legislature duration of a maximum 5 years and be one that captures the widest parliamentary and societal consensus. In order to achieve a good rate of plurality of political views in Parliament, especially in regard to the emerging democracies, proportionality rules are preferrable with an established electoral threshold that does not go ever 3%.

A good (efficient/effective) electoral legislation is distinguished by the characteristic of a universal, equal, free and secret suffrage.

On the grounds of the **Rule of Law**, the research contributed with an important finding: while a good (efficient/effective) political system is generally to be considered one in which the parliament has a central role, the examination of the Hungarian and the Polish cases contradicted this assumption, since the officially established parliamentary democracy in these two countries did not prevent nor managed to impede effectively the democratic erosion.

Finally, on the grounds of the composition of the **Constitutional Courts**, the research revealed that the judicial appointments and the duration of constitutional judges 'mandate should be based on a hybrid model, in which different authorities including the Parliament by qualified majority and the judicial council determine the composition of the Const. Court. This recommendation of the Venice Commission was also confirmed by the examination of the Hungarian and the Polish cases: effectiveness on the appointment and duration of the judges is not ensured (poor) without the participation of a plurality of actors in the decision process.

CONCLUSIONS: Legal practices and practices of law in response to populism under the EU rule of law principle (UCPH)

The outcome of our research gives enough evidence to assess the legal tools according to their efficiency, effectiveness and "versatility" in responding to populist challenges of the EU rule of law.

What can be immediately noted is that, in the populist-driven cases examined, the "milder" legal tools, intended those designed to prevent and persuade through the opening of a dialogue between national governments and institutions do not accomplish their declared purpose. The "**Rule of Law Framework**" and the "**art. 7**", for example, have consistently failed to reach the "fair/good" rating in the scale of evaluation set on our "best practices" approach. The first is substantially based on dialogue, like an act of soft law, whose effects do not go beyond the narrow level of suggestion, persuasion or warning; the latter (limited to the 70(1) and 7(2) implementations, considering that the 7(3)-sanctioning procedure has not yet been triggered) is based on the persuading effect of legal suggestions formulated and incorporated in recommendations, and in the legal-political pressure the eventual declaration of a serious and

persistent breach may provoke. None of the two seem to be a tool able to "immunise" the rule of law from eventual breaches of law, and their legal relevance is limited in the application of a direct pressure of mostly political nature. According to the "best practice" evaluation, the direct effects are irrelevant (poor). Only indirectly, in the perspective of the potentiality these tools may develop in the length of time, can we eventually appreciate the efficiency/effectiveness consequences of these tools.

On the particular grounds of the "political populist legal responses", even if the deterrent ability of these tools is rather poor and limited, failing to persuade or not achieving to refrain the countries from acting against the rule of law, we have to keep in mind instead that these tools were probably not designed exactly with the capacity to *impose* but rather to act as preliminary steps to other tools, by informing, monitoring and sensitising. Considering, in fact, that the RoL framework tool and the accompanying monitoring mechanisms that surround it (i.e. periodic reports) are mainly to be contemplated as part of the actions to an investigative-consultative phase, then we could also sort this as a preliminary or alert stage of "case-file opening".

Conclusions drawn should include considerations on the full potential of this tool in the strengthening of the EU Rule of Law. A series of indirect effects should not be left underappreciated, such as the potential to raise awareness, to enhance the interinstitutional and two-level cooperation between rule of law stakeholders (society, EU and member states). Furthermore, the inevitable collaboration promoted through the RoL Framework mechanism may hinder the capability of this tool, not only to make manifest a specific threat/violation, but also to push forward a revived EU interest in raising European shared principles and values incorporated in the "rule of law and democracy" as the flag of our "common EU identity". The art. 7, instead, while not be effective in compliance-capacity terms, it still seems to be rather suitable to further mobilising political interest and awareness on the rule of law and the democratic principles.

Other indirect effects expected to manifest in the length of time may be the contribution to the creation of an accurate legal-political doctrine and literature on the protection and consolidation of the rule of law principles in the EU, allowing to further theorise the enhancement of the efforts to the "constitutional integration" process in the EU.

In examining the deeper reasons for the failure of these tools against populist challenges, responses become more evident once we examine the tools that appear instead more successful. Indeed, on general terms, tools that are *not* accompanied by any (concrete or alleged) binding legal consequence, allow the inaction or the continuation of the problematic initiative: those governments generally tend to disregard purely discursive or preventive notices. This overall finding implicitly confirms the particularity of the populism phenomenon as a politically driven rather than a legal-technical one, therefore of an extremely "delicate" nature (sovereignty sensitive) which can be effectively dealt with only through "constraining" mechanisms.

In certain cases, the ineffectiveness is related to the particular design or functioning process of the tools themselves, i.e. due to the required time-implementation required to launch and reach the "dialogic" phase, which on practical level allows the concerned governments to procrastinate and perpetrate the threat or the declared violation. Delays also in concluding the processes and determining the final action of the tool may even create a reversed effect: long-

lasting public negotiations on a certain country's policies can nurture the populist scenarios for being "targeted" or offer evidence to populist conspirations over the obsessed antagonism occurring between EU elites and the free determination of the "people" (or of their national policies).

Among the crucial aspects related to the efficiency/effectiveness rate of the tools (especially those that have preventive nature) may also depend on the explicit, direct and immediateness methods through which a populist issue qualifies as problematic, in order to identify it and addressed it. Indeed, lengthy and complicated procedures dragging in time for the final definition of a "threat", and the certification of its grade of "seriousness" and "systematicity" (it is the case of the **art. 7** procedures), is only the first step to allow the procedure to unfold. This trait may be appreciated in different ways: from one side, it can act as a "safety clause" which ensures that the art. 7 procedure isn't triggered by ideological reasons or without the necessary burden of proof of the seriousness of the alleged violation. From the other side, however, a certain amount of time is objectively necessary for the "systematicity" and "persistence" to be manifestly verifiable, thus transforming this otherwise strong tool in a time-consuming process, with the risk to invalidate any effectiveness capacity in its employment.

In other words, because of their intentionality and methodical programming, the *specific* populist challenges to the rule of law seem to require a faster, more solid, responsive approach: as it is well known, responses based purely on "soft power" depart from the assumption of the reciprocal "good will", the "*fumus boni juris*" of the interlocutors, and rely greatly on the agreed postulation of the "loyal cooperation" between national and EU levels. These premises seem to be invalided in the current populist threats: threats and violations based on populist challenges are caused pre-eminently by a clear (populist) political determination, therefore these are not cases in which the threat on the rule of law or on the democratic principles is caused by some accidental, administrative mismanagement or the unfortunate implementation of a nationally based practice which -at the end- was incompatible with EU law and principles. On the contrary, the misalignments of the national level to the EU rule of law principles are generated by deliberate governmental tactics, to specifically benefit or promote a (populist) legal-political antidemocratic line.

The EU's ability to effectively intervene and bring about change through dialogic approaches cannot adequately stop mature and well-established political environments from reiterating dangerous populist approaches.[599]

Based on these considerations, the only way to **frame the RoL Framework and Article 7 as producing beneficial effects is to view their influence in their interplay with other available tools,** combining actions that support and enhance one another (before the CJEU or the infringement proceedings) and consolidate the next steps (collect information, determine the existence of a threat or of a systemic violation, exhaust the possibility of a political deal).[600]

The legal responses relying in tools that instead are supported by legally binding effects,

[599] L. Pech, K.L. Scheppele, 2017. Illiberalism Within. Rule of Law Backsliding in the EU, 19 Cambridge Yearbook of European Legal Studies 3, p. 8

[600] https://institutdelors.eu/en/publications/__trashed/

foresee accessory penalties and are issued by politically independent authoritative institution (such as is the CJEU) are certainly more efficient and effective. Those type of tools are for example the **preliminary rulings** and the **infringement procedures**.

Indeed, beyond the success of the pivotal ASJP case, in most of the populist-driven cases examined here, where preliminary references were requested, the result has been rather encouraging. Efficiency and effectiveness are, in the majority of the cases, of high-level traits, while the capacity to create a "legal precedent" and thus produce *erga omnes* effects raises this tool among the high ranking "best practices".

The limitations of this tool lay in its intrinsic legal base: they cannot be triggered autonomously but necessitate the initiative of a Court. It is a tool founded on the active judicial cooperation, incardinated in an undeniable hierarchical relationship which implicitly rules this cooperation.

An indirect and interested, even if underexplored, aspect emerges: the "common threat" the judicial organs are facing, seems to have awakened a strongly cooperative spirit among the national judges, and among them and the European Courts, while at the same time boosting the EU judicial integration through the consolidation of practices of the legal-constitutional apparatus. The fact that requests for preliminary references have become more frequent on issues regarding the rule of law values and principles may be assumed as an indicator of the fact that the distance between the two judicial systems is substantially decreasing, while the EU values are progressively assuming the role of the legal ridge beyond which governments of the MS's cannot go much further from. Against the reluctance that the national judges used to show towards EU judgments, now this judicial cooperation results "life-saving" for national instances and promotes the re-evaluation of the EU legal space as a safe and protective place for the democratic judicial principles, but also of the judicial structures and processes.

The investigation on the "best practices" evidences another efficient and effective tool, the **infringement procedures** (art. 258-260 TFEU) that combine the informal administrative-consultive stage, and the judicial compliance-stage. Infringement procedures are most effective when reaching the judicial phase, while the earlier stage, however valuable as it may be for the legal framing and validating of the arguments destined to the subsequent judicial action, it may still slow down the procedure thus weaken its effectiveness, especially since the involved countries rarely comply in this phase. But this is not the most problematic aspect of the infringement procedures: it is on the excessive discretion granted to the Commission that most arguments are expressed, concerned that a pre-eminently political authority is granted with the power to start this procedure, compromising the validity of the procedures themselves with the insinuation that allows potentially targeted use of the tool, especially in the populist-driven cases. In the evaluation according to the "best cases", what emerged is that infringement is indeed a "politicised" tool, resulting less efficient and effective in the cases in which the contentious issues regarded politically "delicate" EU topics (such as the failed governance of the migration crisis in EU in the NGO and Asylum/residence cases). It could be said, therefore, that the diminished value of the otherwise strong, effective/efficient legal tool of the infringement procedures, depends mostly on the political opportunity of the involved violation-topic.

Rather efficient and effective against populist drifts when triggered are also the **interim**

measures (art. 278-279 TFEU), that act as enforcement tool aimed at securing the full effectiveness of the action in the main procedure. However, interim relief has been used less often than what it could have been possible or necessary, yet, implying that there is some political sensitivity in the hesitation of the CJEU to turn to such temporary and provisional support while ruling. Indeed, the application of such measures requires a certain political awareness, especially considering that the prescription of the most efficient measures -resulting in penalty payments - have typically applied in EU antitrust and competition law related cases, therefore the faltering approach of the CJEU in applying interim measures on cases regarding the violations of the rule of law appears comprehensible. The ample discretionary powers of the Court are called into play, especially when deciding on pecuniary measures, and taking into account the scheme of the EU Treaties: the possibility to adopt financial sanctions is explicitly foreseen in the framework of the infringement procedures. The Court used its traditional teleological interpretation technique risking being accused of overriding its competences as provided by law and exceed into 'judicial law-making' in response to a particular political context. Interim measures could be perceived as a punishment tool targeting specific countries and introducing "double standards".

The same risk arises with the application of the "**budget conditionality**" measures, with the substantial difference that the latter has been openly defined as tool that explicitly intends to protect the Union from being penalised by the rule of law transgressions. Indeed, the fear of victimising certain countries, being accused of persecuting or excessively targeting them, is almost certainly the reason why the decision to initiate the procedure is still driven away. Here the political element becomes even more delicate, and with the Commission playing again a pre-eminently significant role, constant political tensions and assessments are triggered, especially with the European Parliament. The latest reaction (July 2021) of the EP has been to demand immediate action over Hungary's anti-LGBTQ law,[601] applying the restriction of funds from the EU budget and the recently agreed COVID-19 recovery fund.

How much efficient and effective this tool may be, it is something to examine once it is applied. However, the Regulation contains certain limiting requirements and preconditions for its application that make it difficult to imagine it can act fast and offering immediate solutions: it should only apply when there are no other more efficient means to protect the Union's budget (para. I.1 (d)), mentioning explicitly the Common Provisions Regulation,[602] the Financial Regulation [Regulation (EU, Euratom) 2018/1046] and infringement procedures, thus implying that the Commission eventually has to carefully weigh an infringement proceeding under art. 325 TFEU against the application of the Regulation. The following para. (e) states that 'the mere finding' of a breach of the rule of law has taken place does not suffice to trigger the mechanism, while the link to the Union's budget to trigger the application of the Regulation is indispensable and essential when applying the Regulation. Additionally, the triggering

[601] https://www.dw.com/en/european-parliament-demands-action-over-hungarys-anti-lgbtq-law/a-58190027

[602] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006.

factors of the Regulation are an exhaustive list of elements and are not open to events of a different nature, while the concept of generalized deficiencies is explicitly excluded (para. (f)).

So, while this Regulation revitalises the principle of the rule of law in the European Union and offers a leverage of the Union to protect the rule of law in the Member States, it looks like the first application will take more time. The new legal grounds offered to the Commission to protect and argue for the rule of law in the Member States do not necessarily equal to a revolutionary resolution of the fight against the rule of law backsliding, as long as the open-edged definitions contained can be re-interpreted, and as long as political games prevail. How this Regulation may change adherence to the rule of law by Member States remains to be seen.[603]

PART E. POLICY RECOMMENDATIONS

"Optimizing the legal reactions"

European Constitutional Courts and other high courts under populist pressure (CSS)

1. There has been a long debate over the question whether representative democracy or participatory democracy is more effective against "populist threats". Our research shows that participatory democracy has been expanded by a lot of countries in recent years, but this can carry the danger that the new participatory methods are exploited by populist powers.

2. Strong independent institutions are the most effective. The country reports taught us that there are no "secret weapons" against "populist threats". If the existing tools of liberal-constitutional democracy are functioning well and their misuses are minimized, they can effectively prevent the rise of populism.

3. The concept of "unconstitutional constitutional amendments" exists in a lot of countries and is considered very effective. However, it is important to note that it can easily become a two-edged sword because it is often used by "populist Constitutional Courts", as well.

4. Both political (e.g., legislation, governmental decision-making, parliamentary investigating committees, referendums) and judicial (the work of an active, antipopulist Constitutional Court or ombudsman) actions are effective against the restriction of rights.

5. It is not just the state and public institutions which can effectively battle "populist threats". Non-governmental actors may have an equally important role because a strong civil sphere can often effectively restrict power.

[603] P Pohjankoski, 'New Year's Predictions on Rule of Law Litigation', Verfassungsblog verfassungsblog.de. The Commission either decides to follow the European Council Conclusions and thus dishonours its obligation to act as guardian of the Treaties, or it applies the Regulation with immediate effect in which case the Commission would disregard the European Council Conclusions. It remains to be seen how the College of Commissioners will act in the months to come. Altogether, the declaratory statements in the Council Conclusions set a dangerous precedent for intergovernmental overreach in the rule of law crisis and the current institutional set-up of the EU. https://www.europeanpapers.eu/en/europeanforum/rule-law-conditionality-long-awaited-step-towards-solution-rule-law-crisis#_ftn43

Legal reactions to anti-constitutionalist tendencies (UB)

1. First of all, as a general principle, it can be affirmed that optimal legal reactions to anti-constitutionalist tendencies are to be based on the participation of both institutional and societal actors in all the relevant decision-making processes, as this has proven to better insulate these institutions from political influences. This applies in particular to:

a. Appointment of members of counter-majoritarian institutions, such as the judiciary, constitutional courts, and all independent regulatory authorities, in particular in the media sector;

b. Constitutional revision and constitution-making.

2. As regards the relationship between direct and representative democracy, popular sovereignty does not mean that the people should be consulted before making any relevant decision. On the contrary, the recourse to instrument of direct democracy - to be kept distinguished from instrument of participatory democracy - should be limited to the cases in which the constitution or infra-constitutional legislation so provide.

3. Concerning participatory democracy, constitution and legislation should broaden up the space for citizens participation, both through sectorial consultations - for instance in the media sector - and the conferral of initiative powers to propose a constitutional revision, a referendum or a new bill.

4. In constitutional revision procedures the centrality of parliament should be ensured. This means that parliament shall have the last word on the final text of the reform, which eventually could be submitted to an approval referendum. The optimal required majority to approve the reform should be of two-thirds.

5. In the field of electoral legislation, the legal reactions that can be identified apply in particular to new or transitioning democracies. In particular a proportional systems is the one that better guarantees political pluralism and which offers the more solid guarantees against anti-constitutionalist tendencies.

Legal responses to populism under the EU rule of law principle (UCPH)

Cogency and primacy of democratic standards, principles and values cannot be entrusted solely to the goodwill and state commitments on cooperation, but enforceable measures are necessary, acting timely to prevent/stop the realisation of the deemed as damaging action, in due respect of the boundaries of sovereignty and state independence.

(1) Overall recommendation: Optimise the existing. A structured strategy of combining legal tools-actions against the specific category of the "dangerous populist drifts". Formalisation of complementarity of the tools.

Preliminary key observations carried out by the Report reveal

1. a distinct aspect of the populist threats' manifestation and implementation: while in other irregularity cases (non-populist-driven threats or violations) the expected reaction from the

Member States is that they generally conform and cooperate with the EU opinions, decisions etc., the same attitude occurs much less often in the (more extremist) populist-driven threats.

2. the level of efficiency/effectiveness of corrective legal tools in the EU legal order depends mostly on two typical factors: the **timely activation-conduct** of procedures and the **degree of enforceability** (i.e. legally binding) of the measures undertaken. The legal **status** of the competent institution may as well have a relevance to the compliance rate (i.e. judicial -i.e CJEU decisions- seem to sort more successful results than those coming from the political -i.e Parliament- institutions).

3. the majority of the established legal reactions at the disposal of the EU originated from the general need to offer legal solutions of the broader spectrum of "customary" conflicts, threats/violations. Legal responses were not designed to **properly target populist threats**

4. in consideration of the above, an effective reaction to an erratically performing phenomenon would be -more than setting up new "targeted" measures and procedures- to counteract by adapting the existing procedures to the characteristics of the phenomenon.

A number of reasons support this position: new measures taken against a pre-eminently politically sensitive phenomenon can trigger the 'domino factor' of counterreactions for perceived discrimination (politically manipulated or spontaneous that may be) for having put in place 'targeted', thus biased measures; optimising the existing measures ulteriorly limits the use of political-judicial and economical resources, while concretely allows advancing the current legal framework and improving its levels of efficiency-effectiveness. In a broader sense, trust and confidence in the EU legal system is restored.

Such a result can be achieved at a good level through a strategy that aims at combining the available legal tools by contemporarily maximising each tool's "excellency", while allowing the beneficial consequences to optimise also the others, by slimming and making more agile the implementation of already existing procedures.

2. Overall recommendation: **responding to populism with more EU constitutional integration; optimise the help from "below". Consultations (i.e. a RoL platform) and actions aiming to enhance civic-political awareness, and encourage, deepen, promote concretely more "democratisation" and more "constitutionalisation" of the EU Legal Order (bottom-up actions)**. Making the best out of a crisis, or how to decrease the populist appeal through a win-win strategy: structuring permanent-periodic dialogue and spread the knowledge through channels of consultation, will allow to better coordinate campaigns of information and communication (i.e. suggesting the issues of public interest to discuss), may boost the trust between EU institutions and European citizens, and will strengthen the anchorage to the EU values-principles. Promoting shared knowledge and mutual understanding -also for the non-legal practitioners or the academics- is one way to fight against dangerous drifts while increasing civic responsibility and participation.

On the same grounds, the advancement of the "EU constitutional integration" sphere, will further legitimise and legally validate the possibility to grant "combined procedures" (i.e., authorisation of fast-track procedures to counteract to populist threats, but also to proceed to enhanced cooperation mechanisms) in the fields of threats and violations with a high legal-constitutional relevance and salience.

3. Specific recommendation: on the so-called "preventive phase" – legal responses that do not necessarily produce direct legally binding effects

Tools framed as dialogic or soft law response (i.e. RoL Framework, partly Article 7) produce general and "in the long-term" beneficial effects (raise political and democratic awareness, make political pressure, offer time necessary to correct and conform, provide alternatives to the concerned action etc.) but it is especially in their interplay with other available tools that they manage to produce significant impact. Dialogue and communications performed provide proof of the efforts made to avoid more intrusive legal initiatives, and they offer a stronger legal argumentation for next steps to be taken (collect information, determine the existence of a threat or of a systemic violation, exhaust the possibility of a political deal).

Clear and strict(-er) deadlines (i.e. for the exchange of formal-informal communications and letters) will accelerate the strategies on following steps, while revealing the intentions of the concerned party to cooperate (or not). Structural modifications can be provided with the **formalisation of the dialogic stages as preparatory or as complementary stages for consequent legal action(s) (i.e. the RoL framework complementary to art. 7 procedures or infringement procedures)**. For legal tools acting as legal prerequisite to start actions a "time management" strategy seems to be crucial in order to turn these tools into more efficient responses but also in the view of adopting further concrete actions. Delays in launching-starting, but also the hesitant – time consuming proceedings and overly slow and cautious certification of the main features of an offence (definition of "threat", "systematic", "violation") makes it often problematic to effectively suspend the effects of dangerous actions or to reverse the course of the events. Assuming the populist threats as non "occasional" mismanagements but classifying them as practices that conceptually aim to subvert the constitutional legal order allows to easier and better employ the potential of those legal tools.

4. Specific recommendation: on the so called "*in itinere*" phase – legal responses with (usually) legally binding effects

On the **infringement procedures**: Given that the administrative phase is (almost exclusively) functional to the introduction to the judicial phase and considering that the level of compliance in that phase is close to 0, the optimisation could consist in the restriction to the necessary of the administrative phase: making the administrative approach more "schematic" and provide deadlines for informal communications to the reaching of which the judicial rapidly starts without delay. Eventually, avoid overlapping in case other tools have been implemented already, while still providing the necessary grounds to the judicial phase to start (i.e if the "systematic violation" has been already declared). This might also partially reduce the discussions on the politicisation of this tool, by validating the work of forums other than the Commission.

Another **Recommendation** concerns art**. 7 procedures**: considering art. 7 as a "membership controlling mechanism", when triggered by systematic and serious breaches it could as well "copy" actions implemented from (or *with the activation and support of*) the Cooperation and Verification Mechanism (i.e. prescription of obligation to take into account concrete recommendations, provide with assessments monitoring of progress under horizontal instruments). In that sense, it may act as a *lex specialis* with a very broad scope of application, while at the same time not precluding the application of Articles 258, 259 and 260 TFEU in the area of the defence of EU values. While some value-based violations can clearly fall within or be paralleled by a breach of the *acquis*, a series of systemic *acquis* violations could also amount to a serious breach of values. The prominent nature of the latter may justify, however,

to be processed with more expeditious and more targeted methods than those employed for the "standard" violations of law.

Interim measures, a precautionary tool, should be employed more frequently while at the same time getting **sharpened and shortened in** their duration: the idea is to provide a convincing temporary solution to the need of deterring certain dangerous populist actions. Interim measures can act as **"pre-alarm" provisions**: the area affected by threat-violation will receive relief, firm political-juridical determination from the EU to conclude and to solve such issues is ensured, while the alleged "punitive effect" is restrained in time and limited in the long-term consequences that often may result disproportionate: the country concerned receives a clear message and is treated "fairly", while still time of action is available to conform. The path to optimise the interim relief tool could be also provided with immediate compliance through the combination of suspensive measures with other economic penalties (i.e. budgetary conditionality) to secure the desired effect of the relief.

On the **preliminary reference** procedures, one of the most efficient legal tools at disposition currently, strengthening of the judicial cooperation between national courts and the CJEU can be encouraged by facilitating and simplifying the "**urgent**" procedures.

5. Specific recommendation: Sanctioning mechanisms – legally binding effects

The conditionality mechanism may allow to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the breaches: with due precautions to protect the general interest of the country (i.e. *securing* the exclusion of production of unwanted, penalising effects for the population or for part of it) this response appears potentially to be the most efficient and effective, however the lack of case studies does not allow to make further evaluation-suggestions. It appears, however, necessary to make an adequate information campaign to avoid the exploitation of confusing and contradictory discussions on the purpose of the use, the established prerequisites, the dangers and benefits of this tool.

ANNEX 1. RESPONDING TO POPULISM. "BEST PRACTICES" APPROACHES

In general terms, the best practices methodology can be defined as the "selective observation of a set of exemplars across different contexts in order to derive more generalizable principles and theories" [Overman and Boyd, Best practice research and post-bureaucratic reform, 1994, 69]. 'Best' are practices that, because of their correspondence to certain characteristics of performance, may be considered as an emblematic or good exemplification of how to achieve a certain goal (reach a standard, modify/reverse a situation, guarantee a condition etc). The characteristics that qualify these practices as "best" are frequently determined in the distinctive capacity to be effective, efficient, successful, considered essential (they have consistently shown results superior to those achieved with other means in a given situation, capacity to immediately or directly solve an issue, to promote a change of culture, to address a difficult question or to define with clarity a problem), and high adaptability in different environments (or different legal spheres/areas), therefore to be 'value proven' and suitable to achieve the deliberative end. In other words, the term "best practice" refers to the most efficient way of doing something or the fastest method that uses the least resources to create the highest quality output ("Best Practices." Encyclopedia of Management, 2009).

The Best Practice Research (BPR) employs an assessment approach: it is oriented on constant learning, feedback and reflection of *what* works and *why*, or even what does *not* work (Stenström and Laine 2006) and consists of a qualitative selection and examination of practices. Based on predetermined characteristics, which respond to the foundational question of the research (i.e. efficiency, essentiality and transferability capacity), BPR offers more clarity in identifying "best reactions" to a broad context of possibilities. The process and outcome allow to evaluate but also to map and organize systematically, classify the reactions/practices, in order to be able to formulate more reliable policy recommendations.

However, most of literature on best practices comes from management consultants and practising managers, while on the side of the academic setting best practices interest mostly sociological, psychological, statistical-economic studies (i.e. advertisement, product development, fact-finding etc.). Therefore, a 'best practice research' methodology for a legal task is rather 'innovative'. Indeed, both academics and practitioners are often at odds with the methodological and theoretical foundations of BPR. In particular, instances of "good practice" tend to be selected without any underlying theoretical framework. The literature on BPR can often appear confusing, and terminologically often incoherent, fragmented and in many ways inconsistent. Indeed, there is no baseline consensus on what BPR actually is and how it should be conducted, since many papers and research reports with BPR in their name are nothing but mere descriptions of practices that seem, in one way or another (and often not quite clearly), useful and beneficial. The main problem is that such exemplars tend to be selected randomly, subjectively and without any scientifically proven justification. This does not necessarily mean that such approaches are not useful or helpful, but one can hardly refer to them as "best research".

The critical and scientifically problematic aspects of this methodological strategy require, therefore, a set of clear and shared premises: provide a rigorous definition of the research question, define the leading principles and final goals of the research, determine the priority of the examination and set common criteria of evaluation. The less the investigation relies on subjective or abstract criteria, the more the findings will be bullet-proof and suitable to be

defined as ‘best’. Under this perspective, the best practices methodology can apply in our endeavour since we have a shared definition of the research question, and through our previously conducted research tasks, we have gained certainty in recognizing, selecting and delimiting the research areas. Indeed, after delivering 6 complex Work Packages, there is plenty of shared information, studies, surveys and investigation on the type of populism we intend to examine, the areas in which this type of populism is challenging, the ways these challenges manifest and who is the competent authority to respond.

The central research question of WP 7.5 is to formulate recommendations on a phenomenon that challenges various and very wide legal research fields. This is preceded by another foundational question, which is “what can we do to counter-react to populist threats through law and legal practices?”. To address these questions, we need a comparative study which is capable to move in different levels of legal governance with a systematic approach, and which is able to adapt in different contexts without overriding the specificities of the legal environments. We expect, therefore, that the application of the BPR approach may be different from one level of investigation to another (national-European) in order to avoid compulsory or arbitrary answers to the aforementioned research questions, however maintaining the same leading idea and methodological approach principles. We also need to collect and examine those that are to be considered efficient or else “worthy” (best) legal reactions already implemented, therefore we will collect and examine case-studies, to then map and regroup the ‘legal reactions’ under the BPR criteria. The final step will be the formulation of policy recommendations based on the examined “best practices” we have identified for each field/area of legal research.

Therefore, we can say that the methodology of “best practices” answers in this research two orders of queries: it allows to evaluate those tools/practices that “work well” (or do not work well, or work poorly) with the populist challenge, and permits also to systematically classify them, in order to extract suggestions on how to “optimise” them (policy recommendations). The evaluation consists, in other words, in the assessment of the legal practices as efficient, effective and transferable experiences, answering *how* each one of these tools has been employed in the “populist challenge” and *what* effects did it produce in the concrete examined cases, by evaluating their capacity to either stop and/or neutralize the breaches of the rule of law, how to (re-)install “healthy” and democratic principles, as well as to see their ability to enlarge the “healthy” effects in space (other/similar legal contexts) and time (avoiding other/similar cases). These answers allow us to identify indirectly which aspects of the legal practices employed are defective, and to foresee ways for developing them.

The application of this methodology in highly different contexts (constitutions, party regulations, electoral systems, judicial systems, democratic structures etc) and in the very different institutional and governmental levels (national, EU) in which populist challenges have manifested, has required a particular adaptation in order to deliver responses with a good grade of reliability. These variations did not compromise the validity of the methodological approach but have instead offered a renewed viewpoint on the complexity of the issue, especially when attempting to identifying practices to consider “best” in the broader EU context.

This methodology confirmed the preliminary suspect that there cannot be in the legal environment one single and unique standard applicable universally or in the same manner, especially when this examination involves many national socio-economic contexts, with diverse legal cultures and traditions. Although the values and principles in the European Union are shared and are common, there can only be certain generalisations concerning the

commonalities between the variety of institutional realities and constitutional environments. Although there is no exclusive and unique way to safeguard the values of the rule of law, nor can these values be enforced or directed "from above", and there is no exclusive way of exercising and promoting the same democratic principles, there is, however, a *common level of understanding* these values and principles. This "common understanding" establishes as well the "EU legal standard", as the mandatory level which every EU country must comply with: a dynamic space set on the EU pivotal principles and values which ultimately offers the grounds for the assessment/evaluation of the national practices and policies. Practices of cooperation and collaboration seem to be the key answer to the EU constitutional integration: paradoxically, this building process can benefit in the long run by the common challenges that oblige all parties involved to review and to reaffirm the compulsory principles and values on which we stand together.

The variations on the methodological approach are described more in detail as follows:

CSS: Best practice methodology

In this part of the study, we analyse our results using the "best practice methodology" turning our attention to the best practice list (appendix B of Part A). However, the examination of 110 national cases would be not only extremely lengthy, but above all unnecessary and most likely misleading for the ultimate scope of this report. Therefore, the "case study-based" approach has been applied in this context through a selection among the main thematic areas hereby examined ("Constitutions", "Rule of Law", and "Democracy"), and oriented by the "successful/repeatable" criteria.

Accordingly, the selection identified four different "best practices" representative of the "populist threat" in those thematic areas, while the legal reactions to them have been considered under the combination of the "successful" (effective and efficient) and "repeatable" (feasibility to apply elsewhere) criteria. More precisely:

1. successful and repeatable: the national reaction worked and can be used elsewhere
2. successful but not repeatable: the national reaction worked but it is questionable whether it would work elsewhere
3. not successful but repeatable: the national reaction did not reach its purpose, but it might be worth experimenting with it elsewhere
4. not successful and not repeatable: the national reaction did not work and is clearly tied to the country which tried to use it

UB: Best practice methodology

Based on the Venice Commission and the European Court of Human Rights documental activity in the search for practices and standards which may constitute 'best practices', the research is limited to three thematic clusters, Constitutions, Rule of Law and Democracy, Courts, and one Special Issue, the independence of media.

The main point of reference will obviously be the opinions and documents of the Venice Commission, as the body principal aim is indeed to identify and define the 'best standards' of

European constitutionalism.[604] The judgments of the European Court of Human rights will be instead used to evaluate the effectiveness of specific institutional arrangements to curb anti-constitutionalist tendencies.

However, rather than "good practices", the majority of the standards elaborated by the two Council of Europe organs, refer to "good institutional arrangements". Yet, when it comes to institutional arrangements, as the Venice Commission itself recognises, their effectiveness and efficacy cannot be properly evaluated in abstract, i.e. without taking into account the peculiarities of each legal system.

Furthermore, since the opinions of the Venice Commission, being instruments of soft law, lack any binding effect - the same applies to some extent to judgments of the ECtHR - in most of the cases the good practices elaborated by the two bodies remain without any practical confirmation, and especially without forcing a comparability parameter of the efficiency or effectiveness some institutional arrangements have had in a certain legal context. This is why in some cases it has not been possible to apply the common evaluation matrix, limiting instead the examination to the "efficiency" and "effectiveness" capacity. It was not possible to assess the "transferability" capacity of a certain institutional arrangement, since this is destined to perform in the specific legal-institutional and social surrounding in which it is found.

Yet, the relevance of this research is not diminished by the inapplicability of the matrix as these good practices can be tested using as a yardstick national practices and policy recommendations elaborated in the previous phases of DEMOS.

UCPH: Best practice methodology

In the identification process of the "best legal practices" in response to populism under the EU rule of law principle, the evaluation takes into consideration the examination of responses on populist challenges to the EU Rule of Law under the "EU Toolbox". According to the Commission[605], there is an "architecture" in which these "tools" may be positioned, according to their "purpose" and the effects they can produce: to promote and prevent, to respond/resolve, to enforce compliance. We examine the correspondence between the prefigured goal of each tool, as this is defined in their legal base, with the effects these tools produced in their employment in specific legal cases. The evaluation follows the "best practice" approach, according to which it is possible to assess whether these tools actually are "efficient", "effective" and "adaptable" to other/similar challenges. These criteria describe, in other words, the ability of the legal tool to drastically, immediately, directly disentangle and resolve a legal conflict, address a specific breach or a threat of law. Each legal tool is examined in its vest of a legal reaction or practice to the rule of law backsliding given by what we have defined in previous tasks as "political populism"[606].

[604] G. Buquicchio and S. Granata-Menghini, The Venice Commission Twenty Years On. Challenge Met but Challenges Ahead , in M. van Roosmalen et al. (eds), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk* (2013), 41 ss.

[605] https://ec.europa.eu/info/sites/default/files/rule_of_law_mechanism_factsheet_en.pdf.

[606] What political populism is accountable for is that it can direct, make use of its power to undermine our constitutional democracies through illegal practices that breach the EU Rule of Law.

The 'best' legal responses should encompass certain *characteristics*, which inform our *evaluation criteria*: the more specular or close to those characteristics the "legal responses" (tools) are, the more these can be considered a "best practice". The evaluation is based on **a legal-critical approach** of the essential characteristics of the "legal responses", and on the **evidence-based approach**, considering the instances in which the legal tools have been implemented.

To identify strengths and weaknesses we take into account essential elements that, according to the BPR, are common in the "best practices"; such may be the time required to address the issue (how fast they can be brought into effect), the capacity of a practice to reverse/stop/remedy a breach (do they have a strong/direct effect), the capacity to apply the same result/effect in other contexts (member states or areas of interest) in similar breaches/threats. In this perspective, according to the criterion of **"**effectiveness**"** (did the EU action through the implementation of that tool reached its specific objectives?) a legal tool is deemed effective if it succeeds in reaching its explicit and implicit target (e.g. to prevent or solve a legal conflict, regulate and address a legal vacuum, to offer a "new", clearer and stronger answer to a legally relevant doubt etc.); according to the criterion of "efficiency" (what was the impact on that specific case; what was the general impact the tool employed has generated). The evaluation on efficiency may encounter aspects such as the "directness" and "automaticity" of the tool, the "resoluteness" grade. According to the grade of "transferability", we answer the question of whether the tool examined had the capacity to immediately apply to all similar actors or situations without requiring any particular adaptation/elaboration (strong) or if it applied specifically in a single case (weak)? The "best" tool should be "efficient" (fast, direct), "effective" (solving automatically) and "transferable" (valid not on an exceptional basis only).

The above 3-level criteria of examination allow us to make a "classification", a sort of "matrix" of the tools according to the insight we gain on what can be considered a "best practice against populism" on EU level, collocating the responses in a scale of "shades" of the impact that goes from "poor" to "best". We consider the highest qualitative level (best) as the one corresponding to the "optimum response against populism". Levels below are not dismissed but become part of the evaluation (good-poor response).

We do not need here a broader spectrum of "shades": the validity (consistency) and reliability (truthfulness) of the evaluation is based on the evidence of the "objective legal reality". On the contrary of a "survey", which encounters only "opinions" and usually employs a multiplicity of factors ("attitudes" or "groups" of opinions) this research does not require more extended differentiation in the evaluation: our objective is to systematically identify and assess which are the legal practices that "work", and "how". We do not intend to examine all possibly existing legal responses to the breaches of law but examine those that result more appropriate to address populism on EU level.

The 3-scale of impact goes from "**poor**" (a legal reaction has been implemented "insufficiently" either because it did not address the problem, or it did not manage to achieve its goal, or it has not been used to its full potential), to "**fair-good**" (a legal reaction that has used and exhausted it's potential, but has only achieved a mere-weak adjustment, or a legal reaction that is not direct enough or fast enough, thus requires improvement), to "**very good-best**" (the legal reaction actually stopped, or modified, or prevented the breach, it reached the desired effect of "responding to populism"). These answers allow subsequent considerations (and policy recommendations) on which practices need to maximise (extend, sharpen, better,

focus) their potential and which, instead, are to be considered the most fitting answers to populism.

It is almost *inevitable* in this method the introduction of a margin of appreciation that goes *beyond* the pure-literal legal evidence: this is not problematic as long as it is accompanied either by literature-scholarship on the issue, or by convincing legal reasoning.

Case XYXYX	POOR	FAIR - GOOD	VERY GOOD - BEST
Efficiency	Tool YY		
Effectiveness		Tool YY	
Transferability			Tool YY