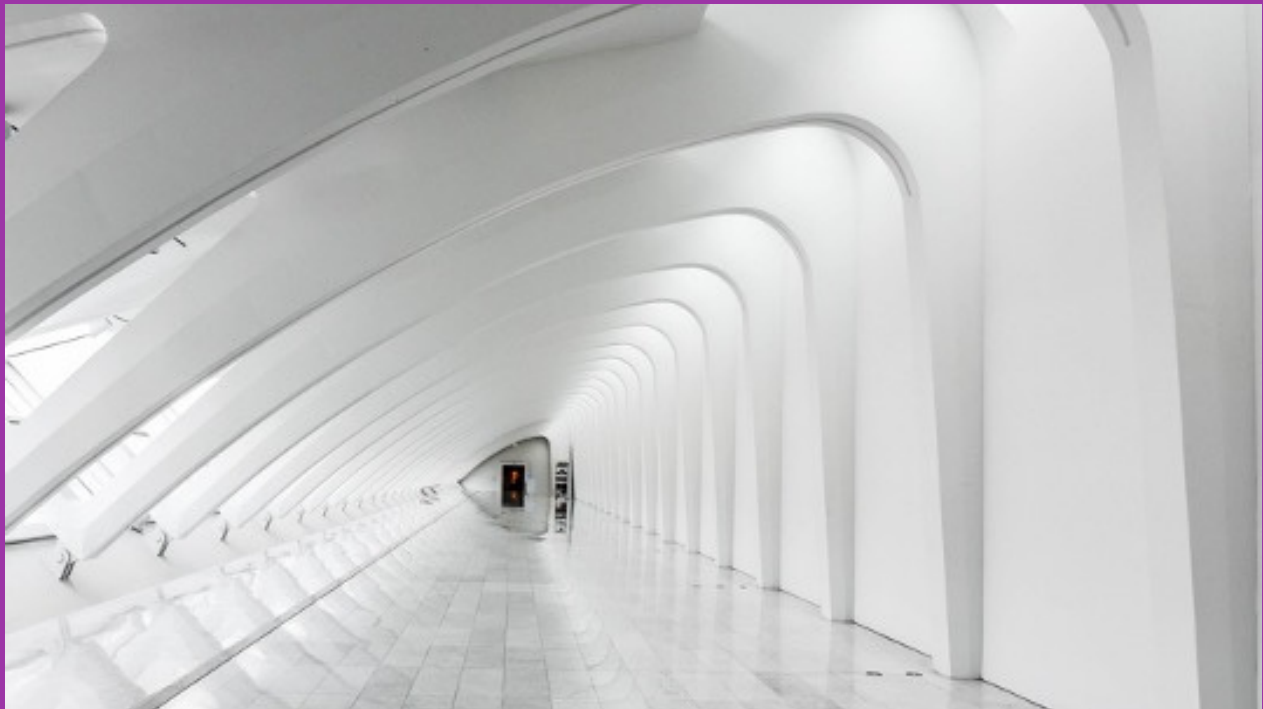


# REPORT ON THE USE AND POTENTIAL USE OF THE THREAT SINCE THE LAUNCH OF THE EU-LEVEL RULE OF LAW ALERT SYSTEM

*Edited by Milieu SRL*



# IMPLEMENTATION OF THE EU RULE OF LAW ALERT SYSTEM

## *RESPONDING TO EMERGING DISSENSUS*

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# IMPLEMENTATION OF THE EU RULE OF LAW ALERT SYSTEM

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## Abbreviations

CEU	Central European University
CoE	Council of Europe
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

# 1. Introduction

The rule of law has been defined as the backbone of any modern constitutional democracy in the EU and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU [1]. Article 2 of the Treaty on European Union (TEU), Article 49 of the TEU and the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU hence make the rule of law one of the main values upon which the EU is based together with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. They are considered those values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

While the precise content of this principle may vary depending on the legal tradition of Member States of the European Union, its common understanding can be derived by the case law of the Court of Justice of the European Union (CJEU), by Article 2 of Regulation (EU) 2092/2020 [2], and by the case law of the European Court of Human Rights (ECtHR) as including: the principle of legality and legal certainty; prohibition of arbitrariness of executive power; independence of judiciary and effective judicial review; equality before the law.

The 2020 Rule of Law report by the European Commission confirms this meaning and states ‘under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts’ [3].

While the different legal traditions of the Member States are in principle well designed to react to and protect citizens against any threat to the rule of law, recent events in countries like Poland and Hungary reveal mounting threats or challenges to the rule of law which undermine democracy. In this context, studies show that democratic backsliding within Europe have followed a path starting to political actors questioning democratic set up and leading to the creation of hybrid governing systems which systematically damages the democratic framework and distorts political competition in their favour [4]. Hence, during the past decades this process resulted in the gradual establishment of a system both in Hungary and in Poland breaking the intrinsic basis of democracy.

Against this background, this report examines how the EU alert system under Article 7 TEU, dedicated to the protection of democratic norms, has reacted to breaches in democratic practices and the rule of law by Hungary and Poland.

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[1]COM(2014) 158 final Commission Communication A new EU Framework to strengthen the Rule of Law.

[2]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 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LL.2020.433.01.0001.01.ENG>

[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.

[4] See for instance Sadurski, Wojciech, EU Enlargement and Democracy in New Member States, in Sadurski, Wojciech, Czarnota, Adam, Krygier, Martin (eds.), Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders 27 ff. (2006); K.L. Sheppelle, L. Pech, and S. Platon, Compromising the Rule of Law while Compromising on the Rule of Law, in Verfassungsblog, 13 December 2020; L. Pech, J. Grogan et al., Meaning and Scope of the EU Rule of Law, in RECONNECT Working Paper, Work Package 7 – Deliverable 2, 30 April 2020, Pech, L. & Jaraczewski, J. (2023) Systemic threat to the Rule of Law in Poland: Updated and new Article 7(1) TEU recommendations. CEU Democratic Institute. DI Working Papers, 2023/2; Pech, Laurent, 'Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure'?', in Uladzislau Belavusau, and Aleksandra Gliszczynska-Grabias (eds), Constitutionalism under Stress (Oxford, 2020; online edn, Oxford Academic, 22 Oct. 2020)

## 2. Systemic threat to the Rule of Law in Hungary and Poland

The rule of law is the cornerstone of mutual trust among its Member States and pivotal for the development of the area of freedom, security and justice upon which the European Union is built. Article 2 of the TEU (enshrining the European constitutional identity [5]) indeed declares that the Union is founded upon the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

Deficiencies in one Member State impact other Member States and the EU as a whole. While ensuring respect for the rule of law is a primary responsibility of each Member State, the Union has a shared responsibility to ensure that the requirements for EU membership are complied with and takes an active role to resolve rule of law issues wherever they appear. The Union has developed the EU rule of law toolbox with different rule of law instruments to respond to a variety of situations. Those tools include the European Rule of Law Mechanism, the EU Justice Scoreboard and support for rule of law watchdogs on the national level. Furthermore, the toolbox includes the alert system under Article 7, TEU setting out a Treaty-based procedure to address risks to the founding values of the EU in the Member States. Finally, the conditionality mechanism was added to the EU Rule of Law toolbox in 2021 as a specific tool to tackle sufficiently direct Rule of Law breaches that threaten the financial interest of the union that cannot be addressed under the general Rule of Law procedures.

In addition to the above EU rule of law toolbox instruments available to tackle rule of law violations, general instruments such as the preliminary ruling (Article 267 TFEU) and the infringement proceedings (Article 258 TFEU) can be mentioned. The protection of the rule of law as a Union fundamental value within the meaning of Article 2 TEU has indeed required the activation of various legal and policy instruments within and outside EU rule of law toolbox in response to the democratic backsliding in Hungary and Poland.

Article 267 TFEU also provides for a system of judicial cooperation between national courts and the Court of Justice about questions related to the interpretation of EU law provisions to ensure a uniform interpretation of EU law in the Member States. In addition to the above EU legal instruments available to address rule of law violations in general, the conditionality mechanism was added to the EU Rule of Law toolbox in 2021 as a specific tool to tackle sufficiently direct Rule of Law breaches that threaten the financial interest of the union and cannot be addressed under the general Rule of Law procedures.

The protection of the rule of law as a Union fundamental value within the meaning of Article 2 TEU has required the activation of various legal and policy instruments of this EU rule of law toolbox in response to the democratic backsliding in Hungary and Poland.

The **infringement procedure** of Article 258 TFEU, for instance, is a legal procedure initiated by the European Commission at the Court of Justice, to establish that a Member State has failed to comply with an obligation under the Treaties [6]. More specifically, if a Member State fails to communicate measures fully transposing the provisions of directives or fails to remedy a suspected breach of EU law, the Commission may open formal infringement proceedings [7].

Rule of law related infringement procedures have been initiated against Hungary, for instance in relation to (1) violation of media freedom [8]; (2) breaches of fundamental rights of LGBTIQ people [9];

[5] See CJEU, Cases C-156/21, Hungary v Parliament and Council, ECLI:EU:C:2022:97; C-157/21 Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:98.

[6] Consolidated Version of the Treaty on the Functioning of the European Union, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>

[7] European Commission, Infringement procedure, available at [https://commission.europa.eu/law/application-eu-law/role-member-states-and-commission/infringement-procedure\\_en#:~:text=According%20to%20the%20EU%20treaties,which%20can%20impose%20financial%20sanctions](https://commission.europa.eu/law/application-eu-law/role-member-states-and-commission/infringement-procedure_en#:~:text=According%20to%20the%20EU%20treaties,which%20can%20impose%20financial%20sanctions)

[8] European Commission, June infringements package: key decisions, Media freedom: Commission launches infringement procedure against HUNGARY for failing to comply with EU electronic communications rules, 9 June 2021, available at [https://ec.europa.eu/commission/presscorner/detail/en/INF\\_21\\_2743](https://ec.europa.eu/commission/presscorner/detail/en/INF_21_2743)

[9] European Commission, EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people, 15 July 2021, available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3668](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668)



(3) restricting civic space [10], and (4) violation the EU asylum acquis [11]. Infringement procedures were also initiated by the Commission in 2019, 2020, 2021 against Poland challenging the new disciplinary regime for judges; the Polish law of 20 December 2019 amending a series of legislative acts governing the functioning of the justice system; and recent case law of the Polish Constitutional Tribunal [12]. In all these procedures, Hungary and Poland failed to provide satisfactory replies to the Commission's letters of formal notice, and to take measures to fulfil its obligations under EU law. Therefore, the Commission brought actions against Hungary and Poland before the CJEU in relation to these issues. While the court proceedings are still ongoing in Hungary in the first two matters listed above, in the other matters the CJEU found violations of EU law in both Hungary and Poland.

However, it is worth noting that the values enshrined in Article 2 TEU, including the rule of law, cannot per se be directly enforced through the legal action under Articles 258-260 TFEU and the role of the CJEU. Under the Treaty on the Functioning of the European Union, the CJEU has jurisdiction to hear cases related to breaches of the rule of law only when they are linked to a breach of a specific provision of the acquis Communautaire [13]. Yet, Article 2 TEU can be transversally enforced through the mechanisms provided for in **Article 7 TEU**.

The political instruments enshrined in Article 7 establish a twofold mechanism. Specifically, Article 7 (1) (preventive mechanism) allows the Council of the European Union to instigate dialogues and give warnings to a Member State for **a clear risk of a serious breach** of the EU values, including the rule of law. Article 7(2)-(3) TEU (sanctioning mechanism) allows the Council to suspend certain rights deriving from the application of the treaties to the Member State in question, including its voting rights in the Council, in the case of a **serious and persistent breach**.

Article 7 TEU, inserted in the Treaty in 1999 with the entry into force of the Amsterdam Treaty, was thought to be never applied in practice but it was designed merely to help prevent 'democratic backsliding' post-EU accession during a time where a number of Eastern European Countries were aiming to join the Union [14]. While the Amsterdam Treaty provided for the EU to intervene where its core principles and values were violated and allowed for the suspension of rights of a Member State which breached the EU's values under Article 2, the Treaty of Nice provided an additional element, whereby in cases of potential breach of core principles and

values, the Council, acting by majority, could make recommendations to the State and request to rectify its behavior before EU action is taken. In 2014 the European Commission introduced a third step requiring the alert system to be used in cases of "systemic threats" to EU values or 'serious and persistent breach'. (Article 2(2)). Article 7 was therefore meant as a political instrument aiming to ensure that the common EU values act as a limit counterbalancing constitutional individuality and national identities recognized in Article 4(2) TEU [15].

The late insertion of a new mechanism aimed at preventing democracy backsliding post-EU accession 'may be explained by a widely held faith, among key institutional actors, in the EU's transformative power pre-EU accession and the effects of the EU's legal and regulatory framework, which has long been believed to make democratic transition irreversible' [16]. Some commentators have argued that Article 7 may provoke a reaction of increased internal support of the Member State subject to Article 7 procedure and an increase of Euroscepticism among the population [17], thereby furthering dissensus against the EU's values.

[11] European Commission, Commission opens infringement procedure against Hungary concerning its asylum law, 10 December 2015, available at [https://ec.europa.eu/commission/presscorner/detail/PL/IP\\_15\\_6228](https://ec.europa.eu/commission/presscorner/detail/PL/IP_15_6228)

[12] European Commission, Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, 22 December 2021, available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_7070](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070).

[13] See CJEU, Cases C-87/12 Kreshnik Ymeraga ECLI:EU:C:2013:291, para. 40; C-370/12 Pringle ECLI:EU:C:2012:756, para. 179; C- 617/10 Åkerberg Fransson ECLI:EU:C:2013:105, para. 17.

[14] Kochenov, Dimitry & Pech, Laurent. (2016). Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation: Commission's Rule of Law Framework. *JCMS: Journal of Common Market Studies*. 54. 1062-1074. 10.1111/jcms.12401.

[15] See case law of the Court of Justice of the EU in the cases Groener, Sayn-Wittgenstein, Runevic-Vardyn and Wardyn. See also Cases C-62/14 Gauweiler and Others, ECLI:EU:C:2015:400; Case C-493/17 Weiss, ECLI:EU:C:2018:1000; C-42/17 Taricco, ECLI:EU:C:2015:555; C-430/21, RS, ECLI:EU:C:2022:99; see also European Parliament, Member States and the Rule of Law. Dealing with a breach of EU values, March 2015, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS\\_BRI\(2015\)554167\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf).

[16] Kochenov, Dimitry & Pech, Laurent. (2016). Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation: Commission's Rule of Law Framework. *JCMS: Journal of Common Market Studies*. 54. 1062-1074. 10.1111/jcms.12401.

[17] European Parliament, Member States and the Rule of Law. Dealing with a breach of EU values, March 2015, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS\\_BRI\(2015\)554167\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf).

Yet, the raise of dissenting actions threatening the rule of law and democracy within Europe and particularly in Hungary and Poland have moved academics and policymakers to question whether the mechanisms established at national and EU level to address the challenges to the rule of law are sufficient to secure the termination of systemic threats to the rule of law. This is also the focus of the RED-SPINEL project and of this report.

As it will be explained below (see section 3) Article 7.1 TEU was indeed triggered only very recently against the democratic backsliding in Hungary and Poland, while the sanctioning mechanism has never been triggered. As it will be discussed, the underpinning reasons for these delays might be found in the strict voting majorities necessary to trigger Article 7.

## 2.1 Threats to the Rule of Law in Hungary

Systemic threats to the rule of law in Hungary have been reported for the past decade and were addressed in detail in the 2018 ‘Sargentini Report’ that documented a serious breach of the values the Union was founded upon and that led to triggering the Article 7(1) procedure against Hungary [18]. Most recently, in September 2022, the European Parliament also issued a resolution with a proposal for a Council decision determining the existence of a clear risk of such a serious breach [19]. The threats to the rule of law that served the basis for this last step in the Article 7 procedure against Hungary have also been corroborated by the Commission’s annual Rule of Law Reports. Furthermore, in December 2022 the Commission activated for the first time the rule of law conditionality Regulation against Hungary.

While the most significant threats to the rule of law concerning the functioning of the **constitutional and electoral system**; the **independence of the judiciary** and of other institutions and the rights of judges; **corruption and conflicts of interest**; **privacy and data protection**; and freedom of expression, including **media pluralism** are addressed in detail in Milieu’s Country Report on Hungary within the RED SPINEL project [20], additional areas of concerns that have directly fed into the ongoing EU-level Rule of Law processes are briefly outlined in the following.

Concerning academic freedom, education not aligned with the Christian-conservative ideology of the government has operated in an increasingly shrinking space in Hungary. The Central European University (CEU), a symbol of liberal democratic values and education, was forced out of the country under a 2017 law, later termed Lex CEU [21], that introduced a set of requirements that were targeted to exclude it from accreditation. While in December 2020, the CJEU eventually ruled, in Case C- 66/18 Commission v Hungary, that the law violates Hungary’s commitments under the WTO, and infringes the provisions of the EU Charter on academic freedom [22], the CEU was already forced to leave the country and to open a new campus in Vienna. In the meantime, the Orbán-government’s higher education reform has continued with the privatisation of 13 state universities that are placed under the close supervision of boards of governors appointed by the government, and with the placement of research institutes formerly under the Academy of Sciences under the control of the Ministry of Innovation [23].

[18] European Parliament, DRAFT REPORT on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Judith Sargentini, p 4, available at: <https://www.europarl.europa.eu/resources/library/media/20180411RES01553/20180411RES01553.pdf>

[19] European Parliament, Existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), 15 September 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0324>

[20] K. Dobias, A. Csonta, Use of the rule of law legal instruments in the face of mounting dissensus at a national level. Milieu Ltd, April 2023.

[21] Act No. XXV of 2017, amending Law No CCIV of 2011 on national higher education (‘the 2017 Law on higher education (Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról szóló 2017. évi XXV. Törvény) available at: <https://mkogy.jogtar.hu/jogszabaly?docid=A1700025.TV>

[22] CJEU: Press Release, The conditions introduced by Hungary to enable foreign higher education institutions to carry out their activities in its territory are incompatible with EU law, 6 October 2020, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200125en.pdf>

[23] BBC, Hungary broke EU law by forcing out university, says European Court, 6 October 2020, available at: <https://www.bbc.com/news/world-europe-54433398>



Specifically, in July 2019 the Hungarian Parliament passed a bundle of amendments that in effect stripped the Hungarian Academy of Sciences of its autonomy after the Academy's year-long resistance to hand over its research institutions for 'free use' to the Ministry [24]. Meanwhile, the Ninth Amendment to the Fundamental Law introduced 'the public interest asset management foundations' to perform public duties even though the Venice Commission reasoned that these foundations should be regulated by "statutory law, clearly setting out all relevant duties of transparency and accountability for the management of their funds (public and private), as well as appropriate safeguards of independence for the composition and functioning of the board of trustees" [25] Tellingly, these boards are filled with Fidesz-affiliates, including ministers [26].

One prominent example of a government-affiliate university is the **University of Public Service (UPS)**, - routinely referred to in domestic press as the "Prime Minister's favourite university" [27]. The university is funded from the central budget [28] and is a frequent recipient of major public investments. Numerous recent state investments include the development of the UPS's Ludovika Campus, which was created as part of a priority state investment amounting to over HUF 3 billion (ca. €7.9 million) and constitutes Hungary's most significant university campus development to date [29]. In addition, the UPS is under the control of Balázs Orbán the political director of Prime Minister Orbán. Pursuant to Article 4 of Act CXXXII of 2011 on the National University of Public Service, he is the controller (in the terminology of the national law "maintainer") of the university exercising extensive control over UPS from the "legality control of the university" as a whole, to the "determination of the number of senior management and management positions at the University", to "internal control authority over the use of the support provided to the University" (Article 5 Act CXXXII of 2011) [30]. Against this background, the effectiveness of the application of the rule of law principles of the EU has been called into question when the Fundamental Rights Agency of the EU entrusted the UPS with data and information collection on fundamental rights issues in Hungary to facilitate the FRA's comparative analyses [31].

The selection of the UPS is even more disturbing from the perspective of independence considering that its rector, Gergely Deli, sits on the FRA Management Board [32]. (It is further noted that UPS' consortium partner, the Office of the Commissioner for Fundamental Rights of Hungary has long been at the centre of national and international criticism due to its lack of functional independence on human rights issues from the Orbán government) [33]. In the context of the fundamental rights of migrants, asylum seekers and refugees, as part of the government's systemic efforts to restrict access to asylum in Hungary, a series of measures were found to be in violation of, not only the EU asylum acquis, but also its fundamental rights and values.

[24] Index, The academics told Palkovics no, the MTA will not give up the institutes (Az akadémikusok nem mondtak Palkovicsnak, az MTA nem adja magától az intézeteket) 5 June 2019, available at: [https://index.hu/techtud/2019/05/06/az\\_akademikusok\\_nem\\_mondtak\\_palkovicsnak\\_az\\_mta\\_nem\\_adja\\_magatol\\_az\\_intezeteket/](https://index.hu/techtud/2019/05/06/az_akademikusok_nem_mondtak_palkovicsnak_az_mta_nem_adja_magatol_az_intezeteket/)

[25] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) HUNGARY OPINION ON THE CONSTITUTIONAL AMENDMENTS ADOPTED BY THE HUNGARIAN PARLIAMENT IN DECEMBER 2020 Adopted by the Venice

Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021) p 18, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)029-e)

[26] Ibid. pag. 31.

[27] 24.hu, Those who want a leadership position in public administration must graduate from Orbán's favorite university (Orbán kedvenc egyetemén kell végeznie annak, aki vezetői pozíciót szeretne a közigazgatásban) 30 August 2017

24.hu, The National Public Service University tried somewhat shamelessly to get rich on an EU project (Kissé szemérmetlenül próbált meggazdagodni egy uniós projekten a Nemzeti Közzolgálati Egyetem), 10 April 2017

[28] Article 35 of Act CXXXII of 2011 on Nemzeti Közzolgálati Egyetemről, valamint a közigazgatási, rendészeti és katonai felsőoktatásról (Act CXXXII of 2011 on the National University of Public Service and public administration, law enforcement and military higher education)

[29] Magyar Építők, The Ludovika Campus, which was created as part of a priority state investment, was handed over (Átadták a kiemelt állami beruházásban létrejött Ludovika Campust), 4 April 2018

[30] 2011. évi CXXXII. törvény a Nemzeti Közzolgálati Egyetemről, valamint a közigazgatási, rendészeti és katonai felsőoktatásról (Act CXXXII of 2011 on the National University of Public Service and public administration, law enforcement and military higher education)

[31] FRA, Franet contractors 2023

[32] FRA, Management Board members

[33] GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS (GANHRI) Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA) 14-24 June 2021, pp 12-15

Those include Case C-564/18 handed down on 19 March 2020 by the CJEU on the national law allowing for the automatic inadmissibility decisions with reference to arrival via a 'safe transit country' [34], the Joined Cases of C-715/17, C-718/17 and C-719/17 of 2 April 2020 on Hungary's failure to provide the number of asylum seekers that can be relocated to its territory [35]; the Joined Cases of C-924/19 PPU and C-925/19 PPU of 14 May 2020 which found that keeping asylum seekers in mandatory transit zones violates the Recast Reception Conditions Directive [36], and Case C-808/18 concluding that such practice prescribed by national law constitutes detention [37]. After the latter decision, Frontex suspended its operations in Hungary (for the first and only time in an EU Member State) [38]. On 12 November 2021, the Commission referred Hungary to the CJEU for non-implementation of the judgement [39].

*“the number of forced removals to Serbia has increased significantly, with over 75,000 reported cases in 2022 alone”*

In the meantime, the Commission also sent various formal notices to Hungary for non-compliance with the obligation to completely and adequately transpose the EU asylum acquis, for instance, regarding various provisions of the Procedures Directive, and referred Hungary to the CJEU due to its new asylum procedure [40]. The violent pushbacks by Hungarian soldiers are well documented and have been found alarming by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that called for an end to illegal pushback practices and for increased safeguards against ill-treatment [41] and the Council of Europe (CoE) Commissioner for Human Rights who reported that “the number of forced removals to Serbia has increased significantly, with over 75,000 reported cases in 2022 alone” [42]. In this context, the European Court of Human Rights handed down a series of decisions in the past two years finding Article 3 violations on account of inhuman and degrading treatment of applicants for international protection in the transit zones. While the transit zones were closed, the new asylum procedure, in effect, excludes the possibility of submitting an application for international protection in Hungary,

while the blanket extra-judicial expulsion of migrants, including prospective applicants for international protection, continues at the southern border [43]. The continued summary push-back of all third country nationals without the examination of protection needs demonstrates the continued need for the enhanced supervision of the execution of the Ilias and Ahmed v Hungary ECtHR judgment [44] [45].

[34] C-564/18 - Bevándorlási és Menekültügyi Hivatal (Tomba), 19 March 2020, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-564/18>

[35] C-715/17 - Commission v Poland (Temporary mechanism for the relocation of applicants for international protection) 2 April 2020, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-715/17>

[36] C-924/19 PPU - Országos Idegenrendezési Főigazgatóság Dél-alföldi Regionális Igazgatóság, 14 May 2020, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-924/19>

[37] C-808/18 - Commission v Hungary (Accueil des demandeurs de protection internationale) 17 December 2020, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-808/18>

[38] Politico, EU border agency suspends operations in Hungary, 27 January 2021, available at: <https://www.politico.eu/article/eu-border-agency-frontex-suspends-operations-in-hungary-migration/>

[39] European Commission: Press Release, Migration: Commission refers HUNGARY to the Court of Justice of the European Union over its failure to comply with Court judgment, 12 November 2021, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_5801](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801)

[40] European Parliament, Existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), 15 September 2022, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0324\\_p19](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0324_p19).

[41] CoE, The Council of Europe anti-torture Committee (CPT) calls for an end to illegal pushback practices and for increased safeguards against ill-treatment

[42] CoE Commissioner for Human Rights, Hungarian authorities should refrain from arbitrary removals of refugees, asylum seekers and migrants to Serbia and ensure access to a fair and effective asylum procedure in Hungary, 31 August 2022, available at: <https://www.coe.int/en/web/commissioner/-/hungarian-authorities-should-refrain-from-arbitrary-removals-of-refugees-asylum-seekers-and-migrants-to-serbia-and-ensure-access-to-a-fair-and-effective>

[43] Aljazeera, Hungary frees refugees trapped on its border, but tightens rules, 21 May 2020, available at: <https://www.aljazeera.com/news/2020/5/21/hungary-frees-refugees-trapped-on-its-border-but-tightens-rules>

[44] Hungarian Helsinki Committee, COMMUNICATION In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by the Hungarian Helsinki Committee, 25 March 2021, available at: [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/03/Rule-9\\_Ilias-and-Ahmed\\_FINAL.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/03/Rule-9_Ilias-and-Ahmed_FINAL.pdf)

[45] ECtHR, GRAND CHAMBER CASE OF ILIAS AND AHMED v. HUNGARY (Application no. 47287/15), 21 November 2019, para 163.

There, the Grand Chamber specifically held that state's responsibility under Article 3 ECHR entails the assessment of the risk of ill-treatment within the meaning that article, which the person may face upon removal to Serbia, including the risk of chain-refoulement to North Macedonia and to Greece.

## 2.2 Threats to the Rule of Law in Poland

After the collapse of communism in 1989 Poland embarked into a democratic transition as part of its agenda to joining the EU and NATO. Yet, after being viewed as a 'model democratizer for more than two decades' from 2015 onwards the newly elected President from the Law and Justice Party (PiS) sought progressively to reinforce national independence and sovereignty from the EU [46].

In a nutshell, both Poland and Hungary have progressively undermined human rights and EU law by subjecting national courts to political control through disciplinary procedures [47] and reducing the retirement age of sitting judges; by repressing and withdrawing funding to dissenting civil society groups; and by exercising control over media freedom [48].

The first actions threatening the **independence of the judiciary** in Poland took place only after a few months from the appointment of the new government led by PiS. Prior to 2015, the Polish Law on the Constitutional Tribunal provided that the outgoing legislature had to nominate five new judges of the Constitutional Tribunal to be appointed by the President of the Republic. In accordance with the Polish Act on the Constitutional Tribunal [49], three judges appointed ahead of the general elections of 25 October 2015 had to take seats vacated during the mandate of the outgoing legislature while two would take seats vacated during the incoming legislature which commenced on 12 November 2015.

Yet, on 25 November 2015, the newly elected Parliament passed a motion annulling the five nominations. Shortly after, it nominated five new judges and adopted on 22 December 2015 a law amending the Act on the Constitutional Tribunal concerning the functioning of the Tribunal, including the independence of its judges.

The recently adopted law was passed notwithstanding two judgments of the Constitutional Tribunal declaring the appointment of the new judges unconstitutional, and the concerns expressed by the Venice Commission regarding threats to the rule of law and to the independence of judiciary. Specifically, in its Opinion CDL-AD (2016)001 the Venice Commission held that the amendments to the law on the Constitutional tribunal risked crippling the Tribunal effectiveness, thereby threatening Polish democracy, human rights and the rule of law [50].

Notwithstanding the voiced concerns against the law passed, from December 2015 to January 2016 the Parliament adopted, through an accelerated legislative procedure, a number of laws concerning media freedom [51], the police [52] and the Public Prosecution Office [53]. In 2016, the former Secretary General of the Council of Europe Thorbjørn Jagland expressed particular concern about the new media law and its impact on the integrity and independence of public service media service [54] in consideration of the direct control that the amending law granted to the Government over management positions within the public service media.

[46] <https://carnegieendowment.org/2021/01/05/democracy-support-without-democracy-cases-of-poland-and-turkey-pub-83485>

[47] see Case C-791/19, Commission v. Poland, ECLI:EU:C:2021:596.

[48] See Madeline Roache, Polish Media and Opposition Fight to Save Press Freedom from State Control, Open Democracy (Aug. 20, 2021), [www.opendemocracy.net/en/polishmedia-and-opposition-fight-save-press-freedom-state-control/](http://www.opendemocracy.net/en/polishmedia-and-opposition-fight-save-press-freedom-state-control/)

[49] In Poland, the Constitutional Tribunal is composed of 15 judges elected by the Lower House, and must take an oath of office before the President. In 2015, the governing Civic Platform party lost both the presidential election and the parliament (Sejm) to the PiS party. After the new Sejm was seated on 12 November 2015 the judicial branch would be left as the only branch of the government of Poland not under the control of PiS provided that the new nomination of constitutional judges were made in advance.

[50] Opinion CDL-AD(2016)001. Venice Commission. Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session. (Venice, 11-12 March 2016).

[51] Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016.

[52] Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016.

[53] Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; Law of 28 January 2016 - Regulations implementing the Act - Law on the Prosecutor's Office, published in Official Journal on 15 February 2016.

[54] See <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049a74c>



The laws amending the Police Act and the Public Prosecution Office, were also considered by the Venice Commission as susceptible to allow unjustified interference with privacy rights [55] and ‘insurmountable problems as to the separation of the prosecution system from the political sphere’ [56].

Further judicial reforms were proposed through accelerate legislative procedure in 2017 concerning the Act on Ordinary Courts, the Act on the National Council of the Judiciary, and the Act on the Supreme Court, further enabling ‘the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice’ [57]. The increasing deterioration on the rule of law, hence, lead to activate for the first time Article 7(1) TEU as regards the situation in Poland.

Democratic backsliding in Poland, and the deterioration of fundamental rights and freedom, has accelerated in 2020 during the global pandemic, at a time where President Andrzej Duda was running for re-election. The election was initially postponed due to the pandemic. However, when it took place observers and international actors reported unfair treatments and barriers to voting for citizens living abroad, along with homophobic and inflammatory rhetoric of President Duda during its campaign [58]. During the pandemic, President Duda used the state media, the changes to the judiciary system, and his incumbency advantage, to consolidate his power as the executive in Poland. Furthermore, studies [59] have pointed out that the Polish government in the year 2020 used the state of emergency and state of epidemic as an instrument of governance of the country, not as a tool to prevent a pandemic. At least part of the restrictions adopted in Poland were indeed beyond the need and unrelated to fighting the pandemic, thereby leading to further deterioration of the state of democracy in the Country.

A resolution adopted by the European Parliament in September 2021 highlighted the above-mentioned problems related to media pluralism but also to the legal challenges seeking to undermine the primacy of EU law. The European Parliament stated that the Polish authorities “deliberately and systematically

violated rule of law-related judgments and orders of the CJEU” regarding the composition and organisation of the illegitimate ‘Constitutional Tribunal’ and the Disciplinary Chamber of the Supreme Court. Therefore, the European Union called on the Polish Prime Minister and the Prosecutor General to ensure the respect of EU law [60].

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[55] CDL-AD(2016)012. Venice Commission Opinion on the act of 15 January 2016 amending the police act and certain other acts. (Venice, 10-11 June 2016), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)012-e).

[56] CDL-AD(2017)028. Venice Commission. Opinion on the act of the public prosecutor’s office as amended. (Venice, 8-9 December 2017), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e).

[57] CDL-AD(2020)017-Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure on 16 January 2020, endorsed by the Venice Commission on 18 June by a written procedure replacing the 123rd. (Strasbourg, 22 June 2020), available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)017-e). Plenary, Session

[58] A. Turne Democratic Backsliding in Poland and Eastern Europe. (20 November 2021), available at <https://www.democratic-erosion.com/2021/11/30/democratic-backsliding-in-poland-and-eastern-europe/>

[59] Szymański, A., & Zamecki, L. (2022). The Impact of the COVID-19 Pandemic on the Model of Governance and Democracy in Poland. *SIYASAL: Journal of Political Sciences*, 31(Suppl. 1), S69–S84. <http://doi.org/10.26650/siyasal.2022.31.944958>

[60] <https://www.europarl.europa.eu/news/en/press-room/20210910IPR11928/poland-attacks-on-media-freedom-and-the-eu-legal-order-need-to-stop>

### 3. Use and potential use of Article 7 in Hungary and Poland

The Article 7 TEU procedure, based on the political will of all EU Member States in the Council [61] and other EU Institutions, is to respond to a clear risk of a serious breach by a Member State of the values referred to in Article 2 and, in case such a breach is determined, allows for the suspension of certain rights deriving from the application of the Treaties to the Member State in question, including voting rights [62]. However, under the sanctions mechanism of Article 7(2) the determination of a ‘serious and persistent breach’ **requires unanimity** in the European Council, with the sole exception of the affected Member State, which leaves the mechanism vulnerable to political sabotage by the very Member States whose actions the mechanism aims to curb. As stated by the May 2022 European Parliament resolution despite the deteriorating situation in both countries in recent years, the Member States have avoided voting to determine whether there is “a clear risk of a serious breach” of the EU’s common values, which is the next step in Article 7 procedure [63].

In the case of **Hungary**, the lengthy and often stalling process has highlighted the weaknesses of Article 7 procedure. It was already eight years ago in June 2015 that the European Parliament requested the Commission to present a proposal in order to start the procedure against Hungary [64], yet it was not until 2017 that the LIBE Committee’s Rapporteur, MEP Sargentini was tasked to examine whether there was a clear risk of a serious breach by Hungary of the values on which the Union is founded. The ‘Sargentini Report’ was released in April 2018 finding that the facts and trends in Hungary examined in the context of the twelve issue areas the Parliament voiced concerns about represented a systemic threat to democracy, the rule of law and fundamental rights thereby constituting a clear risk of a serious breach of the values of Article 2 TEU [65]. Accordingly, the European Parliament passed the resolution on 12 September 2018 on a proposal calling on the Council to determine the existence of such a risk [66]. This proposal was, however, tabled in a political climate where the “rule of law was conspicuously missing” from the sitting Romanian presidency’s agenda and the Council appeared to have been paralysed on this subject [67].

Building political consensus, let alone unanimity, within a Council with multiple overlapping negotiations where Member States are eager to broker the political support of other Member States, including the Rule of Law outliers, have further reduced the possibility of political buy-in.

After a long stalling, MEP Gwendoline Delbos-Corfield, currently responsible for the European Parliament’s Article 7 report on Hungary, has written to all 26 Member States to ensure that the Swedish Presidency of the EU Council, which commenced in February 2023, will re-launch the activities under Article 7 and enter the recommendation phase, which requires a vote without unanimity, to address the deterioration of fundamental rights in and the rule of law in Hungary [68].

[61] Despite the unanimity hurdle in the European Council to impose sanctions, most articles acknowledge that the problem does not lie in the mechanism itself and rather in the political will of European institutions, see for instance Bugarič, B. (2016). “Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism.” In Reinforcing Rule of Law Oversight in the European Union, edited by C. Closa and D. Kochenov, 82–102. Cambridge: Cambridge University Press; and Closa, C. (2019). The politics of guarding the Treaties: Commission scrutiny of rule of law compliance, *Journal of European Public Policy*, 26:5, 696–716.

[62] Article 7(1) and (3) of the Treaty on the Consolidated Version of the European Union, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bfi40bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bfi40bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF)

[63] European Parliament, Ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, 5 May 2022, available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204_EN.html)

[64] European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), available at: [https://www.europarl.europa.eu/doceo/document/TA-8-2015-0227\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2015-0227_EN.html)

[65] European Parliament, DRAFT REPORT on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Judith Sargentini, p 4, available at: <https://www.europarl.europa.eu/resources/library/media/20180411RES01553/20180411RES01553.pdf>

[66] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), available at: [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html)

[67] M. Michelot, THE “ARTICLE 7” PROCEEDINGS AGAINST POLAND AND HUNGARY: WHAT CONCRETE EFFECTS?, 6 May 2019, available at: <https://institutdelors.eu/en/publications/trashed/>

[68] Agence Europe, European Parliament rapporteurs call on EU Council to relaunch work on so-called ‘Article 7’ procedure against Hungary, 26 April 2023, available at: <https://agenceurope.eu/en/bulletin/article/13170/29>



In the same vein, hearings have been ongoing at the Parliament under Article 7(1), which in its latest Resolution of 5 May 2022 underlined that the Commission's findings should constitute sufficient grounds for the Council to adopt recommendations in the Article 7(1) procedure [69]. Under the Swedish Presidency having Hungary's Article 7 procedure among its priority dossiers as well as the ever-explicit confrontation of the freshly inaugurated Fifth Orbán-government with 'Brussels', 2023 has seen a heightened focus on the Rule of Law situation in Hungary and, importantly, a strengthened interlinkage between the various Rule of Law processes, whereby, the Swedish Presidency, for instance, structured its country-by-country Rule of Law dialogue with Member States around the Commission's annual Rule of Law Report. It also pledged to "forward the Council's work on the Article 7 procedures in a constructive spirit" [70], however, its realisation is yet to be seen. Despite the renewed focus on the issue, the political stalemate at the Council has so far not allowed the Article 7 procedure to be an effective tool in protecting the rule of law in Hungary.

In case of Poland, and in the aftermath of the 2015 events, on 13 January 2016 the Commission began dialogues with Poland under the Rule of Law Framework. This was the first time that the Rule of Law Framework was activated by the European Commission, leading some commentators to questioning why the same procedure was not adopted with respect to Hungary [71]. From February to July 2016, Polish authorities and the European Commission entered into a dialogue with the aim to both assess the increasing deterioration of the rule of law within the country and identify targeted actions to address the crisis.

The work of the European Commission was carried out alongside that of the Venice Commission and the European Parliament. The former, adopted in 2016 its opinion on the 2015 amendments to the Constitutional Tribunal, calling for a solution that would respect the judgments of the Constitutional Tribunal [72]. The latter, adopted in 2016 a resolution urging the Polish Government to publish and fully implement the judgments of the Constitutional Tribunal and the recommendation of the Venice Commission, thereby noticing that the risk of a paralysis of the Constitutional

Tribunal following the 2015 amendments posed a danger to democracy, human rights, and the rule of law [73]. In the Resolution, the European Parliament supported the Commission's decision to launch a structured dialogue under the Rule of Law Framework, and referred to the possibility of the activation of Article 7(1) in case Poland did not comply with the Commission's recommendations.

Over the course of few years, the Commission adopted four Rule of Law Recommendations addressing the deterioration of the rule of law in Poland. Yet, as some authors [74] have pointed out, the idea of launching the Rule of Law Framework was not well received by the President of the European Council Donald Tusk who remained extremely cautious in its approach to breaches of the Rule of Law. Already in 2014, when the Commission launched the Rule of Law Framework, the Council Legal Service adopted a strongly critical opinion [75]. While in the Communication setting out a new EU Framework for the Rule of Law the Commission considered the new framework as based on the Commission competences provided for by existing Treaties [76], the Council argued that the new EU

[69] European Parliament, Ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, 5 May 2022, available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204_EN.html)

[70] European Parliament, Briefing, Outlook for Upcoming Presidency: Priority dossiers under the Swedish EU Council Presidency, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739277/EPRS\\_BRI\(2023\)739277\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739277/EPRS_BRI(2023)739277_EN.pdf)

[71] Closa, C. (2021). Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU. *International Political Science Review*, 42(4), pag. 501-515.

[72] CDL\_AD(2016)012. Venice Commission Opinion on the act of 15 January 2016 amending the police act and certain other acts. (Venice, 10-11 June 2016), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)012-e).

[73] European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP)), 2016.

[74] Closa, C. (2021). Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU. *International Political Science Review*, 42(4), pag. 501-515.

[75] Presidency of the Council (2014) Note from the Presidency to the Council, Ensuring respect for the RoL in the European Union (Doc No 15206/14). Opinion of the Council Legal Service (Doc No 10296/14)

[76] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of Law, Brussels, 11.3.2014. COM(2014) 158 final.

Framework for the Rule of Law was not compatible with the principle of conferral governing the competences of the institutions of the Union. In response, the Council created its alternative Annual Rule of Law Dialogue, articulating a process of debate, dialogue and engagement on the rule of law with all Member States [77].

It is probably for reasons underpinning ‘institutional logics’ of the Parliament, the Council and the Commission that although the rule of law in Poland was increasingly deteriorating and the Rule of Law Framework proved insufficient to address the democratic backsliding in Poland, Article 7(1) TEU was only triggered by the Commission in December 2017. As some reports have argued, the use of the Rule of Law Framework instead of Article 7(1) resulted in delays in triggering the former, even though institutions having the power to trigger Article 7 are not obliged to wait for the Commission to complete the Rule Law Framework dialogues [78]. Accordingly, the delay inherent in the Rule of Law Framework would be the ‘least of the evils’ created by the Commission in order to not to trigger Article 7, when such triggering was needed. In the aftermath of Poland’s de facto refusal to cooperate and follow the Commission’s recommendations, the Commission, instead of triggering Article 7 (1) proceeded in adopting new, ad hoc recommendations ‘making the deployment of the Treaty provision de facto impossible as a result of its own inventiveness masking profound indecision’ [79]. The lack of the Commission and the Council support was indeed most likely the reason why, in September 2017, no member states supported the idea of triggering Article 7 TEU [80].

Furthermore, and despite the deteriorating situation in both Poland and Hungary, Member States have avoided voting to determine whether there is ‘a clear risk of a serious breach’ of the EU’s common values, the next step in this Article 7 procedure. The chances of Poland being stripped of its voting rights are slim, as all other EU Member States would need to agree, and Hungary has long said it would veto such a step [81].

## 4. Conclusion and New Challenges

As explained above, the protection of the rule of law as a fundamental value of the EU has led to the activation of various legal and policy instruments of the EU rule of law toolbox in response to the democratic backsliding in Hungary and Poland. Amongst these procedures, the purely political procedure set out by Article 7 TEU aims to respond to a clear risk of a serious breach by a Member State of the values referred to in Article 2 and, in case such a breach is determined, allows for the suspension of certain rights deriving from the application of the Treaties to the Member State in question, including voting rights.

Nevertheless, the lengthy and often stalling process has highlighted the weaknesses of the Article 7 procedure due to the composition of the Council and the requirement of unanimity to trigger more serious sanctions. As things stands now, the importance of the rule of law does not seem to be counter-balanced by adequate tools. The Rule of Law Framework, dialogues-driven, is in itself characterised by generalised prudence while the concrete and equivalent possibility of reaction in terms of severity is the activation of sanctioning mechanisms, which is very difficult to activate.

European institutions, and in particular the European Commission, have attempted to address the systematic threats to the rule of law and democracy in both Hungary and Poland also through other mechanisms, including infringement procedures and the conditionality mechanism.

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[77] Council of the EU (2014) Council conclusions on fundamental rights and RoL and on the Commission’s 2012 Report on the Application of the Charter of Fundamental Rights of the European Union [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/137404.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf)

[78] Kochenov, D. Busting the myths nuclear: A commentary on Article 7 TEU, 2017, available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW\\_2017\\_10.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf)

[79] Ibid.

[80] Closa, C. (2019). The politics of guarding the Treaties: Commission scrutiny of rule of law compliance, *Journal of European Public Policy*, 26:5, 696-716, pag. 707.

[81] See <https://www.politico.eu/article/european-parliament-triggering-article-7-poland-judicial-reform-voting-rights/>.

In force since 1 January 2021, but implemented only since April 2022, the **conditionality mechanism** specifically responds to those rule of law breaches that are affecting the protection of the financial interests of the Union or its sound financial management [82]. The use of the conditionality mechanism is complementary in a way that it can only be activated vis-à-vis breaches that could not be addressed via the above-mentioned rule of law procedures, but it can however be activated in parallel with other tools [83]. For that the conditionality mechanism to be activated, a rule of law breach must be established as being “sufficiently direct” [84]. While not limited to it, the types of violation suspect in the context of this mechanism include, in particular, those endangering the independence of the judiciary; those failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including matters of undue financial influence or conflict of interests; as well as those limiting legal remedies, effective investigation, prosecution or sanctioning [85]. If such a sufficiently direct breach is found, various punitive measures can be taken, such as the suspension of payments and disbursement of funding and loans to the Member States, the prohibition of new loans or the reduction of pre-financing, among others, under Article 5 of the Regulation. Should **the Commission** consider that there are sufficient grounds for believing that the requisite violations are ongoing in a Member State, it sends a written notification and based on the information received in response, it may open a **structured dialogue** on the findings upon the EP’s invitation. If the remedial measures proposed by the Member State are not adequate, it submits a proposal for an **implementing decision on the appropriate measures** to the Council. The Council can amend and adopt the Commission’s proposal with qualified majority under Article 6 of the Conditionality Regulation, i.e., there is no unanimity requirement in place as in case of the Article 7 procedure under the TEU.

**A strength of the conditionality mechanism is that it does not require unanimity, and therefore, Hungary and Poland could not block the procedure in favour of each other.** Unsurprisingly, its planned introduction was, hence, met with stern opposition by both Member States.

Fuelling populist anti-immigrant sentiments, PM Orbán called the conditionality mechanism “a ‘political and ideological weapon’ designed to punish anti-immigration governments” and went as far as vetoing the EU’s trillion-euro COVID-19 recovery package, [86] and subsequently €18 billion EU aid package for Ukraine [87]. It was not until a political deal was brokered with significant concessions, including the amount of funding to be suspended subject to Rule of Law conditionality as well as the approval of Hungary’s own spending plans under the COVID-19 recover funds, that Hungary stopped blocking these critical packages to address the gravest global crisis since WWII.

Having not been able to block the introduction of the conditionality mechanism via political means, Hungary and Poland also brought legal action before the CJEU asking for the annulment of the Conditionality Regulation on the basis that neither the TEU nor the TFEU provided appropriate legal basis for the imposition of conditionality, such a mechanism circumvented the Article 7 procedure, and that the EU exceeded its powers and jeopardised legal certainty. The Court, in its Judgement of 16 February 2022, dismissed both actions in their entirety [88].

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[82] Recital 14 of 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,

available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN>

[83] see in this respect the Commission Guidelines on the application of the conditionality regulation (2022), available at [https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en](https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en)

[84] Article 4(1) Ibid.

[85] Article 2 Ibid.

[86] Euronews, Hungary and Poland block EU’s COVID-19 recovery package over new rule of law drive, 18 November 2020, available at: <https://www.euronews.com/my-europe/2020/11/16/hungary-and-poland-threaten-coronavirus-recovery-package>

[87] Politico, EU strikes deal with Hungary, reducing funding freeze to get Ukraine aid approved, 12 December 2022, available at: <https://www.politico.eu/article/eu-deal-hungary-drop-vetoe-recovery-plan-approved-funding-freeze-ukraine-aid/>

[88] Court of Justice of the European Union PRESS RELEASE No 28/22 Luxembourg, 16 February 2022 Judgments in Cases C-156/21 Hungary v Parliament and Council and C-157/21 Poland v Parliament and Council, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>

Accordingly, on 15 December 2022, the Council indeed passed its implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [89].

Notwithstanding the undeniable added value that the infringement procedure and the conditionality mechanism bring within the context of the EU rule of law tools, both instruments do not per se provide a system counterbalancing systemic breaches of the rule of law and democratic backsliding. Nevertheless, despite Article 7 TEU was designed precisely to face those circumstances, the latter is nowadays considered by some as a dead provision [90]. Hence, the weaknesses inherent in Article 7 TEU have recently prompted the European Parliament to propose changes to its voting majorities. The conference for the Future of Europe has heated up debates over treaty amendments, including on Article 7 TEU [91]. Notably, the amendments proposed by the Parliament would allow to introduce a new legal basis to instrumentalise the values expressed in Article 2 TEU and the Charter of Fundamental Rights, by broadening the scope of the Charter and allowing the European Council to act by qualified majorities and not unanimity to determine that a serious and persistent breach has taken place. However, such changes in the rule of law procedure would require the approval and ratification of all twenty-seven member states, including Poland and Hungary. It is to be seen, therefore, whether the European Union will be able to follow up on this proposal.

Recently, in response to the existing concerns over the state of EU values in Hungary which have further deteriorated despite the activation of the Article 7 mechanism, the European Parliament has also questioned the ability of Hungary to fulfil the important role the Presidency of the Council due in 2024. In its latest Resolution [92] the European Parliament has indeed expressed further concerns over laws being adopted without sufficient parliamentary scrutiny and public consultation, abusive invocation of the 'state of danger' and misuse of whistleblower protection to undermine LGBTQ+ rights and freedom of expression. In adopting this resolution, the Parliament wanted to respond to citizens' expectations to systematically uphold the rule of law across all EU countries, as set out in Proposals 25(1), 25(4), 16(6), and 38(1) of the conclusions of the Conference on the Future of Europe.

Hence, it called the Council to find a proper solution against the Hungarian Presidency which should take seat in 2024. Although at the time of writing there is no obvious legal route to stop Hungary from taking the presidency, the Council has now been called by the Parliament 'to find a proper solution as soon as possible'. And unless they do so, the Parliament has threatened to take "appropriate measures," such as boycotting the operation of Hungary's forthcoming presidency by reducing cooperation to a bare minimum. It is to be seen whether the Council will uphold such unprecedented action against the continued deterioration of EU values by Hungary.

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[89] COUNCIL IMPLEMENTING DECISION (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D2506>

[90] Kochenov, D. (2021). Article 7: A Commentary on a Much Talked-About 'Dead' Provision. In *Defending Checks and Balances in EU Member States* (pp. 127-154). Springer, Berlin, Heidelberg. [

[91] European Parliament, *The Treaty of Nice and the Convention on the Future of Europe*, March 2023, available at <https://www.europarl.europa.eu/factsheets/en/sheet/4/the-treaty-of-nice-and-the-convention-on-the-future-of-europe>

[92] European Parliament, *Hungary: MEPs denounce deliberate and systematic efforts to undermine EU values*, (2023) at <https://www.europarl.europa.eu/news/en/press-room/20230524IPR91910/hungary-meps-denounce-deliberate-and-systematic-efforts-to-undermine-eu-values>