Supranational Tug of War

OVERCOMING THE EUROPEAN UNION'S AUTHORITARIAN EQUILIBRIUM

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Abstract

Democratic backsliding and willful destruction of the rule of law in two member states of the European Union have threatened the EU's status as a democratic entity. The EU has often reacted slowly and ineffectively to these threats. Some scholars have suggested that the EU even contributed actively, if involuntarily, to an 'authoritarian equilibrium'. In this thesis, I trace the EU's actions against Hungary (since 2010) and Poland (since 2015) until the end of 2021, analysing official documents, Parliamentary debates, and elite and expert interviews. EU policy-making evolved considerably between 2010 and 2021, the period under investigation in this thesis and the EU has acted differently in the two cases and over time. To explain these differences, I propose a theoretical framework that I coin 'the supranational tug of war'. I suggest that the EU can destabilize the authoritarian equilibrium by imposing high costs on backsliding governments. For this to succeed, three steps must be fulfilled. First, policymakers must evaluate a backsliding threat correctly; secondly, they need to find an appropriate tool to deal with it; thirdly, they need to build political support for sanctions. If all three of these steps succeed, the EU can sanction authoritarian governments, which could destabilize the authoritarian equilibrium. However, this theoretical framework recognizes two things: first, that backsliding governments are part of the European decision-making process and actively pursue tactics to exploit weaknesses within it and avoid the imposition of costs on them; secondly, that feedback loops provide for changes in the decision-making process over time. I suggest that structurally, the EU is moving in the direction of imposing ever-higher costs on backsliding governments, which holds the key for overcoming the authoritarian equilibrium in the European Union.

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To Ulysses, Callista, Perseus,
& Hansol

for their love, support, patience,
& sacrifice.

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Contents

Abbreviations

AFCO	Committee on Constitutional Affairs
AG	Advocate General
ALDE	Alliance of Liberals and Democrats for Europe Party
ASJP	Associação Sindical dos Juízes Portugueses
BUDG	Committee on Budgets
CEE	Central Eastern Europe
CEU	Central European University
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CLS	Council Legal Service
CoE	Council of Europe
CONT	Committee on Budgetary Control
COREPER	Committee of Permanent Representatives (*Comité des représentants permanents*)
COVID-19	Coronavirus disease 2019
CULT	Committee on Culture and Education
CVM	Cooperation and Verification Mechanism
DG	Directorate-General
DRF	democracy, rule of law and fundamental rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
ECR	European Conservatives and Reformists
ECtHR	European Court of Human Rights
EFD	Europe of Freedom and Democracy
ENF	Europe of Nations and Freedom
EPP	European People's Party
EPPO	European Public Prosecutor's Office
EU	European Union
EUCO	European Council
FDI	foreign direct investment
FEMM	Committee on Women's Rights and Gender Equality
GAC	General Affairs Council
GDP	gross domestic product
GRECO	Group of States against Corruption (*groupe d'États contre la corruption*)
Greens/EFA	Greens/European Free Alliance

GUE/NGL	European United Left/Nordic Green Left
ID	Identity and Democracy
JHA	Justice and Home Affairs Council
KDNP	Christian Democratic People's Party (*Kereszténydemokrata Néppárt*)
LGBT	lesbian, gay, bisexual, transgender
LIBE	Committee on Civil Liberties and Home Affairs
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
NATO	North Atlantic Treaty Organization
NGEU	Next Generation EU
NGO	non-governmental organization
NI	Non-Inscrits
NJC	National Judicial Council
NJO	National Judicial Office (Hungary)
NMHH	National Media and Info-communications Authority (Hungary)
ODIHR	Office for Democratic Institutions and Human Rights
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PES	Party of European Socialists
PiS	Law and Justice (*Prawo i Sprawiedliwość*)
PO	Civic Platform (*Platforma Obywatelska*)
PSPP	Public Sector Purchase Programme
QMV	Qualified Majority Voting
RCV	roll call vote
Renew	Renew Europe
RQMV	reverse Qualified Majority Voting
RRF	Recovery and Resilience Facility
S&D	Progressive Alliance of Socialists and Democrats
SSH IDREC	University of Oxford Social Sciences and Humanities Interdivisional Research Ethics Committee
TAN	traditional, authoritarian, nationalist
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

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1
Introduction

OVERCOMING THE AUTHORITARIAN EQUILIBRIUM

> 'The European Parliament ... expresses deep regret that the lack of decisive EU action has contributed to a breakdown in democracy, the rule of law and fundamental rights in Hungary, turning the country into a hybrid regime of electoral autocracy.'
>
> *(European Parliament 2022a)*

Taking a stroll along the Danube riverbank on the flat Pest-side of Budapest, one comes across the imposing Parliament building – the *Országház*. The building in neo-gothic style was finished over 120 years ago and is said to be the largest building in Hungary. A few hundred metres to its east is Nyugati train station. With the S70 train, it is only a thirty-seven-minute-ride to Göd, a town of twenty-one-thousand people located a few kilometres upstream of the Danube. At first view, it is not a very remarkable town. Along the main street are small, residential houses, lined up behind a ditch, similar to others across the country. Dogs bark viciously in the evening, seemingly competing with each other for attention. Looking at the life in the town, one could think that Budapest, with its imposing Parliament building, is far away. But to think that would be a mistake: the politics of authoritarian Prime Minister Viktor Orbán have broken the peace.

Despite its modest image, Göd is not – or has not been – a poor place. Samsung SDI, a subsidiary of the South Korean *chaebol*, operates an enormous battery factory in town, providing employment for the locals and tax revenues

for the municipality. Yet the town folk appeared ungrateful. When they elected a mayor, the people of Göd steered clear of the candidate of *Fidesz – Magyar Polgári Szövetség* (Hungarian Civic Alliance). Fidesz has governed Hungary in an increasingly autocratic way since its landslide win in the 2010 parliamentary election. When the COVID-19 pandemic struck in March 2020, the Fidesz-run parliament granted the government extensive executive powers. On 17 April 2020, the government issued decree 135/2020, by which it assumed the power to create special economic areas. The next executive decree (136/2020), on the same day, created a special economic area in Göd and transferred ownership of the land on which the Samsung factory was built to the (formerly) surrounding Pest-county, which is run by Fidesz. Through the change of ownership, the right to raise business taxes was transferred. Overnight, opposition-run Göd lost one-third of its tax revenue and even had to transfer business tax that it had already collected (Karsai 2020).[1]

A town does not have to be as large as Göd to be of interest to Orbán. Felcsút is a village with only 1,800 people and the place where Viktor Orbán grew up. Located only thirty kilometres to the west of Budapest, it features a new state-of-the-art football stadium (Pancho Aréna) for 3,500 people, which cost 12.4 million Euro. A 5.7 km light railway connects Felcsút with the neighbouring village Alcsútdoboz. Two million Euro, or 80 per cent of its construction cost, was footed by European taxpayers (Bayer 2017). Orbán's childhood friend, Lőrinc Mészáros, formerly a local gas-fitter, became mayor of the village in 2011. Since Fidesz took power in the country, his small business won large state contracts, which made Mészáros a (Euro) billionaire and one of Hungary's richest men (Keller-Alant, Racz and Simon 2017; Panyi 2020; Forbes 2021).

1. Samsung SDI seemed little concerned. In February 2021, the company announced an investment of 942 billion Korean Won – equivalent of nearly 700 million Euro – in the battery production in Göd (Reuters 2021; Kim 2021).

The media market in Hungary was consolidated over the last decade. The public broadcasters were captured early and turned into the government's propaganda machines. But many private newspapers and broadcasters were threatened, purchased, or shut down as well. At the end of a decade of Fidesz-rule, Index was the most-viewed news website that kept a critical distance from the government. Since 2018, Index had displayed a barometer assessing its own independence. In June 2020, the needle moved from green to amber, highlighting that the independence of Index was jeopardized. A few weeks later, the board of Index fired editor-in-chief Szabolcs Dull. After management let an ultimatum to reinstate Dull pass, over seventy newsroom staff collectively resigned and walked out (Hopkins 2020; Walker 2020).

The few remaining independent and government-critical outlets that continue to cover corruption scandals and government wrongdoings are under pressure too. Szabolcs Panyi is an investigative journalist who has covered many corruption scandals in Orbán's close circle. An international media investigation brought to light that his phone was tapped with the Israeli spyware *Pegasus*. Eleven times the spyware was activated shortly after Panyi contacted the Hungarian government asking for comments, forensic analysis of his phone revealed (Walker 2021).

♣ ♣ ♣

These stories illustrate the grip Viktor Orbán has over his country as well as his primary tools of control. Whereas a twentieth-century-dictator might have suppressed unrest with tanks and military might, jailing, beating, and torturing dissidents into submission, the twenty-first-century-autocrat uses the more subtle means of law, surveillance, and economic sanctions to gain and retain the upper hand. Orbán's Hungary is a 'prime example of a competitive

autocracy'[2] according to the two scholars who have described and popularized the term (Way and Levitsky 2019).

The European Union – the largest block of rich democracies in the world – stood by and watched as Hungary slid into this competitive authoritarianism. In Poland, when Law and Justice (*Prawo i Sprawiedliwość*, PiS) started an assault on the Constitutional Tribunal – packing and disabling the court – in 2015, followed by a quest to bring the judiciary at large under their control, Brussels paid attention. Yet nothing the EU did, visibly contained the Polish government's efforts to attack and capture the judiciary.

What has stopped the EU from reining in the backsliding in these two member states? In this thesis, I explore how Hungary and Poland exploited weaknesses in the EU's institutional model to avoid sanctions. I show how their backsliding and communicative actions have interacted with decision-making of the European Union to bring about milder outcomes.

This thesis builds on various bodies of literature in comparative politics, European politics and law, and communication as well as empirical case studies, to explain the interaction of EU and backsliding member states. Central to the argument is the combination of the incrementalism of democratic backsliding, limits to European decision-making and the contestation of competencies, as well as authoritarian public diplomacy and image management. The next Section (1.1) presents the puzzle, research question and the argument in brief. This is followed by a review of research on EU decision-making in the area of democracy, rule of law, and fundamental rights and why the EU has propped up authoritarianism within (the so-called 'authoritarian equilibrium') in Section 1.2.

2. 'Competitive authoritarian regimes are civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents. ... Competition is thus real but unfair' (Levitsky and Way 2010, 5).

Section 1.3 discusses the concept of 'costs' and its centrality for the ability of the EU to influence backsliding dynamics in member states. Section 1.4 discusses the research design and offers a rationale for the case study approach, while Section 1.5 explains the method used, elite and expert interviews. The chapter concludes with an overview of the thesis (Section 1.6).

1.1 The puzzle and research question

Backsliding by EU member states into authoritarianism presents challenges for the European Union, both normatively and materially. Normatively, the EU is envisioned as a club of liberal democracies and Article 2 of the Treaty on European Union (TEU) reads:

> 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.

Having member states violate democratic and liberal norms and the rule of law is at odds with this self-view of the EU. Materially, national defiance of European law, supported by courts captured by authoritarian governments, jeopardizes the common market, the EU's ultimate *raison d'être*. Embezzlement of European funds and political corruption can disrupt unity within the block. An authoritarian country that is more interested in aligning with geopolitical rival autocracies can do much damage to unanimity-based foreign policy. Despite these high stakes, observers generally agree that the EU has failed to reverse or even stop backsliding in member states.

Some have even claimed that, albeit unwillingly, the EU has propped up authoritarianism. Kelemen (2020b) coined this the European Union's 'authori-

tarian equilibrium'.[3] However, looking at the EU's actions since 2010, one can see an evolution in how the EU has addressed member state backsliding. In the early years, the EU was relatively helpless in the face of Hungarian destruction of democracy under Viktor Orbán. The reaction against Polish rule of law decay, on the other hand, was initially more forceful. Over time, the EU reacted more strongly against Hungary too. While in both cases, the EU has failed to definitively reverse the trend, it moved towards more robust action. This contrasts with the idea of an 'equilibrium', which, by definition, is a relatively stable state. While the authoritarian equilibrium framework offers a good explanation of how the EU stabilized Hungary in the early years of Orbán's rule, it applies less well to the Polish case and to more recent dynamics between Hungary and the EU.

Some scholars have argued that the EU has had all the legal tools at its disposal to stop or reverse the backsliding in its member states. European decision makers only *failed* to use them (Kochenov and Pech 2016; Scheppele 2016; Pech, Wachowiec and Mazur 2021a; Pech 2021; Scheppele, Kochenov and Grabowska-Moroz 2021; Kelemen 2023). Yet 'failure' is not a very helpful category to the social scientist. My starting point is the assumption that policymakers in Europe, by and large, did not actively and purposefully want to strengthen authoritarian tendencies. No one within the European mainstream wanted Hungary and Poland to backslide and dismantle democracy and the rule of law. Policymakers are also not naïve: most of them are highly educated (Hirsch, Adkins and Guàrdia 2021), and many strongly favour European integration (Kassim et al. 2013, ch 4). And still, they failed to prevent an outcome that nobody wanted, pointing

3. While my argument builds on the idea of the 'autoritarian equilibrium' as developed by Kelemen (2020b), Kelemen's views have evolved. Kelemen (2025) acknowledges the evolution of the EU's response over time, finding the politics in the rule of law crisis 'overdetermined' (343). Most importantly, Kelemen writes that 'we should not expect the EU to escape its authoritarian equilibrium anytime soon' (343).

towards a collective action problems. Hence, the factors that prevented the EU from safeguarding Hungarian and Polish democracy require exploration. This necessitates looking beyond the legal framework at the political constraints on the use of these tools in the EU.

At the centre of this thesis is the observation that the backsliding member states actively engage in a variety of ways with European decision makers. But what logic does this engagement follow? The behaviour of these member states has implications for the freedom to manoeuvre of the EU and can either extend or shrink the political space available to it. I explore how the backsliding member states and the EU have interacted and to what effect. Can this help us understand the variation in the EU's approach over time? Based on this, I develop the idea of a 'supranational tug of war'. I look at how Hungary and Poland's actions and reactions have influenced, impacted, and changed decision-making in the European Union. While I aim for a holistic view of the EU's actions, my focus is on the two most politically contentious procedures available to the European Union to address backsliding in member states: the application of Article 7 TEU, and the struggle for the EU budget, which culminated in the budget conditionality regulation.

I assume a simple behavioural model for European action which consists of three steps: first, the detection of an authoritarian threat; second, the assessment of the available tools to counter the threat; third, the political support of key stakeholders within the European Parliament, Commission, and Council. Studying the microfoundations of, and building on, Kelemen's (2020b) concept of an 'authoritarian equilibrium', I argue that it is not as stable as it appears on first sight.

Kelemen argues that the EU stabilizes the authoritarian state in Hungary in a number of ways. He argues that freedom of movement served as a pres-

sure valve, allowing the mass emigration of dissidents; that EU membership comes with a substantial inflow of funds from abroad; and that due to a semi-politicized political system, autocrats can rely on protection from members of their party in Brussels, Strasbourg, and EU capitals. Kelemen assumes that the equilibrium is self-reinforcing and thereby stable. However, I show how multiple feedback loops are built into the EU decision-making process, which over time lead to the weakening of the equilibrium as the European institutions together increase the *costs of backsliding*. As the autocratization unfolds, European policymakers learn how to better detect authoritarian threats and adapt their anti-authoritarian tools. Meanwhile, the protection offered by critical stakeholders in the EU and member states' capitals erodes. Nevertheless, Hungary and Poland actively tried to reinforce the equilibrium through their actions. I show how their communicative action and backsliding behaviour slowed, but did not halt, the authoritarian equilibrium's decay by exploiting weaknesses in the European Union's institutional architecture and decision-making structure. This model of a 'supranational tug of war' will be fleshed out in Chapter 2.

1.2 The authoritarian equilibrium

The crisis of democracy and of the rule of law in the European Union has given rise to a large body of literature in the last few years, spanning several disciplines, especially law, political science, and European studies. Kelemen (2017), based on an review of the comparative politics literature, noted that 'authoritarian enclaves' in democratic, federal polities are not unusual. Even strong, federal countries have problems reining in authoritarian subunits. The same author has described the structure of the EU's 'authoritarian equilibrium' using Hungary as a case study (Kelemen 2020b). He suggested that three mechanisms stabilize the equilibrium.

First, as members of the European Union, countries receive additional funding, both from the Union budget as well as through foreign direct investment (FDI). As part of the single market, private capital can easily flow and companies avoid the controversy they might encounter when investing in non-EU countries, as EU membership brings with it the perks of being regarded as a democracy bound by the rule of law. Research by Bruno, Campos and Estrin (2021) has confirmed a substantial positive effect of EU membership on both intra-EU FDI flows (about 50 per cent up) and outside FDI to member states (about 60 per cent up). Furthermore, the main backsliders are countries in Central Eastern Europe (CEE) that are net-recipients from the EU budget. In fact, Poland is the largest recipient of EU money in total and Hungary is the largest net-recipient per capita (Kelemen 2020b, 490). This inflowing money supports and stabilizes backsliding regimes.

Second, freedom of movement makes it easy for dissatisfied citizens to move to another EU country to work. Emigration drains the opposition's base. Potential dissidents might leave the country rather than engage in costly oppositional activities. Kelemen (2020b, 491–492) finds a 186 per cent increase of Hungarians living in other EU countries from 2010 to 2018. Furthermore, emigrants often send remittances to family members in their poorer country of origin, which Kelemen (2020b, 486) argues, further stabilizes their home country's regime due to 'misattribution' of an improved personal economic situation by left-behind citizens. At the same time, Hungary has provided citizenship and suffrage to its large diaspora in neighbouring countries, especially Romania and Slovakia, which has voted reliably in favour of the governing parties.

Third, the EU has a semi-politicized political and party system. Work in the EU, and especially in the European Parliament, is structured around European party families. To maximize their influence and claim posts, these European

parties need to be large umbrella organizations. However, due to a lack of a European public sphere, many citizens are not aware of the party families and base their vote purely on domestic rationales. As long as awareness of backsliding in other European countries is low, they are not likely to punish parties for harbouring and shielding anti-democratic member parties.

Yet the authoritarian equilibrium is – and always has been – fragile. Over time, cracks have appeared in two of its underlying mechanisms. Support from established allies has decreased and the financial maintenance of backsliding regimes has been threatened as new 'rule of law tools' were created in the European Union and the detection of backsliding threats has improved. As backsliding has spread, geographically and past autocratic thresholds, the topics of democracy, rule of law, and fundamental rights have become politically increasingly salient, reducing support for authoritarian governments among European peers and institutions. This has increased the 'costs of backsliding', a concept, that I will explain in the following paragraphs. Therefore, I argue that the authoritarian equilibrium really is a fragile state, which can be knocked off balance.

This leaves one of the three factors that support the authoritarian equilibrium: the exit of potential dissidents who are able to leave the country due to freedom of movement (and their replacement with ethnic diaspora voters). This has three effects. First, it has a direct electoral benefit for Fidesz. Potentially liberal voters were leaving Hungary in droves and it was made relatively difficult for them to vote (only at Hungarian embassies in other countries), while the more conservative ethnic diaspora was enfranchised in large numbers and allowed to vote easily by mail. Second, this purportedly serves as a 'pressure release valve' (Kelemen 2020b, 486), in that it depletes the opposition of members who protest and fight the regime. Third, the exodus of usually highly educated and

young nationals creates remittances that, according to Kelemen, stabilize the Hungarian regime. However, the effects of this 'pressure release valve' are less clear and the literature on the effects of remittances from democratic countries to authoritarian regimes offers a nuanced picture.

While Kelemen cites Ahmed (2012) and Tertytchnaya et al. (2018) to support his claim that remittances from democratic countries increase support for authoritarian governments, on the whole, the literature makes it plausbile that these may undermine autocratic regimes. Pfutze (2012, 2014) and Escribá-Folch, Meseguer and Wright (2015) find that the additional income through foreign remittances makes voters less reliant on transfers from the autocratic government, subverts the regimes' clientelistic networks, and increases political competition. Pérez-Armendáriz and Crow (2010), on the other hand, find no effect of monetary remittances on support for authoritarianism, but argue that migrants to democratic countries 'remit' democratic norms and values back home. In fact, most of the literature finds a diffusion of democratic norms from democracies to autocracies through migration (Leblang and Peters 2022, 384–385). Escribà-Folch, Wright and Meseguer (2022) describe two mechanisms of remittances that undermine support for autocracy: first, remittances reduce loyalty to the regime by undermining recipients' dependence on state transfers and services; secondly, they increase the left-behinds' capacity for *voice* and, thus, their potential to engage in protests. Furthermore, Fomina (2021) describes, for the case of Russia, how exiled dissidents increasingly organize oppositional activity from abroad. While emigration indeed drains the opposition in the short term, in the long-run the effect of remittances on authoritarian survival is indeterminate. I will therefore focus on the other two aspects of the authoritarian equilibrium.

Remittances are a form of income that goes directly to the people rather

than the regime. Other sources of income support the regime directly, but they too are insecure in the long run. The financial benefit through European Union contributions is over time increasingly threatened, as net-paying countries are unwilling to send money to countries with strongly deficient democracy, civil rights, and rule of law. On the other hand, the financial benefit through foreign direct investment is likely more stable (Medve-Bálint and Éltető 2024), unless a regime engages in atrocities against its citizens or minorities.

Finally, Kelemen and other scholars suggest party-political logics that inform EU institutions' behaviour. In the context of Article 7 TEU sanctions, Closa (2021) argued that the European Parliament was dominated by party-political considerations. The role of party membership has been studied for some years in this context. Sedelmeier (2014), looked at the case studies of Hungary and Romania and found that party-politics play a major role in protecting backsliders, but also observed much variation between the two cases. In the Romanian case, which worried the EU in the early 2010s, the social democrats were the party shielding prime minister Victor Ponta initially, but relatively quickly withdrew their support.

Several studies have focused on Members of the European Parliament (MEPs) in the rule of law field. Meijers and Veer (2019) have studied the agenda-setting of MEPs on the rule of law on Hungary and Poland and their positioning in related votes. They found that MEPs of the European People's Party (EPP) were less likely to table motions for resolutions and parliamentary questions on democratic quality and the rule of law in Hungary than MEPs of other mainstream groups. MEPs from national parties with TAN-ideologies – i.e. traditional, authoritarian, nationalist (Hooghe and Marks 2018) – were more likely to vote against rule of law resolutions on Hungary and Poland.

Granat (2023) investigated party positions in five national legislatures and

the European Parliament towards backsliding under PiS in Poland. She relied on two main explanatory factors: whether a party was in government or opposition in member states, and whether it was a populist or mainstream party. Parties that were in government and those that were populist were generally less likely to support resolutions against Poland's government. Many member state governments were led by EPP member parties, a factor that she expects to make them less likely to vote against another national government. This effect is probably stronger if the national government hails from the same party.

Herman, Hoerner and Lacey (2021) analysed a larger number of votes by EPP MEPs on rule of law and fundamental rights resolutions and noted the evolution of EPP support for this issue. MEPs from the Visegrád countries[4] were about 27 per cent less likely to support sanctions. The EPP on the whole got more willing to support resolutions calling out Hungary over time. This move to pro-intervention positions was also pointed out by Wunsch and Chiru (2025), who studied 'norm contestation' in European Parliament debates on the rule of law. A watershed moment was when the European Parliament voted with many EPP votes in favour of the Sargentini report (Hanelt 2024), which asked the Council to find 'the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (see Chapter 6). This suggests that the political logic underpinning the 'authoritarian equilibrium' has weakened over time in the European Parliament, something that the wider literature has not yet engaged with systematically. The next section discusses the general idea of how the EU could influence the dynamics of backsliding in member states and why we could expect it to do so.

4. Czechia, Hungary, Poland, and Slovakia.

1.3 Manipulating regime trajectories

Scholars of comparative politics have long investigated what causes the emergence of different kinds of regimes, their stability, fragility, and ability to change. In these analyses, it is common to use 'costs' as a concept (Dahl 1971). Costs in this understanding are not limited to finances. There are reputational, audience, and legitimacy costs; social, economic, and political costs; transaction costs, opportunity costs, and many more. This wide understanding of costs is a powerful analytical metaphor. Competing in democratic elections, being constrained by powerful judges and other independent institutions, being scrutinized by free and pluralistic media and watchdogs can all be unpleasant, or 'costly', to leaders. Authoritarianism provides solutions to these problems. Elections on an uneven playing field are easier to win for authoritarian incumbents and hence increase the length of their tenure; dependent judges are less willing to constrain a government, so that it can implement its preferences unobstructed and embezzle state funds with impunity; government-owned and friendly media applaud the regime, helping to secure popular support and slander the opposition, decreasing their popularity; non-governmental organizations (NGOs) that are denounced and obstructed are less effective at uncovering wrongdoings. Thus leaders who are not normatively committed to democracy have a powerful incentive to entrench their rule and choose authoritarian government if they can get away with it.

Yet authoritarianism is not free of costs. In the post-Cold War world, in which democracy is 'the only game in town' (Linz and Stepan 1996, 5) and other forms of government have lost their legitimacy (Fukuyama 1992), authoritarianism is not 'cheap'. Incumbents who engage in democratic backsliding may face personal consequences if they fail, such as 'impeachment, prosecution, jail, exile, and even threats to their lives' (Laebens and Lührmann 2021, 912).

Levitsky and Way (2010) have argued that 'competitive authoritarianism', which is authoritarian, but maintains a democratic façade, is deliberately ambiguous to avoid international scrutiny. 'Accountability actors' can oversee and sanction an autocratizing executive (Laebens and Lührmann 2021). Nevertheless, authoritarianism comes with considerable risk for the government, which may be shunned as well as economically and politically chastised on the international stage. At least since the end of the Cold War, the liberal rule-based international order has been unrivalled. Democracy promotion by North American, European, and pacific-Asian democracies has put pressure on authoritarian countries in the cultural, diplomatic, economic, and military arena (Escribà-Folch and Wright 2015). This democracy promotion might be even stronger within the European Union, an organization that has understood itself since its inception as a 'club of democracies'.

EU membership comes with many benefits to (relatively) poorer CEE countries, to which both Hungary and Poland belong. They benefit from low trade barriers through the EU's many free-trade agreements and receive large transfer payments. Businesses gain access to the largest trade market in the world and enjoy high regulatory standards, which protect them from cheaper competition from abroad; citizens enjoy visa-free travel to all EU countries as well as the ability to move and work in any of the countries in the EU; and governments – even of smaller EU countries – have an audible voice in foreign policy as members of a large block. Furthermore, the alternative to integration with the west is to stay vulnerably within the orbit of Russia to the east, a prospect many countries in CEE are wary of, given the painful history of life under the Soviet empire (Fedorov 2013). While the North Atlantic Treaty Organization (NATO) is the primary security actor in the region, the European Union is not irrelevant.

Article 42(7) TEU provides for 'an obligation of aid and assistance' towards a member state who is 'victim of armed aggression on its territory'.

In this context, the costs of backsliding can be manifold. While autocratic states usually lack the full set of domestic accountability mechanisms that liberal democracies have, the EU can act as an additional international layer of accountability, which authoritarian states can not easily escape. Article 7 TEU can result in a member state's loss of voting rights in the Council and even without that, reputational damage and international shaming. Such reputational costs could lead to economic damage, if firms reduce their FDI, for example, due to worries about reputational damage for engaging in business in a country with precarious rule of law. An end to transfer payments or the imposition of fines by the European Court of Justice (ECJ) could deal a blow to the public finances, especially of poorer countries. Finally, other member states might disregard the interests of a backsliding country in their decision-making, overriding its concerns and, thus, inhibiting its ability to shape policy according to its defined interest. If the European Union and its member states inflict high costs on autocratizing governments, this could potentially reduce the incentives and constrain the ability to follow the path of authoritarianism. Especially if the costs come early and before a government has the opportunity to entrench itself, this might destabilize a backsliding regime and help pro-democratic forces regain the upper hand.

♣ ♣ ♣

In view of the backsliding in first one, then two, of its member states, one could reasonably expect a strong reaction from the European Union. Democratic decay in these countries could undermine the EU's founding values as much as its credibility as a democracy promoter worldwide (Burlyuk, Dandashly and

Noutcheva 2024). Perhaps even more critical is that this jeopardizes the functioning of the common market, which relies on mutual trust and recognition of law, court decisions, and administration. All of this is at stake if some member state is perceived as authoritarian. The backsliding in Hungary and Poland has also put decision-making in the European Union at risk, especially in areas where the interests of autocratizers are at odds with those of more democratic members. This is especially true in those policy areas in which decisions must be made by unanimity in the Council, such as on the Multiannual Financial Framework (MFF) or foreign policy decisions. Finally, the relative success of right-wing populist parties should worry more established and pluralist parties across Europe. Using EU institutions to try to stop populists could weaken the electoral appeal of other populist groups domestically, avoiding diffusion of the radical right.

What could the EU have done to stop backsliding in Hungary and Poland? The main tools available from the beginning were infringement proceedings of Articles 258 to 260 of the Treaty on the Functioning of the European Union (TFEU), in which the Commission (Article 258) or another member state (Article 259) can bring legal proceedings against a member state for violation of its obligations under the treaties. Non-implementation of the judgment of the Court of Justice of the European Union (CJEU) can lead to the imposition of penalty payments (Article 260). The EU treaties do not provide for a way to expell a member state and allow only for a voluntary exit (Article 50 TEU; Theuns 2022). However, Article 7 TEU consists of a preventative and a sanctioning mechanism that can result in the suspension of the treaty rights of a member state. Other options for actions can be found in secondary legislation of the EU, for example those governing financial modalities.

While the Commission started using Article 7 against Poland in 2017, and the

Parliament triggered the mechanism against Hungary in 2018, the Council has been relatively idle and not taken a vote on either member state. In two studies, Closa has investigated the various institutional preferences regarding rule of law sanctions. Closa (2021) argued that three factors explained the Council's reluctance to get behind Article 7: a distaste for the expansion of the powers of the Commission; 'ideological sympathy with the ... political objectives' of the rule of law violators; and the fear of some governments that they could be subject to the procedure in the future. This is in line with studies that have shown that the Commission and Parliament have more supranational preferences compared to the member states' intergovernmental inclination (Ovádek 2021; Kaeding and Selck 2005).

Priebus (2022) argued that the Commission's preferred 'management' approach led to it mostly choosing tools that could be effective in the case of involuntary non-compliance, but were not fitting to cases of willful democratic backsliding. Closa (2019) explained the preferences of the Commission. Based on interviews with Commission officials, he reasoned that the Commission finds itself in a 'compliance dilemma', leading to a preference for engagement over coercion tactics. Therefore, the Commission was more eagerly using dialogues than enforcement tools, but if it resorted to enforcement it preferred narrower infringement proceedings over the usage of Article 7.[5] The Commission also anticipated the institutional preferences of the Council in an Article 7 procedure. On the other hand, Closa does find no support for partisanship in the Commission or of worries regarding a rally around the flag effect in member states.

This leads to the question of what the effects of imposing costs on backsliding

5. Kelemen and Pavone (2023), meanwhile, have detailed how and why the number of infringement proceedings brought by the Commission has dropped across the board in recent decades.

regimes could be. Perhaps, if the EU had acted resolutely when Orbán started to entrench his position in Hungarian politics, isolated him internationally, and used all the tools at its disposal in a timely manner, Orbán would have desisted from further autocratic behaviour, since the price he would have paid would have been too high.[6] On the other hand, the Polish case, in which the EU was intervening early, could be read as a sign that the EU cannot really change the outcome when a regime is set on a backsliding path. Conversely, it is conceivable that the EU was not acting that strongly against Poland after all; despite the fact that it was clearly worried, maybe it acted mostly symbolically, avoiding the imposition of high costs. My model of decision-making contributes to the question why the EU has decided the way it did and how member states have influenced the process (Chapter 2). In the next section, I will explain the research design of this thesis as well as my rationale for the focus on the interactions between the EU with Hungary and Poland.

1.4 Research design and cases

This thesis seeks to explain how the European Union institutions and backsliding countries have interacted over time. This research question is best suited for a qualitative enquiry following a causes-of-effects logic (Goertz and Mahoney 2012). The interest is in explaining rare events for which no large population exists. In two case studies, I investigate the dynamics between the supranational and domestic level, tracing political processes for causal leverage. I build a model of decision-making in the European Union and shows how backslid-

6. This is a turned-around version of the classic argument by Dahl (1971, 15) that countries democratize if the costs for governments of tolerating democratization decrease relatively to the costs of suppressing it.

ing member states have attempted to exploit weaknesses in the EU's decision-making structure to avoid the imposition of costs.

The two selected cases, Hungary and Poland, are the main contemporary cases of backsliding in the European Union. Why these two? Since I build a theoretical framework to analyse decision-making in the European Union, I need cases with protracted exchanges between the EU and domestic elites. This theoretical framework also assumes feedback loops such as learning processes, so it requires a longitudinal analysis and cases that have influenced each other. These criteria apply to Poland and Hungary.

Several countries were discussed in recent years under the terms of backsliding, rule-of-law-crisis, or autocratization. Since the research interest is the interaction of the European Union with domestic backsliding, I do not consider non-EU countries, such as Turkey (Coşkun 2022), Serbia (Castaldo 2020), or the UK (Whitehead 2020; Blick 2023).[7] Countries said to be backsliding or having rule of law problems (at least at some point in the last years) within the EU are the Czech Republic (Pehe 2018), Slovakia (Mesežnikov and Gyárfášová 2018; Priebus 2024), Slovenia (European Parliament 2021b), Romania (Mungiu-Pippidi 2018), Bulgaria (Ganev 2018), and Malta (Borg-Barthet 2019), but in none of these countries has the trend been as persistent, systematic, or serious as in Hungary and Poland.

Compared to other cases of backsliding, Hungary and Poland were once democratic frontrunners in the region and regarded as consolidated democracies, something that cannot be said about Romania and Bulgaria or even Slovakia. Both Romania and Bulgaria were only conditionally admitted to the European Union in 2007; they remained subject to the Cooperation and Verification Mech-

7. The UK, at the time when backsliding has been discussed, was in the process of leaving the EU.

anism (CVM) until 2023, a mechanism of 'post-accession conditionality' that other countries did not face (Gateva 2015). Romania, which was said to be backsliding from 2012 to 2015, eventually rid itself of Prime Minister Victor Ponta.[8] Bulgaria meanwhile, which faces problems with political corruption, still does not exhibit similar degrees of systematic destruction of democracy and the rule of law. Including a country under the CVM would not be helpful for exploring responses to backsliding by countries that are not subject to this mechanism.

Only in Hungary and Poland has the state been captured systemically, albeit with varying levels of success as Poland rid itself of its authoritarian government in autumn of 2023. Both countries were on a similar trajectory transitioning from communism to liberal democracy in the 1990s and 2000s. By the time they joined the European Union in 2004, both countries were considered stable and consolidated democracies. Both Fidesz and PiS had governed before: Viktor Orbán was for the first time Prime Minister from 1998 to 2002 and Jarosław Kaczyński from 2006 to 2007.[9] Given the level of autocratization in the two countries, the EU faced an existential crisis, affecting both its legitimacy as a democracy-promoter and the functioning of its internal market. Therefore, the European institutions had a strong incentive to act on these cases and prevent them from backsliding, yet failed to defend democracy and the rule of law effectively in either case.

While comparisons have for a long time been used in social science research, the methodological literature has become more sceptical towards small-*N* paired comparisons as sources of causal inference, among other reasons

8. Although rule of law problems persist, such as the politicization of the judicial appointments system (Moraru and Bercea 2022).

9. Kaczyński chose not to become Prime Minister again and only reluctantly rejoined the cabinet as Deputy Prime Minister in 2020 when a coalition crisis jeopardized 'his' government.

because real-world cases rarely match on all relevant variables and context factors. Thus, alternative explanations cannot be ruled out (Seawright 2021). In my example, it would be tempting to see Hungary and Poland as most-similar cases that exhibit similar backsliding, deploying comparable strategies at the EU level, but facing different reactions by the EU. It is, for example, often claimed that Poland followed Orbán's 'playbook', suggesting a copy-cat strategy of Poland (Bustikova and Guasti 2017; Puddington and Roylance 2017; Pirro and Stanley 2022). For different reactions, one could point to the Commission's reluctance to start Article 7 TEU procedure against Hungary. However, there are two problems with this view: first, the EU reaction varies over time and between cases; second, the cases are not independent of each other but intertwined. This necessitates analysing the cases diachronically as well as their effects on the European level and on each other. While the comparison of two *relevant* cases (Mahoney and Goertz 2004) can add some extra confidence in the work compared to a single-case study, the primary causal identification has to be done within the cases.

The primary method for causal inference in this thesis is process tracing (Brady 2010; Bennett 2010; Bennett and Checkel 2015; Beach and Pedersen 2019). In process tracing, the researcher traces observable implications of hypothesized causal chains – events and the mechanisms linking those events with the outcome – in case studies (Bennett and Elman 2006). In my case, this means identifying mechanisms that lead to or inhibit actions by European institutions against backsliders.

This thesis uses secondary sources, in the form of documents from the various EU institutions, court cases, debates of the European Parliament, NGO and news reports. Furthermore, primary data has been collected through semi-structured interviews with experts and political elites.

1.5 Interviews

This thesis explores decision-making in the European rule of law crisis. As such, I rely on written sources such as resolutions of the European Parliament, parliamentary debates, Commission communications, and documents in the Council. Yet there are many things that these written documents do not tell. Thus, I have interviewed elites and experts familiar with European Union policy-making and the reactions to backsliding in Hungary and Poland to understand the reasons for which they acted and which obstacles they faced. Interviews have been acknowledged as a useful source in process-tracing research (Tansey 2007; Gonzalez-Ocantos and Masullo 2024). This leads to the question of what the collected interview evidence is used for in this thesis. Having talked to people working in various groups in the European Parliament, the Commission, member states, and NGOs, I probed mostly three questions: the use of various tools to safeguard the rule of law, political support available for them, as well as the behaviour of the backsliding member states.

After having sought ethical approval from the University of Oxford Social Sciences and Humanities Interdivisional Research Ethics Committee (SSH IDREC),[10] I created a list of rule of law procedures in the EU and identified people who were associated with the procedure. This was straightforward for the European Parliament, where it is easy to identify the rapporteur and shadow-rapporteur of each file. One strategic decision I made was to approach policy advisors initially: the people who are involved in the nuts and bolts of policy, rather than acting as the public faces. Then, I would look up the list of parliamentary assistants and perform an internet search, trying to find out who would handle a certain committee or portfolio. Where no email was provided, I tried

10. Ethical approval reference R63379/RE001, R63379/RE002, and R63379/RE003.

the generic format of the institution. I made sure to send the participant information sheet with each first contact. Consent was negotiated at the beginning of the interview in most cases and recorded on an oral consent sheet. At the end of an interview, I usually asked the participant for suggestions on who else to talk to. This way I 'snowball sampled', which helped me find interviewees who might have otherwise been overlooked and helped decide who might be the most helpful from the long list of potential participants.

Focusing my efforts on policy advisors initially had two positive effects and one drawback. First, policy advisors are usually extremely knowledgeable. They work behind the scenes, where they draft, negotiate, coordinate, and advise. Second, I found many of them to be very generous with their time. Whereas I approached many of them by asking for a relatively lengthy one hour, most of the interviews lasted even longer. This allowed me to get into a level of detail which is hard, if not impossible, to attain when talking to more senior people. In fact, I asked a number of parliamentary assistants how much time they thought I could ask from an MEP. Most told me a time not exceeding half an hour, which is too short to build meaningful connection and get into details of policy-making. The drawback of this is that I often found participants to be reluctant to be on the record. Since the rule of law is widely considered politically sensitive, many only spoke on conditions of remaining anonymous or hidden behind a pseudonym and some chose to only speak on background conditions, asking not to be quoted. The trade-off was thus between getting reliable, detailed information and short, catchy quotes. If in doubt, I decided to side with the former.

One policy advisor to an MEP explained his decision not to speak on the record by stating that it is the MEP's job to communicate externally. Many interviews went into a lot of detail concerning certain procedures and in many

cases only a small number of people were involved in the procedure and would have that level of knowledge. This presents a challenge when reporting interview evidence. On the one hand is my ethical obligation to uphold the negotiated terms of the interview, on the other hand my responsibility towards the research community to be as transparent as possible about the source of my information. Table 1.1 shows a list of interviews, and indicates whether the interview was recorded (R) and whether I can quote from that interview (Q). To demonstrate exposure, I have added an estimate of the duration of the interview rounded to the nearest five minutes (Min). Together, these interviews exceed thirty-five hours.

It is important in this context to clarify that my sample is not, nor seeks to be, representative. Instead it is a non-probability sample, best described as lying between the ideal types of purposive, convenience, and 'snowball' samples (Tansey 2007, 769–770). Generally, it was easier to interview people in the European Parliament than in the Commission. First, they were more eager to agree to interviews. This might be because the Parliament is generally a more openly-working political institution, whereas the Commission is a bureacracy with implications for how they understand their roles. Second, I found people in the Greens/European Free Alliance (Greens/EFA) group very accommodating, which may not be a big surprise, given their political ownership (perhaps together with the liberal Renew group) of the rule of law issue. The Greens also had the rapporteurship of the single most important procedure for my purpose in the Parliament: the report to start Article 7 TEU against Hungary. Third, I have made no effort to interview members of the far-right or far-left groups, instead focusing on the mainstream, whose political support is crucial.

All interviews were conducted online using Microsoft Teams as the default option, unless interviewees preferred a different service (such as Zoom, Skype,

TABLE 1.1 List of Interviews

#	Name, Position	Date	Min	R	Q
1	Policy advisor to an MEP, Renew	22.01.2021	125	+	+
2	Policy advisor to an MEP, Greens	11.02.2021	90	+	+
3	Policy advisor to an MEP, Renew	12.02.2021	70	+	+
4	Legal advisor, PermRep of a member state	22.02.2021	60	+	–
5	Administrator, EP support service	25.02.2021	100	+	–
6	Policy advisor to an MEP, Greens	31.03.2021	75	+	+
7	Policy advisor to an MEP, EPP	07.04.2021	75	+	+
8	Jakub Jaraczewski, Policy officer, Democracy Reporting International[a]	09.04.2021	140	+	+
9	Legal advisor, PermRep of a member state	15.04.2021	100	+	+
10	Aleksejs Dimitrovs, policy and legal advisor, Greens	15.04.2021	145	+	+
11	Legal advisor in PermRep of a Visegrád country	23.04.2021	100	+	+
12	Policy advisor to an MEP, EPP	23.04.2021	35	–	+
13	Berber Biala-Hettinga, Senior Executive Officer on Legal Affairs/Human Rights in the EU, Amnesty International European Institutions Office[a]	28.04.2021	95	+	+
14	Judith Sargentini, former MEP, Greens	30.04.2021	150	+	+
15	Anita Koncsik, Senior Legal and Political Officer, Embassy of the Netherlands Budapest	04.05.2021	120	+	–
16	Advisor, PermRep of a member state	06.05.2021	70	–	–
17	Former policy advisor to an MEP, Greens	07.05.2021	75	–	+
18	Former policy advisor to an MEP, EPP	23.07.2021	75	+	–
19	Gwendoline Delbos-Corfield, MEP, Greens	10.09.2021	90	+	+
20	Former cabinet member, European Commission	02.03.2022	55	+	–
21	2 European Commission officials	07.03.2022	90	–	–
22	European Commission official	07.03.2022	70	–	–
23	Senior European Commission official	11.03.2022	35	+	+
24	Aleksejs Dimitrovs, policy and legal advisor, Greens	10.05.2022	70	+	+

[a] Speaking in a personal capacity.

Cisco Webex, etc.). At the time when I started sending invites for interviews, the official guidance of the University of Oxford was to conduct fieldwork online and this was also pointed out again to me during the process of seeking ethical approval. Many EU institutions, including the Council and the European Parliament had at this point already operated remotely for many months. Participants, who were experts or elites, were familiar with online video communication tools and generally did not mind enganging remotely.

Some research has looked at remote interviews compared to face-to-face interviews and found that resulting transcripts were similar. Sturges and Hanrahan (2004) have conducted half of their phone interviews with prisoners and found no significant differences between the results of their in-person interviews and those done remotely. Since then, technology has significantly evolved. Video call software allows for high-quality video and audio engagement. Johnson, Scheitle and Ecklund (2021) have compared in-person interviews with those conducted via phone and Skype. They concluded that face-to-face interviews 'do not significantly differ from the other two modes in interview length in minutes, subjective interviewer ratings, and substantive coding' (1142), although they found that transcripts of remote interviews are less word-dense and interviewers and interviewees take fewer turns. In the case of interviewing experts and elites, who are used to using such software on a daily basis in their work, the difference is likely to be further diminished.

1.6 Outline of the thesis

Chapter 2 presents my theoretical framework that I coin 'the supranational tug of war'. It explains how member states and the European Union have interacted. I model the EU's decision-making process in three steps: the evaluation of a threat, the search for appropriate tools, and the building of political support.

While I theorize that feedback loops lead to stronger reactions in the long term, backsliding member states have strategically exploited weaknesses in the decision-making processes of the EU to avoid the imposition of costs and slow down the erosion of the authoritarian equilibrium. Nevertheless, member states face constraints when trying to influence the EU and I explain which these are.

Every crisis needs a definition. In chapter 3, I discuss the various terms found in the literature and if and how they can be analytically helpful – or not. I introduce the wider literature on authoritarianism, 'illiberal democracy', and democratic backsliding and show how this is relevant to the cases at hand – Hungary and Poland – as well as to the ability of the European Union to react. This Chapter then introduces Hungary and Poland's backsliding and characterizes their regimes, followed by an introduction of the relevant European actors and the available toolkit to deal with member state backsliding.

The empirical part of the thesis spans four chapters. In Chapter 4, I explore the early years of Orbán's rule. This considers the time from 2010 to 2014, coinciding with the seventh legislative term of the European Parliament and the second term of Commission President José Manuel Durão Barroso. Viktor Orbán moved quickly to capture the country's institutions, and at the same time avoided being in the EU's spotlight. His government skillfully avoided sounding the alarm bells, while at the same time capturing the country's electoral institutions and independent offices. The EU, for many years, did very little. While the Parliament passed a few resolutions criticizing Hungary's government, only few saw the authoritarian threat clearly. Where EU policymakers wanted to act, they struggled to find appropriate tools and often lacked the political support to use them in a timely manner.

The period of the eighth European Parliament and Commission President

Jean-Claude Juncker is depicted in the next two chapters. In Chapter 5, I discuss the backsliding after PiS rose to power in Poland and the reactions of the European Union in return. A combination of the prior experience of backsliding in Hungary as well as the relatively crude tactics of the Polish government meant that the threat to democracy and EU interests was perceived as such quickly. Hence the EU reacted faster and more forceful compared to the Hungarian case. Nevertheless, EU action did not impose costs that were high enough to halt or stop backsliding. The Commission did make quick use of its Rule of Law Framework against Poland, and by the end of 2017 activated Article 7(1) TEU. In the Council's hearings on the subject, the EU's limited ability to conclude the procedure with sanctions became apparent.

Chapter 6 deals with the same period, but shifts the focus to Hungary, and on top of this, initiatives for the expansion of the rule of law toolbox. On Hungary, the Parliament demanded more actions from the Commission, but the Commission was reluctant for the lack of political support from the Parliament and Council. It used infringement procedures more earnestly from 2017, but declined the Parliament's repeated requests to activate the Rule of Law Framework or Article 7(1) TEU. In 2017, the Parliament finally succeeded at assembling a majority to use its own prerogative to prepare an Article 7 report, which was followed up by a coalition-building process to increase the size of the rule of law coalition. The Council, under pressure from other institutions, started a Rule of Law Dialogue. The Parliament made a proposal for an elaborate and encompassing mechanism for democracy, rule of law and fundamental rights (DRF). In 2018 and 2019, the Commission made two proposals itself: on a rule of law report (that took up some elements of the DRF mechanism) and on a conditionality regulation, which could be used to cut funds to backsliding member states.

In the ninth parliamentary term and during Ursula von der Leyen's Commission, more work went into extending the toolbox to have useful and useable instruments to tackle the rule of law crisis. While Article 7 hearings on Hungary were held, the focus shifted to the weaponization of EU funds. This is the topic of Chapter 7, which looks at 2019 to 2021. The crises increasingly highlighted the threat emanating from Viktor Orbán's authoritarian state, while Poland's rule of law crisis threatened the European integration project, hence increasing demand for action. The toolbox had increased the capacity to deal with this threat too.

The thesis concludes with Chapter 8. I summarize the theoretical framework of 'the supranational tug of war' and how it explains decision-making in the European Union. I then provide a summary of the case studies, in light of my theoretical argument. In line with my argument, there are signs that the EU institutions have learned lessons from past policy failure, and are working to overcome obstacles to decisive action. Decisive EU action and the imposition of high costs on backsliding governments can bring about a fragile authoritarian equilibrium. Whether this will happen, is, however, not decided. I discuss the limitations of my research and end with a brief outlook for democracy and the rule of law in the European Union.

2

Theory

THE SUPRANATIONAL TUG OF WAR

To understand and explain the rule of law crisis in the EU, my thesis examines two distinct but interrelated processes: first, the decision-making process and actions of the European Union – what it did, what it did not, what it could have done – and second, the actions of backsliding member states to influence these processes to their advantage. Scholarship has long recognized the entangled nature of international and domestic politics (Putnam 1988). Nowhere is this more true than in the European Union's system of multi-level governance. Member states partake in negotiations and legislation on the supranational level, implement EU directives, and enforce regulations domestically, while national judges are tasked with the adjudication of European law alongside national law (Jaremba 2014; Jaremba and Mayoral 2018).

In the area of democracy and rule of law, the stakes are particularly high for everyone involved: the backsliding governments, other member states, and the European Union institutions. Whereas the EU membership brings many benefits to central eastern European member states, would these benefits been withdrawn, it would make backsliding costly for governments. Like in a tug of war, the backsliding countries pull on one end of the rope, trying to destabilize the EU's ability to take action against them. The EU's institutional design – its requirements for large majorities or even unanimity and favouring of consen-

sual decision-making as well as its limited competencies in some policy areas – constrains the Union's ability to sanction backsliding. This introduces risks for the European Union when acting against backsliding member states. Member states could fail to implement EU law, sabotage decision-making and act against other member states' interests in unrelated policy areas. Thus, the European Union has to strategically take interests in other domains into account when making decisions on how to deal with backsliding.

While the EU faces constraints, similarly, the backsliding countries' ability to 'pull' is conditioned by the resources at their disposal. Together, I suggest, these factors on the EU level and the strategies pursued by the authoritarian governments can explain differences in EU responses between cases and over time. If no strong action is taken by the EU, there is little cost of backsliding for the member state and a stable authoritarian equilibrium follows. On the other hand, if the EU acts robustly and in a timely way, it can increase the costs of backsliding. In this case, a more fragile 'equilibrium' follows, which is more likely to break down. The effects of this could be the slowing down or halting of democratic erosion or the member state's exit from the European Union.

To analyse the behaviour of the European Union and the backsliding member states, it is helpful to atomize behaviour into individual steps without, however, loosing sight of the whole picture. Figure 2.1 shows a simplified model of interaction between EU institutions and member states. The argument is that three conditions have to be met for the EU to be *able and willing* to sanction backsliding: first, EU decision makers have to detect a backsliding threat; second, they must find that they have an appropriate tool to counter the threat at their disposal; third, they must have sufficient political support to make use of the tool. In reality, other factors might play a role and the sequence might not always be so neat. Models are always an abstraction from the complexity of

reality, which led Box (1976, 792) to the famous quip that 'all models are wrong'. Notwithstanding I hold that my model is still useful for analytical purposes as it allows us to explain the interaction between EU institutions and backsliding member state governments.

At the beginning of the causal chain is the backsliding action of a member state, which triggers an EU decision-making process (green dotted box). At first, decision makers must evaluate the threat emanating from the action, that is, they must perceive it as an anti-democratic action that jeopardizes their interests. If they fail to classify the backsliding correctly, no action will be taken. However, if they are over time confronted with the fallout of their mistakes, it is likely that EU decision makers will learn from past mistakes and get better at detecting threats in the future. If they, on the other hand, do correctly assess a threat, they must next find an appropriate tool in their rule of law toolbox. In the case that this does not exist, it might trigger actions to create a new tool, which will be usable in the future. Finally, even when an appropriate tool is available, it requires widespread political support from stakeholders in the different EU institutions, European parties, and the national governments. If political support is lacking, at best only limited or symbolic action will be taken, which will only impose modest, if any, costs on backsliding governments. In this case, the authoritarian equilibrium remains stable and further backsliding is likely. However, if backsliding is evaluated correctly, an appropriate tool and political support for its use is available, a more robust response is to be expected, which would inflict higher costs on backsliding member states and weaken or break the equilibrium.

Critically, the backsliding member states are part of the decision-making process itself and not confined to only create the 'input'. They anticipate the EU's reaction and manipulate the process through the use of communication

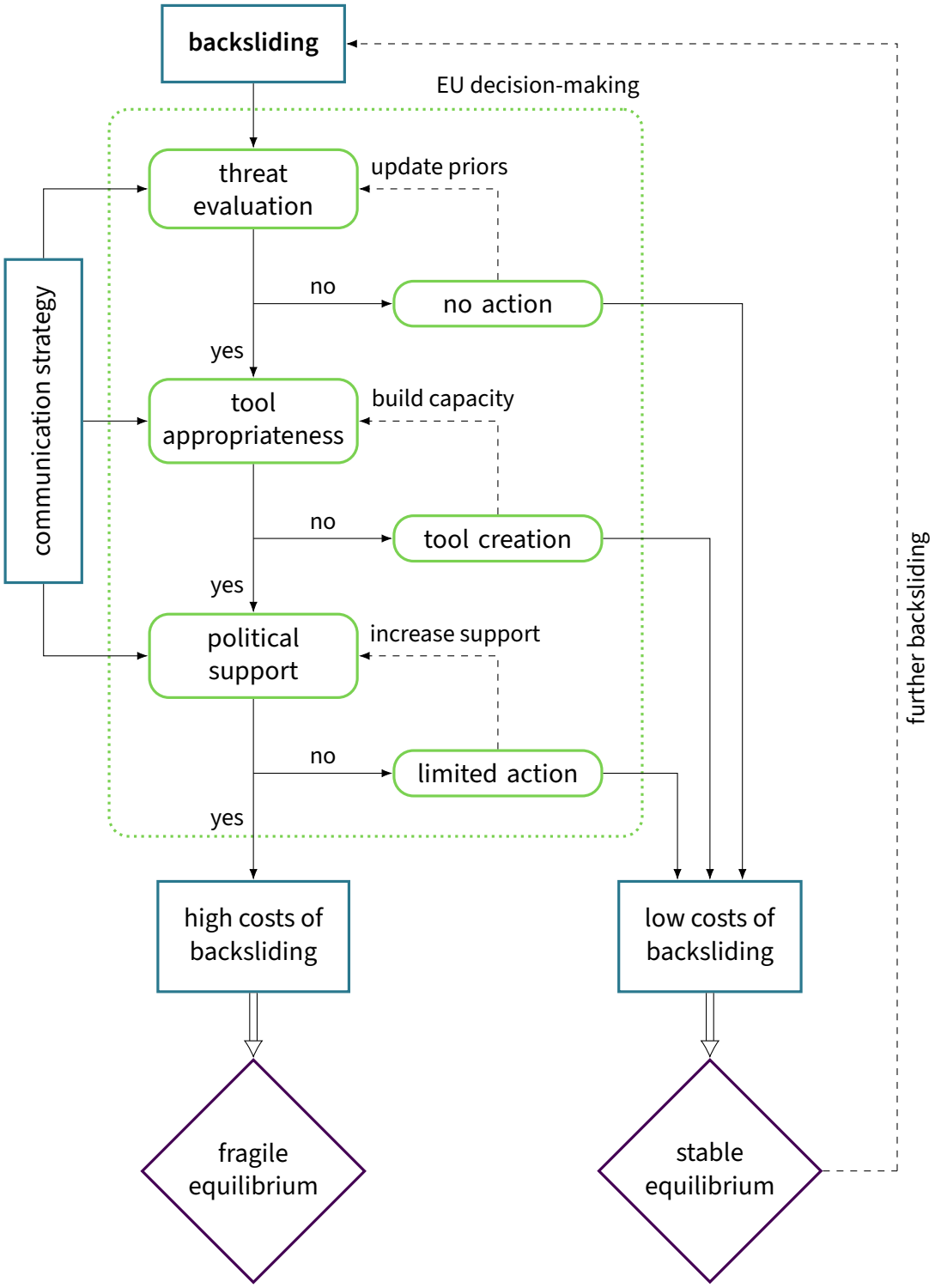

FIGURE 2.1 The supranational tug of war.

and backsliding strategies to exploit the weaknesses of the European Union's institutional design. They try to obfuscate their backsliding, deny the EU's competencies, and maintain the political support available to them to avoid the infliction of costs.

In this chapter, I present my model of EU–member state interaction in the rule of law crisis as a *supranational tug of war*. The following sections zoom into the picture introduced above, to show how I conceptualize the EU decision-making process. This yields the weaknesses of the process, and in turn, the strategies through which member states can exploit them. Through this lense, I will interrogate the causal mechanisms and behavioural microfoundations that have two EU members allowed to slide back on democracy. After discussing the three steps 'threat evaluation' (Section 2.1), 'tool appropriateness' (Section 2.2), and 'political support' (Section 2.3), I will turn to the limitations backsliding member states face in deploying their strategies (Section 2.4). These constraints can explain some of the variation between cases and over time.

2.1 Threat evaluation

When a member state takes steps toward authoritarianism, a European Union actor must assess whether and how big a threat this poses. They can only do this if they *gain factual knowledge* of the backsliding, *classify it as an anti-democratic or anti-rule of law action*, and *interpret it as a threat to their interests.* This is shown schematically in Figure 2.2. If EU decision makers do not conclude that a threat is posed, we should not expect any action. Threat evaluation, thus, can be understood as an agenda-setting process. Being confronted with gradual backsliding in a member state, the EU has to make potentially far-reaching decisions under conditions of uncertainty. Overacting against a member state could lead to a rally around the flag effect and reduce support for the European

Union among citizens (Schlipphak and Treib 2016) and endanger 'the principle of sincere cooperation' between member states and the EU (Article 4(3) TEU).

However, this is not a one-shot game. Backsliding consists of many actions, so the game is played repeatedly. Over time, the effects of democratic decay will become visible, giving decision makers ample opportunities to update their prior beliefs. While the 'incrementalism' of backsliding obfuscates intentions initially, these become more evident in hindsight. Because the process is ongoing, this has implications for the future too. More technically said, this constitutes a feedback loop in the decision-making process which prompts learning processes. Decision makers will update their posterior beliefs. They will make better decisions in future iterations of the game. Critically, I expect this to hold across cases, so learning from one case should be applicable to another case.

Gaining factual knowledge

Gaining factual knowledge about backsliding in a member state is a natural first step before the European Union can react to it. Principally, this sounds like an easy thing to do, but the process is fraught with problems. The main weakness in this step is the *information deficit* of the EU. While media like to portray the European Union as an administrative leviathan, in reality, it has a low number of staff. The Commission employed about 32 thousand people in 2022 (including nearly 7,500 contract staff and over two-thousand translators and interpreters[1]). Given the Commission's many regulatory competencies on a continent of twenty-seven countries with 447 million people, this leaves very little personnel for monitoring the legislative, administrative, political, and

1. https://op.europa.eu/s/xeFI, accessed 19 December 2024.

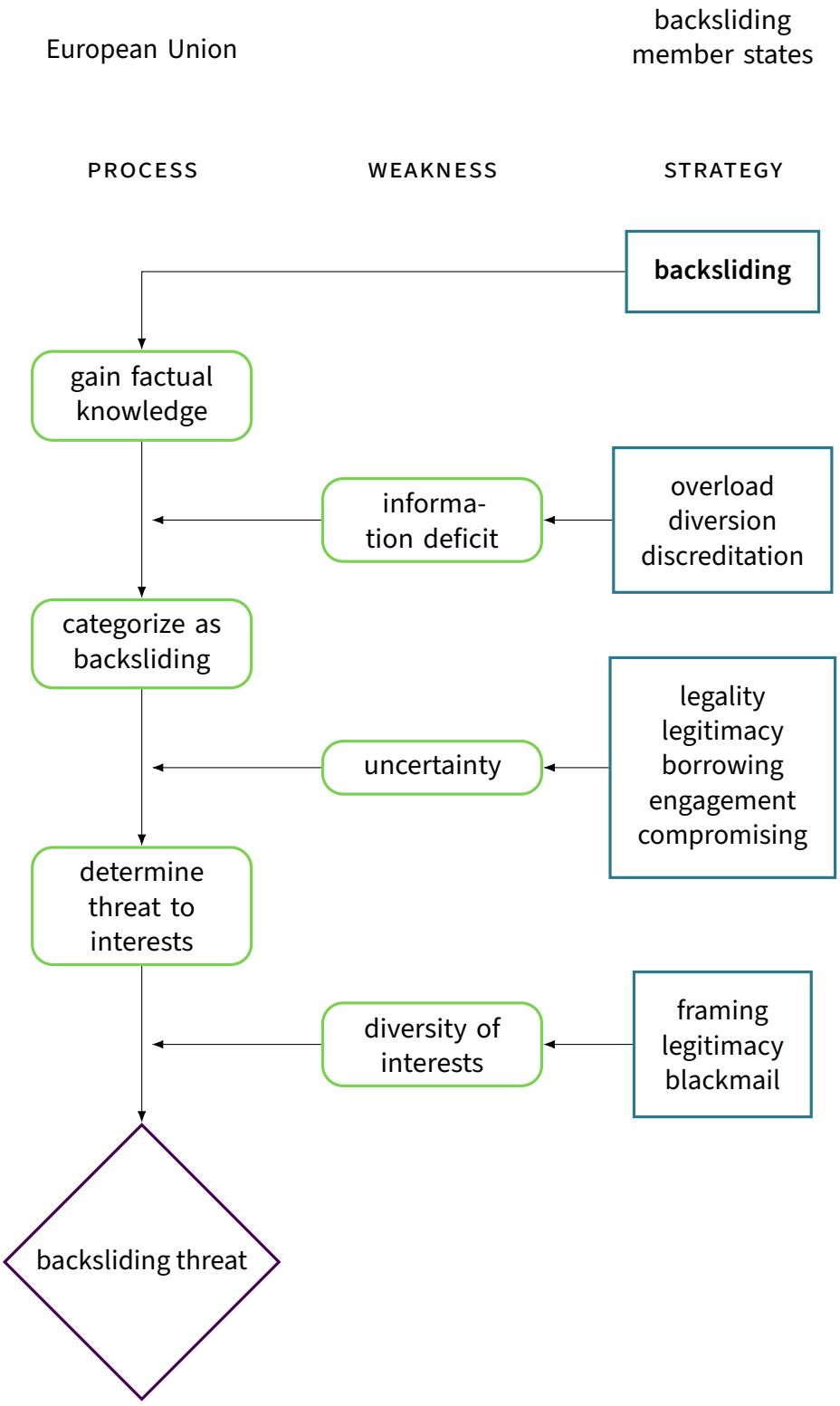

FIGURE 2.2 Threat evaluation.

legal outputs of the member states.[2] For perspective, large EU countries such as Germany and France each employ millions of public servants. This creates an information deficit that backsliding governments can exploit strategically.

The first way of doing this, is by *overloading* the system. By passing large volumes of legislation, government decrees, and administrative acts, backsliding governments flood the EU bureaucracy (as well as their own citizenry) with information. While some measures will be picked up and reported by international media, civil society, and international organizations, some will inevitably fall through the cracks or fail to attract attention in light of other – worse – measures. That makes it unlikely that all of them will be somehow addressed by the supranational level. However, overload can also happen through last-minute changes or agreements to changes that make it harder for the European Union to monitor effective compliance with demands.

Related to the idea of overload, are diversion tactics. Backsliding governments can divert attention away from their real goals by doing or talking about other things. Untactful gaffes to create artificial scandals are one way to shift the discussion from their policies to another level.

Naturally, the sternest and most knowledgeable observers of a country's government are not abroad but located within it. The opposition, civil society watchdogs, academia, professional organizations affected by new rules, and media typically observe the government closely. They can blow the whistle, disseminate knowledge, and mobilize protests. Within the European Union, this can help the supranational level detect the backsliding. Authoritarian regimes typically repress or co-opt these institutions in order to keep them quiet. At the start of backsliding in a liberal democracy, these institutions will be largely func-

2. https://commission.europa.eu/document/download/e13190b6-d950-48c7-85a1-296d1d9aae64_en?filename=european-commission-hr_key_figures_2022_en.pdf, accessed 19 December 2024.

tional. Hence, we can expect a backsliding government to attempt to discredit critics and paint them as biased. Through discrediting critics, a regime will not have to engage closely with the arguments. Nevertheless, these strategies are not risk-free either: repression, co-optation, and discreditation can be seen as autocratic ways of silencing critics – which they are – and have a risk of backfiring, especially in regimes that are not able to suppress criticism entirely, which most are not.

Classification of backsliding

While gaining information about backsliding is a necessary first step to evaluate it as a threat, it is not sufficient. In a second step, the information must be processed. Specifically, this requires that an EU actor classifies the backsliding as such: an action that is anti-democratic or violates the rule of law or fundamental rights. This is not straigthforward, since backsliding is an incremental process based on 'executive aggrandizement' of elected governments (Haggard and Kaufman 2021a). In contrast to other moves into authoritarianism such as by *coups d'état*, which are obvious power grabs, backsliding can often be concealed for a while. Because the process is gradual and undertaken by elected leaders, it is hard to detect it initially. This gives backsliding governments 'a tactical advantage' (Haggard and Kaufman 2021b, 28). Each step of the backsliding can be defended: it might emulate the institutions of another country, it might be in line with historically existing rules, or it is simply a different policy choice of a democratic majority. From the European Union's point of view, there is a great deal of *uncertainty* about whether each of these steps is a move toward authoritarianism.

Even though backsliding is incremental, this does not mean that it does not raise concerns at all; instead, I posit, backsliding is typically surrounded by *a*

fog of uncertainty, due to the information assymetry between the backsliding government and the EU. For the latter, it is impossible to know the endpoint of the backsliding policies. Observers might worry about a specific measure, but at the same time wonder if this is indeed a decisive move towards authoritarianism. Could it not be justified by contextual factors? Do other democratic countries not have similar rules to the ones just enacted? Perhaps the old rules were inefficient and not suitable for dealing with new circumstances. Are NGOs who issue warnings not pursuing their own interests, are left-wing and ideologically opposed to the elected government? These lines of thinking can be exploited by a backsliding government to avoid its backsliding being detected. A targeted communication strategy can exploit and increase the uncertainty of supranational actors: governments legitimize their actions, take cover under the veil of legality, point out how they imitate other countries' rules, while they engage and compromise with the EU.

A rich literature on cognitive heuristics and biases has developed in the 1970s, pioneered by Daniel Kahneman and Amos Tversky, which can help explain the limitations of decision-making under uncertainty. Over time, their insights have been adopted into theories of strategic decision-making in management, public administration, and behavioural economics (Schwenk 1988; Rizzo 2022). Of particular relevance in this context is the *availability heuristic* (Tversky and Kahneman 1974), by which 'decision-makers judge a future event to be likely if it is easy to recall past occurrences of the event. In other words, judgements of the likelihood of an event are based on the availability of past occurrences in memory' (Schwenk 1988, 43). Learning from past events has been emphasized in public administration research (Krause 2006). For example, in the case of bilateral sanctions by EU member states against Austria for including the far-right FPÖ in its coalition government, the comparison of FPÖ leader Jörg Haider

with Adolf Hitler's rise to power loomed large (Brandstrom, Bynander and 't Hart 2004). The availability heuristic would let us assume that in early cases of backsliding, there is a higher chance 'to get it wrong' and commit type-II errors, that is wrongly conclude that actions do not constitute backsliding. Through many iterations of this decision-making process, however, EU actors will get better at the classification task, since they have recent cases of backsliding at hand, which allows them to reason by analogy.

The choice of backsliding strategy is itself the input that generates the need for an EU decision to impose costs, but it is also a way to manipulate the process itself. One way that a member state can interfere with the process is through what Scheppele (2018) termed 'autocratic legalism', which describes a particular kind of authoritarian behaviour. Autocratic legalists maintain the appearance of electoral democracy, legality, and constitutionalism: 'they come to power with a phalanx of lawyers. The new autocrats look like democrats playing hardball, not like dictators playing softball' (581). Pirro and Stanley (2022) distinguished three modes of 'illiberal policy-making': 'forging', meaning the adoption of conservative, nationalist policies that are compatible with the rule of law; 'bending', 'policy change … consistent with the letter of the law, but in contradiction to its spirit' (90); and 'breaking', the violation of international or domestic constitutional law. Autocratic legalists 'forge' or 'bend' the rules, rather than 'break' them. Law becomes a tool of legitimation in their hands (Lauth 2017) and their 'rule *by* law' (Tushnet 2014) is more likely to escape detection.

Another idea developed by Scheppele, is the 'Frankenstate', which 'is composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together' (Scheppele 2013b, 560). Dixon and Landau (2021) have developed the term 'abusive constitutional borrowing' for the practice of constitutional copycat. By using

individual provisions which are in itself not problematic, governments can circumvent detection by organizations that employ a 'checklist approach' to the rule of law, such as the EU, which, in order to appear as 'neutral' and 'fair', attempts to atomize the concept into distinct, measurable categories (Scheppele 2013b). By borrowing and stitching pieces from other countries systems together, backsliding governments can defend each of them by pointing to the other member states and demand equal treatment.

While the appearance of legality is important, *legitimacy* is imperative. In democracies, legitimacy is primarily generated through elections and the winner can claim a mandate to govern. This has largely replaced other modes of legitimation, such as the divine right or ideologies such as fascism or communism, which legitimated regimes in the past. After the third wave of democratization, most of the remaining autocracies at least pretended to hold elections or held elections in such a way that the odds were overwhelmingly in the incumbents' favour (Diamond 2002; Levitsky and Way 2010; Levitsky and Ziblatt 2019). Even within authoritarian countries, legitimation, alongside repression and co-optation, is one of 'three pillars' of regime stability (Gerschewski 2013). Recent scholarship points out that contemporary dictatorships are 'focused more on shaping public opinion than on violent repression' (Guriev and Treisman 2022, 11–12). An expert survey carved out six dimensions of autocratic legitimation strategies: *foundation myth*, *ideology*, *personalism*, *international engagement*, *procedure*, and *performance* (Grauvogel and Soest 2017). While there has been some disagreement about the value of legitimation strategies for electoral autocracies (Lueders and Croissant 2014; Schneider and Maerz 2017), within the international context of the European Union, the value of projecting legitimacy abroad is apparent.

Backsliding governments can claim legitimacy in Brussels for their actions

back home based on elections won, popularity, and public support. This can even be the case in electoral autocracies. While they hold highly unfair elections, they nevertheless often manage to be 'popular dictatorships' (Matovski 2021). This will make it harder for the European Union to label such actions as anti-democratic or violating the rule of law. Many studies in international relations explore how countries seek 'status' among their peers, even though various traditions define 'status' in different ways and differ in their explanations of why states want, and how they seek, 'status' (Renshon 2017; Larson and Shevchenko 2019; Murray 2019; Götz 2020). This can involve 'authoritarian image management'. Dukalskis (2021, 6) shows how autocracies manage their image within an international system dominated by liberal norms set and promoted by democracies. Through image management, they 'make the world safe for dictatorship'. This could apply similarly within the context of the European Union, where authoritarian image management could help backsliding states avoid the imposition of costly sanctions by the EU. However, Krekó (2021, 111) points out (in a case study on Russia) that autocracies are also inclined to 'inflate their image' in the process, appearing as 'stronger, richer, and more influential than they are'. This is similarly a risk within the EU. In an increasingly hostile European environment, image management and inflation become forms of 'soft power' (Nye 2004).

Finally, to assuage any concerns of the EU, member states can use engagement tactics to obfuscate backsliding. Rather than hiding from their critics, backsliding governments can engage with them. Through dialogues, governments can appear open to criticism and signal willingness to go some way to meet supranational demands. Ceding some points, will make them appear more reasonable and less threatening to the European Union. Batory (2016, 686) showed that governments use 'creative and symbolic compliance' to appear

as conforming in the rule of law arena. Concessions, even if narrow, increase the uncertainty over how determined a government is to dismantle democracy, rule of law, and fundamental rights.

Determining a threat to the rule of law

After an EU actor has learned about some actions of a member state, then mentally classified it as an instance of backsliding, in a last step before pondering any action they will consider whether this backsliding poses a threat to the European rule of law. If decision makers' interests are not adversely affected by the backsliding, they are unlikely to take action. However, interests are complex and multi-dimensional. This can be exploited by member states through framing and the 'rhetoric of inaction' (Emmons and Pavone 2021).

Within the context of complex (political) reality, the chosen frames decide what policymakers (and scholars) pay attention to, what they miss, how they evaluate a problem and which solution they choose. Entman (1993, 52) defined framing in this way:

> to frame is to *select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation* for the item described.

Policymakers in the European Union have chosen the frame of a 'rule of law problem'. Magen (2016) showed how this frame purposefully de-politicized the issue on the supranational level, transforming it from a primarily political to a legal problem. This was both a consequence of the EU's institutional structure and a deliberate choice of policymakers. Magen (2016, 1058) argued that this legal framing strengthened inter-institutional bargaining power of the Commission. At the same time, legal framing limited the Commission to pursuing

legal solutions, which did not work in the face of deliberately uncompliant authoritarianism (Priebus 2022). Having decided on a frame, policymakers were slow to update their interpretation in light of new evidence, a bias that has been termed 'conservatism' (Tversky and Kahneman 1974). Lacking available cases of prolongued and transformative backsliding, decision makers were too optimistic about the prospects of dialogue and cooperation, a weakness that the backsliding regimes could readily exploit. At the same time, 'symbolic compliance' of member states allows the EU to claim victory, reducing their political costs and reducing the threat to its immediate interest (Batory 2016).

Backsliding governments, too, engage in framing. By choosing frames, they influence whether an EU decision maker perceives their backsliding to run counter against their interest. To avoid forceful interference with backsliding, the regimes use rhetoric to demobilize their counterparts in the European Union. Emmons and Pavone (2021) argued that the backsliding countries employ a 'rhetoric of inaction', which consists of three elements: that action by the EU 'will either backfire (the *perversity thesis*), put other hard-won policy achievements at risk (the *jeopardy thesis*), or prove useless (the *futility thesis*)' (1615). Whereas scholars can spend years to write a thesis or book on backsliding and the rule of law, policymakers do not have the luxury to focus all their attention on one particular problem. Instead, they have to deal with a multitude of simultaneous demands, some of which might take precedence over perhaps concerning, but ultimately abstract issues of backsliding. Hence, they might not be willing to jeopardize other policy priorities, which makes them susceptible of blackmail by backsliding governments.

Finally, politicians are professionals. When a politician says something particularly egregious, it is often understood by peers that this must not be a sincere expression of sentiment, but caters to a particular, perhaps domestic,

audience. As such, populist rhetoric by backsliding governments might be perceived as a piece of political theatre in which everyone engages to some degree. Then, it would not be as shocking to policymakers as to the media and wider population. This will work against a sense of threat emerging due to populist rhetoric employed by representatives of backsliding governments. Nevertheless, there are unwritten rules and boundaries. Overstepping these, will likely result in a greater sense of threat, with implications for further actions.

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The evaluation of a backsliding threat works like a filter. Many backsliding actions are thrown into it, but not all will become known on the supranational level, even fewer will be categorized as backsliding, and only some will trigger a sense of threat that is necessary to justify further action. While member states that dismantle their democracy or rule of law have many ways to exploit weaknesses of these processes, ultimately some of their actions will end up on the EU's agenda.

2.2 Appropriate tools

When EU decision makers conclude that autocratization poses a threat to their interests, they must assess whether they have an *appropriate tool* at their disposal to deal with this threat. By 'appropriate', I mean one that is both *legally available* and *politically useable*. If decision makers find that they lack an appropriate tool, my theoretical framework expects them to create new tools to tackle future instances. Tool creation has two effects: in the short term, the backsliding government does not face a strong reaction; in the long term, the EU's toolbox to tackle anti-democratic behaviour by member states grows, *increasing its capacity*.

Many leading scholars see the claim of an insufficient toolbox as an excuse for lack of action. They argue that instruments were legally available. On this view, decision makers underused these tools (Pech and Kochenov 2019; Scheppele, Kochenov and Grabowska-Moroz 2021; Pech and Wachowiec 2019a, 2019b, 2020a, 2020b; Pech, Wachowiec and Mazur 2021c; Pech 2021; Pech, Wachowiec and Mazur 2021b; Kelemen 2023). However, this raises the question of *why* they were used too little. Back in 2010, the toolbox consisted of only two tools to defend democracy and the rule of law: the infringement procedure and Article 7 TEU. This has since grown: the 'justice scoreboard' (2013), the 'rule of law framework' (2014), the 'rule of law dialogue' (2016), an extension of the 'European Semester' to include the rule of law (2018), the 'rule of law monitoring cycle' (2019), and the 'budget conditionality regulation' (2021), and, additionally, the 'Recovery and Resilience Facility' (RRF, 2021).

The EU is unique among international organizations for the breadth and strength of its power. Like any other international organization, however, it is built on the foundation of sovereign member states that have voluntarily banded together via international treaties. These treaties create the Union and define the extent of its competencies, which have grown over many decades and treaties. The Treaty of Lisbon (2007) removed the need for unanimity from most legislative processes, replacing it with a qualified majority rule in the Council,[3] and made the European Parliament an equal co-legislator. The successive strengthening of supranational elements vis-à-vis the intergovernmental remnants and the increase of majority voting have not changed the fact that the EU remains a 'consensus democracy' (Lijphart 2012, 40–45). When decision makers in the EU consider how to respond to a backsliding threat, they must

3. In the case that the initiative starts with the Commission or the High Representative, 55 per cent of member states that represent 65 per cent of the Union's population are the required majority. In other cases, the threshold is higher.

take stock of the tools they have at their disposal and consider both *their legal and political limitations*. Backsliding regimes know this and will likely attempt to exploit existing weaknesses.

Legal availability

To join the European Union, countries have to fulfil the so-called 'Copenhagen criteria' set by the European Council (1993). Yet scholarship discusses the 'Copenhagen dilemma', which describes the problem that the EU lacks competencies to enforce standards in member states that were a requirement for joining the club in the first place (Coman 2014; Closa 2016; Tuori 2016; Leloup, Kochenov and Dimitrovs 2021). 'The Copenhagen dilemma arises from the fact that the EU seems to run out of instruments when the democratic *Rechtsstaat* is jeopardised in states which have already successfully acceded' (Tuori 2016, 225).

A tool that does not exist cannot be used. But some tools did exist all along in the period under consideration, namely infringement proceedings and Article 7 TEU. The latter is a political tool and its use cannot be substantively reviewed by the CJEU; the court can only review its procedural aspects (Besselink 2017, 132–133). Moreover, Article 7 is not limited to the *acquis* (Commission of the European Communities 2003, 5; Besselink 2017, 141; Council of the European Union 2014a, § 17). It is, from a legal point of view, an available instrument with broad applicability.

The infringement procedure, on the other hand, is a legal tool that can be used to censure member states for their violation of treaty obligations, non-implementation of directives, and violations of regulations. However, this requires that member states violate EU law or treaty obligations – that is, infringements cannot be used in cases where backsliding occurs outside of the *acquis* (Gormley 2017).

2.2 APPROPRIATE TOOLS

While the scope of European Union treaties and law is vast and ever increasing, the reach of the EU is far from uniform across policy domains. In some affected domains, little EU law was available, such as in the area of judicial independence, which was long seen as an exclusive competence of member states. Besides, competencies of the European Union are often contested. Institutions of the EU regularly challenge each others' assertion of competence along a polarized EU integration dimension. While there is variation across policy domains, in general the Council – made up of member states' governments – prefers intergovernmental co-operation over supranational integration, which is the integration model favoured by the majority of the European Parliament (Kaeding and Selck 2005; Ovádek 2021). Furthermore, member states challenge the European Union's competencies in favour of the national level. A good example of this is the PSPP judgement (5 May 2020, 2 BvR 859/15) of the German federal constitutional court, in which the court reserved for itself the final decision on the question whether the EU acts *ultra vires*, i.e. outside of the scope of the competencies transferred to it via the treaties (Bobić and Dawson 2020).

EU institutions and member states diverge in their legal positions and preferences about the scope of EU powers. An anti-democratic government can exploit this through the strategic prioritization of backsliding policies as well as through the use of a targeted communication approach. Backsliding can be concentrated in areas that are outside of the *acquis* of the EU, making reactions through infringement proceedings harder. Governments that pursue authoritarian plans in constitutional and legal ways ('autocratic legalism'), immunize themselves to some degree from supranational interference. Their ability to do so depends on the resources at their disposal, which is not equally distributed.

Furthermore, they can legally and rhetorically contest the EU's competencies and build on existing legal arguments, highlighting competing treaty values.

Backsliding regimes can pursue lines of argument that are popular with other member states, using concepts such as 'legal pluralism', which have been developed or used elsewhere, e.g. in the case law of the German federal constitutional court (Kelemen 2016; Kelemen and Pech 2019). Furthermore, through court-packing, backsliding governments not only remove obstacles on their authoritarian path, but also create institutions that legitimize their policies with favourable interpretations of the constitution and law (Sadurski 2019). The member states can then hide behind universally embraced concepts such as judicial independence (Kosař and Šipulová 2023b).

Finally, much is left to interpretation and argument in legal matters, especially where laws or facts are not clear cut. In these cases, legal action often has uncertain outcomes. But given the enormous stakes when defending democracy, the rule of law, or fundamental rights, EU actors might be risk-averse and not willing to take chances. A victory in court could delegitimize future action and hand a propaganda victory to those seeking to undermine EU values.

Political useability

Even if a tool is legally available, it must also be politically useable before we can expect action. If that is not the case, the creation of a new instrument might be triggered instead. In order to be politically useable, a tool must appear to be meant to achieve certain objectives related to addressing democratic backsliding. In particular, it must be seen as *proportionate* to the violation it means to address and *effective*, that is, able to remedy the situation.

According to some, the European Union could have used Article 7 TEU to strip the voting rights from backsliding states early on and bombarded them

with infringement proceedings for rule of law violations. This position suffers from hindsight bias and ignores the uncertainty under which decision makers operated at that time. While it is correct that these tools were legally available, to be used, they must be politically useable as well. This means principally that they are seen as proportionate to the backsliding threat and an actor believes that there is a chance to change the behaviour of the member state. Using the sanctioning mechanism of Article 7 would have been a major escalation, at a time when the uncertainty over backsliding was still relatively high among policymakers and most of academia. As the strongest tool in the treaties, I expect Article 7 only to become politically useable in the face of clear, unequivocal backsliding, which would be considered a threat to the interests of other member states and after other measures have failed bringing the desired result of moderation, slowing or halting the backsliding. Likewise, a bombardment with infringement proceedings could have led member states to disregard the judgments and refuse to comply, creating another rule of law crisis. Closa (2019) documented the Commission's preference for engagement over enforcement. He also pointed out that the Commission anticipates the positions that will be taken by other actors, in particular the Council, and the chance of non-compliance of member states.

Several conclusions follow from these requirements. First, the decision makers in the European Union will be most likely to opt for the least severe tool at their disposal, as long as they have reason to believe that these might achieve the desired result as much or better than a more severe tool. Second, actors will anticipate the risks associated with the use of a given tool.

Creating new instruments

If decision makers feel that a situation needs to be addressed (i.e. constitutes a threat) but deem existing tools to be not appropriate to react, they will likely respond with the extension of the toolbox – that is, they will create new instruments. Since creating new instruments takes time, these will only be available in the future and likely come too late for the situation that triggered their creation. However, new tools will provide additional options in case of future backsliding, allowing reactions where previously no reaction was possible. This builds capacity in the European Union. New instruments have indeed proliferated in the EU. Laurent Pech has criticized this 'quasi-permanent new instrument creation cycle' (Pech 2021, 337) and stated that 'a bad workman always blames his tools' (Pech and Wójcik 2018). Kelemen (2023, 223) likewise wrote: 'The repetition of this cycle has resulted in the creation of a Rule of Law Rube Goldberg machine – a redundant assemblage of mostly useless instruments ostensibly designed to help the EU address backsliding'.

Why is it easier for the EU to create new instruments and expand the toolbox than to use existing tools against member states? The creation of new tools usually generates less political controversy and opposition compared to strong action against a member state. The reason is that tools are never created for a specific case – at least on the face of it. From a backsliding government's (and its political allies') point of view, new tools can be a welcome pressure release valve that reduce the immediate stress on them. An extension of a toolbox will take some time, which a regime can use to further entrench itself. For authoritarian-minded member states it is rational to support the creation of new tools, even if it comes with long-term risks to their interests.

Nevertheless, there are limits to the addition of new tools. Given its supranational character, the EU operates according to the treaties, which delineate

the competencies of the European Union. Article 5 TEU specifies that member states 'confer' power to the European Union, according to the principles of 'subsidiarity' and 'proportionality'. Therefore, member states retain competencies in many areas. The treaties also set up often high procedural thresholds for creating new instruments and using existing ones. Given that Article 7 specifically contains a procedure to defend the values of the Union, new potential instruments must also be careful not to be too close to this Article without following the same process. The EU treaties are also rigid and difficult to change. They can only be changed by unanimous agreement of governments and require further ratification in line with member states' constitutional requirements, often necessitating national referendums. This makes selective amendments highly unlikely and sets limits to the EU's ability to create forceful new tools or improve the functioning of existing tools.

Member states can use communication strategies to further their aims. Autocratic regimes will try to delegitimize the use of existing and, to a smaller extent, the creation of new tools. Tools extend the EU's capacity to address backsliding in the long term by expanding the Union's power. In the short term, their effect is more benign to authoritarians. Tools are not generated 'against' a particular country, but with horizontal applicability. Meanwhile, the creation of new tools takes away the immediate pressure of the EU to act against member states. Occasionally, however, new tools have the potential to 'bite'. In that case, I expect more resistance from backsliding regimes. They can claim that these new instruments are *ultra vires*, that is, outside of the competencies assigned to the European Union by the treaties, or argue that tools duplicate and circumvent majority requirements specified in the treaties.

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After having evaluated a backsliding threat, an EU actor must check whether they have an appropriate tool at their disposal. A tool must be both legally available as well as politically useable. If either is not given, they might instead opt for the creation of new instruments. This causes delays in the sanctioning of backsliding, but builds rule of law capability for the future. This is a trade-off between the short term and long term. However, trading time for capacity could work, if this time is used to gain political support for robust action. I will consider this point next.

2.3 Political support

If policymakers find that they have an appropriate tool – that is one that is both legally available and, in principle, politically useable – at their disposal to deal with a recognized backsliding threat, they must assess whether they have *the political support of all relevant stakeholders.* Whereas assessing tools for political appropriateness requires an institution to look whether the tool is meant to be used in a certain way, finding political support is less technical. It requires policymakers to be sure that others would support its use and give their agreement. The European Union as an organization consists of many institutions, each of which incorporates many interests that are aggregated according to rules of procedure and learned working practices. Within the EU, stakeholders are primarily the participating institutions: the European Parliament, Commission, Council, and European Council. However, they are made up of member states, political parties, and organizational units within these institutions. Who counts as *relevant* varies between procedures, depending on the involvement of actors and the majorities required. The EU tends to have relatively high qualitative majority requirements reaching, in some cases, the level of unanimity of many actors. Hence, the literature describes the European

Union as a form of consensus democracy (Lijphart 2012; Häge 2013; Heisenberg 2005).

Assembling a coalition for action can be a tiresome task. EU rules are complex and heavily promote consensual decision-making. Hence, the twenty-four official languages of the EU or the 'travelling circus' of the European Parliament, which holds twelve plenary sessions per year in Strasbourg but is otherwise based in Brussels. Sanctions of the supranational Union against individual member states are the opposite of a consensual affair and require careful coalition-building to succeed. Where such coalition-building fails, the default will be a failure to impose meaningful sanctions. This is due to *inertia*. The European Union resembles a massive oil tanker more than a speedboat; it is slow to change course and, thus, often 'fails forward' (Jones, Kelemen and Meunier 2016).

Before deciding to make use of a tool to tackle backsliding in a member state, an EU decision maker will have to anticipate whether he or she has the political support of all necessary stakeholders to successfully enact sanctions, i.e. anticipate the positions taken by other relevant players (Closa 2019). If this political support for the use of available tools does not materialize, only limited or symbolic action against backsliding governments will be taken, which in turn will not succeed in inflicting high costs on the regime. For the time being, the authoritarian equilibrium will remain strong. However, with increasing autocratization, an increase in political support for stronger action can be expected for two reasons: first, the interests of democratic member states and EU institutions, on the one hand, and backsliding regimes, on the other hand, will likely diverge with deepening authoritarianism over time; secondly, other, milder options to potentially resolve the predicament will have been increasingly exhausted. Hence, protection from allies of backsliding states in the EU is expected to decline the further autocratization proceeds.

Political capital

Backsliding governments start with a level of *political capital.* This depends on the legitimacy they build, but also on their networks and connections within the European political system. A high level of political capital protects countries from sanctions. Not all governments have the same level of political capital and they will differ in their ability to maintain it. One part of the political capital depends on the European party membership of the national ruling parties. This is widely pointed out in the literature (Granat 2023; Kelemen 2020b), but often ignores that party membership and the level of protection afforded by it is not fixed. The protection backsliding member states enjoy vary over time as European parties have sometimes abandoned their backsliding members. This was the case when Romania's Prime Minister Victor Ponta attacked the rule of law in his country and, after a while, the European social democrats withdrew their protection in the EU institutions (Sedelmeier 2014). The same happened more recently with the governing parties Smer and Hlas in Slovakia, which were suspended by the Party of European Socialists (PES) (Jochecová, Wax and Barigazzi 2023).

Nevertheless, backsliding regimes start with different levels of political capital and can exploit their party membership for political gain by highlighting mutual interests, leveraging their votes, and using relationships to provide spin and information. Party politics are the dominant logic in the European Parliament, but less controlling in the other European institutions. Yet even there, political support for actions against backsliding can shift over time. This has the potential to undermine the authoritarian equilibrium.

European parties are not the only source of political protection for backsliding governments. Supporters and allies can be found in all institutions: the European Parliament, Commission, and Council of the European Union and

European Council and can be based on shared positions on the EU integration dimension – such as a preference for intergovernmentalism – or it can be based on alike interests in politically salient policy domains, or it can come from economic and cultural ties of countries. Closa (2021) speculated about different institutional logics underpinning behaviour in the rule of law crisis. The Commission, he wrote, considers it risky that non-compliance by governments undermines the Commission's ability to enforce the rule of law. It has a preference of infringement proceedings over Article 7, and anticipates the Council's likely position in its evaluation of whether to start Article 7. He alleges that a partisan logic reigns in the European Parliament (but see Chapter 6), while he argued that the Council is guided by a preference for the avoidance of supranationalization of competencies, 'ideological sympathies' with backsliding governments and a fear of potentially ending up on the other end of the EU's enforcement policies, that is, becoming a target of EU sanctions (511). Within the 'supranational tug of war', further differences come into play to determine different institutions' political support for sanctions. This can be underlined by differences in the perception and categorization of backsliding as a threat to the rule of law and their different political priorities for which they seek the support of the backsliding member states.

Awareness of backsliding and the sense of threat that it poses is not equally distributed among all actors. While those who work on the most affected areas will sooner learn and care about it, others will not be directly affected. Depending on from whom they take their cues, they might be much slower to update their beliefs about the threat that alleged backsliding poses. This information assymetry can be exploited by backsliding member states by providing false or misleading information.

Mitigating and aggravating factors

It is useful to think in two ways about how political support develops. Some things *aggravate* political support for the use of sanctions; others *mitigate* political support. I argue in this thesis, that aggravating factors pile up over time – they increase – while mitigating factors fall away, or decrease.

An increase of political support can be expected if *member states diverge between each other in their interests and values.* Governments that erode democracy, the rule of law, or fundamental rights do no display the same values as full, liberal democracies. They adopt populist rhetoric and radical-right policies, which are anathema to more centrist governments. They divide, oppose, alienate, and insult. At the same time they seek aliances with like-minded radical right parties across borders, and might even align with authoritarian and hybrid regimes abroad. While they seek to solidify power, backsliding governments attack courts, which can threaten business interests and FDI. Having reduced checks and balances, backsliding governments will be tempted to use European Union money to buy the loyalty of cronies and co-opt institutions. This sets them on collision course with net-paying countries, which will be unlikely to accept poor financial management and lack of accountability. With increasing backsliding over time, the issue will grow in political salience as the public in other member states will start to pay attention. As public awareness grows, democratic governments and EU institutions will be under increasing demand to defend the interests and values of the union, that is, *the cost of inaction increases over time.*

While countries slide further back on prior democratic and rule of law achievements, the gap between them and the other, democratic member states is increasing, slowly increasing the need to act. Compared to measures against abstract concepts such as democracy and the rule of law, concrete actions

against the fundamental rights of citizens are likely to trigger the strongest supranational backlash against a backsliding government. In this sense, hybrid regimes within the EU are uniquely, 'externally restrained' (Bozóki and Hegedűs 2018).

On the other hand, there are factors that mitigate political support for sanctions. Institutional values such as inter-governmentalism and the believe in sovereign nations reduce the willigness to intervene forcefully. Other actors might not be particularly concerned about relatively obscure problems of democracy or the rule of law in other countries, but be more focused on other policy or personnel issues for which they seek support. Therefore, many political actors will prefer softer measures, such as engagement and dialogue over enforcement (Closa 2019). One worry is that the use of sanctions might backfire elsewhere and threaten interests in other domains. These concerns equate to the *costs of action*.

When backsliding begins, the EU or other member states can reasonably hope to be successful with soft engagement tactics and dialogue to resolve disagreements. When the EU observes time and again the same cycle of creative compliance and further backsliding, dialogue and soft engagement will be increasingly exhausted. This means that engagement will in the long run become less of a viable alternative, and, thus, increase the support for strong European action.

Hence, structural factors are decidedly in favour of a slow shift towards strong sanctions against backsliding regimes. These mitigating factors, in the longer run, get weakened. As backsliding within a country deepens and soft engagement tactics have failed to stabilize democracy and the rule of law, milder ways of dealing with democratic erosion are increasingly exhausted. Democratic and backsliding governments meanwhile diverge on their interests and values,

while voters in some countries will become more aware of the backsliding, increasing political costs of inaction. This drives down the *opportunity costs of sanctions.* Knowledge about backsliding will increasingly diffuse among decision makers too. Therefore, political support for sanctions is increasing over time.

♣ ♣ ♣

Backsliding countries in the EU start with an uneven level of political capital, which can be based on their history, connections, and party membership. This shields them, to various decrees, from sanctions by the EU. Over time, however, political capital runs out. Factors that aggravate political support for sanctions tend to accumulate over time, while mititating factors fall away. This changes the opportunity cost structure that other stakeholders in the EU face, hence, increasing their willingness to punish backsliding.

2.4 Limitations of backsliding governments

The theoretical framework aims to explain interactions between backsliding member states and the European Union. To do so convincingly, it needs to be able to account for the difference between how backsliding governments interact with the EU. By exploiting weaknesses of the decision-making process, backsliding governments are able to delay and weaken the imposition of costs of backsliding. Shifts over time are either a function of different backsliding inputs or feedback loops, meaning the better detection and classification of backsliding, better tools, and increased political support. This misses a final, crucial point: member states vary in the backsliding resources they have at their disposal, which defines their opportunity structure. Backsliding governments too can be restricted in their ability to play the two-level game with the European Union.

The opportunity structure of backsliding agents consists of '(a) *access* to power and (b) *persistence* in power as well as (c) the sufficient *scope* of power for the change of rules' (Kneuer 2021, 1448). Institutions matter, as they can limit the opportunity structure of democratic erosion. An elected executive bound for backsliding has access to power. However, he or she can not be certain to persist in power. After a number of years, the government will be up for re-election, with some chance of losing power. But even before this, the backsliding government will need to maintain the support of its legislative coalition to stay in power. Loosing legislators' support will put a premature end to the government. The scope of powers is restricted externally by constitutional rigidity, number and strength of veto players, the size of the backsliding coalition as well as strength of media and civil society actors.

Why do these factors matter to restrict governments' freedom to manoeuvre? Since persistence in power is a necessary condition for successful backsliding, time is of the essence for a regime intent on entrenching itself. To pursue its policies, the regime needs to be secure in government and enjoy legislative support so that it can secure its position. However, to avoid detection and the perception of posing a threat, a backsliding government must tread carefully. It cannot grab power too obviously, but at the same time, it cannot wait too long: it must be in government, ideally with a large legislative majority to entrench itself, which is easy to lose even within one electoral cycle. Governments will therefore be under pressure to 'capture the referees, sideline at least some of the other side's star players, and rewrite the rules of the game to lock in their advantage, in effect tilting the playing field against their opponents' (Levitsky and Ziblatt 2019, 34). Since elections held on a level playing field are easily lost, doing all of this within the span of one legislative term is crucial. But this can increase the threat of detection if they are not careful.

The constitution can limit a government by specifying high legislative or constitution-changing thresholds, appointment rules, and veto players. Where the constitution is rigid, so that the backsliding government has no way to change it, it will be restrained in its ability to overcome constraints to pass legislation freely and appoint loyalists to key posts. Its ability to use 'autocratic legalism' is significantly reduced (Scheppele 2018) and it might resort to breaking law rather than just forging or bending it (Pirro and Stanley 2022). Working around these constraints is not impossible but inherently costly, as anti-constitutional measures are easily deligitimized by the citizenry as well as international organizations. Backsliding governments will struggle to defend them in the court of public opinion, although they might be able to rely on the support of their followers, who take their cues from the ruling parties (Krishnarajan 2022).

Large legislative majorities reduce the pressure from electoral competition and render parliamentary opposition less effective, while the unity of the backsliding coalition reduces internal contestation of backsliding policies and increases the government's freedom to manoeuvre. On the other hand, a backsliding government that faces serious opposition in one of the houses of parliament will be slowed down or restrained in its ability to pass backsliding legislation quickly and without much resistance. Especially where legislative majorities are narrow, the internal cohesiveness of the backsliding coalition is paramount to getting legislation passed. Internal contestation could limit the government's ability to quickly entrench itself or respond effectively to EU demands.

Finally, the presence of a free and diverse media landscape and civil society influences backsliding governments' ability to control the narrative and political agenda. Where these are lacking, the potential for anti-regime mobilization is limited. Co-opted media and weak watchdogs also allow the government to ex-

ploit divisions within the population while helping to conceal their backsliding action vis-à-vis international actors.

Besides these institutional factors, governments can be restrained in their interaction with the EU by their *ideological rigidity*. Magyar and Madlovics (2020) point to the difference between 'ideology-driven' and 'ideology-applying' regimes. The former are actors with a deep set of values they uphold, while the latter exploit them only for strategic purposes. A regime that is ideology-driven has a narrower win set, that is, it has a strong interest in substantive policy outcomes. On the other hand, an ideology-applying regime will be more flexible and willing to take a transactional approach, which makes engagement and compromising strategies more feasible. I expect an 'ideology-applying' regime to be more willing to compromise on particular backsliding policies, whereas an 'ideology-driven' government will be more adherent to the policies it enacts on ideological grounds, which limits its ability to see backsliding policies as a negotiation mass that it can willingly give up in return for preferential treatment from the EU.

A similar argument can be made towards the *internal cohesion* of the backsliding coalition: if actors within the backsliding coalition have different priorities, this can weaken a government's ability to compromise effectively, since the consent of all relevant actors has to be sought. A more cohesive government will find it easier to seek a dialogue, fake compliance and then renege on individual policies.

2.5 When push comes to shove

This chapter has introduced my theoretical framework, which I coin the *supranational tug of war*. The framework explains how the European Union makes decisions to defend democracy, the rule of law, and fundamental rights in

member states and how the backsliding member states interact with the EU institutions to avoid the imposition of *costs of backsliding*. If backsliding governments are successful, they stabilize the 'authoritarian equilibrium', which allows them to entrench their position with impunity. They gradually reduce the quality of the rule of law and democracy, up to the point where they cease being democracies altogether.

To act against backsliding, the EU needs to first *evaluate the threat*, then *assess the appropriateness of available tools*, and finally *find political support* for their use. Each of these three steps can be broken down in smaller steps. This disaggregation reveals the weaknesses of the processes, which can be exploited by backsliding member states. Through the clever use of backsliding techniques and communication strategies, they can reinforce the authoritarian equilibrium and slow down its erosion. However, member states are limited in their ability to deploy these tools, as it depends on the resources at their disposal and the opportunity structure available to them.

Notwithstanding the interference and manipulation of decision-making processes by backsliding member states, my framework suggests feedback loops within the EU decision-making process that feature *learning, capacity-building,* and the growth of *political support.* Much scholarship has criticized the EU's reaction to backsliding in Hungary and Poland as too little and too slow, arguing that the EU failed to act despite having all required tools. In contrast, my framework of the 'supranational tug of war' aims at explaining political behaviour of the EU institutions in the rule of law crisis, thus explaining variation between the cases and over time. While Kelemen (2025) remains pessimistic about the EU's ability to overcome the authoritarian equilibrium, my model predicts a slow, long-term move towards the imposition of ever-higher costs on backsliding member states, with the expected result of the

authoritarian equilibrium's erosion. The next chapter explores the concept of backsliding, introduces the cases, and provides an overview of EU action.

3
Background

BACKSLIDING MEMBER STATES

For many years, *democratization* was the main interest of research into regime transformations. This changed markedly in the last couple of years and is based on two trends. First, researchers have identified the halting of the democratization trend and even its partial reversal. The end of the Cold War brought about a large number of authoritarian breakdowns, but the number of democracies has peaked. Second, scholars pay attention to new ways in which democracies turn into hybrid regimes and autocracies. Whereas in the past, democracies were overthrown in coups d'état or bloody revolutions, recent reversals often happened gradually, overall slower, and more peacefully. The recent authoritarian 'wave' notwithstanding, pictures of tanks in front of the main government buildings have become rarer and modern strongmen seldom wear the regalia of a general (Diamond 2020, 30). As explained in the vignettes at the beginning of Chapter 1, the contemporary autocrat reigns more subtly when compared to a typical twentieth-century-dictator, relying on law, surveillance, and economic pressure more than on violent repression.

This chapter will first discuss regime types, with a focus on hybrid regimes such as competitive authoritarianism, and regime change, in particular democratic backsliding, which is critical to understand what is going on in Hungary and Poland. I will put literature on authoritarianism, backsliding, and related

concepts such as rule of law, illiberal democracy, and populism into a dialogue (Section 3.1). Against this backdrop, I will discuss Hungarian and Polish backsliding and discuss how their democracy and freedoms are rated in Section 3.2. In the following sections, I introduce briefly the European actors (Section 3.3) and the main instruments they inherited at the beginning of the time under investigation (Section 3.4). Section 3.5 concludes.

3.1 The changing faces of authoritarianism

After the end of the Cold War, the world saw an unprecedented increase in the number of democracies. Huntington (1993) termed this phenomenon the 'third wave of democratization'. At this point, famously designated as 'the end of history' by Fukuyama (1992) – a point of time where the epic struggle among regime types had come to an end with liberal democracy emerging victoriously – elections became the only accepted form of legitimation and even autocratic regimes had to compete in elections (Diamond 2002, 24). After 1945, the share of closed autocracies in the world markedly declined while the number of electoral autocracies – authoritarian states that retain a democratic façade – as well as electoral and liberal democracies, increased. This trend accelerated even more at the end of the Cold War (Figure 3.1).

In an influential essay, Zakaria (1997) popularized the term 'illiberal democracy', by which he wanted to capture that 'Democratically elected regimes, often ones that have been reelected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms' (22). Hungary's Prime Minister Viktor Orbán has attempted to utilize this label by openly declaring his vision of an 'illiberal state' in a speech in 2014:

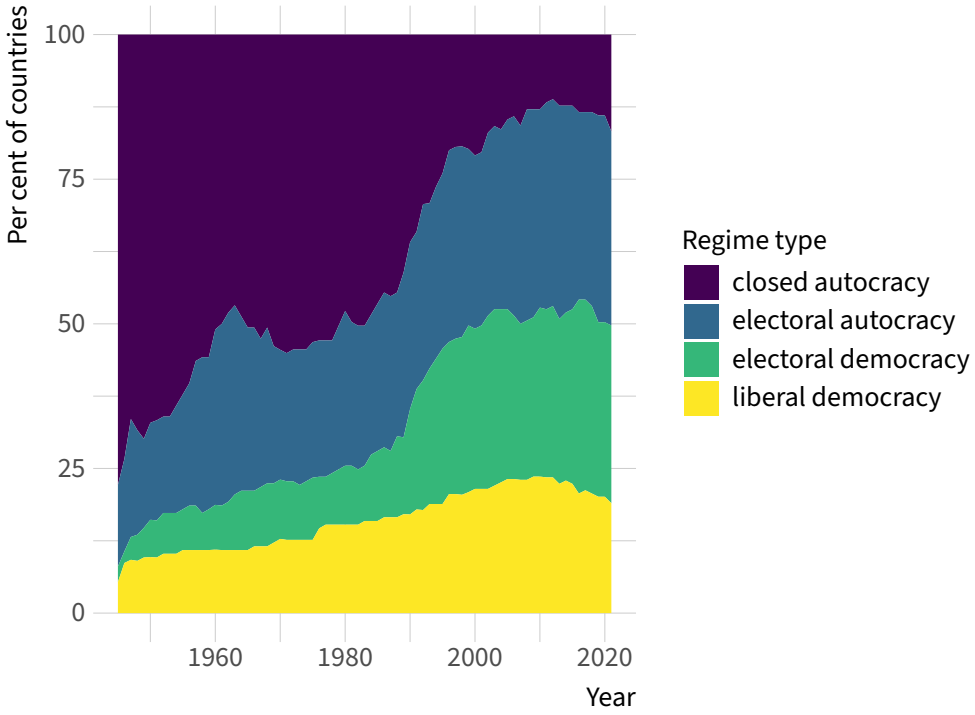

FIGURE 3.1 Regime types in the world since 1945.
Source: V-Dem v12 (Coppedge et al. 2022).

> the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, ... but it does not make this ideology the central element of state organisation, but instead includes a different, special, national approach. (Orbán 2014)

The term 'illiberal democracy' has been critically discussed for some time by scholars. Müller (2016b) problematized that 'illiberal democracy' lends democratic credential to deeply undemocratic behaviour, which also speaks to the question of which elements are necessary characteristics for democracies. Nevertheless, Orbán's much cited speech left marks on the discussion. Figure 3.2 shows the number of research outputs in the Scopus database that feature the bigram 'illiberal democracy'. After 2014, the usage of this term in social science research climbed steeply. Nevertheless, the terms 'illiberal democracy' and

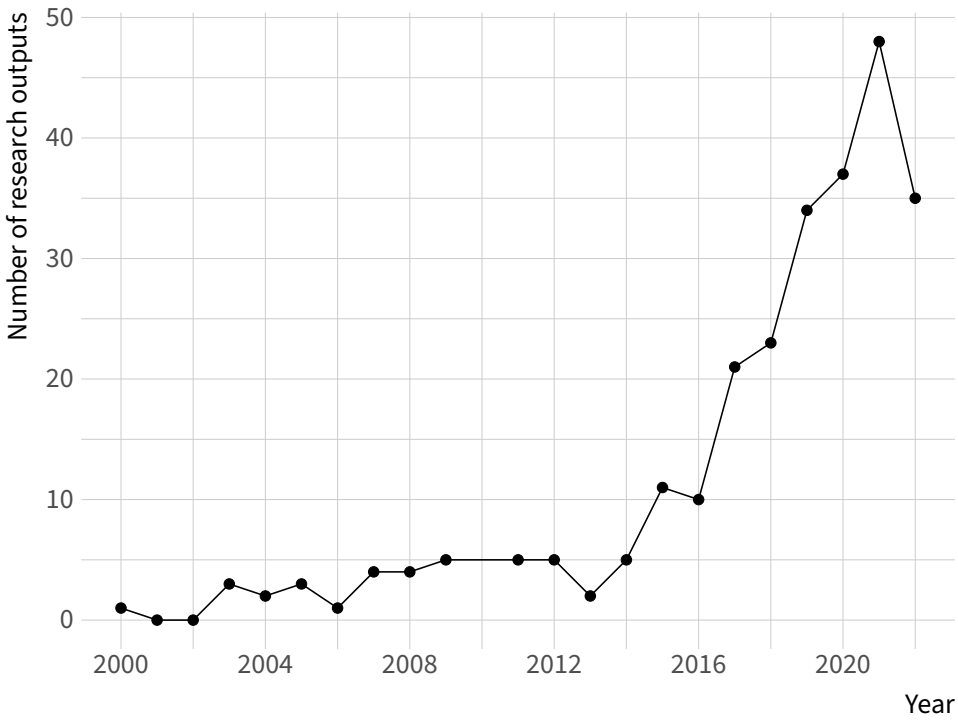

FIGURE 3.2 'Illiberal democracy' in research outputs.
Source: Scopus.

'illiberalism' continue to be popular, especially with legal scholars as recent book titles attest.[1] This is unfortunate, as the criticism of Zakaria's 'illiberal democracy' is not new. Levitsky and Way (2002) argued that this term suffers from two shortcomings: first, it exhibits 'democratization bias'; second, it forms a residual category. In their article, they introduced the term 'competitive authoritarianism' as a specific type of hybrid regime characterized by a democratic form that is systematically violated in practice. Countries in that regime type hold elections, but they are neither free nor fair.

1. See for instance: Belov (2021): 'Populist Constitutionalism and Illiberal Democracies', Drinóczi and Bień-Kacała (2021): 'Illiberal Constitutionalism in Poland and Hungary', Pap (2018): 'Democratic Decline in Hungary. Law and Society in an Illiberal Democracy', and Sajó (2021): 'Ruling by Cheating. Governance in Illiberal Democracy'.

With this, Hungary is part of a wider, global trend. In recent years, scholars of political regimes have observed 'a third wave of autocratization' (Lührmann and Lindberg 2019). While the earlier literature on 'competitive authoritarianism' came about from the realization that some countries got stuck in their democratization process, the newer literature discusses an alternative trajectory of countries that, at some point, were democracies before they started backsliding. Breakdowns of democracies are nothing new to be sure, but compared to *Weimar*-Germany or *Allende*-Chile, the process of autocratization in the twenty-first century often differs. A seminal essay by Nancy Bermeo 'on democratic backsliding' discussed how:

> A close historical look at the varieties of backsliding reveals that the classic *open-ended coups d'état* of the Cold War years are now outnumbered by what I call *promissory coups*; that the dramatic *executive coups* of the past are being replaced by a process that I call *executive aggrandizement*; and finally, that the blatant *election-day vote fraud* that characterized elections in many developing democracies in the past is being replaced by longer-term *strategic harassment and manipulation.* (Bermeo 2016, 6)

Similarly, Levitsky and Ziblatt (2019) assert that after the end of the Cold War, democracies did not typically die in coups but through a breakdown process initiated by elected leaders that consists of three steps: 'capturing the referees, sidelining the key players, and rewriting the rules to tilt the playing field against opponents' (67). Haggard and Kaufman (2021b, 27) offer the following definition: 'democratic backsliding is the incremental erosion of institutions, rules, and norms that results from the actions of duly elected governments'. Daly (2019, 17) has defined 'democratic decay' as the 'incremental degradation of the structures and substance of liberal constitutional democracy'. Unlike a *coup d'etat*, it is not a single event that kills democracy, but a 'death by a thousand cuts' (Qvortrup 2021). Each of the steps of autocratization might not in itself

create a threat to democracy or the rule of law, but together they entrench the incumbent, undermine the opposition, and weaken or remove veto points. 'The gradual subversion of democratic institutions allows incumbents to slowly accrete powers, making the process difficult to detect and counter until it is too late', observe Haggard and Kaufman (2021b, 28), who point out that this identification problem 'provides a tactical advantage to incumbents'. Within the EU, this meant that high-stakes decisions, involving many institutional players who pursue their own agendas, had to be taken under *conditions of uncertainty* about the intents and actions of backsliding governments.

While the basic features of backsliding are relatively well established, scholars disagree on semantics and explanations. Besides democratic 'backsliding' (Bermeo 2016; Mechkova, Lührmann and Lindberg 2017; Haggard and Kaufman 2021b; Wunsch and Blanchard 2023), 'decay' (Daly 2019; Adams and Janse 2019; Markowski 2020), and 'erosion' (Ginsburg 2020; Jakab 2020; Kneuer 2021; Laebens and Lührmann 2021), the literature features 'democratic regression' (Diamond 2020; Croissant and Haynes 2020), 'democratic rollback' (Diamond 2008), 'de-democratization' (Bogaards 2018; Coşkun 2022), and 'autocratization' (Lührmann and Lindberg 2019; Skaaning 2020; Boese, Lindberg and Lührmann 2021). In an attempt to organize the concepts, Gerschewski (2021) differentiates between 'erosion', which he sees as exogenously caused and 'decay', which has endogenous causes. He observes that while the term 'erosion' is much used in the literature, 'erosion' *arguments* are rare. It is noteworthy that this research programme is relatively recent, as shown by Figure 3.3. According to Scopus data, the number or research outputs using 'erosion', 'decay', 'backsliding' or 'autocratization' has increased sharply since 2015. 'Democratic backsliding' is a relatively new term but has since become the most popular.

It is noteworthy that this result is starkingly different from the one reported

by Waldner and Lust (2018, 94), based on data by JSTOR. Their search covers a longer historical period (1900 to 2010) and they find an increase in the frequency of the term democratic backsliding since 1990, from about 25 articles per year to 45 in 2010. However, they provide little detail of how they have searched JSTOR, for instance they remain silent on whether they have protected the search term with inverted commas. My finding of seeing only few outputs before 2015 is confirmed by a corresponding search of *Web of Science*. It is possible that the variation can be explained by different coverage of material in JSTOR compared to Scopus (or WoS). Either way, it is clear that in recent years, these terms have been of increased interest to scholars.

As a relatively new direction of research, it is not easy to arrive at definite conclusions of why democracies backslide. Haggard and Kaufman (2021a, 2021b) offer a causal explanation consisting of three elements: first, polarization erodes trust and strengthens anti-system parties or drives established parties to more extreme positions; second, the government captures the legislature, enabling the aggrandizement of the executive; third, because backsliding happens incrementally, it is difficult to counter it until it is too late.

Some scholars have argued against the (alleged) teleological nature of the decay argument, which places countries onto a one-dimensional democracy-autocracy-axis. Not all countries start as 'consolidated' democracies and then move to authoritarianism. Slater (2013) has described a process of 'democratic careening', which is neither consolidation nor collapse and can be observed in many young democracies. Rather than moving along an autocracy-democracy axis, he suggests a typology along the lines of 'horizontal accountability' (checks and balances) and 'vertical accountability', which can result in 'careening' between populist and oligarchic outcomes. Likewise, Cianetti and Hanley (2021) have argued that 'backsliding' can be unhelpful, as it assumes a linear and

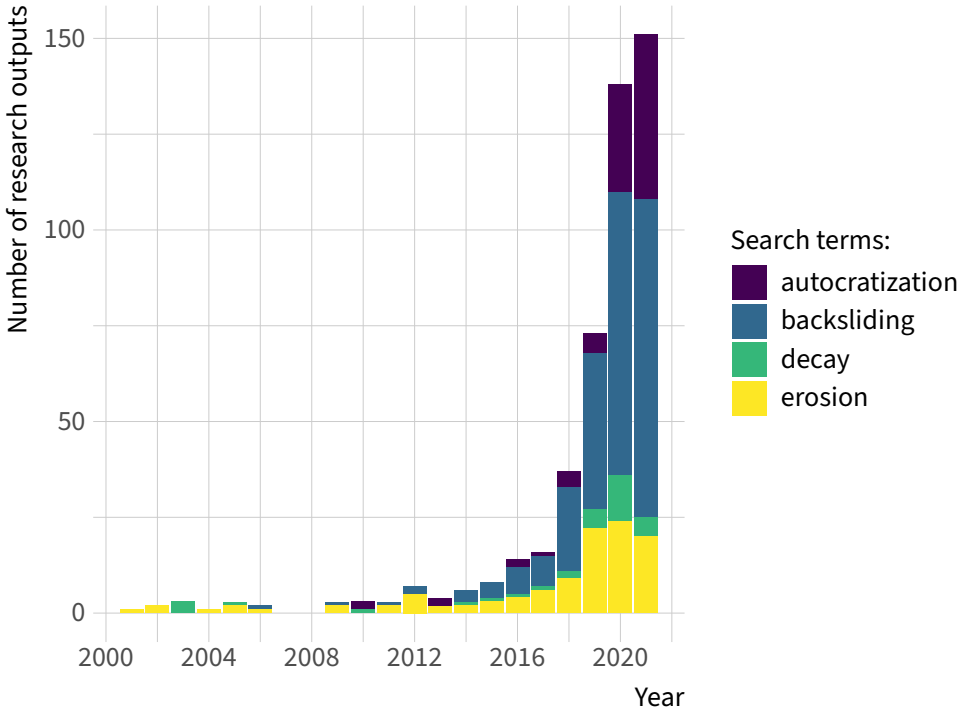

FIGURE 3.3 Terms used in social science research.
Source: Scopus. To minimize false positive results, the search terms were 'autocratization OR autocratisation', '"democratic backsliding" OR "backsliding of democracy"', '"democratic decay" OR "decay of democracy"', and '"democratic erosion" OR "erosion of democracy"'. I searched for title, abstract, and keywords in Scopus's social science collection from 2000.

total trend between two endpoints – consolidated liberal democracy and (electoral) autocracy – which they find too simplistic to capture processes of regime change in many countries in Central Eastern Europe. Cianetti, Dawson and Hanley (2018) do recognize, however, that the term captures the essence of what is happening in Hungary and Poland.

3.2 From democratization to autocratization

Hungary and Poland were both successful in their transition from Soviet-imposed socialism to market-based economies and liberal democracies. Both countries

witnessed rapid economic growth especially since the early to mid-2000s (see Figure 3.4). Hungary had a nominal gross domestic product (GDP) per capita of $3,350 in 1991 and Poland of only $2,235. Their economies grew to over $15,500 per head in 2020. Perhaps even more impressive is their growth in terms of purchasing power parity. In these figures, the per capita count for Hungary grew from $8,305 to $33,084 and for Poland from $5,910 to $34,264, indicating a steep increase in material wellbeing. Both countries have joined the ranks of high-income countries that are integrated into the international community. Hungary joined the Council of Europe (CoE) in 1990, Poland followed in 1991, both became members of the Organisation for Economic Co-operation and Development (OECD) in 1996, the NATO in 1999 and then ascended to the EU together with other Central and Eastern European countries in 2004. When Fidesz and PiS came to power in 2010 and 2015 respectively, both countries were widely regarded as consolidated democracies. Since then, Hungary and Poland have seen sharp declines in different metrics of democracy and the rule of law.

Hungary and Poland have seen profound backsliding since authoritarian, nationalist, and populist parties came to power. In Hungary, the deterioration has been so sharp that Viktor Orbán's claim to be building an 'illiberal state' misses the mark: several ratings of democracy and rule of law attest to Hungary's character of a hybrid regime and electoral autocracy, a first time for an EU country. Poland was on a similar trajectory and at least superficially followed Orbán's playbook (Pirro and Stanley 2022). When PiS came to power, it quickly unraveled checks and balances, and in particular, the courts. The party was, however, limited in its ability as it did not have the required majority to change the constitution. Due to the resilience of formal institutions and the limited time that has passed since the backsliding began, Poland can still be considered

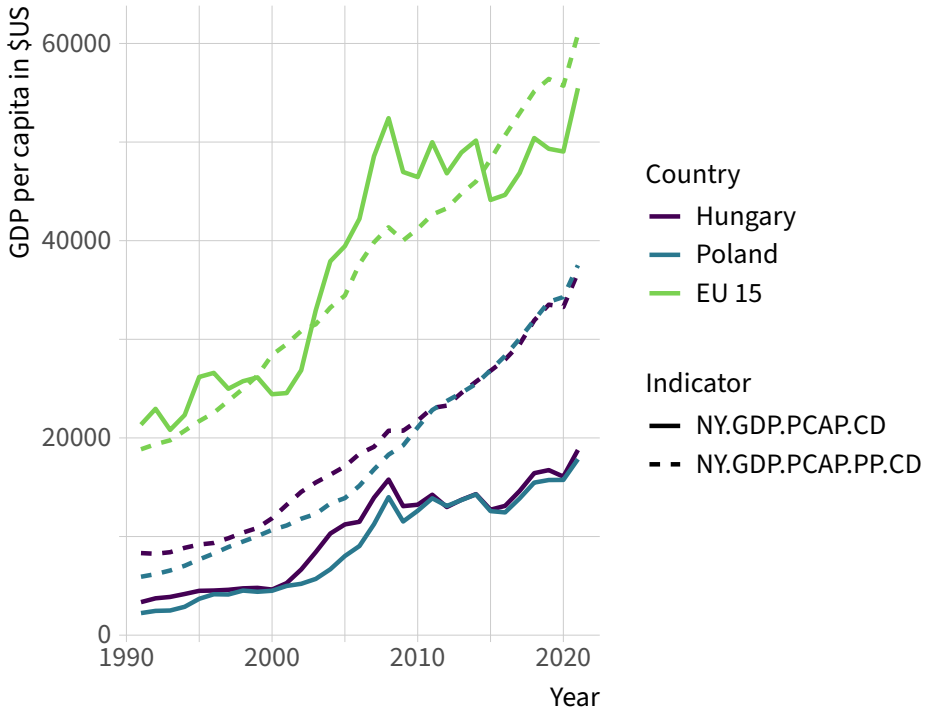

FIGURE 3.4 Economic development since 1991.
Source: World Bank, World Development Indicators. NY.GDP.PCAP.CD refers to 'nominal' GDP per capita in current US-Dollars, while the indicator NY.GDP.PCAP.PP.CD measures the GDP per capita in purchasing power parity in current international Dollars.

democratic and the pro-democratic opposition regained a majority in 2023. While the comparison with other backsliders suggests itself, one needs to be careful not to overlook differences or fall into a deterministic and teleological way of thinking. Sadurski (2019, VII) put it this way:

> the construction of authoritarian populism in Poland is very much a work in progress. It is dynamic, moving along a trajectory the subsequent stages of which are uncertain. Kaczyński's Poland is not Erdoğan's Turkey; we can roughly discern its directions, but we do not know the endpoints.

The watchdog Freedom House rates democracies of formerly communist

nations in its *Nations in Transit* report. It considered Hungary to be a 'consolidated democracy' until 2015 but downgraded the country to 'semi-consolidated democracy' in 2016. In 2020, Freedom House downgraded Hungary further to the category 'transitional or hybrid regime'. The report stated:

> Hungary's decline has been the most precipitous ever tracked in *Nations in Transit*; it was one of the three democratic frontrunners as of 2005, but in 2020 it became the first country to descend by two regime categories and leave the group of democracies entirely. (Freedom House 2020, 2)

Similarly, Poland shows a sharp decline in this rating since 2016. However, given the five-and-a-half-year gap between the start of the Hungarian-Polish backsliding, Polish democracy has not deteriorated as much in absolute terms. Poland was considered a 'consolidated democracy' by Freedom House until 2019 and downgraded to 'semi-consolidated democracy' in 2020 (Freedom House 2020), 'but its decline over the past five years has been steeper than that of Hungary' (Freedom House 2021). Figure 3.5 shows the development of 'democracy percentages' of Hungary and Poland since 2005. Both countries started at a very high level but declined from there. In Poland, a first decline in democracy percentages coincided with the first PiS-led government (2005–2007). After the end of the Kaczyński-government it bounced back before declining again after PiS subsequent election victory in 2015. In Hungary, several political scandals have indicated some backsliding before Fidesz' electoral victory in 2010. In its 2009 report, Freedom House warned that the looming economic crisis led to pressure on Hungary's democratic institutions and also noted 'a rise in "uncivil societies" in the form of extreme nationalist groups' (Freedom House 2009, 5).

Reflecting the developments described in *Nations in Transit*, Freedom House's *Freedom in the World* report downgraded Hungary from 'free' to 'partly free', a first for a European Union country (Freedom House 2019). Poland, meanwhile,

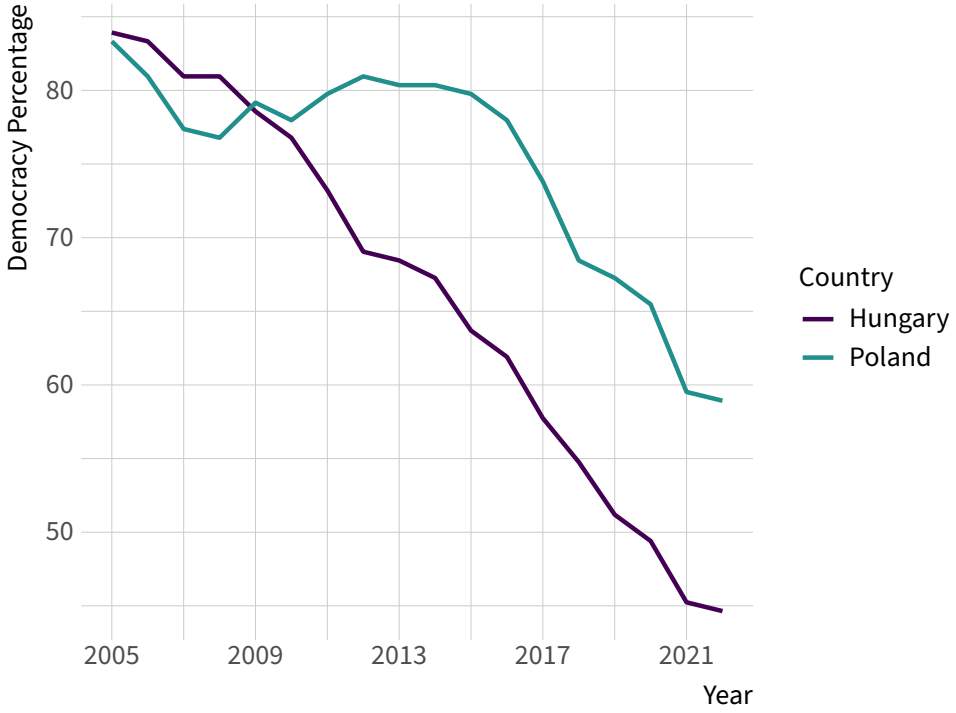

FIGURE 3.5 Decline of democracy percentages.
Source: Freedom House, Nations in Transit 2005–2021.

is still holding on to its 'free' rating (Freedom House 2022). The decline in the freedom scores – which is the sum of two indices, 'political rights' (PR, 0 to 40 points) and 'civil liberties' (CL, 0 to 60 points) – are plotted in Figure 3.6. This shows the strong decline in political rights and civil liberties in Hungary since Fidesz started controlling the National Assembly in 2010. In comparison, since PiS came to power in Poland in 2015, the civil liberties index has dropped more sharply relative to the political rights index.

The research project 'Varieties of Democracy' (V-Dem), shows similar trajectories of the two countries in its high-level indices of democracy.[2] Figure 3.7

2. Another widely-used index does not show the same trend. Polity5-data has, remarkably, not captured backsliding in Hungary and Poland. Both countries continue to receive the

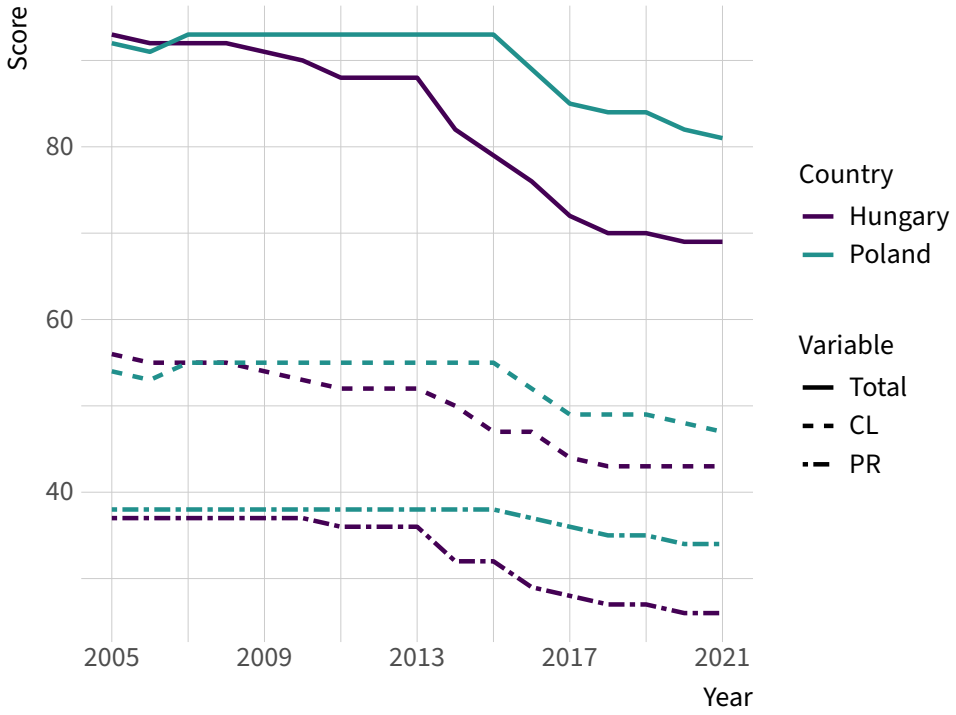

FIGURE 3.6 Decline of civil liberties and political rights.
Source: Freedom House, Freedom in the World 2005–2022.

displays two of them: the minimalistic electoral democracy index and the more encompassing liberal democracy index. These indices show high levels after the accession to the EU in the mid-2000s until the Fidesz and PiS governments started their backsliding agenda in 2010 and 2015 respectively. In 2020, a V-Dem-report downgraded Hungary to the status of an 'electoral autocracy', making the country the first non-democracy in the European Union. At the same time, they noted that Hungary and Poland are among the ten most autocratizing countries in the decade from 2009 to 2019 and that 'Hungary is a particularly striking case of contemporary autocratization and ranks first' (Lührmann, Maerz et al. 2020,

top score of 10 in the regime type variable *polity*, which equals 'strongly democratic'. The last year for which data is available is 2018 (Polity5 2020).

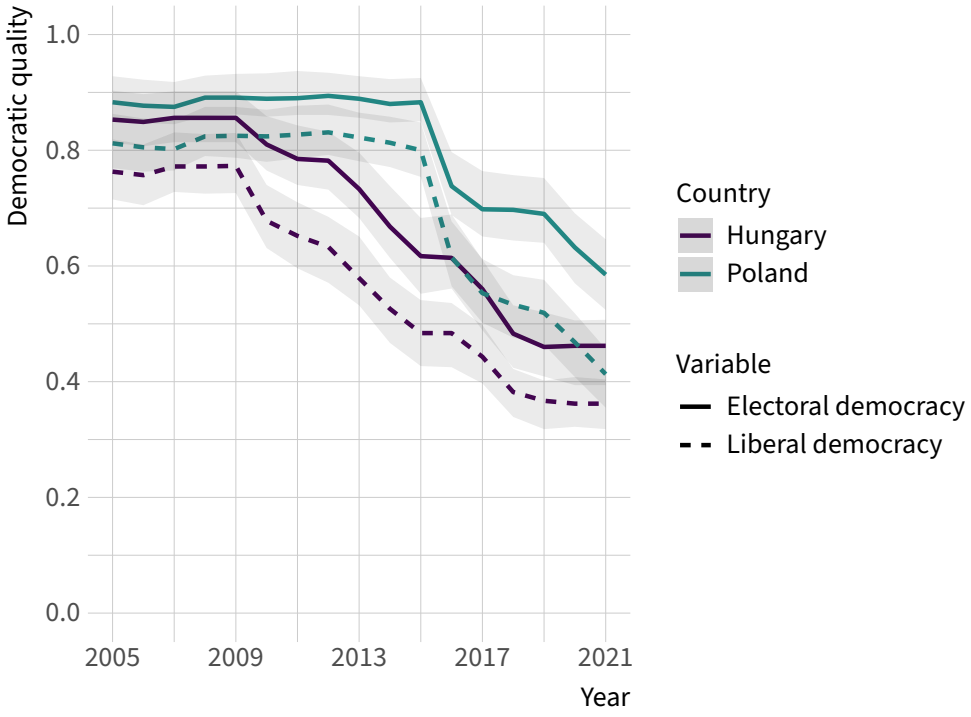

FIGURE 3.7 Decline of electoral and liberal democracy.
Source: V-Dem v12 (Coppedge et al. 2022).

16). One year later, Hellmeier et al. (2021, 1061) stated: 'While Hungary's ongoing autocratization is still conspicuous, Poland has taken over the first position with a dramatic 34 percentage-points decline on the [Liberal Democracy Index], most of which has occurred since 2015'.

Voices that still categorize Hungary as democratic have become fewer. Bogaards (2018) argued that Hungary is a 'diffusely defective democracy'. More typical are classifications on the hybrid regime spectrum. Bozóki and Hegedűs (2018) have suggested a unique category for Hungary, namely that of an 'externally constrained hybrid regime', to properly account for the unusual constraints the country faces as a member of the European Union. Way and Levitsky (2019) have described Orbán's Hungary as a 'prime example of a competitive autocracy'.

While Hungary has become a competitive authoritarian state, this in itself does not make the regime unpopular: 'popular dictatorships' exist (Matovski 2021). Notwithstanding carefully crafted electoral laws and hijacked institutions that are crucial in ensuring continued supermajorities (Scheppele 2022), Orbán's strongman rule enjoys widespread support among the Hungarian people (Krekó and Enyedi 2018). Even though Poland's democratic quality has declined steeply, it is still seen as an electoral democracy by most observers. While checks and balances on executive power have weakened, the country continues to have a diverse media landscape and free and (mostly) fair elections, which made unseating the government not unlikely and eventually succeeded in 2023. The reduction in civil liberties is worrying, but the country continues to enjoy high levels of political rights and competitive elections.

Magyar (2016) deliberately tried to capture additional features of autocratic politics by referring to Orbán's Hungary as a 'mafia state'. The 'mafia state' is a reference to the 'organized upperworld' of the regime built around an 'adopted political family' (70). The 'mafia state' features 'a centralized, largely legalized enforcement of tribute organized from the top' (71). Compared to Orbán's 'kleptocratic state' (Tóth and Hajdu 2018), Kaczyński's Poland is featuring relatively low levels of systemic corruption by CEE standards (Przybylski 2018, 61). This is partially captured by Transparency International's Corruption Perception Index: between 2012 and 2022,[3] Hungary's score has fallen by twelve points to 43 (out of 100), putting the country at a global rank of seventy-third. Poland's score, meanwhile only decreased by two points to 56 in the same period, although the decrease was six points compared to 2015 as the baseline (Transparency International 2022).

3. The methodology has changed after 2011, making earlier scores not strictly comparable.

Despite the massive problems with the state of democracy in Hungary and (to a lesser degree) in Poland, within the European Union the discussion has been heavily framed as a rule-of-law crisis (Magen 2016). The European Commission, taking into account both EU and CoE texts and case law, defines Rule of Law according to these principles:

> 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. (European Commission 2014a, 4)

While, according to the same text, 'respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights', using rule of law as a frame has the effect of focusing the attention on more *legal* issues, rather than authoritarianism. This framing 'could be understood as an exercise in bureaucratic politics, where legalistic language is deliberately chosen in an attempt to de-politicize the issue' (Magen 2016, 1058).

The World Justice Project produces a 'rule of law index' that scores and ranks countries on eight criteria: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. In 2021, Hungary only received a score of 0.52, below the *global* average of 0.56, putting the country last in the region and sixty-ninth out of 139 globally. In the category 'constraints on government powers', Hungary's score of 0.39 puts the country far behind on rank 117. Poland's overall score has reduced from 0.71 in 2015[4] to 0.64 in 2021. Thereby, the EU's fifth-largest member state has assumed the thirty-sixth position globally. On 'constraints on government powers', Poland is well ahead

4. Due to changes in methodology, scores from before 2015 are not easily comparable.

of Hungary with a score of 0.54 and ranks sixty-seventh (World Justice Project 2021).

A frame very popular with academics in recent years has been 'populism'. The literature often refers to Orbán and Kaczyński as 'populists'. Despite an enormous body of research, populism remains 'an essentially contested concept' (Mudde and Kaltwasser 2017, 2). While I generally agree that the two countries' leaders *are* populists, I stay clear of this term. The reason is that I am doubtful that much analytical power is gained by the concept for my purposes. Mudde and Kaltwasser (2017) have described populism as a 'thin-centered ideology' defined by antagonism between 'the pure people' and 'the corrupt elite' and the view that the 'general will of the people' (or *volonté generale*) should reign supreme. 'In a world that is dominated by democracy and liberalism, populism has essentially become an illiberal democratic response to undemocratic liberalism' (116). This view might accurately describe the origins of Hungary and Poland's backsliding, but democratic backsliding is a better way to capture the unfolding state capture. In light of the authoritarianism of Fidesz and PiS within the European Union – itself a supranational political entity that puts democracy, rule of law, and fundamental rights at the centre of its existence – the actions of the EU institutions to counter the backsliding need to be discussed.

3.3 The European actors

The European Union consists of several primary institutions, which have played different roles in the fight against backsliding: the European Parliament, the Council of the European Union, the European Council, and the Commission. Besides these, the Court of Justice of the European Union (CJEU) is part of the narrative, but not an actor whose behaviour I explain.

The Commission is the executive branch of the European Union. Every member state sends one Commissioner in line with national rules, but Commissioners represent the EU and not the governments that dispatched them. The Commission President is proposed by the European Council and elected by the European Parliament. The President then assigns portfolios to the Commissioners. In recent years, the practice has emerged that the Commission president appoints three Executive Vice-Presidents and further Vice-Presidents to streamline policy management. Larger decisions of the Commission are taken in the College of Commissioners. Each Commissioner is supported by a cabinet consisting of special advisers. The civil service of the Commission is organized in thirty-three Directorate-Generals (DGs). Rather unusually in national political systems is an (almost) exclusive right of initiative in the executive branch; the Commission has the sole power and responsibility to table legislation, apart from specifically defined exceptions.

The European Parliament is directly elected by Europeans in all European Union member states according to national election rules. The MEPs sit together grouped by party affiliation, not nationality. Since the Lisbon Treaty (signed 2007, in force 2009), the Parliament has become an equal co-legislator to the Council in most legislative procedures. The work of the Parliament is organized in political groups and in committees. In this thesis, I repeatedly refer to the Committee on Civil Liberties and Home Affairs (LIBE), one of the largest committees of the European Parliament, which handles a plethora of politically salient issues.

The Council, that is, the *Council of the European Union*, also called the *Council of Ministers*, consists of meetings of the government ministers of member states. It holds, together with the European Parliament, legislative power. While the Council is one institution, it meets in ten different configurations depending on the policy area, such as the General Affairs Council (GAC) or the Justice and

Home Affairs Council (JHA). The Council (of the EU) has to be differentiated from the *European Council*, which is the meeting of the heads of state and government of the EU. The European Council meets every three months. While the Council of the EU (together with the Parliament) legislates, the European Council sets the broad directions of policy. It is, however, not a legislative body. Since the Lisbon Treaty, the European Council is headed by a full-time president elected by that institution; the presidency of the Council of Ministers, meanwhile, is rotating between member states every half year. The meetings of the Council are prepared by the permanent representatives of the EU member states, who meet in a forum called COREPER. In fact, it also consists of different configurations, namely COREPER I and II. The deputy permanent representatives discuss more technical policies in the COREPER I forum, while the politically most salient issues (including the work of the GAC and JHA, as well as foreign policy and economic and financial affairs) are discussed in COREPER II by the ambassadors to the EU.[5]

The Council of the EU and the European Council must not be confused with the Council of Europe (CoE), which is a separate international organization with forty-six member states. This thesis is about the European Union and does not systematically deal with other international organizations, including the CoE. Nevertheless, other organizations cannot be entirely ignored either, since European decision makers regularly refer to the organizations and their institutions. Hence, a very brief overview is in order.

Two institutions are at the heart of the CoE: first, the Committee of Ministers, and second, the Parliamentary Assembly of the Council of Europe (PACE). The CoE is most notable for the European Convention on Human Rights (ECHR) and

5. Of course, more committees feed into the decision-making process. Most notably, the meetings of COREPER II are prepared by the 'Antici' group and the meetings of COREPER I by the 'Mertens' group.

its court, the European Court of Human Rights (ECtHR) – the *Strasbourg Court* (which must not be confused with the Court of Justice of the European Union (CJEU) – the *Luxembourg Court*). Two other institutions of the CoE are refered to in later chapters: the Venice Commission and Group of States against Corruption (*groupe d'États contre la corruption*, GRECO). The Venice Commission, formally the 'European Commission for Democracy through Law' is an expert body for constitutional advice-giving. It is usually asked by member states' governments for advice on constitutional questions. Furthermore, I refer to the Organization for Security and Co-operation in Europe (OSCE) and, in particular, its Office for Democratic Institutions and Human Rights (ODIHR). ODIHR engages, *inter alia*, in election monitoring in participating states.

3.4 Dissecting the instruments

To join the European Union, countries needed to fulfil the 'Copenhagen criteria'. These were set out by the European Council at its summit in Copenhagen in June 1993. Faced with the (relatively recent) fall of the Iron Curtain and the democratic transition of former communist autocracies, leaders of the twelve EU member states had to decide how to proceed with its neighbours. Would the European Union stay a club of Western European countries or would it offer membership to Central and Eastern European states ranging from Estonia in the north to Bulgaria in the south? In Copenhagen, the leaders agreed that expansion was desirable and promised their neighbours membership if they fulfilled three broad criteria:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the

> Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. (European Council 1993, 7.A.III)

This included three points: political criteria, economic criteria, and finally, legislative alignment, i.e. the adoption of the *acquis* (Hillion 2004).[6]

Within the fifth enlargement round, which included Hungary and Poland, the Commission divided the *acquis* into thirty-one chapters (Gateva 2015). Most notably, Schimmelfennig and Sedelmeier (2004, 2020) have described an 'external incentives model' of 'governance by conditionality', in which the EU grants membership as a reward for the implementation of its requests. In 2004, in the first phase of its fifth enlargement round, the EU admitted ten additional countries, which included, besides Malta and Cyprus, eight post-communist CEE countries.[7] Bulgaria and Romania acceded in a second phase in 2007, concluding the enlargement round (Gateva 2015).

The anatomy of Article 7

At the time backsliding in Hungary began, the EU had two main instruments at its disposal. These were the provisions of Article 7 TEU and the infringement procedure of Articles 258–260 TFEU.

What has since become Article 7 TEU, was introduced as Article F.1 by the Treaty of Amsterdam (signed 1997, in force 1999), specifically because of the plans to admit more CEE countries. The Article was to be used to sanction 'the existence of a serious and persistent breach' of the Union's values. The first

6. Short for *acquis communautaire*. 'The European Union (EU) *acquis* is the collection of common rights and obligations that constitute the body of EU law, and is incorporated into the legal systems of EU Member States' (https://eur-lex.europa.eu/EN/legal-content/glossary/acquis.html, accessed on 13 November 2023.).

7. Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia.

time the use of Article 7 was pondered was in 1999, after Jörg Haider's far-right FPÖ entered into a coalition government with the centre-right ÖVP. Lacking a preventative mechanism, Article 7 could not be used without showcasing actual breaches of the rule of law in the country (Sadurski 2010). Therefore, the other fourteen EU countries decided to opt for bilateral sanctions instead to isolate Austria diplomatically (Brandstrom, Bynander and 't Hart 2004). In light of this experience, a preventative mechanism to enable the EU to act early rather than wait until 'serious and persistent' breaches occurred was added in the Treaty of Nice (signed 2001, in force 2003). Its treshold was 'the existence of a clear risk of a serious breach' (Besselink 2017, 133).

Since the EU treaties lack an article that would allow the Union to expel a member state (Theuns 2022), the procedures laid down in Article 7 TEU are the European Union's sharpest sword to sanction member states. This makes Article 7 the *ultima ratio*. As such, decision makers in the EU are unlikely to use it lightly. Indeed, as I discuss in later chapters, decision makers have repeatedly made references to atomic weapons when talking about Article 7. Article 7 consists of five sections, of which the first three outline two separate mechanisms that can be triggered. The first section is sometimes referred to as the 'preventive mechanism' and the following two sections form the 'sanctioning mechanism'. Table 3.1 shows the key points side-by-side. In 2003, the Commission published a paper that set out the standards for the application of Article 7. In it, the Commission made clear that it regards the rules of section 1 and 2 as separate procedures and that the activation of the sanctioning mechanism does not presuppose the use of the preventative mechanism (Commission of the European Communities 2003, 4–5).

From a legal perspective, the preventative mechanism is more 'bark' than 'bite' (Sadurski 2010). It can be activated by either a third of the member states,

TABLE 3.1 Overview of the Article 7 TEU procedure

	preventive mechanism	sanctioning mechanism
activation	either one-third of member states or Commission or Parliament	either one-third of member states or Commission
decision	four-fifths of Council members with consent of Parliament	unanimous European Council with consent of Parliament
benchmark	'clear risk of a serious breach'	'serious and persistent breach'
consequence	the Council may address recommendations to member state	by qualified majority, the Council may suspend certain rights deriving from treaties including Council voting rights

the Commission or the Parliament and used in cases 'when there is a clear risk of a serious breach by a Member State of the values referred to in Article 2'. The principal decision for the preventive mechanism is taken by a four-fifths majority in the Council with consent of the Parliament. Crucially, the preventive mechanism does not have any legal consequences, but can be seen as a political tool for naming and shaming. The Council can also address recommendations to the member state.

If the preventative mechanism is a 'bark', the sanctioning mechanism is the 'bite'. It cannot be started by the Parliament, but only by a third of the member states or the Commission. The principal decision rests with the European Council, rather than the Council of the EU, and requires a unanimous vote, excluding the member state subject to the procedure (Article 354 TFEU). The fact that this (and only this) step involves the European Council highlights its centrality (Besselink 2017, 132). In addition, the Parliament's consent is needed. The benchmark is 'the existence of a serious and persistent breach by a Member State of the values referred to in Article 2'. Other than the preventive mechanism, the sanctioning procedure can result in relatively strong legal consequences.

After the European Council has determined the 'serious and persistent breach', the Council of Ministers can by qualified majority, suspend the treaty rights of the member states, essentially disenfranchising the state (Theuns 2022). Section 3 specifically only mentions the suspension of voting rights in the Council as an outcome, which would preclude the member state from participating in legislation. Theuns (2022) argues that therefore Article 7 contradicts its own purpose, as it violates principle of equality and democracy by disenfranchising states while subjecting them to Council decisions.

From the aformentioned follows that both mechanisms of Art 7 TEU have very high vote thresholds. The voting rules are further detailed in Article 354 TFEU. This makes it clear that the member state subject to the procedure does not have a voting right in either of these cases and is not counted in the calculation of the quota. Even the preventive mechanism, which does not have any legal consequence in itself, requires currently (after the United Kingdom left the EU) a majority of 21 countries, so only five countries may vote against or abstain. Furthermore, Article 354 TFEU elucidates that a decision on the sanctioning mechanism can be taken even though member states abstain in the European Council.

In conclusion, Article 7 is a highly *political* instrument. For instance, the ECJ has not been given a specific role in this Article. Besselink (2017, 132–133) notes that under the Treaty of Amsterdam, the now-Article 7 procedure was explicitly excluded from the court's jurisdiction, but was given a procedural oversight role in the Treaty of Nice. Furthermore, given the political nature of the Article, its application is discretionary and not restricted to the *acquis* (141–143). This position is shared by the Commission (Commission of the European Communities 2003, 5).

Infringement proceedings

The other tool available to the European Union are infringement proceedings. The infringement procedure can be used to sanction violations of EU law. Two actors can do that: the Commission (Article 258 TFEU) and other member states (Article 259 TFEU). This thesis is mostly concerned with the Commission's infringement procedures. While Kochenov (2015) has argued in favour of more reliance on Article 259 TFEU, this has mostly not happened. Nevertheless, in recent years, some member states have shown willingness to intervene on the Commission's side in rule of law infringement proceedings before the ECJ (Íñiguez 2022). The procedure of Article 258 TFEU requires that the Commission opens an infringement case by sending a letter of formal notice to the member state and giving it the opportunity to react. In case of non-compliance within a period set out by the Commission, the Commission can refer the infringement to the ECJ for a decision. Article 260 TFEU requires the state to comply with the judgment of the court, if it fails to do so, the Commission can bring another case to the court, but only after the state had been given the opportunity to respond. The court can then impose a penalty or lump sum payment on the state.

The reality, however, is more complex. While the Commission is called the 'guardian of the treaties', nevertheless it has wide discretion to decide which infringement cases to pursue (Gormley 2017, 65). Kelemen and Pavone (2023) detail the procedural shift during Manuel Barroso's first term as Commission president, imposing additional 'forbearance' on the Commission, apparently on the basis of the wishes of member states. Under the new system, a pilot procedure became a necessary first step, which also needs specific approval of the Commissioner in charge. Only after the failure of the pilot can an infringement procedure be opened, but this requires the approval of the legal service, the

Commissioner, the Secretary General, and the Commission President. In effect, this means tightened political control over infringement procedures which led to a sharp drop of the number of cases the Commission has brought after 2004. Under the Commission presidency of Jean-Claude Juncker (2014–2019), the Commission set out selective handling of enforcement of EU law as part of its policy (European Commission 2016d, 11).

Whereas the Article 7 procedure is a political procedure that is not confined to the *acquis*, the infringement procedure is a *legal* tool and presupposes the infringement of EU law obligations by a member state. This can be limiting in policy areas where little EU law is available and member states enjoy wide discretion. Besides, in order to start an infringement procedure, the legal service of the Commission gets involved, adding another actor who can raise objections (Kelemen and Pavone 2023; Leino-Sandberg 2021, 80, 176). Based on interview research, Leino-Sandberg described the relationship between DGs and the legal service like this:

> The Legal Service generally feels that the 'DGs very loyally and faithfully follow the advice given, to the most minor detail'. Yet, sometimes, policy officials feel that the Legal Service is overly conservative, and reactive rather than creative. (Leino-Sandberg 2021, 165)

Some scholars have argued in favour of broadening the interpretation of powers under the infringement process into one of 'systemic infringement procedure'. This would in effect mean identifying infringements in related areas that are 'systemic and persistent' and bring many such infringement procedures to the CJEU together (Scheppele 2016). This argument was later extended by Scheppele, Kochenov and Grabowska-Moroz (2021), who argued that the values enshrined in Article 2 TEU are EU law too and could be addressed through 'systemic infringement proceedings'. However, whether Article 2 values take

any direct legal effect enfoceable by the CJEU is subject to debate (Bogdandy and Spieker 2019, 409; Spieker 2019; Mader 2019, 137).

3.5 Backsliding in theory and practice

In this chapter, I have first surveyed the literature on hybrid regimes and regime changes. Hybrid regimes were once thought of mostly as a transitional stage of countries on track of democratization. The worry was that countries could get stuck on their path to democracy. In recent years, however, it has become clear that hybrid regimes can also evolve by autocratization from established, or 'consolidated', democracies. Not only has the focus of research on regime types changed, but also the methods of would-be autocrats. 'Democratic backsliding' as a distinct practice is driven by elected executives and their aggrandizement. Backsliding is a process and not a single event, which makes it hard to detect initially. What is more, the research interest in backsliding is a relatively recent one.

I have then discussed how Hungary and Poland have turned from once established liberal democracies to competitive authoritarian regime and electoral democracy, respectively. Metrics from Freedom House and V-Dem clearly show the reduced quality of democracy in the two countries and similar trends can be seen when looking at the quality of the rule of law as measured by the World Justice Project. The two countries differ in how far their democracy has deteriorated and in their level of corruption. Both are much worse in Hungary than in Poland. Besides, Poland has in 2023 turned around, by voting out its backsliding government.

This Chapter has also introduced the European actors: the Commission, Council of the European Union, European Council, and European Parliament.

On top of this, I have discussed the two tools that could be used to tackle democratic backsliding in 2010: infringement proceedings and Article 7 TEU.

This ends the preliminary discussions. The next four chapters will apply my theoretical framework of the 'supranational tug of war' to the empirical case studies. Chapter 4 will discuss how and why Viktor Orbán's backsliding did not much earlier sound the alarm bells, the first step required for a potential response by the EU.

4
Boiling a Frog

BUILDING HUNGARY'S ILLIBERAL STATE

When Viktor Orbán became Prime Minister of Hungary for the first time, he could have flown to Paris to meet *président* Jacques Chirac for breakfast, then taken the Eurostar service to meet Prime Minister Tony Blair in London, and jetted to Berlin to have dinner with *Bundeskanzler* Helmut Kohl. Let us imagine the world back then and how different it looked: the EU had only 15 member states – Hungary was not one of them and would not be for another six years – and the terror attacks of 9/11 and the wars in Afghanistan and Iraq that would follow them were still in the future.

In a period in which Hungary's entrenched governing party, *Fidesz*, rides from electoral victory to electoral victory, it is easy to forget that in 1998 Viktor Orbán won his premiership fair and square. His first government was formed from a coalition of Fidesz with two other parties: the conservative MDF and the agrarian FKGP. In 2002, after four years, voters sent Orbán back to the opposition benches, where he would stay for eight years.

Voters gave him a second chance in 2010. Fidesz, now together with its smaller satellite, the Christian Democratic People's Party (*Kereszténydemokrata Néppárt*, KDNP), profited from the country's complex electoral rules that translated a fifty-three per cent majority of the vote into sixty-eight per cent of seats in the unicameral National Assembly. On 29 May 2010, Viktor Orbán became

Prime Minister of Hungary for the second time. This time, Orbán made sure he would not return to the opposition benches anytime soon.

How he has done that and why the EU did not react earlier and more effectively is the topic of this chapter. In the early years of his second government, he entrenched his party's rule at home, but at the same time skillfully avoided sounding alarm bells in the European Union. While he 'captured the umpires', 'sidelined key players' and 'tilted the playing field' (Levitsky and Ziblatt 2019), at the same time he engaged EU policymakers, compromised, and changed course if the pressure on his government became too great. His 'peacock dance' – as Orbán called it himself (Csaky 2018) – with the EU served him well until, with Kaczyński's PiS in Poland, a second government embarked on a backsliding path. Over time, however, it became impossible for Orbán to disguise the authoritarian marks he has left all over the country and the risks his backsliding posed to the European project. In this chapter, I consider the first phase of backsliding, up until 2014, which is also the time frame of the seventh European Parliament and Manuel Barroso's second term as Commission President.

At this point, it is important to state clearly what I am not arguing. First, I do not argue that Orbán hid his backsliding perfectly. At points, he was fairly frank about what he was doing. Second, I do not argue that no one saw Hungarian backsliding and its authoritarian threat. Some scholars, journalists and politicians understood what was happening quite clearly. Nevertheless, this was not the general opinion, even among people with good knowledge of the country. It would take even longer until these views became mainstream outside that relatively small group of country experts. Many of the things that are obvious in hindsight were not at the time. Finally, this chapter should not be read as an 'excuse' for either Hungary or EU policymakers. Rather, the point is to contex-

tualize Hungarian backsliding and find an explanation for why it did not earlier become a core priority for the EU.

This chapter focuses on constitutional change and on three policy areas: the media, elections, and the judiciary. I simultaneously review the European Union's responses, in particular the use of infringement procedures by the Commission, debates in and resolutions of the European Parliament, and the non-use of Article 7 TEU. I will discuss, albeit briefly, the creation of new tools: the Justice Scoreboard (2013) and the new Rule of Law Framework (2014). Compared to the following chapters, this one relies less on interviews as a source of evidence, since most of my participants were not directly involved with these events from 2010 to 2014. However, procedural knowledge and background gained through interviews informs the narrative.

4.1 Constitutional changes

The victory of the Fidesz–KDNP alliance in the 2010 election was widely expected. Trust in the government of the incumbent socialists had been shaken by corruption and political scandals. The election did indeed shake up the entire party system. The governing socialists (MSZP) got a dismal result: they lost nearly twenty-four percentage points. The liberal SZDSZ and conservative MDF failed to achieve the five per cent threshold after having been continuously in parliament for twenty years. Two new parties, the extreme right Jobbik and the green-liberal LMP, entered the National Assembly (Várnagy 2011). Fidesz–KDNP, meanwhile, won all but three out of 176 single-member districts as well as 52.7 per cent of the regional votes, which gave it sixty-eight per cent of the seats.

This was the highest vote share for a party in the EU-28 in any election since 1991. Only in 1990 were the victories of democratic parties in Romania and

Latvia over the Communists more resounding (data from V-Party v2, Lindberg et al. 2022). This is even more astounding since this was a true multi-party election, while the data includes countries with two-party systems, which are more susceptible to absolute majorities, such as Malta (Cini 2002).

While the outcome was an unprecedented victory for Fidesz, the election followed democratic rules that were respected by the losers. An election assessment mission of the OSCE's ODIHR summarized its observations:

> The 2010 parliamentary elections confirmed the democratic principles established over the past 20 years. The elections were conducted in a pluralistic environment characterized by an overall respect for fundamental civil and political rights, and high public confidence in the process. The competition took place on a generally level playing field, under a sophisticated electoral system. It was administered by professional and efficient election management bodies, including fully-fledged political party representatives. (ODIHR 2010, 1)

The electoral victory of 2010 not only enabled the many changes to the constitution, legislation, and appointments to key positions that would follow, but also provided legitimacy for these measures.

Fidesz's constitutional reforms were ostensibly democratically legitimated, but they served undemocratic, authoritarian ends: they entrenched the governing party in the political system. Constitutional changes became part of the regular *modus operandi* of the Orbán government (Sonnevend, Jakab and Csink 2015). During the first ten weeks in office, parliament passed six constitutional amendments (Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union 2010). In the first year, the number rose to twelve and an entirely new constitution came into force in 2012 (Kovács and Scheppele 2018, 191).

Hungary still operated under the communist constitution of 1949, although it had been heavily amended since 1989. In effect, Hungary was the last CEE coun-

try that had not replaced its Soviet Union-imposed constitution. The preamble highlighted 'its own provisional status, and promise[d], in effect, the drafting of an entirely new constitution' (Arato 1995, 45). Changes to the constitution had been agreed during the democratic transition in 1989 by the outgoing communist government and the democratic opposition, but this 'was meant to be a temporary solution: rules of the game for the first elections, nothing more but nothing less' (Vincze 2012, 89). This created problems: 'constitutional ambiguities' of the 'patchwork constitution' led to institutional struggles over governmental power after the transition (Schwartz 2000, 83; Vincze 2021). Hence, there was a democratic case for constitutional reform and the eventual replacement of the constitution.

Orbán's government was only the second Hungarian government post-1990 that could command a constitution-changing majority. This was the case from 1994 to 1998, when a left-liberal coalition government had the necessary votes. However, it sought consensus with the opposition and passed a constitutional amendment that raised the bar, by requiring parliament to pass rules for constitution-making with eighty per cent of its members (Kis 2012, 4; Bánkuti, Halmai and Scheppele 2012b, 249). In 2010, the situation was different. Essentially one party controlled the government and had, by itself, the two-thirds parliamentary supermajority necessary to change the country's constitution.[1] Fidesz, controversially, repealed the four-fifths provision on a two-thirds majority in 2010, which some consider unconstitutional (Arato, Halmai and Kis 2012, 53; Bánkuti, Halmai and Scheppele 2012a, 139; Scheppele 2015, 113). While large-scale constitutional reform had not been a campaign promise of Fidesz, the party quickly seized the opportunity provided through the election victory

1. KDNP is often considered a satellite organization of Fidesz and not an independent party in its own right (Ilonszki 2019, 212; Donáth 2021, 6).

(Bánkuti, Halmai and Scheppele 2012b, 253). The government immediately started constitutional changes (Kovács and Tóth 2011) and used them both tactically and strategically.

The National Assembly promulgated a newly drafted constitution on 25 April 2011, on the anniversary of Fidesz's election victory, and the new constitution, termed the 'Fundamental Law' (sometimes also translated as 'Basic Law') came into force on 1 January 2012 (Kovács and Tóth 2011). It was passed only on the votes of Fidesz–KDNP, without a single vote from the opposition. The Fundamental Law's preamble (the 'National Creed') 'places special emphasis on values such as family, nation, loyalty, faith and love and is dominated by religious references' (198). As one commenter put it, 'it was written in the spirit of not just Christianity but specifically the Catholic faith' and makes reference to 'the Holy Crown' as well (198). The Fundamental Law also paved the way for granting citizenship to ethnic Hungarian diasporas in adjacent countries, which exist due to the Treaty of Trianon of 1920 following World War I that forced the Kingdom of Hungary to cede over two-thirds of its territory and with it, nearly three fifths of its population (Molnár 2001, 262).

The Fundamental Law left thirty-two different policy areas to be regulated in more detail by 'cardinal laws', which are 'hierarchically placed between the constitution and ordinary laws', and need to be passed with a qualified two-thirds majority of members present (Vincze and Varju 2012, 438). The high number of issues governed by cardinal laws locks in policy-choices and makes it very difficult for future parliamentary majorities to govern effectively. This was repeatedly pointed out, and criticized, by the Venice Commission (2011a, 2013).

The government could rely on its supermajority to fine-tune the system further through the extensive system of cardinal laws, as well as through fur-

ther constitutional amendments. Several changes passed the parliament in rapid succession, a tactic that has been described as 'constitutional tinkering' (Körösényi, Illés and Gyulai 2020, ch. 4). In 2013, NGOs pointed out that the new Fundamental Law was being amended every 125 days by the governing parties (Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union 2013, 1). Using constitutional amendments had several benefits for Viktor Orbán: first, it helped the party overcome veto points, such as the country's interventionist Constitutional Court; second, it allowed Orbán to make sweeping changes to Hungary's institutions; third, it entrenched these changes by immunizing them from future change by political opponents, since a regular majority would not be able to undo them. Nevertheless, Gomez and Leunig (2022, 674) point out that it was less the new Fundamental Law that was undemocratic and illiberal, than its 'application … under the current political conditions'. Thus, uncertainty surrounded the developments in Hungary.

The speed of constitutional change was only outpaced by the swiftness of legislation. In less than two years, from spring 2010 to December 2011, parliament passed 365 bills, while the former parliament had passed just 591 in four years (Várnagy 2012, 129). In 2013, the number reached a peak of 254 annual laws (Várnagy 2014, 149). Such pace was achieved by changing and circumventing procedural rules. Many acts were introduced as 'private member bills' – that is, by individual Members of Parliament – avoiding requirements of public consultation for bills formally introduced by the government. Furthermore, Fidesz changed the rules for using emergency procedures to fast-track legislation through Act XXXVI of 2012. It reduced the majority required to two-thirds (from previously four-fifths), enabling it to do this without the consent of the opposition (Ilonszki and Vajda 2021).

4.2 The first test: the media law

After Fidesz came to power, the Hungarian government took incremental steps to control the media. In fact, while little attention was paid to this internationally, already Orbán's first term as prime minister (1998–2002), 'was marked by confrontation with the critical media to the extent that analysts described this period as a "second media war"' (Bajomi-Lázár 2014, 52). In his second term, Orbán moved quickly to de-consolidate media freedom. This became the first policy area in which Orbán received resistance from Brussels and Strasbourg.

In the early years, two pieces of legislation are relevant: Act CIV of 2010 on the freedom of the press and the fundamental rules of media content and Act CLXXXV of 2010 on media services and mass media (Polyák 2015). This new media legislation established a Media Council and the National Media and Info-communications Authority (NMHH), with the former managing the latter. The Media Council consists of the chair and four members. The members were appointed by an ad-hoc parliamentary committee, while the chair was personally appointed by the Prime Minister to a renewable nine-year term. The chair of the Media Council is *ex officio* the NMHH's president (Bajomi-Lázár 2013, 81).[2] The president of the NMHH controls a sizeable budget that amounted to 0.3 per cent of GDP in 2011 and got wide-ranging powers: from allocation of radio frequencies to fining media outlets for various reasons, including a lack of political balance or other violations of law (Bajomi-Lázár 2014, 54).

The legislation merged the Hungarian News Agency (MTI) and several public service broadcasters under the roof of one foundation and created several bodies to manage them, with members appointed through parliament and the

2. Annamária Szalai, the first appointee in 2010, died in 2013. She was replaced by Mónika Karas, who resigned after eight years at the end of October 2021, giving the Fidesz-controlled parliament the opportunity to appoint a successor for nine years ahead of the competitive 2022 election (Bajomi-Lázár 2014, 54; Vaski 2021).

Media Council. As Bajomi-Lázár (2013, 83) put it: 'Fidesz has built a centralised, pyramid-shaped, institutional structure with the Media Council's Chair on top'. Furthermore, the sizeable media budget was distributed to profit Fidesz-aligned firms that received orders for content creation and managed advertisement for the public service media (Bajomi-Lázár 2013).

In 2011, Barroso's Vice-President, Dutch liberal Neelie Kroes, also the Commissioner for Digital Agenda, started an investigation into the new Hungarian media and telecommunication legislation (Várnagy 2012). This was the first time the Commission became publicly active to push back against Orbán. Yet the Commission never sent a formal notice of opening an infringement case against Hungary on this matter.[3] The Commission raised concerns on the media legislation's compatibility with the Audiovisual and Media Services Directive. In particular, according to the Commissioner, it violated the directive that the laws applied to media established in other countries (violating the concept of regulation in the country of origin), that a requirement of balanced coverage would apply to on-demand media, and that all media had to register before starting to 'broadcast'. Finally, the media legislation was too vague as to the prohibition of 'causing offence', risking freedom of expression (European Commission 2011). Comments by the Commissioner suggested that 'media authority independence' was another concern (Kroes 2011).

The media legislation of Hungary also became the first subject for debate and resolution on Hungary by the European Parliament in its seventh term. A resolution on Hungary's media law was passed on 10 March 2011 (European Parliament 2011a) and was tabled by four groups of the left (GUE/NGL, Greens/EFA,

3. While Anders and Priebus (2021) count it as an infringement, I have not been able to find a reference to this procedure in the Commission's database of infringement proceedings: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en.

S&D) and centre (ALDE). Notably missing was the centre-right EPP group, which included Fidesz and KDNP. The preceding parliamentary debate was ostensibly only about the media legislation, but it became an opportunity for a broader discussion about the policies of the government of Viktor Orbán. Batory (2014) described this as a case of 'venue shopping' on the side of the national opposition.

On the day of the debate (16 February 2011), the Commission's Vice-President Neelie Kroes, who had first raised concerns about the media legislation, began her statement:

> Mr President, I am pleased to inform you that, when the plane was touching down this morning in Strasbourg, I got the good news that the Hungarian Prime Minister has agreed to amend the media law so that it complies with all aspects of EU law that we, the European Commission have raised. (European Parliament Debate, 16 February 2011, Item 13)

The Hungarian government often used this tactic, namely to agree last-minute changes, without giving its counterparts sufficient time to check the details. This obfuscation tactic gave it a 'tactical advantage' (Haggard and Kaufman 2021b, 28) in its dealings with the EU, as discussed in Chapter 3, and made it harder for EU policymakers to act to counter it. Hence, the European Parliament debated a resolution on Hungarian media legislation, having just been told Hungary would amend its law to take the Commission's criticism on board, but without specific knowledge of the proposed changes.

The EPP group, tabled its own version of the resolution (B7-0099/2011), which focused on the engagement of the Hungarian government with the EU Commission and the country's willigness to work with the Commission to enact changes. It 'deplore[d] the premature and unjustified attacks to the Hungarian Government'. Before the vote took place, on 10 March 2011, the EPP group withdrew

its version of the resolution and asked the left wing of the house to do the same, arguing that the Hungarian National Assembly had just passed amendments of the media law that had satisfied the Commission. The EPP's speaker wanted to frame the vote as a motion of confidence in Neelie Kroes. Voting for the resolution would be voting to not trust the Commissioner's judgement (European Parliament Debate, 10 March 2011, Item 9.1).

The uncertainty over the changes to the law since the debate in February was exploited as a rationale by the supporters of the Hungarian government in the European Parliament. In an oral explanation of vote, Finnish ALDE MEP Hannu Takkula explained why he defied the whip and voted against his own group's resolution:

> The information which I have received ... shows that the Commission made requests to Hungary, Hungary responded to them and it amended its media laws accordingly. In my opinion, that ought to have been enough. ... I believe that what Hungary has done is exactly what the Commission asked it to do. (European Parliament Debate, 10 March 2011, Item 10)

Takkula, hence, saw the matter as resolved and the vote as superfluous. Similarly, German EPP member Mathieu Grosch explained his vote in writing:

> I am convinced that a very broad majority in the European Parliament will uphold the fundamental rights of the media. These rights are now being called for in a resolution, although the amendments to this law which were adopted this week in the Hungarian Parliament have not been taken into account. I would therefore have liked all resolutions ... to be updated and only then to be debated and put to the vote. Consequently, the vote in the European Parliament no longer had anything to do with freedom of the press, which should have absolutely priority, but was simply a trial of strength between the groups.

Like Takkula, Grosch thought that the vote was not up-to-date with the facts. But while Takkula was happy because the Commission was happy, Grosch

also pointed to the fact that he had not enough information on the amended Hungarian media law. He wished for a reassessment of the new law and another debate before voting on any resolution to the matter.

The European Parliament passed the resolution with 316 to 264 votes (and 33 abstentions) in an electronic vote procedure that records the tally but not the individual votes. After the 2009 elections, the EPP gained 265 seats, S&D won 184, ALDE ended up with 84. The European Conservatives and Reformists (ECR) and Greens/EFA each had 55 seats, the GUE/NGL 35 seats and the EFD group 32 seats. 26 members were Non-Inscrits (NI), that is not attached to a group. Hence, the three right groups directed 352 votes, while the three left groups wielded 274 votes. However, in 'rule of law' resolutions, the liberal ALDE typically voted with the left, handing them a bare majority of 358 votes. This suggests a very close vote, however, I will show that the majorities in resolutions on Hungary were more pronounced, suggesting lower discipline on the right and some principled rebels.

In conclusion, the resolution and debate on the Hungarian media law shows how Hungary used last minute changes to confuse and obfuscate its supranational counterparts. Hungary had backtracked and compromised on a number of provisions that the Commission had criticized in Act XIX of 2011 (Anders and Priebus 2021, 251). Nevertheless, it established both a powerful Media Council and agency (the NMHH) and its political appointees remained in place for a long time. Yet in line with my theoretical framework, the threat was not evaluated correctly by lots of MEPs, who often lacked knowledge about the details. Thus political support remained a partisan matter.

4.3 Entrenching Fidesz rule

While the election victory of 2010 is widely understood as an enabling factor for the sea change in Hungary, the level of legitimacy it conferred upon Viktor Orbán is not always appreciated. Before Viktor Orbán changed the electoral rules, the country employed a unique and complicated mixed electoral system involving three elements (Shugart and Wattenberg 2003). Of the 386 members of the National Assembly, 176 were allocated by double ballot in single-member districts, similar to the French system; 146 seats were distributed by proportional vote in regional multi-seat constituencies; and the final 64 votes were allocated nationally to balance the proportion of overall seats in the parliament, acting as a bonus to make the outcome of the majoritarian vote more proportional.[4]

After 2010, the government engaged in careful 'tilting of the playing field' to lock in its advantage (Levitsky and Ziblatt 2019). This happened through a combination of strategies. First, it changed the mode of elections; second, it chose the voters (Scheppele 2022, 55–56), by increasing the number of eligible voters, discriminating between them (Kelemen 2020b), and applying pressure on them (Mares and Young 2018); third, it entrenched its incumbent's advantage by influencing media during electoral campaigns and circumventing campaign finance limits, for instance by using state advertisement to overlap with party campaign messages (ODIHR 2014).

Fidesz and KDNP passed a new electoral law in December 2011 (Act CCIII of 2011) against the united vote of all opposition parties. The new law kept the mixed character of the system but simplified it and strengthened majoritarian over proportional elements. First, the number of deputies was reduced sharply

4. The exact numbers of seats allocated to regional and national lists varied over time and more seats were added to the national list allocation (Schiemann 2004, 360). I report here the numbers for the 2010 election.

from 386 to 199. This was critical for ensuring the discipline of the parliamentary party. Anything short of perfect discipline would jeopardize a Fidesz deputy's chance to be renominated. The number of constituencies was reduced to 106, but simultaneously their share of all seats increased from 45.6 per cent to 54.4 per cent (Venice Commission and ODIHR 2012, 7).

The reduction of the number of seats neccessitated a redrawing of electoral districts, which gave Fidesz the ability to gerrymander the electoral map. Scheppele (2014) has described how the new electoral map has systematically favoured Fidesz over the opposition. Experts rated Hungary's 2014 electoral map as the fourth most gerrymandered map among a sample of 54 lower-house elections across different countries (Martínez i Coma and Lago 2018). Under the new law, the run-off vote was abolished in favour of a first-past-the-post system, which favoured Fidesz over the fragmented opposition. Furthermore, the national seats in the new system were distributed according to a party-preference vote and not to compensate parties for overall disproportionate outcomes. In effect, this means that the new system is more majoritarian, which favours Fidesz as long as the opposition and electorate remain disunited.

The new constitution in 2012 provided a path to citizenship for millions of ethnic Hungarians living outside of the borders of modern-day Hungary. About one million kin-Hungarians had applied for citizenship by the end of 2017 (Kovács 2019a, 1156). The new electoral law afforded Hungarians without permanent residence in Hungary suffrage to vote by mail for national lists. This created a large number of new voters, which overwhelmingly favoured Fidesz – over ninety-five per cent of postal voters would choose the governing coalition in subsequent elections (Scheppele 2022, 56). At the same time the electoral law discriminated between voters, absentees with a permanent address would

need to register in advance to vote on the day of the vote in person in one of the embassies or consulates (Majtényi, Nagy and Kállai 2018; Kelemen 2020b, 493).

In 2012, the Venice Commission and ODIHR issued a joint opinion on the new election law. The organizations were relatively positive in their assessment. The reduction in seats, the stronger majoritarian component and a new mode of election were in line with international standards. They criticized the lack of public consultation, the use of cardinal laws to draw district boundaries, which should have been left to an independent expert commission and periodically reviewed, while more concrete rules for districting were needed in the law. More details should have been provided for registration of oversees voters. They also welcomed new rights for minority voters, but thought that their choice to vote either for a minority list or party list should be made closer to the election. The organizations concluded:

> Act CCIII revising the rules on elections of members of parliament of Hungary as from 2014 is a good basis for the conduct of genuine and democratic parliamentary elections. The Venice Commission and the OSCE/ODIHR underline positive developments such as specific provisions for favouring better participation of national minorities in parliament. (Venice Commission and ODIHR 2012, 13)

Hence, two expert bodies missed or underestimated the distorting effects that the legislation could have and actively, if not purposefully, legitimated the anti-democratic reforms. This speaks to the theorized difficulty of detecting the early stages and onset of democratic backsliding, especially where it is enacted by a government that controls the necessary constitution-changing majority.

While the methods used by Fidesz to ensure future electoral victory are complex, two need to be pointed out. First, Orbán overhauled the welfare benefit systems. The number of eligibility restrictions was increased and decisions were decentralized. Mayors, most of them Fidesz officials, received significant

discretion to distribute benefits. This made people economically dependent on local Fidesz mayors and officials, enabled the building of clientelistic networks from which votes could be extracted (Mares and Young 2018, 2019b, 2019a). Secondly, Fidesz proved creative in optimizing, for its own benefit, campaign financing rules. It restricted campaign advertisement in private television broadcasting (Várnagy 2015, 135). Public service media were captured since 2010 (Polyák 2019), resulting in media bias in favour of Fidesz (ODIHR 2014, 18). Furthermore, Fidesz conflated party and government messaging. An example are 'national consultations' – non-binding referendum campaigns with heavily suggestive questions that have been used repeatedly since 2010 (Körösényi, Illés and Gyulai 2020, 63–65).

Thus, while Hungary's government changed electoral rules in the country to tilt the playing field in its own favour, international organizations did not realize this at the time. Only after the 2014 election, in which Fidesz–KDNP reclaimed a two-thirds majority of seats, with 44 per cent of the vote (Scheppele 2014), did this become clearer (ODIHR 2014).

4.4 Taming the judiciary

With nearly unlimited control of the executive and legislative branches, Orbán's focus shifted to independent institutions that could act as veto points, such as the courts. The process of 'capturing the umpires' was decisive to follow-through with a wide range of authoritarian measures (Levitsky and Ziblatt 2019). The courts were targeted on several levels, using a combination of formal and informal methods (Vincze 2023b; Hanelt and Vincze 2025). This ensured that European policymakers were only slowly catching up to the developments.

The first judicial target of Fidesz became the Constitutional Court. The Court was created during the roundtable talks of the governing socialists and the

democratic opposition and had built a reputation for being strong, assertive, and activist (Elster, Offe and Preuss 1998; Scheppele 1999; Schwartz 2000; Schiemann 2001).

Shortly after coming to power, on 5 July 2010 Fidesz passed a constitutional amendment concerning the way the judges and President of the Constitutional Court were elected (Kovács and Scheppele 2018). As before, an ad-hoc nominating committee selected a candidate on a two-thirds majority, who would then need to be confirmed by the parliament in plenary session, also with a two-thirds majority. However, before the change, the nominating committee was composed of one member of each parliamentary group, independent of its size, ensuring the need for consensual decision-making and moderation. After the amendment, the nominating committee was to be composed in a way that reflected the parliament, which meant that Fidesz–KDNP could use its supermajority to unilaterally nominate candidates (Kovács and Tóth 2011, 193). Nevertheless, it could hardly be argued that it would be anti-democratic to compose parliamentary committees in a manner that is proportionate to electoral outcomes. The same amendment also changed the rules for the selection of the President of the Constitutional Court. Whereas before, the judges of that court voted on a President, under the new rules, the National Assembly would choose, on a two-thirds majority (Kovács and Scheppele 2018, 191). The Venice Commission (2011a, § 94) held that this was 'widely accepted'.

In 2010, the government introduced retroactive tax legislation, which taxed up to 98 per cent of severance payments for public employees in the last government. The Constitutional Court found this to be unconstitutional and the government responded with a constitutional amendment in November 2010 (Act CXX/2010) that restricted the Constitutional Court's jurisdiction in fiscal matters (Kovács and Tóth 2011, 192–194). This restriction of the court was re-

peatedly criticized by the Venice Commission (Venice Commission 2011b, §§ 9, 15; 2012a, § 54; Kovács and Scheppele 2018, 191). Instead of repealing this restriction, the Hungarian government doubled down in the fourth amendment of the Fundamental Law in 2013 (Venice Commission 2013, § 113).

Another constitutional amendment (Act LXI/2011) increased the size of the Constitutional Court from eleven to fifteen judges. The government argued that the workload of the Court had increased and therefore more judges were needed (Kovács and Tóth 2011, 200). This allowed the National Assembly to elect four new judges and thus speed up the process of creating a new majority. Fidesz had effectively captured the court by spring 2013 (Kovács and Scheppele 2018, 191; Szente 2016).

The new Fundamental Law changed the institution of the Constitutional Court. Under the old system, Hungarians had easy access to it through the *actio popularis* procedure, which allowed anyone to challenge legislation without having to prove a legal interest (Vincze and Varju 2012, 452). The Fundamental Law of 2012 abolished the *actio popularis* and replaced it with a German-style system: abstract review of legislation that political actors could initiate; concrete review based on preliminary questions raised by courts; and an individual constitutional complaint procedure. The constitutional complaint is only permissible against decisions by courts, so that the laws that underlie them cannot be reviewed with this procedure. This changed the character of the remedy, as the law's application through judicial rulings became the focus rather than the legislation itself. Individuals can no longer challenge laws or administrative acts directly (Kovács and Scheppele 2018, 192).

During the drafting of the new Fundamental Law, the Hungarian government asked the advice of the Venice Commission on three questions, one of them, on the *actio popularis* procedure's role and significance. The Venice Commission

made no objections to the abolition of the *actio popularis* if a system of individual constitutional complaints was introduced which would also cover individual acts of the state (Venice Commission 2011b). The Hungarian government stayed, with this change, within the boundaries of European standards.

The prosecution service was also reformed through two laws (Act CLXIII and Act CLXIV, both of 2011). The election of the chief prosecutor would require a two-thirds majority of votes in parliament (rather than a simple majority), and the term of office was increased from six to nine years, with the possibility for re-election. This provided the governing party with the chance to put a loyalist in this position for longer than two legislative terms. This is particulary important, since the prosecution service is hierarchically organized, so controlling the top is an important lever to instigate or prevent prosecutions from happening (Kovács and Tóth 2011, 189). The Venice Commission (2012c) issued a generally positive opinion on the reforms, which it thought to be in line with European standards. However, it thought that the high level of independence of the prosecutor general need to be accompanied by more accountability mechanisms and criticized the prosecutor general's freedom to choose at which court to prosecute a case.

Yet the government did not stop with the Constitutional Court. Act CLXI/2011 reconstituted the Supreme Court under its historic name 'Kúria', and dismissed the sitting President and Vice-President of the Court. The President – András Baka – had frequently criticized the government's judicial policies (Vincze 2015, 448). The act introduced requirements for the President to have had a mandatory period of five years of judicial service in Hungary. While Baka was an experienced judge, he had spent seventeen years at the ECtHR and had not served five years in the Hungarian judiciary. The transitional provisions of the Fundamental Law also terminated the tenures of the President and Vice-President of the

Court three and a half years prematurely. Baka and his deputy retained their status as judges but lost their management positions at the court (Vincze 2015, 446). The former Vice-President sought relief from the Constitutional Court, where he lost narrowly with eight to seven votes (Vincze 2015, 446–447; Kovács and Scheppele 2018, 193).

Ex-president Baka litigated at the ECtHR against his dismissal. In what became one of the most important cases regarding Hungary's rule of law backsliding decided by the grand chamber of the ECtHR. Baka claimed that he had been removed because of statements he had made, violating his freedom of expression (Article 10 ECHR). He also asserted that he was deprived of his right to a fair trial, as the nature of the act as a constitutional amendment deprived him of legal remedy, even at the Constitutional Court (Article 6 ECHR). These two claims were upheld by the ECtHR.

While Baka won the case, his victory was Pyrrhic. The ECtHR only imposed damages of one-hundred-thousand euros (plus tax) on Hungary. It had no power to reinstate the claimant to his office (*Baka v Hungary*, no. 20261/12. ECtHR, 23 June 2016). Vincze (2015) noted that the case only scratched the topic of judicial independence, while Kosař and Šipulová (2018) stressed that the judgment showed that the ECtHR is ill-equipped to deal with structural rule-of-law problems, as opposed to individual human rights abuses.[5]

Another step undertaken to control the judiciary was the introduction of a National Judicial Office (NJO, Act CLXI/2011 on the Organization and Administration of Courts in Hungary). The President of the NJO, appointed by the parliament on a two-thirds majority for nine years, received vast powers of

5. It is noteworthy, however, that there are cases in which the ECtHR did order the reinstatement of Supreme Court judges, see *Volkov v Ukraine*, no. 21722/11. ECtHR, 9 January 2013. In particular, Baka lost his office due to legislative and constitutional changes and kept his judicial office (Vincze 2015, 448; Kosař and Šipulová 2018, 95, 103).

judicial administration. The parliament appointed Tünde Handó as the first President, a former judge who was also the wife of a Fidesz MEP, József Szájer, one of the principal authors of the new constitution (Rozenberg 2012).

The NJO President's powers include the appointment of judges and their promotion and demotion, she could instigate disciplinary proceedings and appoint court presidents. The transitional provisions of 2011, also handed her the power to move individual cases to other courts (Bánkuti, Halmai and Scheppele 2012a, 143). These powers overshadowed those of the National Judicial Council (NJC). The NJC consists of members of the judiciary and was effectively strapped of powers and influence through the reform (Kovács and Scheppele 2018, 192–193). In its opinion on the organization of the judiciary in March 2012, the Venice Commission was very critical of the imbalance between the powers of the NJO President and the NJC. While it accepted the need to reform the old system, it was concerned about the concentration of power:

> The main problem is the concentration of powers in the hands of one person, i.e. the President of the NJO. ... The President is indeed the crucial decision-maker of practically every aspect of the organisation of the judicial system and he or she has wide discretionary powers that are mostly not subject to judicial control. The President is elected without consultation of the members of the judiciary and not accountable in a meaningful way to anybody except in cases of violation of the law. The very long term of office (nine years) adds to these concerns. (Venice Commission 2012b, § 118)

The Venice Commission listed a range of issues that would need amendment, in particular concerning the President of the NJO, but also the retirement age of judges (§ 119).

In another consequential change, the government lowered the mandatory retirement age of judges (as well as notaries and public prosecutors) from 70 to 62 years through Act CLXII of 2011 on the Status and Remuneration of Judges.

This affected 274 judges, or about ten per cent of Hungary's total, including twenty out of seventy-four judges of the Supreme Court and, disproportionately, judges in senior positions, such as court presidents (Halmai 2017, 471). The Venice Commission was critical of the lowered retirement age in its opinion of June 2011 and March 2012 (Venice Commission 2011a, 108; 2012b, § 119).

Under the pressure of the international community, including the EU, which demanded compliance with the Venice Commission, the Hungarian government walked back some of the most controversial points. In October 2012, the Venice Commission issued an opinion on the changes that Hungary had undertaken and whether these were removing the Venice Commission's concerns. In summary, the opinion was more positive towards the reforms. Indeed, the Venice Commission acknowledged that the changes addressed 'most remarks made' in the earlier opinion (Venice Commission 2012d, § 83) and 'constitute[d] a commendable step in the right direction' (§ 85). In particular, the changes balanced the powers of the NJO and the NJC towards the latter, handing oversight powers to the NJC. All in all, the Venice Commission listed 27 improvements (§ 86). However, the President of the NJO retained 'very extensive powers' (§ 88). Two main points remained: first, judges subject to the early mandatory retirement should be reinstated to their office without a special application procedure. Second, the procedure to transfer cases between courts remained problematic. Hungary had argued that this was to balance the workload, however, the presidents of overburdened courts had much discretion in yielding cases to other courts. The Venice Commission listed fourteen detailed points that needed further amendment (§§ 89–93).

The honeymoon with the Venice Commission did not last long. The fourth amendment to the Fundamental Law in March 2013 introduced a range of issues that affected the judiciary and, in particular, the Constitutional Court. Several

provisions that the Constitutional Court had previously found unconstitutional were repeated and lifted to constitutional rank and shielded from further judicial review. The Venice Commission identified five such laws. This was done to the Constitutional Court decisions on the prohibition of retrospective taxation, on banning trainee judges to decide cases and on disallowing the transfer of cases between courts. In one case, the Constitutional Court had previously struck down a provision twice (Venice Commission 2013, § 83). On the Constitutional Court, the Venice Commission commented:

> A series of provisions of the Fourth Amendment raise issues to the constitutional level as a reaction to earlier decisions of the Constitutional Court. Reacting to Constitutional Court decisions by 'constitutionalising' provisions declared unconstitutional is a systematic approach, which was applied already to the old Constitution, then to the Transitional Provisions and now to the Fundamental Law itself. It threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances. (§ 144)

The fourth amendment also entrenched the much-criticized restriction of the Constitutional Court's jurisdiction in budget matters. Perhaps most severe was the restriction that the Constitutional Court, or other courts for that matter, could not refer to the Constitutional Court's previous case-law, based on the old constitution. This did not invalidate earlier rulings, but took away the courts' ability to build on prior decisions that had extended the scope of constitutional provisions, such as the doctrine of the 'invisible constitution' (Kovács and Scheppele 2018, 191–192; Sajó 1995; Tóth 2018; Venice Commission 2013). The Venice Commission hence arrived at a gloomy summary:

> In conclusion, the Fourth Amendment perpetuates the problematic position of the President of the National Judicial Office, seriously undermines the possibilities of constitutional review in

> Hungary and endangers the constitutional system of checks and balances. Together with the *en bloc* use of cardinal laws to perpetuate choices made by the present majority, the Fourth Amendment is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics. (Venice Commission 2013, § 147)

Given the level of international pressure, the government again remedied some provisions in the fifth amendment of the Fundamental Law in September 2013. This included changes to the balance of power between the NJO and NJC, and in particular the abolition of the NJO president's ability to transfer cases to other courts.[6] Yet critics alleged that most of the changes were superficial and did not address the core of the problem (Hungarian Helsinki Committee, Eötvös Károly Policy Institute and Hungarian Civil Liberties Union 2013).

The umpires were captured in the early years of Orbán's rule. From the Constitutional Court, over the *Kúria*, to the ordinary courts and judges via the NJO, the Fidesz government did not leave any lever untouched to tinker with the operation of the judiciary. The Venice Commission followed the developments closely. As Hungary initially backtracked some changes, it became more positive in its assessments. Orbán's government later reinstated problematic measures.

4.5 Debating constitutional change

Within three years, Orbán's government had replaced and then amended the constitution several times and made sweeping changes to hundreds of laws covering a multitude of areas. The European Parliament reacted with a debate and resolution on Hungary's new constitution in 2011. Yet for the time being, Orbán's government enjoyed the protection of the EPP group in the European

6. The fifth amendment also included some changes to election campaign rules and the law on Churches.

Parliament. The rule of law in Hungary remained a partisan issue with Parliament divided between the left and the right, while the Commission had trouble since it found many of the controversial issues not to be covered by Union legislation. The right did not evaluate the changes in Hungary as problematic or felt that disagreements were best solved through dialogue with the Commission.

In July 2011, the European Parliament passed a resolution concerning the new Hungarian constitution (European Parliament 2011b). At the time of the debate, on 8 June 2011, Hungary held the rotating presidency of the Council. Hence, the Hungarian state secretary for EU affairs, Enikő Győri, spoke for the Council:

> the Treaty has not conferred any power on the Council to deal with national constitutions of the Member States. Under Article 4(1) and (2) of the Treaty on the European Union, the adoption of a constitution remains in the exclusive competence of the Member State concerned. Therefore, the Council has not been in a position to discuss the newly adopted constitution of Hungary. (European Parliament Debate, 8 June 2011, Item 11)

This made clear that the Parliament's attention to the topic was outside the acquis as well, since the treaty articles she cited are applicable to the whole EU and not only the Council.

Next, Justice Commissioner Viviane Reding (Luxembourg, EPP) spoke for the Commission.

> The Commission may, however, assess the constitution – as it may any other legal act of a Member State – from the perspective of its compliance with Union law. ... The new Hungarian constitution will enter into force on 1 January 2012 and will require the adoption of implementing measures. Therefore, at this stage, the Commission can only make a preliminary analysis, as the precise view on the interaction of the constitution with Union law and its legal effects can only be fully evaluated when taking into account the implementing legislative, administrative and judicial

> practice based on it. … As I have already explained, all the matters discussed at that time are linked to national competence. We can become competent only when such matters are translated into legislation.

While the Commission acknowledged that constitution-making is a national competence, it stressed at the same time that any constitution needs to comply with European standards. Without knowledge of the cardinal laws and transitional provisions implementing the constitution, the Commission suffered from an information deficit: it had no way of knowing if Hungary, under the new constitution, would comply with the acquis.

József Szájer, one of the architects of the Hungarian Fundamental Law and a member of the EPP spoke next. Addressing the left of the house, 'who forced this topic on today's agenda', he asked:

> Do you find it compatible with the prohibition of discrimination based on birth that the European Union has Member States, such as Spain, Belgium or Sweden, where citizens are entitled to hold high-ranking state positions, for instance that of the monarch, based on their birth? My country's new constitution does not apply such discrimination. Do you find it acceptable that the Union has Member States, for instance the United Kingdom, that do not have a unified written constitution? My country's new constitution is a democratic, written constitution.

While the constitutions of these countries were not the topic of the debate, Szájer invoked them as reference points to put the Hungarian constitution in a more positive light. He went on to invoke Article 4(2) TEU, 'one of the most important principles of the Treaty of Lisbon'. This article affirms 'the equality of Member States before the Treaties as well as their national identities'. Not only was the politics of singling out the new Hungarian constitution problematic, he argued, it rested on shaky legal ground too. Thereby, Szájer gave a legal defence

to the Fundamental Law. 'I would suggest you follow the example set by the new Hungarian constitution in your countries'.

Other EPP members similarly questioned the legal basis of the debate and the focus on Hungary's constitution. Maltese MEP Simon Busuttil found two flaws with the debate: 'It singles out one Member State out of 27, and it concerns a national issue which falls within the sovereignty of Member States'. Manfred Weber, a German who would later become the president of the EPP group, pointed out that 'none of the speakers so far, including the critics, has quoted the constitution to indicate exactly what it is they do not like'. He also invoked the legitimacy of the Hungarian government:

> I would like to state that many of those in positions of responsibility in Hungary today are the people who took to the streets to fight against communism and for liberty. It is simply unacceptable that accusations should be continuously made against these people and that the impression should be created that they are experiencing problems with freedom.

Later in the debate, Weber asked a liberal colleague, who had critisized some rules governing the Hungarian Constitutional Court:

> I would like to ask you whether you are aware that the provisions for the Hungarian Constitutional Court – I am not sure whether you have read the Hungarian constitution in its entirety – are almost identical to those that apply to the Constitutional Court in Germany. Therefore, I wanted to ask you whether the German Constitutional Court is just as undemocratic and worthy of criticism as the Hungarian Constitutional Court?

Because the rules were, at least on the face of it, replicating the rules in Germany, any criticism of them would by extension also be a criticism of the German court. Otherwise, one would hold the two countries to different standards. Casually, he had implied that his colleague might not have actually read the constitution and so lacked proper knowledge of the subject matter.

In its resolution, the Parliament referred six times to the Council of Europe's Venice Commission and asked the Hungarian government to follow its recommendations. In particular:

> the European Parliament shares the concerns voiced by the Venice Commission, particularly regarding the transparency, openness and inclusiveness of and the time frame for the adoption process, and regarding the weakening of the system of checks and balances, in particular the provisions concerning the Constitutional Court and the courts and judges that may put the independence of the Hungarian judiciary at risk (European Parliament 2011b, recital F).

Many of the points raised by the resolution were vague. For example, the resolution requested Hungary to 'guarantee equal protection of the rights of every citizen … in accordance with Article 21 of the Charter of Fundamental Rights, in the Constitution and its preamble' (§ 1c). A few other points, however, were more concrete. Specifically, the resolution asked Hungary to:

> reaffirm the independence of the judiciary by restoring the right of the Constitutional Court to review budget-related legislation without exception, as required by ECHR-based law, by revising the provision on the lower mandatory retirement age for judges and by guaranteeing explicitly the independent management of the judicial system. (§ 1e)

The resolution passed with very similar majorities as the one on the media law and without widespread support of the EPP, splitting the house along party lines. In the debate, the Hungarian government questioned the EU's competence to engage in the matter, accused the other side of applying different standards to different countries. The Council, chaired by Hungary, took the view that national constitutions are outside the EU's competence, and the Commission felt that it could not act without knowing the specific implementing legislation,

as it lacked an appropriate tool to deal with constitution-making in member states.

4.6 Prioritizing infringement proceedings

Except for the matter of the media law, Viviane Reding, the Justice Commissioner, took the lead for the rule of law in Barroso's second Commission. On 17 January 2012, the Commission announced the start of three accelerated infringement proceedings against Hungary concerning the early retirement of judges, the independence of the Central Bank and the Data Protection Authority. To this end, the Commission sent letters of formal notice to Hungary (European Commission 2012a). Following the answers of the Hungarian authorities, the Commission decided to proceed with the cases of the retirement of judges and the independence of the Data Protection Authority, but halted the procedure on the Central Bank's independence to collect more information (European Commission 2012c).

Changes by the Hungarian government strengthened the executive oversight over the Central Bank (European Commission 2012a). In this case, the Commission could rely on Article 130 TFEU that regulates the independence of central banks of member states. Furthermore, in Article 127(4) TFEU, a requirement to consult with the European Central Bank for changes in this policy area was stipulated and evoked by the Commission (Anders and Priebus 2021, 242–243). The Hungarian government only partially complied with the Commission's demands in this case by installing a Fidesz government minister as governor of the Central Bank (Buckley and Eddy 2013), yet the Commission closed the infringement file (Anders and Priebus 2021, 244–245; European Commission 2012b). On 25 April 2012, the Commission announced that it was satisfied with Hungary's response on the Central Bank's independence, but that it was going to

refer the other two cases to the ECJ (European Commission 2012b). Later in 2013, the government doubled down with the fifth amendment of the Fundamental Law by merging the Central Bank with the Financial Supervision Authority, a point the government had earlier abandoned under Commission pressure (Anders and Priebus 2021, 245).

Anders and Priebus (2021) have noted the tendency of the Commission to base infringement procedures on technical legal points. The media law was challenged, albeit not through a formal notice, as an incorrect transposition[7] of an EU directive on Audiovisual Media Services, while the early retirement of judges was seen as a case of violation of the equal treatment in employment and occupation directive (2000/78/EC). The case of the data protection authority meanwhile, relied on Article 8 of the Charter of Fundamental Rights (CFR) as well as Directive 95/46/EC together with Article 16 TFEU (European Commission 2012b).

Early retirement age of judges

While the Hungarian government had undertaken a huge number of reforms that changed the functioning of the judiciary, the European Commission initially focused only on two. First, it noted concerns about the concentration of power in the President of the NJO and their ability to transfer judges. Since the Hungarian government and the Venice Commission had ongoing discussions on the powers of the NJO, the European Commission decided to monitor the situation, rather than start an infringement procedure (European Commission 2012b). Indeed, after criticism from the Venice Commission, the cardinal acts on the judiciary in 2012 rebalanced the powers of the Constitutional Court and NJC and gave

7. Transposition is the incorporation of European Union directives into national legal systems which requires national legislative acts.

the latter more oversight. This was partly reversed in the fourth amendment to the Fundamental Law in 2013 (Venice Commission 2013). The European Commission did not take action on these provisions.

The second area concerned the reduction of the retirement age of judges. This was first dealt with through the national judicial system. The Hungarian Constitutional Court heard an application concerning this law and decided it with seven to seven votes – one of the fifteen judges did not participate – in which all Fidesz appointees dissented and the president's vote broke the tie (Scheppele 2012). On 16 July 2012, the Constitutional Court found the lowered retirement age of judges unconstitutional (Kocsis 2013). However, this did not lead to the automatic reinstatement of all judges, as the court did not offer an effective remedy (Belavusau 2013). A constitutional amendment reaffirmed the provision that the Court had invalidated and shielded it from constitutional review (Kovács and Scheppele 2018, 192).

The Commission started an infringement proceeding in January 2012 and requested an expedited procedure at the ECJ (European Commission 2012a, 2012b). The Commission's application to the ECJ interpreted the retirement age change as a breach of 'equal treatment in employment and occupation', rather than one of judicial independence (European Commission 2012b). Judicial systems were seen as an exclusive competence of the member states and little was available to the Commission in terms of legal text or established case law on judicial independence (Belavusau 2013; Bonelli and Claes 2018; Leloup 2021, 68).

Hungary argued in the proceedings at the ECJ that the Constitutional Court's judgement and finding against the reform had removed the legal issue. Advocate General (AG) Kokott argued that the Constitutional Court's judgement had

not entirely addressed it.[8] The court followed its AG and decided the case on 6 November 2012.[9] Following the judgement, Hungary changed the law on the status and remuneration of judges. Former judges could ask for reinstatement within one month. If they were in managerial positions (other than presiding judges), such as court presidents or vice-presidents, they would only be reinstated to these positions if the roles had not been filled in the meantime. Judges could, however, also choose a severance package and stay in retirement (Halmai 2017, 482–483). Only four of seventeen dismissed court presidents and only a minority of judges returned to their original positions (International Bar Association's Human Rights Institute 2015, 27). The Commission announced on 20 November 2013 that it had closed the case (European Commission 2013a).

In effect, Orbán's government largely succeeded in replacing court presidents and senior judges, giving it the ability to freely choose loyalists to these positions, as well as hiring young judges. While the Commission had intervened quickly, the ECJ had sided with the Commission, and Hungary had technically complied with the judgement, the facts on the ground were little altered by the legal intervention.

The data protection commissioner

The case of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information was another of the three infringement proceedings that the Commission started in the early years. Nevertheless, the case attracted less international attention than the early retirement of judges.

8. C-286/12, *Commission v Hungary*, opinion of AG Kokott, ECLI:EU:C:2012:602, §§ 22–23.

9. C-286/12, *Commission v Hungary*, judgement, ECLI:EU:C:2012:687.

The Parliamentary Commissioner acted as an advocate for data protection and freedom of information, as an ombudsperson, and as an enforcer and was elected with two-thirds majority for a six-year term by the Parliament. In one of the more politically salient cases, the Commissioner objected, in 2011, to certain practices of data collection in one of the government's 'national consultations' (Jóri 2013; Scheppele 2016).

The Hungarian government replaced the Parliamentary Commissioner's office with a 'National Agency for Data Protection and Freedom of Information' from the start of 2012. The Commissioner received the draft bill and was given one day to provide comments. In the process, the Commissioner's tenure was ended prematurely, and the head of the new National Agency was appointed by Viktor Orbán with the consent of the country's President (who, himself, had been elected by Orbán's parliamentary party). The staff of the Parliamentary Commissioner were laid off and only some of them were rehired by the new Agency. The last Commissioner, András Jóri, commented later that the draft law contained some questionable, yet easily amendable, provisions, which could have been included to provide a bargaining chip that the government could sacrifice if the European Commission later raised concerns (Jóri 2013).

After receiving letters from several Hungarian NGOs, the European Commissioner indeed started an accelerated infringement procedure in January 2012 (Jóri 2013; European Commission 2012a). In March of that year, the Commission followed up with a reasoned opinion (European Commission 2012c) and referred the case to the ECJ in April 2012, citing concerns about the independence of the new data protection agency (European Commission 2012b). In 2014, the ECJ followed the Commission and decided against Hungary, ruling that the dismissal of the data protection commissioner violated the directive (European

Commission 2014b).[10] This did not lead to the reinstament of Jóri, but only to him receiving financial compensation for his dismissal (Anders and Priebus 2021, 254). Thus, in this case, too, the Commission's legal victory did little to halt backsliding in Hungary.

Article 7

In his 'State of the Union' address in September 2012, Commission president Barroso spoke about the rule of law:

> In recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check.
>
> But these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments – not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of article 7 of the Treaty. (Durão Barroso 2012)

Barroso recognized the threat to Article 2 values, but did not name and shame any specific member state. He pointed to institutional weakness, by creating a dichotomy between 'persuasion' on the one hand, in which a member state would need to go along with the Commission's demands, and Article 7 on the other hand, that he upgraded to a 'nuclear option'. Given the existence of the 'preventative mechanism' of section 1, which lacks consequences apart from shaming and addressing 'recommendations' to a member state, the nuclear analogy of Article 7 seems surprising. Perhaps the analogy is better understood in another way: namely, that nuclear weapons are not an alternative to other weapons, given the 'nuclear taboo' surrounding their use (Tannenwald 2007).

10. Case C-288/12 *Commission v. Hungary* ECLI:EU:C:2014:237.

In that sense, Barroso's analogy might have actually reinforced the idea that Article 7 was not to be used.

The Justice Scoreboard

Besides the infringement procedures pursued by the Commission and the option of Article 7 that it was not willing to use, in 2013 the Commission created the 'Justice Scoreboard', an annual report comparing the justice systems of the EU member states. The goal was to 'promote effective justice and growth' (European Commission 2013b). The Justice Scoreboard was an attempt to find a monitoring system for member states' judiciaries that would collect information, while treating every member state equally. Therefore, the Justice Scoreboard only uses quantitative indicators, which are provided by the member states themselves and not independently collected.

Due to these limitations, the Justice Scoreboard remained a useless tool for assessing the actual independence of member states' judiciaries (Jakab and Kirchmair 2021). In the first iteration of the Justice Scoreboard, Hungary managed to surprise by performing highly in several categories, due to outdated data from 2010 (Nielsen 2013). The findings of the Justice Scoreboard have since been incorporated in the European Semester (Besselink 2017, 135), an annual process of budget and policy-coordination. It is hence a governance tool (Dori 2015). Nevertheless, the Commission did at least try to address the criticism that it did not treat member states equally when it came to their judiciaries.

4.7 Majorities against democratic backsliding

While the Commission engaged the Hungarian government with infringement procedures, Parliament held two further debates and passed two more resolu-

tions. Compared to the focus of the Commission's infringement actions, the Parliament took a more broad-brush view of Hungarian backsliding.

Recent political developments in Hungary

On 18 January 2012, the day after the Commission announced the start of three infringement proceedings against Hungary, the European Parliament debated 'recent political developments in Hungary'. It was a high-profile debate, in which Viktor Orbán participated personally and which lasted for more than three hours.

At the time of the debate, Denmark had taken over the Council presidency from Poland. The presidency's representative, Minister of European Affairs, Nicolai Wammen, struck a very different tone to the Hungarian presidency in the earlier debate on Hungary's constitution.

> The Presidency is very well aware of the concerns which have been expressed by Members of this House over some aspects of the legislation recently adopted in Hungary, including the new constitution. Let me be absolutely clear: all EU Member States must comply with the rules of the Treaty. ... Rule of law cuts both ways. Member States' compliance with EU law must be ensured, but the process must be based on a solid and fact-based analysis and there should be a dialogue with the Member State. We therefore welcome the fact that the Commission has issued its legal assessment of the Hungarian laws. ... I therefore expect that Hungary will meet the obligation it has accepted as a Member of the European Union. (European Parliament Debate, 18 January 2012, Item 21)

The presidency thus acknowledged concerns, which the Council had earlier seen as outside the purview of the EU.

In the parliamentary debate, Commission President Barroso spoke about the Commission's concerns. He explained that the Commission had raised concerns about the cardinal laws at the drafting stage, but that the Hungarian govern-

ment had not changed course. Then he spoke at length about the infringement proceedings the Commission had started:

> Today I received a letter from Prime Minister Orbán, reacting to the three Commission decisions. He has indicated to me his intention to modify the relevant legislation and to work with the Commission in the coming days in order to find legal solutions to the issues raised. ... In fact, beyond the legal aspects, some concerns have been expressed regarding the quality of democracy in Hungary, its political culture, the relations between the government and the opposition, and those between the state and civil society. I strongly appeal to the Hungarian authorities to respect the very principles of democracy and freedom and to implement them: not only in terms of norms but also in practice and in the political and social life of the country. These are matters where political judgment is more difficult, and sometimes – let us be honest – ideologically polarised. But I believe that all democratic political forces have an interest in working together for the consolidation of a Hungarian democracy. (European Parliament Debate, 18 January 2012, Item 21)

Barroso highlighted that Hungary showed willingness to engage with the Commission's demands on the three issues where it had started infringement proceedings. But the problems ran deeper. Not all concerned conflict with EU law – there were political problems as well that required political, not legal solutions. This could only be achieved by cooperation with Hungary, not enforced against the Hungarian government's will.

Viktor Orbán asked to join the parliament debate. It was the first time he engaged with critics in the European Parliament. 'I thought it appropriate to be at your disposal, so that you may learn firsthand about the intentions of the Hungarian Government', he told the Parliament.

> Let me tell you that I am not surprised at the increased interest shown in Hungary. Our country has undergone a comprehensive, deep, magnificent and exciting reform over the past one and a half years. The reform was justified and urgent. In 2010 our country

> was on the verge of economic collapse. ... We were the last of the formerly occupied countries to enact a new constitution in place of the Communist one adopted in 1949. ... Considering the extent and rate of the transformation I, together with everyone else in Hungary, consider it natural for disputes to emerge.

He admitted to far-reaching reforms, but framed them in a positive light. He drew further legitimacy from the fact that the constitution that he overhauled was the one imposed on Hungary by the Soviet Union. Orbán normalized the political conflicts that arose due to the reforms:

> We implemented structural reforms and reorganised the governmental system, the system of municipal governments, public administration, the justice system, education, health care, taxation and public contributions, the pension system and the social security system. We reorganised everything that was generating sovereign debt in Hungary. This naturally entailed the injury of interests.

Orbán pointed out that he had sent a letter to Barroso and that a top-level meeeting had been scheduled, which would bring 'quick results'. None of the objections of the Commission were about the Fundamental Law, but only regarding transitional provisions, he explained. (This should not be a surprise, given that the Commission had taken the legal view that national constitutions are outside its competence.) Finally, he asked for the European Parliament's support for 'the major transformation and restructuring that we are in the process of completing in Hungary'.

Joseph Daul, then the president of the EPP group, pointed out Orbán's mandate for reform. 'Hungary was the last central and eastern European country to have kept its 1949 Stalinist constitution'. Furthermore, he highlighted the Commission's role as 'guardian of the EU treaties', to which the EPP group would 'defer'.

József Szájer, in his debate contribution, drew on his personal and his party's history in the fight against communism.

> I was a young lawyer when I began my fight for freedom against a dictatorial Communist regime. This freedom we did achieve. It is thanks to this that today Hungary is a European democracy. To this day Fidesz has always stood up for this freedom, no matter what you might say. Today Hungary is a democratic Member State of the European Union and abides by the EU's rules. If the Commission says that Hungarian law is in conflict with EU law, we listen to its opinion and change the law. We demonstrated this over the recent period. In the case of the Hungarian media law we did so within a few weeks.

He then continued to address the criticisms:

> the attacks against Hungary are an indication that there is a task we here in the European Parliament and in the European Union have failed to fulfil, namely to acquaint ourselves with each other. You do not know Hungary. The accusations that are largely published in newspapers and other media are untrue. We can provide evidence regarding every single point.

This points towards a strategy that the Hungarian government developed and perfected: overloading their international counterparts with detailed information, which was nearly impossible to independently verify and thereby using an informational advantage. This often changed the frame of the debate. For instance, Frank Engel, a Luxembourgian EPP member, observed:

> in December, the European Commissioner, Ms Reding, sent the Hungarian Minister of Justice a letter requiring him to explain a certain number of things. Just a few hours later, the Hungarian Minister replied to this letter by means of a 19-page mail.

Manfred Weber (EPP) praised Viktor Orbán for his initiative to join the debate and stay longer than some critics. But he also took aim at the broad-brush approach of his liberal counterparts:

> Mr Verhofstadt [the leader of the ALDE group] says that this is not about individual legal details. It is about the fundamental question of whether Hungary is still democratic. ... If anyone has a criticism, they must substantiate it objectively ... and not simply claim that someone has acted undemocratically.

This rhetorical device steered the debate away from big questions, towards smaller, granular issues, in which the Hungarian government could play out its informational advantage. Fidesz member Kinga Gál lamented 'double standards' in that the left side of the Parliament had not condemned human rights violations by the former socialist government in 2006. This too would become a common theme in the Hungarian government's international communication. With the Parliament divided between the left and the right groups, it was easy to brush off attacks as politically motivated and biased.

In his final statement, towards the end of the debate, Viktor Orbán downplayed the conflict with the Commission. There was no disagreement about judicial independence, he claimed, only on pension reform. Both sides were very close to agreement on the Central Bank and had only minor disagreements. The old constitution had failed on various fronts and required replacement. Finally, he lamented that 'in today's debate I was on many occasions presented not with arguments and concrete facts, but with absurd factual errors, vehemence, rage and prejudice'. It was not the Hungarian government, according to him, that stood in the way of an honest, factual debate, but the critics who were blinded by their partisan interests.

The European Parliament finally passed a resolution with a similar set of votes as the earlier resolutions, crucially, without sizeable support from the EPP. In its resolution, the Parliament 'expresse[d] serious concern at the situation in Hungary in relation to the exercise of democracy, the rule of law, the respect and protection of human and social rights, the system of checks and balances,

equality and non-discrimination' (European Parliament 2012, § 1). It asked its conference of presidents 'to consider whether to activate necessary measures', and specifically, whether to activate Article 7(1) TEU (§ 7). The resolution also tasked the Committee on Civil Liberties and Home Affairs (LIBE) to prepare a report on the implementation of the Parliament's demands (§ 6).

The Tavares report

The LIBE committee prepared its own-initiative report under the rapporteurship of Rui Tavares, hence its informal name. Tavares, a Portuguese MEP, became the rapporteur of the report as a reward for changing allegiance from the post-socialist GUE/NGL group to the Greens. 'He was entitled to a high-brow report' (Interview 14). The *Tavares report* was formally concerned with the 'situation of fundamental rights: standards and practices in Hungary' and adopted by the European Parliament on 3 July 2013 following a plenary debate the day before. It was the last procedure on Hungary's backsliding in the seventh term of the Parliament and the most important one.

The resolution amounted to 27 pages in the English version of the Official Journal, significantly exceeding the usual length of resolutions in the European Parliament. Normally, resolutions are only allowed about six pages, due to the necessity to translate the text into all of the other twenty-three official languages, but each committee receives an allowance of reserve pages that they can use freely. The report addressed a wide range of issues, including the Fundamental Law, its transitional provisions, the 'extensive use of cardinal laws', parliamentary procedure, 'weakening of checks and balances', judicial independence, electoral laws, media laws, minority rights, and freedom of religion. The recitals described the developments in Hungary, which were then assessed in the main text, which also addressed recommendations to the other

EU institutions and the Hungarian authorities. Finally, it contained requests for the other institutions to follow up on its recommendations.[11]

The report singled out the European Council as the only EU institution that had not addressed the situation in Hungary (European Parliament 2013, §§ 66–69). The resolution asked the Commission:

> to focus not only on specific infringements of EU law, to be remedied notably through Article 258 TFEU, but to respond appropriately to a systemic change in the constitutional and legal system and practice of a Member State where multiple and recurrent infringements unfortunately result in a state of legal uncertainty, which no longer meets the requirements of Article 2 TEU. (§ 70)

Thereby, the Parliament recognized a weakness in the Commission's enforcement strategy. Infringement proceedings could address individual problems, but they were ill-suited to deal with a wide range of problems stemming from a broad autocratization strategy.

The systemic alternative to infringement proceedings was the Article 7 procedure. The Tavares report addressed this possibility. The Parliament:

> ask[ed] the Conference of Presidents to assess the opportuneness of resorting to mechanisms foreseen by the Treaty, including Article 7(1) TEU, in case the replies from the Hungarian authorities appear not to comply with the requirements of Article 2 TEU. (§ 87)

Nevertheless, Parliament fell short of calling for the activation of the procedure. Interestingly, no group has tested support for this particular provision with the request of a roll call vote. Instead, it asked for an update on the Commission's communication on Article 7 from 2003 (§ 70, indent 10).

The report recognized the legal limits of the EU. It identified

11. EU documents following the inter-institutional style guide start with a preamble consisting of the 'citations' followed by the 'recitals', before the main text starts.

> the urgent need to tackle the so-called 'Copenhagen dilemma', whereby the EU remains very strict with regard to compliance with the common values and standards on the part of candidate countries but lacks effective monitoring and sanctioning tools once they have joined the EU. (European Parliament 2013, § 73)

It also suggested 'a new mechanism to ensure compliance by all Member States with the common values enshrined in Article 2 TEU, and the continuity of the "Copenhagen criteria"' (§ 79). To tackle the 'Copenhagen dilemma', the resolution suggested creating a politically independent 'Copenhagen Commission' (§§ 79–81). More general, the resolution called

> for closer cooperation between Union institutions and other international bodies, particularly the Council of Europe and the Venice Commission, and for use to be made of their expertise in upholding the principles of democracy, human rights and the rule of law. (§ 75)

This call to use the 'expertise' of the CoE and Venice Commission hints at Parliament's perception of an epistemic problem in the EU institutions, which seemingly were unable to monitor and analyse developments in member states by themselves. Perhaps most prominently, the resolution asked the Commission to create an 'Article 2 TEU/Alarm Agenda'. Under this agenda, the Commission would monitor the implementation of the Parliament's recommendations and not negotiate any other policies with the member state in question while doing so (§ 70). As a follow-up, the report suggested an 'Article 2 Trilogue', of Parliament, Commission, and Council, to try to involve all three institutions in work on a solution (§ 86).

Parliament debated the resolution in plenary session on 2 July 2013. The Parliament's president noted the absence of a representative of the Council. While the Council, under the presidency of Lithuania, had not joined the debate, Viktor Orbán had come. The rapporteur, Rui Tavares, pointed at the rapid change

of legislation in Hungary. It was not only the speed, but the trend that concerned him:

> We reach a very important conclusion in this report: that the changes in Hungary have been systemic, that they have a general trend and this general trend moves away from the values in Article 2. This is a very serious conclusion and one that needs to be taken seriously by all institutions concerned. (European Parliament Debate, 2 July 2013, Item 14)[12]

The problem, according to this analysis, went beyond a few legal changes. The problem was rather of a 'systemic' nature. Hence, it could not be solved by the Parliament alone, but needed the joint effort of the Council and Commission.

In his contribution to the debate, Commission president Barroso pointed out the Commission's concerns about the fourth amendment of the fundamental law. The Commission had raised three concerns with the Hungarian authorities:

> Firstly, there is an ad hoc tax for the European Court of Justice's judgments, entailing payment obligations. Secondly, there is the regime for transferring cases between courts. Thirdly, there are the restrictions on the publication of political advertisements, specifically during European Parliament election campaigns. In order to address these concerns, the Hungarian authorities have offered solutions for the first two issues ... On the restrictions of political advertisements, ... the Commission and the Hungarian authorities are still in contact with a view to finding a satisfactory solution in line with EU law before the start of the next electoral campaign. On 28 June 2013 – last Friday – Prime Minister Orbán sent me a letter indicating the Hungarian Government's readiness to address the Commission's concerns. I welcome this recent information.

12. Debates in the European Parliament are held multilingually and are live-interpreted. Until December 2012, the transcripts were also translated into 23 languages. This has since been discontinued and no official translation exists for plenary debates since 10 December 2012 (Hall 2012). Quotes from originals that are not English from debates since are either my own (for German) or machine-assisted translation.

Here again, Hungary had sent a letter on a Friday in proximity to an important debate scheduled for the following Tuesday, leaving little room for close analysis or follow-up. Nevertheless, Barroso stressed the Hungarian government's willingness to talk: 'I think the presence among us today of Prime Minister Orbán is clearly a sign of their willingness to engage in such a dialogue with Parliament'. Since success was only possible in cooperation with the Hungarian government, it was important for the Commission to continue the dialogue. In cases where the two sides could not agree, the Commission used infringement proceedings and Viktor Orbán had signalled that he would accept the judgements. The Commission's role was then to monitor their implementation.

Viktor Orbán first paid his respect to the European Parliament: 'I have come here today to pay tribute and to express my respect for the European Parliament and for the elected representatives'. He then made remarks on the political nature of the vote in front of the Parliament. It was the socialists, the liberals and the greens that were voting against Hungary, for selfish political reasons. The Tavares report was 'seriously offensive to Hungary': 'This report is deeply unfair to Hungary and the people of Hungary. It openly applies a double standard, does not recognize, belittles and downgrades the huge work with which the Hungarians renewed their country'. The report was problematic due to its unfairness, but even more so, it was dangerous:

> Your decision, which is due tomorrow, is the real threat to the future of Europe. The proposal contained in the report violates the founding treaties. It seeks to set up a specific institution, unknown to the EU Treaties, which would place a Member State of the European Union under its control and guardianship. This ignores the powers of the European Parliament, the division of responsibilities between the institutions of the European Union and the legal balance between the Member States and the Union.

In this narrative, the European Parliament had overstepped the powers con-

ferred on it by the treaties, represented the real threat to democracy and the rule of law. The Hungarian people had chosen this government and it acted in their interest. The level of supranational sentiment expressed by the Parliament was not covered by the treaties to which Hungary had ascended.

Orbán went on to leverage Hungary's history as a Soviet satellite state: 'That is why we will fight anyone who uses double standards, who abuses their power and who wants to treat us as second-class citizens. We will fight against those who want to turn our Union into an empire!' Orbán had displayed his own reasonableness and 'respect' by participating in the debate; he tried to delegitimize the report as as a polarized political issue; he had called out supposedly unequal treatment of member states; and he pointed out the real danger for the European rule of law: a European Union exceeding its own and encroaching on member states' powers. Orbán's government had also prepared a ten-page memorandum that refuted claims the Tavares report had made and would be sent to the President of the Parliament (Government of Hungary 2013).

The sharpest criticism of the Hungarian government came from the liberal ALDE group. Guy Verhofstadt (Belgium) made a point in favour of the use of Article 7: 'I think, based on this report from the Venice Commission, there is already a reason to use Article 7(1) of the Treaty and that in fact it is necessary to launch that procedure'. Not only did he refer to and embrace the expertise of the Venice Commission, but he also constructed his argument with reference to earlier experience:

> Let us be honest – what we are doing here is making the same mistake we made when we talked about the Stability and Growth Pact. Do you remember, in 2003, Germany and France not applying the rules of the Stability Pact and what that created in the end? An enormous economic crisis and a euro crisis.

He drew the line from the disregard that the two largest member states had

shown to the rule that limits the government deficit to three per cent of GDP to the concurrent debt crisis in the Eurozone. Ignoring problems in their infancy could create unforseeably large problems later, he insinuated.

But not everyone, even on the left, joined in the call for Article 7. A Green MEP from Austria, Ulrike Lunacek, remarked: 'Much as I would love to have it here, Article 7(1) does not work. We need new mechanisms and that is up to the Commission'. French GUE/NGL member Marie-Christine Vergiat, similarly pointed to the limitations of Article 7: 'All those who work on these subjects know full well that Article 7 is an atomic bomb, almost impossible to trigger effectively, given all the clever locks, I would say, put in place by the authors of the Lisbon Treaty.' While she used the very commonplace nuclear analogy, it was not just an 'atomic bomb' due to its strength and destructive potential, but because the many safeguards in place preventing its launching made it very hard to use. Speaking for the Hungarian socialist opposition, Csaba Sandor Tabajdi (S&D) praised the report, but he also made clear that they were against Article 7: 'The Hungarian Socialists clearly welcome the fact that the report does not propose sanctions. This is right, since the European Union does not wish to punish the Hungarian people, it has neither the intention nor the right to do so'. This raised an interesting problem: that the Hungarian national opposition was not a natural ally of those demanding sanctions against a member state.

In their defence, members of the EPP pointed to double-standards, alleged factual errors, and the Parliament's limited compentencies. For Fidesz's front-man in the Parliament, József Szájer, the Parliament was risking its reputation:

> A European refuses to measure one country by different standards from another. Anyone who breaks the rules that the Union has agreed upon is rightly asked by others to abide by them, but it is unacceptable that Hungary should be held accountable for something that has never been done before to any EU Member State. The EPP says that before Hungary is put under trusteeship,

> all members must be vetted, otherwise the Parliament will be discredited.

Later in the debate, József Szájer received a call to order from the Parliament's President Martin Schulz (Germany, S&D) for remarking that those accused in Stalin's show trials were given more time to defend themselves than Hungary's representatives in this debate. Fidesz member Kinga Gál, meanwhile, who had submitted over 175 amendments at the committee stage, alleged that the report was full of factual errors:

> And the text we are voting on is a judgment that does not take into account either the truth or the facts, and cannot bring up a single concrete evidence, a single violation of the law. It is unfair, full of mistakes and slip-ups, proof of double standards, since it objects to the practice of other member states only in the case of Hungary, not in theirs.

French Christian Democrat Véronique Mathieu Houillon (EPP), reminded the rapporteur that 'the recommendations of [the resolution's] Article 71 go beyond our competences'.[13] Anna Záborská, a Slovak EPP member, said that 'the Tavares report turns this Parliament into a tribunal that investigates, accuses and pronounces judgment at the same time'. The German MEP Manfred Weber (EPP), acknowledged that Hungary had to accept the 'rules of the game'. But it had done so, he said, effectively implementing the changes that Commissioner Reding had demanded. And if there was a difference of opinions in the end, it was up to the ECJ to have the last word.

From the debate, one could get the impression that the EPP stood firmly behind Hungary. While this was true for most, a few were unsure. The Portuguese MEP Carlos Coelho had a nuanced view on the report and the Hungarian govern-

13. Article 72 in the final, amended resolution. This article makes a long list of recommendations to the Hungarian government.

ment. He accepted that it was a legitimate matter for the European Parliament to uphold the common values and praised the work of the rapporteur. He pointed at the need to be fair and apply the same standard to all member states. But at the same time:

> I would have liked the rapporteur to have underlined better the fact that the Hungarian Government has backtracked on different points. This is very important, not only because it recognizes that the wrong solutions had been adopted, which denies the conspiracy theory, but because it underlines how positive the intervention of community institutions has been. ... That's why, for now, I'm giving the benefit of the doubt and will abstain on the final vote. I want to believe that common values will be reinforced and respected.

Abstentions, however, were disregarded in the tally, meaning they did not stand in the way of Parliament adopting a proposal. In fact, a decidedly larger number of MEPs abstained than in the earlier votes, increasing the share of votes against Hungary to nearly sixty per cent. This was still several percentage points away from the two-thirds that would need to be achieved to trigger Article 7(1) TEU. But it was a step towards a broader consensus for European action to defend democracy and the rule of law in Hungary. A report which listed in detail the rule of law violations in Hungary moved the Parliament to be more critical of Orbán's government. 'Europe finally said No to Viktor Orbán' (Scheppele 2013a).

4.8 The Rule of Law Framework

In March 2014, the European Commission published a communication entitled 'A new EU Framework to strengthen the Rule of Law'. Such a 'communication' is not a legal act in itself, but sets out the Commission's interpretation of existing legal provisions. The communication stated that 'recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as

a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern' (European Commission 2014a, 2). It cited Barroso's reference to Article 7 as a 'nuclear option'. The communication took a broad approach towards defining the rule of law, linking it with democracy and fundamental rights. Fundamental rights and democracy were, therefore, subsumed under the label of the 'rule of law'. It was the first comprehensive definition of the concept undertaken by the Commission. At the same time, as Magen (2016) has pointed out, it was an attempt to de-politicize the more political concept of 'democracy' and turn it into a 'legal' issue.

In its communication, the Commission admitted to the limitations of infringement procedures: they could only address a member state's 'breach of a specific provision of EU law' (European Commission 2014a, 5). The new framework would 'address threats to the rule of law which are of a systemic nature' (5). In an interview, a Commission official has confirmed to me that the creation of the 'Rule of Law Framework' was a direct response to the developments in Hungary, where the Commission found Article 7 difficult to use (Interview 20). The Framework set up a three-stage process, with a structured dialogue with the member state at its core. This reflects the experience with Hungary, which initially was responsive to Commission feedback (Interview 20; Closa 2019). Creating a more systematic dialogue looked like a means to slow or reverse backsliding. The Framework's application was based on 'an objective and thorough assessment of the situation at stake' (European Commission 2014a, 7), pointing to the epistemic difficulties presented thus far, where a member state could exploit the information assymmetry to cloud the factual basis of European procedures, as suggested by my theoretical framework.

The Commission would invoke the Framework by sending to the member state an assessment that it would make public. Then, the Commission could

issue 'rule of law recommendations' to the member state with a deadline for addressing them. The Commission would follow-up the recommendations and monitor their implementation and, if the member state failed to address them, the Commission could use the Article 7 mechanisms. Legally, the Framework would not block the direct invocation of Article 7, but politically it is hard to imagine a situation in which the Commission would invoke Article 7 without a prior dialogue according to the Framework.

In May 2014, however, the Council Legal Service came to the conclusion that the process set out in the Commission's Framework communication was not compatible with the treaty as it lacked a legal basis and exceeded the competencies of the EU (Council of the European Union 2014a). The Council, hence, challenged the legality of the Commission's Framework to deal with the rule of law in member states. The result was that the Commission operated for years in a legally ambiguous borderland until it based its actions on Article 7 directly (Interview 20).

4.9 Dealing with the unimaginable

Viktor Orbán was no stranger to the European political establishment when he became Prime Minister in 2010. His election appeared as a democratic correction to the scandal-ridden eight-years government of the Socialists. Voters endowed Orbán with an extraordinarily strong majority, which afforded him a high-level of legitimacy in his dealings with Brussels and Strasbourg. Orbán's government made many changes to Hungary's institutions, normalized constitutional amendments as a mode of politics, and staffed 'independent' offices with loyalists. Nevertheless, many of the changes did not make it onto the European agenda, i.e. EU institutions took no counter-measures. My theoretical framework guides us towards answering why.

First, the frequency and scale of changes overwhelmed European institutions. The Hungarian government did its best to exploit the information deficit of the EU, by announcing changes last-minute, moving the frames of the debate from systemic issues towards granular, individual problems, where comparisons could be made with institutions in other member states, and exposing the European Union of charges to applying unfair double standards. At a more detailed level, the government and its allies accused critics of factual errors. By attending the debates at the highest political level, the Hungarian government and Orbán himself signalled willingness to engage and compromise. Where the Commission applied more pressure, Orbán's government indeed backtracked, albeit rarely in a way that truly abandoned its authoritarian agenda. Instead, the government sought compromises to achieve the systemic effect through other means that circumvented the legal objections. It could fully enjoy its tactical advantage in the early years.

By preparing a detailed report, the Parliament tried to overcome its apparent information deficit. Setting out the problems with Hungary in the Tavares report increased the support for the resolution by about five percentage points. Whereas in the three earlier resolutions the majority had changed little, the Tavares report was able to shift the number of MEPs willing to call out backsliding in Hungary. The more principled members of the EPP group were willing to vote for the resolution or at least let it pass by abstaining.

Second, EU actors felt they lacked the right tools to deal with these problems. The Council and Commission felt that some of the matters the Parliament pursued were outside of the acquis and not legitimate subjects of debate or action. This represents different institutional ideal points on the European integration dimension, with the parliamentary majority taking a more supranational position in contrast to the Council's inter-governmental preference for member

state competencies and a strong subsidiarity principle. The EU treaties contain Articles that are in tension with each other and the different institutions tended to emphasize different Articles, leading them to different positions on what the EU could or should do.

Article 7 TEU was discussed occasionally, but only the liberal ALDE group embraced it during these years. With no support from the Commission, the Council, the left and right members of Parliament, or even the democratic opposition in Hungary, there was no realistic case for using the Article successfully. The Commission even made nuclear analogies, further delegitimizing the use of Article 7. Hence, there was widespread support for seeking new instruments to tackle backsliding. The Commission focused its energy on infringement proceedings and formally instigated three procedures, although only two of them were brought to the ECJ. Although the Commission won both legal proceedings, Orbán still achieved his political goal of replacing large numbers of judges and, especially, court presidents. In areas such as Hungary's Fundamental Law or the independence of the judiciary, infringement procedures were difficult to use given the lack of EU law in these areas.

Third, the European Parliament was the institution most willing to take on and call out the Hungarian government. Nevertheless, the votes traced party lines closely, with the EPP overwhelmingly backing Orbán. This reflects the level of political capital that Fidesz enjoyed at the very beginning. Due to its large majority, Fidesz had a relatively large number of MEPs, which gave it influence within the EPP group. The Council remained largely passive during this period and adopted a wait-and-see approach. The Commission lacked political support from either the Parliament or the Council for more serious action (such as Article 7 TEU), and felt encouraged by the possibility to mend at least some of the problems by engaging directly with the Hungarian government.

Therefore, during the seventh term of the European Parliament (2009–2014), little action was taken to sanction Hungary. A consensus emerged that existing tools were unsuitable to deal with the problem of Hungarian backsliding, laying the groundwork for further tool creation. Vis-à-vis Hungary, there was a focus on engagement and persuasion, with the systemic risk being ignored or downplayed. Decision makers may have hoped that Orbán might lose the next election, as he had done before, sitting out the problem. But this – as we know in hindsight – proved to be an elusive hope.

This chapter has considered the start of the supranational tug of war. But in the next years, the topic of the rule of law in the European Union only grew in importance as PiS in Poland emulated, to some degree, Orbán's playbook. This changed the dynamic in the EU profoundly. The eighth term of the European Parliament is considered in the next two chapters. While the case studies of Poland and Hungary are, henceforth, diachronical and interlinked, I consider them in turn. The focus of Chapter 5 are the attempts of the Commission to rein in the Polish government. In Chapter 6, I consider the difficulty of finding appropriate solutions to Hungarian backsliding.

5
Limits of Engagement

THE JUNCKER COMMISSION ON POLAND

The tug of war for democracy in the European Union intensified during the eighth term of the European Parliament and during the Commission presidency of Luxembourgian Jean-Claude Juncker. In the previous term, Hungary was alone in systematically dismantling democracy and the rule of law. In 2015, Jarosław Kaczyński's *Law and Justice* party (PiS) won first the presidential and then the parliamentary election in Poland and quickly started attacks on the independence of courts, thus becoming a second problem for the EU. Facing the heavy-weight Poland – the sixth largest country by population in the EU28 – complicated the tug of war and resulted in very different reactions from Brussels and Strasbourg. This Chapter explores the first of two diachronical and concurrent case studies in the period from mid 2014 to mid 2019: the rule of law backsliding of PiS in Poland and the EU's reactions to it. In Chapter 6, I focus on Hungary during the same period and on horizontal initiatives of tool creation.

In Chapter 2, I presented a model of the EU's decision-making process that involves three main steps: the evaluation of a backsliding threat, the search for a suitable, that is (legally and politically) appropriate tool, and the building of necessary political support available to sanction backsliding. However, the backsliding member states, being members of the EU, participate in the decision-making and attempt to avoid the imposition of costs that could desta-

bilize their regimes. I also argue that the opportunity structure and backsliding resources of member states vary, which explains different responses of the EU against them.

Chapter 4 has shown how in the case of the first four years of Hungarian backsliding, the EU's reaction was half-hearted, due to a lack of understanding of the regime's backsliding, the underestimation of how far Orbán was willing to go, and an overly optimistic appreciation of dialogical engagement with his government. At the same time, the European Union lacked tools that decision-makers found appropriate. The Commission found infringement proceedings hard to use since areas of backsliding were often not covered by the Treaties, while in the cases where infringements were pursued, the Hungarian government responded with technical changes that did not remedy the rule of law situation. At the same time, Article 7 TEU was seen as not appropriate to the kind of policies Orbán had implemented and too escalatory. Even within the European Parliament, only a minority considered its use. Nevertheless, with the Justice Scoreboard the Commission had created a monitoring tool to assess the functioning of national judiciaries and with the Rule of Law Framework, it had come up with a Framework that could end in Article 7's use. With this, it could create a structured discussion around written documents that assessed the rule of law problems in a member state. The Council Legal Service had argued that this tool has no justification under the treaties, thus creating a legal limbo over its use.

In this Chapter, I turn to the case of Poland. As presented in my theoretical framework, the EU's reaction to Poland's democratic regression was swift as European policymakers were very alert to the threat early on. PiS attempted to follow Orbán's playbook, which was known already to European policymakers. Based on their recent, prior knowledge of Hungary, they were aware to early

stages of backsliding and took the issue seriously. PiS's backsliding ressources were more limited than Fidesz's, so it had to resort to more brute tactics, while it faced more open opposition from the courts and civil society, which spread awareness internationally. The government had less opportunities to legitimate its actions. I describe the steps taken by the different EU institutions to address the situation in the period between 2015 and 2019 and demonstrate how they followed the logic of my theoretical argument, ending with hearings in the Council in 2018.

Had their been no creation of new tools in the last term, EU reactions other than Parliamentary debates would have been unlikely. Armed with the new Rule of Law Framework, the Commission was able to publicly engage the Polish government. Poland's crisis was the ideal test case. When, if not now, should it use it? Alternatives were lacking as the attacks against its judiciary were little covered by EU law. Article 7 TEU would have still been an inappropriate escalation coming out of the blue. The Rule of Law Framework created an opportunity for the Commission to produce documents outlining Poland's rule of law crisis, which served as an evidentiary basis for discussions at the Council and in Parliament and put the topic on the EU's agenda.

During this engagement it quickly became clear that the Polish government was not willing to negotiate in good faith. Compared to Hungary, the Polish government started with less political capital in the Parliament, lacking the support of a strong group. When even the member states grew frustrated with the Polish government, the Commission felt emboldened to invoke Article 7. The Commission triggered Article 7, but the first Council hearings on Article 7 in 2018 quickly showed the limitations of the format.

In Section 5.1, I narrate the rise of PiS in Poland and provide a sketch of Poland's political system and of PiS's regime. This gives a clearer idea of its

starting position, political capital, and opportunity structure, especially when compared to Orbán's Hungary. Kaczyński did not waste time: immediately after controlling the government, he started attacking the Constitutional Tribunal followed by the rest of the judicial system (Section 5.2).

In the case of Poland, the Commission reacted relatively fast by using its Rule of Law Framework for the first time, thereby, it put the spotlight on PiS's backsliding and brought political attention to it. Initially, PiS reversed course on a few points and engaged in tactics to appease the Commission. The Commission, however, had learned from past policy failure in Hungary and did not let Poland off the hook easily. The European Parliament broadly supported the Commission's actions (Section 5.3).

In Section 5.4, I show that once PiS started targeting the judiciary more broadly in 2017, the EU was ramping up its efforts to avoid a situation in which the Polish government created facts that could not be changed afterwards. It was very aware of the threat that this constituted. Some of the measures could be targeted by infringement proceedings, in others, this was legally challenging. Thus, the Commission applied a conditional logic to the Rule of Law Framework application and threatened Poland with Article 7. Since the Polish government did not reverse its course, the Commission received signals of support for the use of Article 7 from the Parliament and member states. In 2018, the ECJ decided a landmark case in which it extended the reach of European law to the issue of member state judicial independence. Afterwards, the Commission pursued judicial independence cases more vigorously against Poland.

In 2018, the Council held three hearings on Poland under Article 7. While the Polish government contested the appropriateness of the tool and the correctness of the Commission's information, the main test was whether four-fifths of member states were ready to vote against Poland. Bound by diplomatic customs,

the Council struggled to find a format in which to discuss member states' rule of law fruitfully. Furthermore, while there was initial momentum for Article 7, it became clear that reservations were deep in capitals to put a member state on the spot. Many of the newer member states were at least ambivalent towards Article 7. Thus, the political support for its use was not a given. A majority preferred keeping the procedure alive over forcing a vote. This followed a conditionality logic: like Damocles's sword, Article 7 kept dangling over Kaczyński's head. It could be removed as a reward for good behaviour, while deterring much deeper backsliding on Poland's account (Section 5.5). Section 5.6 concludes.

5.1 The foundations of Kaczyński's power

What I call 'the supranational tug of war' operates on two levels: the European and the national. In Chapter 2, I discussed potential limitations of backsliding regimes to which I return in this section. As the second-mover in the supranational tug of war, Poland's PiS party is often compared with Fidesz in Hungary. Yet while both share many characteristics, their differences warrant discussion as well. In this Section, I briefly discuss the corner stones of the Polish political system, followed by an overview of PiS's history in power, in order to highlight the parallels with the Hungarian case, but also to point out where the cases differ. Finally, this Section describes how PiS regained power in 2015. This is critical to understand PiS's starting position, subsequent trajectory, and the reactions it elicited from the EU, as well as how it engaged with European institutions.

The political system of Poland

The Polish political system is based on its 1997 constitution. The parliament consists of two chambers, the *Sejm*, which forms the lower chamber, and the Senate, the upper chamber. The Sejm has 460 deputies, elected by a proportional

vote (Article 96 Constitution). The Senate is made up of 100 senators (Article 97 Constitution) who are – since 2011 – directly elected using a first-past-the-post voting system in single-member districts. The two chambers have asymmetric powers with the Sejm being the more powerful. The Senate can veto legislation (Article 121(2) Constitution), although this can be overridden by an absolute number of Sejm deputies (Article 121(3) Constitution). Bills that have been adopted by parliament have to be signed by the President of the Republic, who may submit for *a priori* review to the Constitutional Tribunal (Article 122(3) Constitution). The President has a veto on legislation, but the the Sejm can override the veto with a three-fifths majority of the members (Article 122(5) Constitution).

Compared to Hungary, the Polish political system features more checks and balances. The directly elected President has both ceremonial and political powers. In Poland, political power is more distributed through the two chambers of the Polish parliament and decentralization in the provinces (*voivodships*), which involve more actors. The political system of Poland is usually described as a version of 'semi-presidentialism', with a directly elected president, but also a prime minister and cabinet who are accountable to the legislature (Duverger 1980, 166; Elgie 1999, 13). Elgie (2011, 28) classifies Poland as a 'premier-presidential system', one 'where the prime minister and cabinet are collectively responsible solely to the legislature'. The President is, according to the Constitution, 'the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority' (Article 126(1) Constitution). According to section 2, 'the President of the Republic shall ensure observance of the Constitution'. The President is directly elected for a five-year term using a double ballot method (Article 127 Constitution), which ensures that the elected candidate commands support of at least half of the voters.

Kaczyński's return to power

Like Viktor Orbán, Jarosław Kaczyński started his political career fighting against communism. And he, too, *returned* to power. Jarosław Kaczyński had been Prime Minister from July 2006 to November 2007, while his brother, Lech Kaczyński, was the country's President from 2005 to 2010.[1] Jarosław's first stint as Prime Minister was cut short by early elections, which became necessary when PiS's coalition with two other parties broke down. During his short duration in office, several of his main projects, such as a tough lustration act, were thwarted by the courts (Sadurski 2014, 359–361; Kantorowicz and Garoupa 2016).

After Kaczyński's coalition broke in 2007, PiS lost the parliamentary election. Since then, the centre-right Civic Platform (*Platforma Obywatelska*, PO) had ruled, with Donald Tusk as the Prime Minister, a post he left in September 2014 to take up the position of European Council president. It was Ewa Kopacz who led the PO into the two election campaigns of 2015, which swept PiS back to power. In May 2015, PiS candidate Andrzej Duda, narrowly won the presidential election against the incumbant Bronisław Komorowski, an independent who was supported by the PO. Duda received 51.5 per cent of the vote in the run-off election and assumed office in August 2015. This cast doubts on the PO's fortune in the forthcoming parliamentary election in October that year. In that election, PiS won an absolute majority of seats in the lower house, the *Sejm* (235 out of 460), and in the upper house, the Senate (61 of 100).

Even though this electoral victory was remarkable, PiS achieved it through an unremarkable vote share. PiS was victorious with 37.6 per cent of the vote, which was lower than PO's 39.2 per cent in 2011, which failed to produce an absolute majority. A combination of ideosyncratic factors inflated PiS's seat share in

1. Lech Kaczyński died on 10 April 2010 in an aeroplane crash near Smolensk, Russia on an official visit.

2015: three different parties and electoral coalitions narrowly failed to achieve the threshold to enter the Sejm, leading to the discarding of over 16 per cent of votes in 2015 (Markowski 2016). Jarosław Kaczyński had no interest in becoming Prime Minister and conferred the privilege on Beata Szydło, while controlling the government from outside the cabinet (Sadurski 2019, 14–15). After two years, Kaczyński replaced her with Minister of Finance Mateusz Morawiecki (The Economist 2017; Szczerbiak 2017).

Thus, the surprise was not so much the victory of PiS, but the absolute majority it achieved in both houses of parliament. This is in parallel to the fateful 2010 election in Hungary, which gifted Viktor Orbán his two-thirds supermajority. Important differences between the cases concern the position of the governing majority in the Parliament, the intra-coalition politics, and the strength of public support. First, PiS was at the right of the Sejm, lacking a strong right-wing contender able to win seats in 2015, whereas Fidesz, in Hungary, was sandwiched between a divided opposition to its left and right. Second, compared to the dominance of Fidesz in the coalition with KDNP (Enyedi 2016, 212), the Polish *United Right* is a genuine, if unequal, coalition. PiS accounted for nearly thirty per cent of the vote, with the remaining eight per cent coming from its smaller coalition partners and independent candidates who joined the electoral coalition. Within this coalition, PiS occupied the middle ground, between Zbigniew Ziobro's 'United Poland' to the right, and Jarosław Gowin's 'Poland Together' to the centre. Third, PiS's electoral support was far from the absolute majority of votes Orbán could muster. In fact, a clear regional cleavage between the east and the west of the country emerged on the electoral map, with a further urban-rural divide. Fidesz, meanwhile, won nearly all single-member districts across the country.

PiS's peculiar positions

PiS is usually portrayed as a right-wing and populist party with authoritarian streaks. While PiS is TAN, and staunchly anti-communist, unlike typical right-wing parties in western Europe, it slants to the left on redistributive policies (Bill and Stanley 2020). Similar combinations are common in Central Eastern Europe (Tavits and Letki 2009). Since gaining power, PiS has adopted policies such as a generous child benefit,[2] lowered the retirement age to sixty-five for men and sixty for women (from sixty-seven), and exempted young workers from income tax.

In the European Parliament, PiS deputies are members of the ECR group, a eurosceptic and anti-federalist group, to which also the British Conservatives belonged. In the eighth European Parliament, there was an equal number of MEPs of PiS and of the Tories within the ECR, but PiS's dominance grew after the Tories left. With their exit, the group moved to the right, diminishing further in importance in the European Parliament.

Despite some similarities, the differences between Jarosław Kaczyński's PiS and Viktor Orbán's Fidesz are large. First, their regimes have different ends. Whereas some authors argue that Orbán's Hungary is a 'kleptocracy' (Tóth and Hajdu 2018; The Economist 2018) or 'mafia state' (Magyar 2016) whose main purpose is the extraction of public resources for private gain, the same cannot be said about Kaczyński's Poland. Second and relatedly, Kaczyński is far more ideologically driven and has genuine far-right and religious ambitions to shape

2. The 'Family 500+' programme was introduced in April 2016 and pays 500 Polish złoty, about £100, per month to families for the second child and for the first child if certain household income thresholds are not exceeded. A 'flash report' by the European Commission lauds the programme with a steep reduction of child poverty in Poland, although it also finds room for improvement of the policy (Topińska 2018).

his country (Magyar and Madlovics 2020, 575–576). In comparison, Orbán is a pragmatist and uses ideology where it suits him (Magyar and Madlovics 2020).

In summary, Kaczyński, just as Orbán before him, started his backsliding crusade when he returned to power. He too gained a surprising majority, yet faced more obstacles in a more decentralized political system with a more rigid constitution. Compared to Fidesz, PiS was electorally weaker, requiring coalition partners to form a government, which added challenges to the government's internal cohesion. Furthermore, the level of polarization in Poland injected a degree of uncertainty into the future: Poland's elections are genuinely competitive. Its long-term persistence in power was ambigious and it faced time-pressure to enact its policy programme. In order to not fall behind, Kaczyński started a vendetta against checks and balances and in particular the courts. This is the topic of the next section.

5.2 Ignoring law, denying justice

The fight against the judiciary is at the centre of the Polish case of backsliding, which started almost five-and-a-half years later than in Hungary, but unfolded with breathtaking speed. Among the first victims of the PiS government was the Constitutional Tribunal and the developments were complex and fast-paced. Afterwards, several further attacks were directed at the Supreme Court, the National Judicial Council (NJC), and ordinary courts. These included a new disciplinary regime for judges as well as a 'muzzle law' and a politicization of the prosecution service. The reforms have been described extensively by others, hence, I will not go into great detail. Rather, I provide an overview of the main attacks against the judiciary that, over time, led to conflicts between Poland and the EU. First, I discuss the fight over the Constitutional Tribunal between 2015 to 2016 as well as the origins of that conflict. I then turn towards the wider

judiciary, in particular the ordinary courts, the NJC and the Polish Supreme Court from 2017.

Fighting the Constitutional Tribunal

Judges of the Polish Constitutional Tribunal are appointed via a partisan process. The *Sejm* elects the fifteen judges with an absolute majority of votes (in the presence of at least half of the deputies) for a non-renewable nine-year term. There is no practice of a quota system, in which the major parties share the appointments between them (Kantorowicz and Garoupa 2016, 71). Two quantitative studies found compelling evidence that the judges vote in line with the political preferences of the majority that appointed them (Kantorowicz and Garoupa 2016; Bricker 2016). When PiS for the first time formed the government in 2005, it found that the Constitutional Tribunal was an obstacle. In the following years, the court decided more frequently than usual against the government and ruled many pieces of legislation unconstitutional, including the Lustration Act of 2006, a core piece of PiS legislation, which would have allowed more screening of citizens for cooperation with the communist secret police (Sadurski 2019). Kaczyński complained about 'legal impossibilism' (Blokker 2019, 537; Sadurski 2019, 172; 2022, 43).

The first target of PiS was the Constitutional Tribunal, which fought back for over a year. The process of its capturing was extremely complex and dense and has been described in much detail before. Sadurski (2019, ch. 3) describes it as a two-stage process, in which the Tribunal was first paralysed through court-packing and legislative bombardment. Once it was packed with loyalist judges, it was used to enable the government by giving the government's actions stamps of constitutional approval. This was crucial, as PiS wielded no majority that could change the constitution.

In May 2015, PiS candidate Andrzej Duda won the presidential election. This spelt trouble for the governing PO in the parliamentary elections that would follow in October. In line with the expectations of 'insurance theory' (Ginsburg 2003; Stephenson 2003), the PO tried to strengthen judicial oversight by packing the Constitutional Tribunal. Five vacancies were to arise that year, three in November and two in December 2015. Critically, the December vacancies would only arise after the new Sejm had first assembled. According to the Constitutional Tribunal Act, the Sejm could only elect judges to the November vacancies. So the governing coalition, which had for years worked on a new Constitutional Tribunal Act, wrote an ad-hoc amendment to change the appointment rules in June 2015. In the last session of the old Sejm in October, the governing majority elected five new judges (Szuleka, Wolny and Szwed 2016; Sadurski 2019). President Duda refused to swear them in (Pietrzak 2017, 3; Szuleka, Wolny and Szwed 2016, 9).

The new PiS-controlled Sejm similarly engaged in abusive tactics, which it legitimated through the earlier attempt of court-packing by its opponents (Kosař and Šipulová 2023a, 103). The actions and reactions in the early months of PiS-rule have been likened to a *constitutional blitzkrieg* (Koncewicz 2016, 1757). The Sejm passed resolutions to invalidate the election of all five new judges, then elected new ones. The Constitutional Tribunal was called upon by PO deputies to decide the constitutionality of the basis of these appointments. The Court issued an injunction, but before it could decide in the main proceedings, President Duda swore in five new judges close to midnight. The Tribunal held that the new Sejm should have filled the December vacancies, but that the old one had the right to elect judges to the November vacancies. The President then ignored the court ruling, arguing that there were no vacancies on the bench (Sadurski 2019; Szuleka, Wolny and Szwed 2016; Venice Commission 2016). The

three illegitimately PiS–appointed November judges were thus referred to as 'pseudo-judges' (Matczak 2018), 'quasi-judges' (Sadurski 2019), or 'fake judges' (Pech 2020). The President of the Tribunal, Andrzej Rzepliński, initially denied the five new PiS-elected judges to participate in any cases, but later included the two elected to December vacancies (Sadurski 2019).

The government, meanwhile, did not, or only with great delay, publish some of the rulings of the Tribunal. A cat-and-mouse game ensued, as the government targeted the Court with new measures that the Tribunal then struck down. Since the Court kept invalidating several of the government's measures, the Sejm passed various amendments and entire new versions of the Constitutional Tribunal Act, which were meant to impede the working of the Court. For instance, these raised the quorum for the Court to find legislation unconstitutional, shortened the terms of office of the Court's President and Vice-President, reduced the Court's control over its docket by forcing it to adjudicate cases strictly chronologically, and the Court's budget was cut by ten per cent (Sadurski 2019; Pietrzak 2017; Szuleka, Wolny and Szwed 2016). The Venice Commission closely followed the developments and issued several opinions. Against one particularly critical opinion of the Venice Commission (2016), the Sejm appointed own experts that wrote a counter-report (Adamczyk et al. 2016).

In December 2016, President Duda appointed Julia Przyłębska as the new President of the Court. While Przyłębska as one of the December-judges was legally appointed, the appointment as the Court's president was riddled with procedural problems casting doubts over her presidency. As the new President, she included the three illegitimate November judges to participate in the Court's work (Sadurski 2019). Once the capture of the Court was complete, the government roled back several of the measures that had incapacitated the Constitutional Tribunal so that it could enable the government by whitewashing

its legislation and, later, shield it against the reach of EU and international law (Sadurski 2019).

Capturing the justice system

While the Constitutional Tribunal was the first victim of PiS, it was not the last: the rest of the justice system would soon get its turn. In spring 2016 the Polish government made the Minister of Justice *ex officio* the Prosecutor-General (Venice Commission 2017a). This put the prosecution service under tight political control. Then, the Sejm passed three bills: on the common courts, the Supreme Court and the NJC (Śledzińska-Simon 2018). The first one, on the common courts, was enacted in July 2017, while the other two were initially vetoed by President Duda, then amended and adopted in December 2017 (Sadurski 2019, 98–99).

The Act on Ordinary Courts of July 2017 gave the Minister of Justice wide-ranging powers over the lower courts, including disciplinary powers over court presidents and vice-presidents, as well as the right to appoint and dismiss them. Following this, he replaced ten out of eleven appelate court presidents, as well as much of the lower courts' leadership (115–116). This was consequential given court presidents' wide-ranging powers over the judiciary in Poland (Blisa and Kosař 2018; Śledzińska-Simon 2018, 1846). Furthermore, the Sejm reduced the retirement age of judges to sixty-five for men and sixty for women. Judges who wanted to continue past this threshold, could request this from the Minister of Justice, who enjoyed wide discretion (Sadurski 2019, 121).

Under pressure from the EU Commission (discussed below in Section 5.4), amendments were passed in April 2018 (Śledzińska-Simon 2018, 1853). These unified the retirement age for men and women judges to sixty-five, and increased

the role of the NJC in promotion and dismissal cases. Given the politicized nature of the NJC by then, Sadurski (2019, 116) referred to these changes as 'cosmetic'.

Next, the government captured the NJC, an institution with a basis in Article 179 of the Constitution. It proposes candidates for judgeships to the country's President and is a body of judicial self-governance, which should guarantee judicial independence (Sadurski 2019, 99–100; Śledzińska-Simon 2018). The NJC consists of fifteen judges, the Presidents of the Supreme and Supreme Administrative Courts as well four members of the Sejm, two members of the Senate, a deputy of the President of the Republic and the Minister of Justice. Before PiS's reforms, the fifteen judge-members were elected by the judiciary itself. New legislation in December 2017, terminated the mandates of the judge members and changed the appointment rule, so that they would be elected by the Sejm. This turned the NJC from a body of judicial self-governance into a political tool (Sadurski 2019, 100–102; Duncan and Macy 2020; Śledzińska-Simon 2018, 1854–1855). The Venice Commission (2017b, para 130) warned of 'far reaching politicisation' of the NJC.

In the Polish judiciary, the act led to actions of protest. The President of the Supreme Court resigned her (*ex officio*) position in the new NJC and the Polish Judicial Association *Iustitia* threatened to expel any judge who agreed a candidacy for the NJC (Sadurski 2019, 102–104). The lack of the NJC's independence led in August 2018 to Poland's suspension in the European Network of Councils for the Judiciary (2018) – an institution associated with the CoE – and in October 2021 to its permanent termination of membership (Matthes 2022, 476).

Another target was the Supreme Court, which the government attempted to pack with judges it picked. It did this primarily in two ways: the pursuit of a swapping and of an expanding strategy (Kosař and Šipulová 2020). First, similar to Orbán in 2012, the Sejm passed a law reducing the retirement age of judges,

emptying the senior ranks of the Supreme Court. Then it created two new chambers – a new disciplinary chamber and a chamber for extraordinary control – and appointed loyalist judges. A further change increased the President's role in the appointment of the Chief Justice (Sadurski 2019, 113–114).

The bill of July 2017 would have ended the tenure of all Supreme Court judges, with the Minister of Justice holding the power to reappoint them individually. The amended version did not end all judicial tenures, but lowered the retirement age to sixty-five. The new bill also transferred many of the powers originally foreseen for the Minister of Justice (Ziobro) to the President of the Republic (Duda). Judges could apply to the President of the Republic to continue their service, leaving the decision up to the President's discretion. The lowered retirement age affected 27 out of 73 judges at the court including the Chief Justice (106). Not all were unhappy: eleven retired voluntarily, while the rest wanted to continue to serve, although many defied the (unconstitutional) requirement of the act to apply to the President for permission to continue on the bench. An amendment of the law in May 2018 mandated that the President must seek the opinion of the NJC in deciding about applications of judges to continue to serve, yet at this point the NJC was no longer an independent body (106–110).

On top of trying to swap the judges at the Supreme Court, two new chambers were set up by the law. The disciplinary chamber was responsible for disciplinary action against judges and, therefore, a clear threat to judicial independence and was used by the government to repress recalcitrant judges. The chamber was also insulated from the rest of the Supreme Court, for instance by receiving control over its own budget (112–113, 259). The other new chamber of the Supreme Court was the chamber on 'extraordinary review and public affairs' (or Extraordinary Chamber), which included the adjudication of

elections (Sadurski 2019, 112). The Extraordinary Chamber's main purpose was, however, to create an 'extraordinary appeal' against court decisions. During a three-year transition period, this would be open against decisions as old as twenty years (114). This was akin to an 'emergency break' in case other methods to reach the desired outcome have not worked (Vincze 2023a). Both chambers were criticized by the Venice Commission (2017b, 19), which warned that the two new chambers were 'above all others'.

What is noteworthy when looking at the attacks on the Polish judiciary is how much resistance they met, something that had been lacking in Hungary (Bojarski 2023; Coman and Puleo 2025; Kubal 2024; Matthes 2022; Puleo and Coman 2024). The Constitutional Tribunal repeatedly voided or ignored legislation that attempted to undermine its own powers and processes in 2015 to 2016, judges and judicial associations refused to cooperate with the government and organized protests, and judges brought preliminary reference questions concerning their independence to the ECJ[3] and human rights cases to the ECtHR[4] (Sadurski 2019).

This section has briefly described the main backsliding events in Poland. These have mostly focused on the courts, which were seen as checks and balances on PiS's power and stood in the way of the adoption of a wider authoritarian policy programme. First, PiS fought back against an attempt at court packing by the former governing party and packed the court itself. As the Constitutional Tribunal fought back, the Polish government became increasingly assertive. In the end, the court was captured. The attention of the governing party then

3. For example: Joined Cases C-585, 624 and 625/18, *A. K. and Others v. Sąd Najwyższy* EU:C:2019:982.

4. For instance, *Tuleya v Poland*, App nos. 21181/19 and 51751/20 (ECtHR 6 July 2023); *Żurek v Poland*, App no. 39650/18 (ECtHR 16 June 2022)

turned to the rest of the judiciary, which similarly resisted. The next section will deal with EU policymakers' attempts to deal with backsliding in Poland.

5.3 Framing the rule of law in Poland

Backsliding in Poland unfolded very quickly as soon as PiS had won the elections. Compared to Hungary five years earlier, reactions from the EU came quickly. First, there was a clear sense of threat: the backsliding disease was spreading and had infected the sixth-largest EU28 country by population. Decision-makers were not under the illusion that the democratization process was teleological, as democratic backsliding quickly became a topic of discussion. Secondly, some new tools were available, besides infringements (which are limited to the *acquis*) and Article 7 (which requires extremely high levels of political support and was seen as inappropriate at the onset of backsliding). The Rule of Law Framework was created by the Commission to structure engagement in case of concerns about the rule of law. Thirdly, Poland's government had less political capital than Hungary. It could not count on the same level of support of the mainstream of European politics, as it itself belonged to the fringe ECR.

This section shows how the EU reacted against Poland with its Rule of Law Framework. The Commission asserted ownership of the rule of law in Poland, which transformed the role of the European Parliament from a leader to a follower and supporter of the Commission. Early on, the Polish government attempted some engagement tactics with the Commission, but soon abandoned them, perhaps due to their limited success, since the Commission was suspicious already, and the internal mobilization and resistance made it hard to conceal backsliding. This further aggravated political support in the Commission, the Parliament, and even other member states.

The first official reaction by the European Union to PiS's attacks on the Constitutional Tribunal did not take long. Already in December 2015, less than two months after the new parliament in Poland had constituted itself, the Commission sent the first letters to the Polish government. The first of three letters was sent on 23 December 2015 by First Vice-President Frans Timmermans (Netherlands, S&D) to the Polish government to request more information regarding the Tribunal. Timmermans noted the Commission's concerns on judicial independence and the rule of law, asked Poland to refrain from adopting the bill on the Tribunal and to work closely with the Venice Commission. On the same day, one of the recipients of the letter, Poland's Foreign Minister, Witold Waszczykowski, asked the Venice Commission to prepare an opinion on the government's bill. A week later, on 30 December, Timmermans sought more detail on the reform plans of the public broadcaster. On 13 January 2016, after an 'orientation debate' of the College of Commissioners, Timmermans replied to the Polish authorities, noting again concerns about the Tribunal and the media reforms. He informed them that the Commission was 'examining the situation under the Rule of Law Framework' and requested a high-level meeting with representatives of the Polish government. For the first time, the Commission made use of the Rule of Law Framework – a Framework that had been created because of the prior experience with Hungary (Interview 20).

The Parliament's debate on Poland, January 2016

The European Parliament first debated the rule of law crisis in Poland on 19 January 2016. The president of the Parliament, German social-democrat Martin Schulz, welcomed the Polish Prime Minister Beata Szydło. He pointed out that this was the first time the Parliament would debate about the Commission's decision to use the Rule of Law Framework against a member state.

The word was first given to the representative of the Council, Dutch Foreign Minister Bert Koenders. After Koenders highlighted the importance of the rule of law for democracy in Europe, he then said that the debate 'has been triggered by the most recent measures introduced by the newly democratically elected Polish Government, including the position of the Constitutional Tribunal, and the governance of public media'. Nevertheless, he said, '[i]t is not for the Presidency to pass judgment, especially not at this juncture in time. The Council has not discussed the situation'. He pointed out that the Netherlands was one of the strong supporters of the rule of law in Europe, and promoted the role of the Commission in 'monitoring developments in this field across the Union'.

Timmermans spoke for the Commission. He pointed in particular to the Polish government's non-compliance with judgments of the Constitutional Tribunal, the cutting of the terms of office of the Tribunal's President and Vice-President. 'Given the central position of the Tribunal within the Polish judicial system, we risk seeing the emergence of a systemic threat to the rule of law'. Furthermore, the media law was troubling the Commission: 'When national rule of law safeguards seem to come under threat, the EU needs to act'. He pointed to his letters from December 2015, but found the replies 'not sufficient'. Timmermans also mentioned that an hour before the debate, he had received a response letter from Poland. He highlighted how the Rule of Law Framework's 'preventative nature' gave the Commission the chance to work together, in a cooperative manner, with the Polish government to resolve the concerns.

The Polish Prime Minister, Beata Szydło, kept a respectful tone in her speech. She referred to her party's democratic legitimacy and explained that her party represented those Poles, who had been left behind by economic transformations of the past. Szydło defended the appointments to the Constitutional Tribunal and mentioned its decision of 3 December 2015, in which it declared the former

Sejm's usurpation of two additional judgeships unconstitutional. This would have led to fourteen out of fifteen judges being appointed by the PO, an unbalanced court and in violation of European standards, for which she referred to a 1997 opinion of the Venice Commission.

> Law and Justice has never sought to dominate the Tribunal. Moreover, we never wanted a majority in the Court. Our aim was only to ensure balance. I also want to tell you that we agree that 8 out of 15 judges should be appointed by the opposition. This is a positive change in the approach to the perception of the opposition's rights, which radically distinguishes us from our predecessors. We respect the opposition and its rights.

She argued that the media reforms were about restoring access of diverse views to the public broadcaster. Finally, she emphasized her readiness to engage in dialogue with the European institutions.

Instead of Manfred Weber, the German chair of the EPP group, his deputy Esteban González Pons, a Spanish MEP spoke. This was to not allow the Polish government to hold his nationality against the speaker. For the same reason, González Pons explained, did not one of the many Polish members of the EPP speak. 'A Spaniard is speaking to you, ... but any other deputy from my group could be in my place, because we all think the same'. He pointed out 'that the destruction of the judiciary and control of the media can be a beginning to end democracy'. 'Authoritarianism' was the problem. Nevertheless, he did not want to condemn Poland prematurely as the Polish members of his group would not sanction it. Instead the debate was to examine the 'facts and actions'.

The speaker of the social-democrats, Gianni Pittella (Italy) broadly supported the Commission's path to lead an investigation under the Framework. Belgian ALDE leader Guy Verhofstadt, impressed with the civil speech of the Polish Prime Minister, promised to try the same. He criticized the attacks on the Constitutional Tribunal and on checks and balances generally, which 'was not

announced in the manifesto of your party before the elections', but saw steps in the right direction in the Polish government's invitation of a report by the Venice Commission. Verhofstadt summoned the spectre of Putin, who would profit from European disunity. Finally, he ended on a hopeful note, trusting that Poles would defend their democracy. The speaker for GUE/NGL, German MEP Gabriele Zimmer also welcomed that the Venice Commission had become involved. She embraced the Commission's investigation under the new Rule of Law Framework and hoped it would be used regularly in the future to create a structured and fact-based dialogue. In her opinion, in question was not the democratic legitimacy of the Polish government, but the compatibility of its actions with the rule of law.

The speaker for the Greens/EFA, German Rebecca Harms, shared Verhofstadt's concerns. She also highlighted problems with the process of rushing important decisions through the Parliament with little time or respect for deliberations. She appreciated the Commission's start of an investigation under the Framework, but said that decisions about consequences had to be at the end of the process, not at the beginning. Finally, she floated the idea of an independent 'Copenhagen Commission' to advise the European Commission.[5]

The speaker for the ECR, Polish MEP Ryszard Legutko, showed his suprise at and appreciation of the tone of the debate. He questioned the facts that formed the basis of the Commission's decision, but he did not substantiate his criticism. Then he criticized the 'double standards', referring to the attempt of the former PO-government to pack the Tribunal: 'If my party were to put fourteen judges in a fifteen-member Constitutional Court, all hell would break loose in this House'. Legutko also contested the legality of the Rule of Law

5. A Copenhagen Commission as a 'democracy watchdog' was suggested by Müller (2013, 139; 2016a).

Framework – citing the Council Legal Service's opinion – and thus challenged the Commission's competence under the treaties.

The resolution was passed almost three months after the debate. It was tabled by five groups, including the EPP, which had usually opposed similar resolutions on Hungary. Unsurprisingly, the majority was stronger: 513 votes in favour to 142 against, with 30 abstentions.[6] This meant 78 per cent support for the resolution. The Parliament expressed its concerns about 'the effective paralysis of the Constitutional Tribunal in Poland' (§ 3), called on the Polish government to implement the changes asked by the Venice Commission (§ 5), and 'support[ed] the Commission's decision to launch a structured dialogue under the Rule of Law Framework, which should clarify whether there is a systemic threat to democratic values and the rule of law in Poland' (European Parliament 2016c, § 7).

Using the framework

On 1 June 2016, the Commission issued a written opinion on the rule of law in Poland (European Commission 2016a). Based on the framework communication from 2014 (Council of the European Union 2014a), the 'opinion' was part of the first stage of a 'Commission assessment'. Officially, this was to focus the dialogue, giving the Polish government the ability to respond to the Commission's concerns. The scope was defined by the measures targeting the Tribunal: selection of judges, Constitutional Tribunal Acts and judicial review of laws. However, the Commission clarified that measures cutting short the terms of the Tribunal's President and Vice-President were no longer part of the procedure (European Commission 2016a, § 39, fn 21). Nevertheless, the issuing of this

6. Result of votes: https://www.europarl.europa.eu/doceo/document/PV-8-2016-04-13-VOT_EN.pdf.

opinion was itself an admission that the Commission had 'clear indications of a systemic threat to the rule of law' (§ 6). The opinion outlined the interactions of the Commission with the Polish government as well as the facts of the fight of the Polish government with the Tribunal.

In return, Poland's government reacted with a whitepaper. The Marshall of the Sejm appointed a board of academics, including a former Supreme Court judge, to write a report on 'the Issues Related to the Constitutional Tribunal'. The report was published on 15 July 2016 and on over eighty pages refutiated the opinion of the Venice Commission from March 2016 (Adamczyk et al. 2016). The authors juxtaposed two interpretations of the normative origins of state authority, 'which either put emphasis on its function as a political community, that is, a nation, or on the significance of the legal order' (3). The Venice Commission supposedly emphasized the latter interpretation, which the report refutiated from the point of view of the Polish constitution. Furthermore, the report contained a chronology of events on twelve pages, to 'supplement' the narrative of the Venice Commission. This shows how facts became entangled in politics in the supranational tug of war.

Unimpressed, the European Commission published its first Rule of Law Recommendation on 27 July 2016 (European Commission 2016b). Here, the Commission presented its opinion on the composition of the Polish Constitutional Tribunal, the implementation of the decisions K 34/15, K 35/15 and K 47/15, the non-publication of the latter and following judgments, as well as the effect of the July 2016 Constitutional Tribunal Act on the working of the Tribunal. Overall, the focus was unchanged compared to the Reasoned Opinion a month earlier. The recommendation referred to the Venice Commission's opinion nineteen times. For the composition of the Tribunal, the Commission highlighted the need to implement the decisions K 34/15 and K 35/15 and to

comply with the Venice Commission's opinion. Furthermore, the Commission noted that the refusal of the government to publish judgment K 47/15 would create legal uncertainty and undermine the rule of law (European Commission 2016b, §§ 57–59). The Commission found a number of improvements of the July 2016 law compared to the amendment from December 2015, but that the new act would still repeat a number of unconstitutional provisions that would jeopardize the rule of law and judicial independence. Looking more broadly, the Commission noted a number of fast-tracked bills that could not be effectively screened for their constitutionality in absence of a functional Tribunal. Those bills included a new media law, a Civil Service Act, an amendment to the Police law, acts on the Public Prosecutor-General and Ombudsman (§ 66).

This led the Commission to find a 'systemic threat to the rule of law in Poland' and set out a series of recommendations. The Polish authorities were called upon to comply with the judgments of the Tribunal and make sure that the three lawfully elected judges could take up their positions, while making sure that their three PiS-appointed counterparts would not work as judges until they were properly elected (§ 67). Furthermore, the recommendation asked for the publication and implementation of the unpublished Tribunal judgements, as well as compliance with the Venice Commission's opinion. The Commission also recommended that Polish authorities should seek the Venice Commission's opinion on the law of 22 July 2016 and 'refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal' (§ 74e). The Commission set a deadline of three months for Poland to solve the problems through 'loyal cooperation' by state institutions (§§ 75–76).

Debates on Poland

On 13 September 2016, the European Parliament held a debate on 'recent developments in Poland and their impact on fundamental rights'. Frans Timmermans, speaking for the Commission, thanked the Parliament for its support in its resolution from April. He explained that the first recommendation in July had become necessary because following its June opinion, Poland had adopted a new Constitutional Tribunal Act. Timmermans pointed to exchanges on all levels between the Commission and Poland, but that the matter was not resolved (European Parliament Debate, 13 September 2016, Item 8).

No representative of the Polish government had come, but MEP Ryszard Legutko of the ECR group gave a long speech in the defence of his government. First, he accused the drafters of the resolution of getting facts wrong, because they did not have any knowledge about Poland. In this context, he referred to the report by 'fifteen law professors' the Sejm had appointed and which was sent to the Commission and the Council of Europe. Secondly, he stated that the Rule of Law Framework that the Commission applied to Poland was illegal as it violated the treaties. Finally, Legutko accused the Commission of acting as 'prosecutor, judge and enforcer' all in one.

In his final statement, Timmermans returned to Legutko's comments:

> If any information pertaining to this issue is brought to our attention, we will carefully study it and reflect on it and take a position on it. We do not disregard any information. … Mr Legutko said … that what I am saying is not true, but let me remind him that several rulings of the Constitutional Tribunal have still not been published by the Polish Government. That is a fact, Mr Legutko. (European Parliament Debate, 13 September 2016, Item 8)

The resolution was passed the next day and criticized the lack of adoption of the Venice Commission's recommendations. The Parliament was concerned,

among others, about the lack of a functioning Tribunal in Poland as well as the rapid pace of legislative processes in Poland that often unfolded without sufficient consultation. In particular, the resolution mentioned legislation on public media, the police, criminal procedure and prosecution, the civil service as well as counter-terrorism (European Parliament 2016b, § 8). Noteworthy are the Parliament's view on the Commission's actions. It 'welcome[d] the Commission's determination to pursue a constructive and productive dialogue with the Polish Government with a view to finding swift and concrete solutions to the systemic threats to the rule of law set out above' (§ 4), noted the opinion and recommendation the Commission had published under the Rule of Law Framework and made clear that it wanted to have access to the Commission's subsequent assessments (§ 5).

The Parliament returned to the issue of Poland on 14 December 2016, with a statement by the Commission and a debate. Timmermans pointed out how the Polish government had dismissed the last (critical) opinion of the Venice Commission of 14 October. In its reply to the European Commission's first Rule of Law Recommendation, the PiS government had challenged the Commission's assessment rather than announce actions to remedy the situation. Ryszard Legutko (ECR) made similar comments as in the last debate and the cleavages were the same as before: the left to centre-right against the right wing-groups. The right accused the left of lecturing the democratically elected government of Poland because it rejected its pro-European consensus; the left pointed at the need to uphold European values, restrained government and separations of powers, which Poland had voluntarily agreed to by acceding to the Union.

Only two speakers addressed the issue of Article 7. The first was German social-democrat Birgit Sippel, speaking for her group. She supported the Commission's use of the Rule of Law Framework, but lamented the lack of will of

PiS to remedy the situation. Hence, Article 7(1) was needed: 'Poland belongs on the Council's agenda, and only a four-fifths majority is needed to formally recognize that there is a systemic threat to the rule of law in Poland. That would at least be a signal, even if there are probably no concrete sanctions'. Sophie in 't Veld, speaking for the ALDE group, asked Timmermans:

> I would like to know what you are going to do? ... You described the situation in Poland as 'a systemic threat to the rule of law'. Now, if that does not call for action by the European Commission, then what does? Even if you know that the Council will never vote for an Article 7.1 procedure, the Commission should take its responsibility and vote on that. We should put it on the agenda.

Timmermans made no mention of the calls for Article 7 in his final statement. Nevertheless, two things can be learned from this debate: First, few MEPs specifically asked for Article 7 to be used against Poland in December 2016; second, those who did share this position, were divided in their opinion of whether the Council would muster the four-fifths majority required. Nevertheless, there was overwhelming support for the Commission in their tug of war with the PiS government.

The second recommendation

Just before Christmas 2016, the Commisssion published a second Rule of Law Recommendation (European Commission 2016c). It noted that while the Polish government had replied, it had 'disagree[d] on all points with the position expressed in the Recommendation and d[id] not announce any new measures to alleviate the rule of law concerns' (recital 17). The Commission noted partial improvements in some areas, but found that many of the problems identified by the first recommendation had not improved and some new problems had been added. It criticized the Polish authorities for instigating criminal proceedings

against Constitutional Tribunal President Rzepliński (European Commission 2016c, § 61(7)). On top of that, it expressed concerns about the disciplinary action against Tribunal judges and incentives for early retirement (§§ 26–29). Furthermore, the Commission mentioned the new appointment procedures for the President, Vice-President and the new 'Acting President' of the Tribunal. The Commission noted that creating a position of an Acting President would circumvent the constitutionally-rooted Vice-President and posited that the appointment of Julia Przylębska as President on 21 December 2016 was flawed and unconstitutional (§§ 43–60). The Commission set a two-month deadline to implement the recommendation (§ 68). Finally, the Commission threatened that Rule of Law Recommendations did not preclude the use of Article 7 (§ 69). This warning was new: the Commission had not issued it in its July recommendation.

This section has shown that the Commission in the Polish case did not underestimate PiS. It was alert early and followed the developments closely. While it had no good options regarding the use of infringement actions, it could rely on its Rule of Law Framework. This gave the Commission the competence to engage the Polish government in a discussion. The reports it prepared helped the Commission to frame the problems. The Polish government tried to contest the facts and findings, but was not convincing in this regard. The Parliament backed the Commission's use of the Rule of Law Framework and supported its work politically. The supranational tug of war was at play.

5.4 Attempts to save judicial independence

PiS managed to pack the Constitutional Tribunal. It then started to expand its reach to the rest of the judiciary, preparing laws on ordinary courts, the NJC and the Supreme Court. The Commission, having learned from its failure in the Hungarian case, tried to prevent Poland from creating facts on the ground.

This was the backdrop for the third Commission recommendation, published on 27 July 2017 (European Commission 2017b) and infringement proceedings.

The third recommendation expanded its scope from the Tribunal to these new laws affecting the wider judicial system. Regarding the operation of constitutional review, the Commission found that Poland had taken 'none of the recommended actions' (§ 5). For the wider judiciary, the Commission referred to 'statements or opinions, including from the Supreme Court, the Ombudsman and the National Council for the Judiciary' that had questioned the constitutionality of the new laws. Resisting national judicial stakeholders, became a crucial information source (Matthes 2022). The Commission listed issues such as 'assistant judges', the presidents of courts, judicial career development and appointment of judges, the reduction of their retirement age and the discretionary power of the Minister of Justice to extend their tenures, as well as similar concerns about the Supreme Court judges.

Noteworthy were the laws on the NJC and the Supreme Court, because they had been vetoed by the Polish President and returned to the Sejm three days before the adoption of this recommendation by the Commission. While the Commission mentioned this, it did conclude that if these bills would be adopted, the 'Polish judicial system would no longer be compatible with the European standards' (European Commission 2017b, § 47). Thus it called on the Polish government to prevent the adoption of these laws. The Commission set a deadline of only one month to resolve the problems (§ 55). Finally, it warned again that it could use Article 7, but this time clearly threatened that the sacking or forced retiring of Supreme Court judges would 'seriously aggravate the systemic threat to the rule of law' and lead to the 'immediate' use of Article 7(1) (§§ 57–58). The Commission had drawn a red line.

Infringement action for ordinary courts

Closa (2019) has argued that the Commission prefers dialogue over enforcement, but if it has to use enforcement, it favours narrower infringement action over Article 7. Research shows that overall, the level of political control of infringement cases has increased and simultaneously their number decreased since Barroso's terms as Commission president, leading to more 'forbearance' and 'deliberate underenforcement' (Kelemen and Pavone 2023, 781). Yet the Commission did start to use infringement proceedings more vigorously against Hungary in 2017 (see Chapter 6), but had problems building good legal cases against Poland. Nevertheless, it evaluated Poland's actions as a threat that required a response. Yet the Commission was constrained in what it could do due to legal limitations it faced in infringement actions. The Commission did not initiate infringement proceedings for the capture of the Constitutional Tribunal, which it tackled instead with the Rule of Law Framework. The Commission started using infringement proceedings, when the Polish government began attacking the wider judiciary.

Directly after Poland passed the Act on Ordinary Courts in July 2017, the Commission opened an infringement case against Poland with a Letter of Formal Notice dated 29 July 2017 (European Commission 2017e). The Commission was concerned about the reduction of the retirement age of judges, the discrimination between male and female judges, and the discretionary extension of the tenure by the Minister of Justice and his power to appoint or dismiss judges. It primarily based its case on a directive that mandated gender equality at the workplace,[7] similar to its case against Hungary in 2013. In addition, it argued that the Polish Act would threaten 'judicial independence' and relied

7. Directive 2006/54 on gender equality in employment.

on Article 19(1) TEU, read together with Article 47 CFR (European Commission 2017e). This was a new line of argument, outside of established doctrine and enabled by a seemingly unrelated case on Portuguese judges, which will be explained below. The Commission followed up on its Formal Notice and sent its Reasoned Opinion on 12 September 2017, in which it maintained its criticism (European Commission 2017h). At the end of the year, the Commission referred the case to the ECJ.

Parliament's support for Article 7

The European Parliament debated 'the situation of the rule of law and democracy in Poland' on 15 November 2017 and passed a resolution on the same day. The Polish government had not sent any representative. At the beginning of the debate, Matti Maasikas, Deputy Minister of Foreign Affairs for European Affairs of Estonia spoke for the Council presidency. He highlighted that this was the third time the Council had been asked to intervene in debates on the rule of law in Poland and that Timmermans had twice informed the Council about developments in Poland. He pointed to several activities the Council had undertaken, such as an exchange of views with the Director of the EU's Fundamental Rights Agency and the annual Rule of Law Dialogue, which was held on the topic of 'media pluralism' in the GAC. Finally, he pointed to country-specific recommendations on the rule of law under the European Semester that the Economic and Financial Affairs Council (ECOFIN) had adopted on 11 July 2017 (European Parliament Debate, 15 November 2017, Item 7). Compared to earlier contributions by the Council presidency, Maasikas signalled some engagement with the rule of law issue.

Frans Timmermans gave once more the Commission statement. He emphasized the Commission's third Rule of Law Recommendation from July that year

and that two out of four laws had been vetoed by the Polish president. Nevertheless, the response from the Polish government was insufficient as it did not make specific suggestions on how to address the Commission's concerns. Four times since July, the Commission had asked for meetings, which had been rejected by the Polish government, resulting in only written exchanges. He pointed at infringement proceedings started by the Commission and that the Commission was closely following legislation in Poland. In this, the Commission was not alone: both Polish institutions and international bodies, especially of the Council of Europe, kept analysing the legislative outputs. Finally, he mentioned four expectations he had for the Polish government 'to avoid further escalation'. The two draft laws were a 'key test for the Polish authorities, to show to the outside world whether or not there is willingness to respect the rule of law'.

Ryszard Legutko, for the ECR group, was clearly outraged. The debate was only about 'power', not law, 'a show of force'. The Commission's actions against Poland were 'illegal and violate European treaties':

> The Commission, unfortunately, has this bad habit of simply ignoring all the answers from the Polish government and repeating the same thing over and over again. The Commission calls this a dialogue or an invitation to talk. Mr. President, this is not a dialogue.

The leader of ALDE, Guy Verhofstadt (Belgium), asked for the activation of Article 7 by the Parliament. This was echoed by Barbara Spinelli (GUE/NGL, Italy), who pointed out that Article 7(1) was the only tool that the Treaties had conferred upon the Parliament. Judith Sargentini (Greens/EFA, Netherlands) found 'reason enough for this Parliament to investigate whether the rule of law is systematically eroding'. Sophie in 't Veld (ALDE, Netherlands) welcomed the words from the Council, but demanded 'some action'. What was needed was a 'broad, independent mechanism'. Josef Weidenholzer (S&D, Austria) pointed

out that 'things can't go on like this' and the conflict had to be resolved. Since 'repeated calls for dialogue were ignored', there was a need to use Article 7. His party colleague Tanja Fajon (Romania) agreed on Article 7.

The Parliament expressed its worries about the deterioration of the rule of law situation in Poland, the lack of a functioning Tribunal and the undermining of the independence of the judiciary. It called again for a better mechanism to defend democracy, the rule of law and fundamental rights. Most importantly, the Parliament expressed its belief that there was a clear risk of a serious breach of the values of the EU, and instructed the LIBE Committee to prepare a report with a view to holding a plenary vote on starting the preventive mechanism of Article 7 (European Parliament 2017b, § 16). This was supported by 448 MEPs, while 190 voted against and 29 abstained – a majority of 69 per cent – which would be enough to meet the required majority for Article 7.

Towards Article 7 on Poland

The Commission had drawn a red line. The Sejm adopted the laws on the Supreme Court and NJC regardless on 8 December 2017. On 20 December 2017, the Commission stepped up and published two documents: a fourth Rule of Law Recommendation under the Framework (European Commission 2017c) and, at the same time, a Reasoned Proposal for a Council decision for finding a clear risk of a serious breach of the rule of law under Article 7 TEU (European Commission 2017k). On the same day, it referred the infringement proceeding against Poland for the Act on Ordinary Courts to the ECJ.

In its fourth Recommendation, the Commission focused on the laws on the Supreme Court and the NJC, while the other issues addressed in the third recommendation 'remain[ed] valid' (European Commission 2017c, §§ 2–3). The Commission observed that none of its concerns in the last recommendation

had been elevated and hence considered 'that the situation … has seriously deteriorated further', and that the newly adopted acts 'significantly increase the systemic threat to the rule of law' (European Commission 2017c, § 38). This time, the Commission set a deadline of three months to address the problems. Besides the stick of the simultaneous activation of Article 7, it dangled a carrot in front of the Polish government:

> The Commission is ready, in close consultation with the European Parliament and the Council, to reconsider that reasoned proposal, should the Polish authorities implement the recommended actions set out in the present Recommendation within the time prescribed. (§ 50)

Together with the fourth Recommendation, the Commission also published a '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' (European Commission 2017k). The proposal consisted of two parts: the first was an 'explanatory memorandum' that set out the chronology of events and an analysis of the Polish government's transgressions of the rule of law and consisted of 39 pages; the second part was much shorter: on three pages, the Commission suggested a legal text for the Council to adopt.

From the Commission's memorandum it is clear that the discussion was not merely academic any more. It noted, for instance, that 24 court presidents had been dismissed already under the new rules (§ 161). Furthermore, it counted 13 laws that the PiS majority had enacted that all undermined the separation of powers and judicial independence (§ 173). Thus, any remaining uncertainty over the intents of the Polish government had vanished. In its memorandum, the Commission pointed at the long and intensive process of dialogical engagement with the Polish government (§ 174), which had, however, not brought about systemic changes. The Commission also noted that many other international

organizations had repeatedly voiced criticism of the Polish reforms (European Commission 2017k, § 183).

The proposal for a Council decision suggested only two articles. Article 1 would state the 'clear risk of a serious breach by the Republic of Poland of the rule of law'. Article 2 would contain the five recommendations which Poland was asked to implement within three months. This included the Tribunal as well as the Supreme Court, NJC and ordinary judiciary and should be done in close cooperation with judicial stakeholders and the Venice Commission. Finally, the Polish government would be asked to stop making statements that undermined judicial legitimacy.

The Commission, thus, applied a logic of conditionality to the Framework and Article 7. In the second Rule of Law Recommendation, it had warned that it could use Article 7 if the situation deteriorated. The third Recommendation had more specifically warned against removing sitting Supreme Court judges. As this was ignored by the Polish government, the fourth Recommendation offered the prospect of dropping Article 7 in exchange for a rollback of the reforms. The Commission was increasingly emboldened to do so: the European Parliament had put its weight behind the Commission's use of the Framework in its November 2017 resolution and authorized a LIBE report to draw up a text to trigger Article 7 (European Parliament 2017b, §§ 6, 16). Perhaps more importantly, Macron and Merkel – leaders of France and Germany – in a joint press conference, had signalled that they would support the Commission if it decided to use Article 7, days before the Commission published its Reasoned Proposal (Simon and Gotev 2017).

At the end of 2017, the Commission had gone the final step to use the preventative mechanism. It could rely on a large, qualified majority in the European Parliament as well as on the support of the largest member states. With its

actions, the Commission became the political 'owner' of the Article 7 process with Poland. In an interview, I asked a senior Commission official, where the Commission's priorities lay in 2017, when he started working on the topic. He explained that Poland – and not Hungary – was the centre of attention (Interview 20). With the Commission in the driver's seat regarding Polish rule of law, the Parliament was demoted to an auxiliary role. On 1 March 2018, the European Parliament (2018b) passed a very short resolution that lent support to the Commission's decision to use Article 7 and encouraged the Council to act swiftly. The Parliament passed this resolution with a majority of 422 to 147 votes, with 48 abstentions – a majority of 74 per cent.

In the case of Poland, backsliding was apparent. Not only did PiS mirror Orbán's 'illiberal playbook' (Pirro and Stanley 2022), but it also did so openly. When it attempted to capture the courts, judicial actors' resistance created noise that drew attention. Kaczyński could not leverage the same level of legitimacy as Orbán could. Equipped with the new Rule of Law Framework, it was now or never for the Commission. While the Framework was an engagement strategy without a 'bite', it provided an opportunity to create documents on the country's backsliding – an evidentiary source for the EU, which helped shape the agenda. Nevertheless, Poland did not change course, prompting the Commission to turn the Framework and Article 7 into tools of conditionality. While some influential member states supported the Commission's use of Article 7, it was unclear how the Council would react and whether a four-fifth majority of member states was willing to vote against Poland.

Unlikely allies: Portuguese judges

So far, the Commission had struggled finding appropriate legal bases for infringement proceedings against member states for attacks on their judiciaries.

This was about to change through a seemingly unrelated decision in a preliminary reference procedure by the ECJ in a case on Portuguese judges, usually referred to as the ASJP case.[8]

Whereas the infringement proceedings allow the Commission to enforce EU law in member states, the procedure for preliminary references in Article 267 TFEU is a way for private parties to enforce EU law through national courts. It has been called a method of 'indirect enforcement' (Andersen 2012, 32). Preliminary references allow national courts to pause proceedings to elevate legal questions on EU law for a decision by the ECJ. After the ECJ has ruled on these questions, the national court resumes the proceedings and decides the case, taking into account the ECJ's clarifications on EU law.

The ASJP case concerned the temporary lowering of Portuguese judges' salaries as part of austerity measures implemented by the Portuguese government. The case was brought by the Portuguese judges' association (ASJP) on behalf of the judges of the Court of Auditors and was an annulment action that was decided by the Supreme Administrative Court of Portugal (Bonelli and Claes 2018). The Supreme Administrative Court paused proceedings to ask the ECJ whether these austerity measures were incompatible with the requirements of judicial independence under EU law (Article 19(1) TEU and Article 47 CFR). In his opinion of 18 May 2017, AG Saugmandsgaard Øe argued that the ECJ had jurisdiction to decide the case under these articles, an argument that the Commission took up in its Letter of Formal Notice to the Polish government in July.[9] The ECJ not only accepted to review this case in a preliminary reference proce-

8. Judgment of the Court (Grand Chamber) of 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

9. Opinion of AG Saugmandsgaard Øe of 28 May 2017, Case C-64/16, *Associação Sindical dos Juízes Portugueses,* ECLI:EU:C:2017:395.

dure, but also referred the case to its grand chamber, where most innovations of case law emanate (Ovádek 2023, 1129), and went beyond the AG's opinion (Pech and Platon 2018, 1835). It based its review on the second subparagraph of Article 19(1) TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

While the ECJ in this case allowed the salary cuts, it had assumed jurisdiction over the judicial organization of member states. Without this being specifically intended by the litigant (Ovádek 2023, 1125), the Court read the treaty Article 19(1) to demand guarantees of judicial independence *in member states* (Bonelli and Claes 2018). With this ruling, the ECJ opened new avenues for its own involvement in the Polish government's attacks on its own judiciary. Whereas Article 47 CFR establishes a subjective right to a fair trial by 'an independent and impartial tribunal previously established by law', the ECJ's reading of the second subparagraph of Article 19(1) TEU created a justiciable obligation on member states to uphold judicial independence (Leloup 2020, 163; 2021, 51–56). Interestingly, the Commission intervened in the case (it submitted its own observations and was represented at the hearing) and argued against this expansive reading of Article 19(1) TEU (Ovádek 2023, 1130). Pech and Platon (2018) hailed the judgment as the most groundbreaking case for the rule of law in the EU in thirty years. This importance was not lost on members of the Court. The ECJ's president, Koen Lenaerts, highlighted the case's significance in a speech he gave at a conference organized by the Polish Supreme Administrative Court on 19 March 2018 (1832).

Ovádek (2023, 1129) contrasts the ECJ's decision in the ASJP case with earlier judgments, such as the Court's handling of the infringement proceeding against Hungary in 2012–13, where the ECJ was not ready to extend its competence in cases concerning judicial independence. The ASJP-decision, however,

heralded a new era in the ECJ's caselaw in which it developed a tighter jurisprudence on judicial independence and the rule of law (Pech and Kochenov 2021; Mańko 2021). Its importance was highlighted in all interviews I conducted with Commission officials. As one put it:

> The ruling of the Court of Justice in the Portuguese Judges Case was, of course, a seminal ruling that clarified certain things that were not [pronounced] ... before. And there we had the official position of the Court on Article 19 and ... that was ... quite an important point of orientation for the Commission (Interview 23).

Protecting judicial independence with infringements

On 2 July 2018, the Commission started another infringement case against Poland, this time concerning Poland's Law on the Supreme Court. Armed with the case law of the ECJ, this time the Commission framed the case specifically as one of judicial independence and based it on Article 19(1) TEU together with Article 47 CFR, which was made possible by the ASJP case. Specifically, the Commission criticized the forced retirement of judges of the Supreme Court, including its Chief Justice, and the discretion of the President of the Republic to decide whether to prolongue the duration of office of judges who had reached retirement age. The Commission did not find that the new role of the NJC in issuing an advisory opinion removed the threat to judicial independence, since its composition 'is not in line with European standards on judicial independence' (European Commission 2018c). Furthermore, the Commission mentioned that the Polish government in a GAC hearing on 26 June 2018 had not given assurances that it was planning to comply with the Commission's demands (European Commission 2018c). In mid August, the Commission sent a Reasoned Opinion in which it affirmed its remaining concerns (European Commission 2018e).

TABLE 5.1 Rule of Law infringement actions against Poland, 2014–19

Date	Topic	Action	Number
2017-07-29	Law on ordinary courts	Formal Notice	IP/17/2205
2017-09-12	Law on ordinary courts	Reasoned Opinion	IP/17/3186
2017-12-20	Law on ordinary courts	Referral to ECJ	IP/17/5367
2018-07-02	Supreme Court	Formal Notice	IP/18/4341
2018-08-14	Supreme Court	Reasoned Opinion	IP/18/4987
2018-09-24	Supreme Court	Referral to ECJ	IP/18/5830
2019-04-03	Disciplinary regime	Formal Notice	IP/19/1957
2019-07-17	Disciplinary regime	Reasoned Opinion	IP/19/4189
2019-10-10	Disciplinary regime	Referral to ECJ	IP/19/6033

On 24 September 2018, the Commission brought a legal case to the ECJ, requesting interim measures and a decision in an accelerated procedure, since the Polish law was 'creating a risk of serious and irreparable damage to judicial independence in Poland' (European Commission 2018d). On 15 November 2018, the ECJ's Vice-President granted interim measures, ordering that the new law on the Supreme Court was not to be applied until the case had been decided (Bogdanowicz and Taborowski 2020, 310). The Polish government complied with the judgment and stopped the forcible retirement of judges (Jaraczewski 2019). On 24 June 2019, the Grand Chamber decided in the main proceeding. The Court followed the Commission's application in basing its decision on Article 19(1) TEU, dismissing the Polish government's argument that the organization of the judiciary in a member state was a purely national competence. The member states, while enjoying discretion, still needed to follow the requirements of European law, the Court decided (Bogdanowicz and Taborowski 2020, 312).[10]

The final infringement procedure against Poland for rule of law matters

10. Judgment of the Court (Grand Chamber) of 24 June 2019, Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531.

under Juncker came in the beginning of April 2019 and was concerned with Poland's disciplinary regime for judges. The Commission declared that it wanted 'to protect judges in Poland from political control' (European Commission 2019f). The case was again concerned with judicial independence and based on Article 19(1) TEU and Article 47 CFR. The Formal Notice alleged that the disciplinary regime could target judges for their judicial decisions, including for using preliminary references to put questions of EU law in front of the ECJ. Thereby, it was creating a 'chilling effect'. On top of that, the Commission complained that the new Disciplinary Chamber of the Supreme Court was entirely staffed with judges who had been appointed by the new, politicized NJC and that there was no guarantee that a court 'established by law' would decide, in first instance, about disciplinary action. Further procedural guarantees were lacking in the new disciplinary regime (European Commission 2019f). The Commission sent a Reasoned Opinion on 17 July 2019 (European Commission 2019h) and referred the case to the ECJ on 10 October (European Commission 2019g).

It took until 5 November 2019 for the Grand Chamber of the ECJ to reach a judgment in the case on ordinary courts.[11] By the time the Court ruled, Poland had already amended its law and abolished the different retirement age for male and female judges (Mieńkowska-Norkiene 2021). Nevertheless, the Court found the different treatment of men and women to be discriminatory, and that the discretion enjoyed by the Minister of Justice to decide whether a judge could continue on the bench violated Article 19(1) TEU and Article 47 CFR (Bárd and Sledzinska-Simon 2020, 1576).

At this point, it is worthwhile to point out the missing cases. The Commission had not opened infringement cases for the NJC and for the Constitutional

11. Judgment of the Court (Grand Chamber) of 5 November 2019, Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, ECLI:EU:C:2019:924.

Tribunal,[12] nor did it start a case for the personal union of Minister of Justice and Prosecutor-General.

Backsliding in Poland, with its focus on attacks against the judiciary, was of great concern for the Commission. Nevertheless, infringement proceedings were not seen as legally appropriate to handle many of the concerns. This changed once the ECJ expanded the reach of European law in the area of judicial independence and brought the organization of member state judiciaries under the *acquis*. Only after a decision by the ECJ in 2018 did it have the tools and confidence to bring cases against Poland and used requests for interim measures and expedited proceedings. The legal certainty that the ASJP case brought about, also improved political support for the use of infringements within the Commission. While infringement cases in areas concerning the rule of law are only a tiny fraction of all infringement cases in regard to Poland, they were politically important and consequential.[13] Yet infringement proceedings were only one part of the Commission's toolbox in the Polish case.

♣ ♣ ♣

The European Commission was following the developments in Poland closely. Once the Polish government attacked and attempted to capture the wider judiciary, the Commission was stepping up its efforts to intervene. It clearly understood the threat for judicial independence. The third Recommendation under the Rule of Law Framework threatened Poland with Article 7 if it were

12. The Commission brought a case in the end of 2021 (European Commission 2021g; see Chapter 7).

13. As of 26 August 2021 there were 92 active infringement cases against Poland (including 36 non-communication cases). Since 2016, the Commission sent 777 Formal Notices against Poland. According to a database search, grouped by case, for 'Formal notice Art. 258 TFEU' and 'Formal notice Art. 258 TFEU + Press release' at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/.

to adopt measures to attack the Supreme Court. At the same time, it used an infringement case to avoid the creation of facts on the ground in the case on ordinary courts, however, mainly relied on the equality directive, since it had no clear competence in the field of judicial independence. In November, Parliament voted with a huge majority to start Article 7 proceedings against Poland. After Poland passed the laws on the NJC and Supreme Court in December 2017, Germany and France signalled to the Commission their support for Article 7 action. With this political support and lacking a good basis for infringement action against Poland in the cases of the Supreme Court and NJC, the Commission took the initiative on Article 7 and triggered it on Poland. Only after the ECJ decided in the ASJP case to massively extend the reach of the *acquis* in the area of judicial independence, could the Commission safely bring a case on the Supreme Court, which it quickly did. In 2019, it also did the same with a case on the disciplinary regime for judges. While the Commission pursued the infringement actions, Article 7 was now primarily the Council's responsibility.

5.5 The Council hearings on Poland

The Commission's use of the preventative mechanism of Article 7 against Poland forced the Council to act as well. The treaties outline the Council's role in the procedure: before it finds 'a clear risk of a serious breach' of EU values, it 'shall hear the Member State in question' (Article 7(1) TEU). In this section, I discuss the Council's three Article 7 hearings on Poland in 2018. Poland and other member states argued about the threat and discussed the appropriateness of the tool. The big unknown, however, was whether there was enough political support to find 'a clear risk', which required four-fifths of member states. Since this majority requirement excluded the targeted member state (Poland, Article 354 TFEU), this meant at a majority of 22 out of 27.

The Commission adopted its reasoned proposal for a Council decision at the end of 2017, and presented it to the Council on 27 February 2018. In several so-called 'states of play', the Commission kept the Council informed of its engagement with the Polish authorities over the following months. After discussions in COREPER in June, the Council's Bulgarian presidency added an Article 7 hearing to the Council agenda for 21 June 2018. Two further hearings were organized by the Austrian presidency on 18 September and 11 December of that year.

These hearings took place in the General Affairs Council (GAC), whose meetings are prepared by COREPER II. However, there is no formal rule-of-law working group below COREPER that prepares the meeting (Interview 11). COREPER discussed only formalities, not the substance of the meeting. Thus no substantive preparation took place beneath ministerial level. Nevertheless, an informal working group of like-minded countries has emerged, colloquially referred to as 'Rule of Law Friends'. This group has roughly fifteen members, but this has fluctuated with government changes in some member states (Interviews 9; 11).

Parliament debate

The Parliament debated 'the independence of the judiciary in Poland' on 13 June 2018, although no resolution was tabled and voted on. Monika Panayotova, Bulgaria's Deputy Minister for the Council presidency, called her country an 'honest broker' of different positions, but also reaffirmed that the Council would make an assessment only after the hearing. Frans Timmermans, for the Commission, spoke longer than the allocated time. His reason was to present the Parliament with the same information as the Council. He pointed out that a number of meetings had taken place between the Polish government and the Commission. A few enacted changes went in the right direction, yet overall, the Commission's

concerns remained unaddressed and the forced retirement of Supreme Court judges was on track to cause 'irreparable damage' (European Parliament Debate, 13 June 2018, Item 13).

Several speakers expressed a sense of urgency, considering the forthcoming forcible retirement of a larger number of Polish Supreme Court judges. Among those speakers, were the speakers for the EPP group (Polish MEP Janusz Lewandowski), S&D group (Austrian Josef Weidenholzer) and the Greens/EFA (Belgian Philippe Lamberts). An ALDE MEP, Dutch Sophie in 't Veld, also urged the Commission to bring an infringement proceeding at the ECJ and ask the Court for interim measures. She referred to the recent experience with Hungary:

> We have to avoid that, because otherwise we get what we saw in Hungary: the situation may have been redressed by Luxembourg, but by then a lot of judges had already been dismissed, and they never came back. That means that, in the end, there is still undue political influence on the judiciary.

In line with my theoretical framework, the recent memory of policy failure informed decision makers. Whereas Lewandowski had pointed to the role of judicial independence in protecting ordinary citizens, in 't Veld spoke about the dangers for the European project, such as the European arrest warrant, which had already been suspended by some courts due to doubts about the independence of Polish courts (Krajewski 2018; Konstadinides 2019).

The speaker for the ECR group, PiS MEP Zdzisław Krasnodębski, pointed out that the reshuffled Polish government with Mateusz Morawiecki at the top had actively pursued a dialogue with the Commission. He accused the critics of only speaking with small fringes of Polish society, claiming that eighty per cent of Poles would back the judicial reforms. Finally, he attacked the Commission's tools. He cited an interview with the former German Commissioner Günter

Verheugen, who had said: 'In my opinion, the European Commission does not have the appropriate competences to deal with this matter'.

The first Council hearing

Since this was the first time the Council would hold such a hearing, it had to agree on its procedure and which topics to cover. This was done in so-called 'modalities', in which the Council defined the hearing as 'a peer review exercise' (Council of the European Union 2018h, § 8). Poland was allowed an unspecified increase of its delegation size for the hearing. At the start, the Commission would present the latest developments to the Council, to which Poland could respond. Each delegation was then allowed to put two questions to Poland, limited to two minutes each and to the scope of the session. The Polish delegation's responses were not time-limited. At the end, the Commission would remark on the facts presented by the Polish government, and Poland would be given the right to respond. Finally, the presidency would only come to 'procedural conclusions' (Council of the European Union 2018h). In terms of the substantive scope, an annex defined seven topics all related to the Polish judiciary: the Supreme Court, the NJC, the ordinary judiciary, the disciplinary regime for judges, the extraordinary appeals procedure, court presidents and the Constitutional Tribunal, identical to the Commission's reasoned proposal (Council of the European Union 2018h).

The Commission produced an update for the Council hearing, in which it outlined the developments in the seven areas of concern. In each of these, it referred to its final Rule of Law Recommendation under the Framework. In some areas, the Commission listed new legislation implemented by Poland. However, in no area did the Commission come to a positive conclusion. All its concerns persisted (Council of the European Union 2018e).

The Council released protocols of the hearings after Laurent Pech submitted Freedom of Information requests. The hearing, which was only one point on a busy agenda, started already three hours late, prompting the Polish government to (unsuccesfully) move to postpone the meeting. It then lasted three hours (Council of the European Union 2018j). The Commission stressed that it was most concerned about the issue of the Supreme Court. The Polish delegation unsurprisingly rejected the allegation that the criteria for Article 7(1) were met. It highlighted the top-level dialogue between Prime Minister Morawiecki and Commission President Juncker, which had resulted in concessions from Poland and twenty-five legislative changes. The report notes that after the introductory dialogue, the Polish government started a Powerpoint presentation that lasted for one hour. Fifty slides were attached to the report (3). Thereafter, the other delegations had the opportunity to ask questions. The report summarizes each of the questions, notes who had asked it, and also the reply by the Polish delegation. At the end of the meeting, the Commission reaffirmed its concerns, while the Polish government affirmed that its concessions had been 'neither minor nor cosmetic but fundamental and of a systemic nature' (10).

Further hearings

On 4 July 2018, COREPER again requested a hearing on Article 7 for the next GAC meeting on 18 September 2018, this time under the presidency of Austria. The procedural modalities remained largely the same as the first time, although the Polish delegation was limited to eight people (Council of the European Union 2018g). The Commission updated its document on the state of play and highlighted how recent developments surrounding the Polish Supreme Court had 'aggrevated' its concerns, while in the other six areas, concerns 'fully remained' (Council of the European Union 2018d). The second hearing lasted two and a

half hours. The Polish government held 'that, according to Article 67 TFEU, regulation of the judicial system was a competence of the individual Member State' and argued that it had complied with Commission demands in areas such as unequal retirement age of male and female judges. Afterwards, the representatives of Poland gave a Powerpoint presentation with 26 slides lasting forty-five minutes (Council of the European Union 2018i).

In October and November 2018, the Commission twice updated the Council on the state of play in Poland and requested another formal hearing on 11 December. The modalities of the hearing were essentially the same as in the second hearing (Council of the European Union 2018f). The Commission maintained its critical position, upholding its assessment of 'aggrevated concerns' regarding the Supreme Court (Council of the European Union 2018c). The third hearing lasted 'only' two hours. The Polish delegation presented their point of view for forty minutes and with thirty slides. The delegation argued that it had reversed course in some of the most criticized areas and asked how the Council wanted to proceed with Article 7 and about the relationship of the Article 7 procedure with infringement proceedings. The Polish delegation also circulated a three-page non-paper, in which it argued that it had made concessions in all areas in which the Commission had voiced concerns.[14] It also bemoaned that the Commission was slow to update its state of play and that the most recent Commission update did not take into account developments that had happened in November (Council of the European Union 2018k).

14. In diplomatic usage, a non-paper is an informal document used by delegations to float ideas that need not be the approved position of their governments and does not commit their governments to this position. It is used to float ideas and to discuss and test support for these. It can be withdrawn at any point.

Analysis of hearings

The three Council hearings in 2018 show how the Council struggled to find a working format for conducting these hearings. An interviewee, who was personally in the room at two of the three hearings said:

> Normally, it's only ministers in the front seat in the hearing. ... Poland was given the possility to have more civil servants present and also, if I remember right, they answered some questions in the hearings. And it created a bit of an imbalance that on the [one] side you have people that know all the details and on the other side you have only ministers. And it's difficult to have a meaningful discussion, because ... the ministers cannot go very deep. (Interview 9)

This level of technical details caused problems in the Council hearing. Ministers of 27 member states had to sit three times through long meetings, listening to repetitive Powerpoint presentations by the Polish delegation:

> I think their tactic was to speak and speak and speak and speak until time runs out or people get bored or they have to catch their flights. And they really covered a lot of details and they had lots of slides. ... There was this problem of time running out, ... and people had to leave, ministers had to catch their flights before they could ask questions. (Interview 9)

Questions were subject to strict time limits, but answers were not, meaning in essence that each question a minister asked could prolong the meeting for an indefinite time. The Polish demeanor during the hearings was describes as 'constructive', but also 'consuming' (Interview 9; similar interview 11).

An analysis of the delegations that asked questions over the three meetings shows a divide between the old and new member states of the EU. Among the new states, only Estonia and Cyprus asked questions, whereas the Nordic and Benelux states together with Germany, France, Ireland and the Iberian

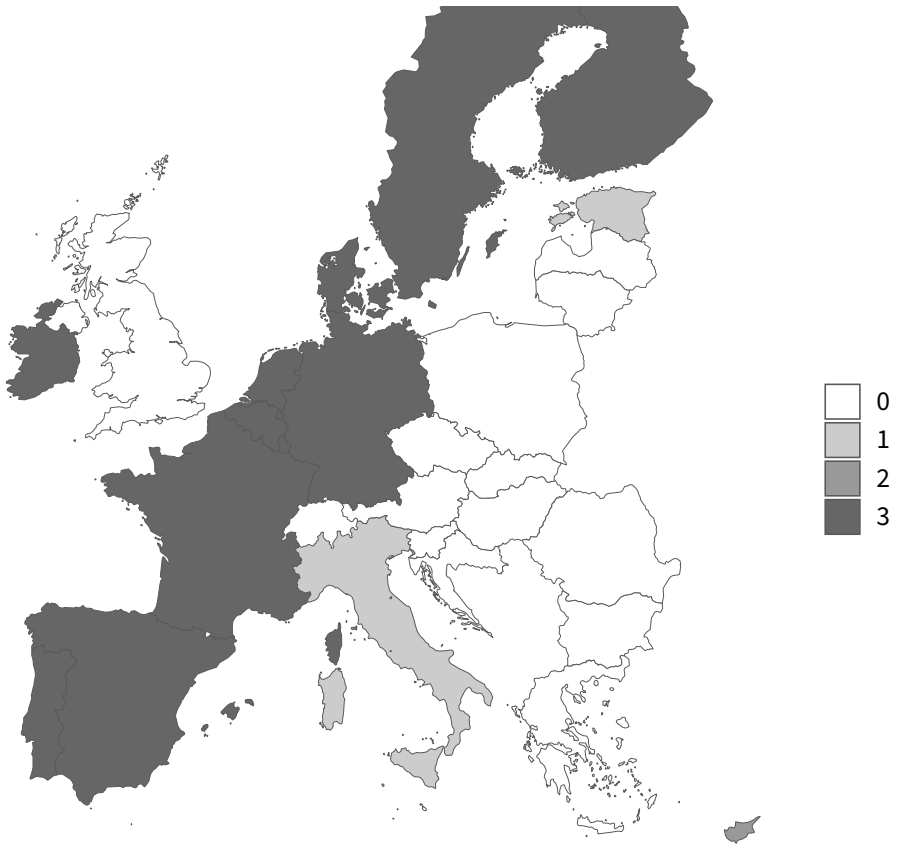

FIGURE 5.1 EU countries asking questions in Article 7 hearings on Poland, 2018

countries signalled that they were critical.[15] Among the old member states, only Austria and the United Kingdom did not ask questions, while Italy asked only once (Figure 5.1). This left fourteen countries disengaged from the discussion.

After these three hearings, the Council had no more Article 7 hearings on Poland until June 2021. Another interviewee, who was in the room during these meetings, reported that the hearings were redundant and that delegations asked repeatedly the same questions that Poland had already answered (Interview 11). Since the Commission had no major news to report, and the GAC already had a busy schedule, no more space was made available for further hearings for a while. At the same time, a majority wanted to keep the procedure alive and

15. Which delegations asked questions in Article 7 hearings has been analysed before by Pech (2019, 2022).

having too many meetings would have increased the pressure to come to a conclusion (Interview 11). Speaking generally about Article 7, one interviewee explained that there was uncertainty about what would follow a vote, even if it succeeded.

This section has shown the limitations of Article 7 hearings in the Council. Without preparations on technical level, the GAC proved to be an unsuitable format for discussion. Poland was all too eager to go into technical detail at which ministers of other member states could not engage, overloading them with information while diverting their attention, thus exploiting the information deficit. The Polish government also challenged the appropriateness of the Article 7 tool, especially to include subjects that were part of infringement proceedings by the Commission. Most critically, the hearings lay open the divisions between member states: the rule of law friends on the one hand, and those member states that preferred minding their own business, on the other. With almost half of them not even tabling questions during the hearings, this gave the impression that a four-fifths majority could not be mustered and certainly no unanimity, as required by the sanctioning mechanism. This meant that political support for sanctions was missing in the Council. Thus, the best course of action was to keep the procedure alive, rather than force its resolution. With Article 7 TEU proving to be a toothless tiger rather than a nuclear bomb, other avenues had to be explored.

5.6 A timid escalation

In this chapter, we have seen that the Commission has learned to take the threat of backsliding in Poland seriously. First, Kaczyński emulated strategies that Viktor Orbán had used years earlier. His government attacked the Constitutional Tribunal. Since the Tribunal resisted, Kaczyński had to overpower it before he

was able to capture it. Then, in parallel to Hungary (2012–13), he attempted to pack the courts by emptying the senior ranks of the judiciary by forcibly retiring them. Orbán had succeeded with this strategy, even though he lost the legal battle at the ECJ, since he had quickly created facts which could not be changed thereafter. The Commission was determined not to let this happen in Poland. Like Orbán before, Kaczyński also tried to control judicial governance. This he did through a politicization of the NJC. The recent experience with Hungary and certain failures in managing the situation there created learning processes that helped the Commission understand the threat.

Its sense of threat was aggravated by the way Poland handled its attacks on the judiciary. Lacking a majority able to change the constitution, PiS often resorted to unconstitutional measures, where Orbán could simply change the Constitution and therefore legalize his authoritarian politics. This in turn, helped spark resistance from judicial stakeholders, which helped bring the issue on the Commission's agenda. Whereas Orbán could 'forge' and 'bend' constitutional rules, Kaczyński often had to 'break' the Constitution (Pirro and Stanley 2022), and with it, European law. This shaped the response by the EU institutions, especially the Commission, who had chosen legal frames for backsliding politics. Furthermore, with only 37 per cent of the vote, PiS could hardly claim a mandate for the sweeping changes to the country's judiciary. While Poland's government originally attempted engagement tactics with the European Commission, these quickly fell flat and failed to conceal the authoritarian political tactics.

While the Commission had to evaluate backsliding as a threat, it also needed to find appropriate tools to respond. In 2015 and 2016, when Poland attacked the Constitutional Tribunal, Article 7 was again too escalatory to use. On the other hand, it had no good legal case to use infringement proceedings. But since it had

created in 2014 the Rule of Law Framework, it had something in its hand. This was quickly activated to engage with the Polish government. In this process, the Commission generated reports on the issues it deemed problematic.

Once PiS widened its attacks to the judiciary, the Commission got more active. First, it brought an infringement case against the law on ordinary courts, basing it on the equal treatment directive. Second, it used the Recommendations under the Rule of Law Framework to draw red lines, in particular the forced retirement of the Supreme Court judges and threatened the Polish government with Article 7 in that case. Since it did not heed the Commission's warnings, Article 7 was activated. This allowed the Commission to also target issues outside of the *acquis* proper, such as judicial independence and the Constitutional Tribunal. Once the ECJ had extended the *acquis*, through its landmark ASJP case, the Commission could now bring cases on judicial independence with little risk.

Compared to the Hungarian case, it was easier to find political support for sanctions in the case of Poland. Since PiS and its coalition-partners were in the ECR, in the Parliament a broad majority spanning from the left to the centre-right EPP supported action to safeguard the rule of law, even though PiS utilized the Council Legal Service's opinion that the Rule of Law Framework was illegal. The apparent futility of engagement tactics with the Polish government quickly aggravated the political support for actions against Poland. In 2017, the Commission was determined to prevent a situation in which the Polish government could create irreparable damage to judicial institutions. In November and December that year, the Commission received signals of broad support from the Parliament and member states for Article 7, thus it was confident using the procedure.

However, in the Council hearings, Poland was contesting the procedure's le-

gitimacy and attempted to appeal to inter-governmental values dear to member states. There, it became quickly doubtful whether four-fifths of member states were ready to vote for Article 7. Taking a vote was politically costly, should it fail.

Thus, in line with my theoretical framework, actions against Poland were faster, better targeted and more broadly supported by EU institutions. They forced painful concessions from Poland's government, which was not able to go through with some of its most egregious changes. On the whole, however, the sanctions the EU inflicted on Poland's government, were not strong enough to create high costs of backsliding and destabilize the authoritarian equilibrium. The next Chapter turns to the concurrent case of Hungary, where the rule of law situation became progressively worse as well.

6
Parliament Goes Nuclear

USING ARTICLE 7 AGAINST HUNGARY

It was one of the more bizarre moments in EU politics: Commission President Jean-Claude Juncker welcomed on 22 May 2015 the Heads of State and Government of member states for an Eastern Partnership Summit in Riga. When Viktor Orbán approached Juncker, who was flanked by Donald Tusk, the president of the European Council, and Latvian Prime Minister Laimdota Straujuma – the host – Juncker turned to Laimdota and said: 'The dictator is coming'. When it was his turn to shake hands, Juncker once more exlaimed 'dictator!', smiling broadly, and delivered a friendly slap on Orbán's cheek. The 'dictator' had been confirmed in elections in 2014. While the share of votes his party, Fidesz, won was nearly ten percentage points lower than in the previous (free and fair) election, Orbán defended his two-thirds majority of seats in the legislature with a well-adapted electoral system (Scheppele 2014, 2022; ODIHR 2014).

In Chapter 5, I have discussed how in 2016 Poland became a priority for the European Commission. While the Commission was highly alert to the threat posed by PiS's attacks on the Constitutional Tribunal and independent courts, it had trouble using infringement proceedings due to legal uncertainties. Instead, it focused on its new Rule of Law Framework, which it could use to engage with the Polish government early on. While Poland at first engaged with the Commission, it soon became clear that it was not willing to offer concessions

without proper pressure. The ECJ extended its case law on judicial independence in member states, bringing this area under the acquis. The Commission then brought two more infringement cases against Poland. Furthermore, since the Commission could rely on political support of the European Parliament, where Poland enjoyed little protection, and influential member states, it used Article 7(1) TEU. However, in the hearings in 2018 it became clear that the political support was far from universal and that a clear cleavage existed between most of the old and new member states. This kept the costs of backsliding low and ultimately upheld the authoritarian equilibrium.

In this Chapter, I show how policymakers were grappling with how to rein in Hungary, but also which ideas they pursued to extend the toolbox in the 2014 to 2019 period. In Hungary, too, the threat from its backsliding became apparent during this period. The EU institutions disagreed on how to respond: Parliament wished for the Commission to use its Rule of Law Framework and Article 7 TEU, while the Commission preferred to use the infringement procedure. With the Commission focused on Poland, the Parliament decided to fill the void and focus its attention on Hungary. Despite Orbán's willingness to talk, it became clear to many that his government was on an authoritarian path. Increasingly, even those sympathetic to engagement with the government noticed that these had no discernible effect on the situation in Hungary.

Under pressure from the other institutions, the Council started a rule of law dialogue, which showed the Council's inter-institutional preferences more than a committment to upholding the rule of law (Section 6.1). In 2015, the European Parliament urged the Commission to use its Rule of Law Framework in the Hungarian case, which it could not do by itself. The Commission did not comply and the Parliament made its first attempt to use Article 7, but failed to even

garner a majority, much less the qualified majority needed to trigger Article 7. The attempts to use this tool had hit a ceiling (Section 6.2).

The focus of the European Parliament shifted to a proposal for a pact on democracy, rule of law, and fundamental rights (DRF), which would tie the different EU instruments together, create a clearer division of labour between itself, the Commission and Council, and structure the inter-institutional engagement. This DRF pact would help the EU evaluate threats, but also create a structure within which to build political support for sanctions. The Commission reacted negatively and the Council did not react at all (Section 6.3).

Section 6.4 shows that on Hungary, the Commission used more infringement cases in this period, which it saw as an appropriate measure. First, compared to the difficulties in the earlier period until 2014 and in the Polish case, the Commission found it easier to find violations of secondary law. Secondly, it viewed Hungary as more ready to comply with ECJ judgments. Thus, it was seen as the best strategy. At the same time, the Commission remained critical that democratic backsliding in Hungary warranted the use of Article 7. It was not a tool it found politically and legally appropriate.

This is where the European Parliament disagreed (Section 6.5). In light of deeper backsliding in Hungary in 2017, the Parliament made another attempt to use the Article 7 procedure. While it could find this time a majority for authorizing a report, it remained unclear whether a qualified majority required by the treaties would support it in the end. Thus, in Section 6.6, I detail the process of the Parliament's activation of Article 7(1) TEU. It required political entrepreneurship to build the necessary support.[1] The Hungarian government

1. Parts of this chapter formed the basis for a research article with the title 'Getting Article 7 done: coalition-building against Hungary in the European Parliament' published in the *Journal of European Integration*. There, I identify the crucial role of the rapporteur as a political entrepreneur in the coalition-building efforts of the European Parliament. I argue

fought tooth and nail against the Parliament's report, but made mistakes and did not offer enough concessions to appease EPP members. The government quickly mobilized the law to cast doubts on the Parliament's resolution, targeting both the procedural and substantive dimension to undermine political support for sanctions.

Late in Juncker's term, the Commission paid renewed attention to the toolbox. I discuss in Section 6.7 two new additions, which were considered. First, together with a proposal of a new seven-year budget of the EU – the MFF – the Commission tabled a legislative proposal for a rule of law conditionality regulation, which could be used to withhold funding from member states that had general deficiencies of the rule of law. Secondly, under pressure from the Parliament, the Commission took some steps to create a kind of DRF mechanism built around annual rule of law reports, even if this was not based on an inter-institutional agreement and not quite as encompassing as the Parliament's demand. The mechanism was framed as a horizontal tool to create a rule of law culture, prevent deterioration and sanction transgressions. Importantly, the reports would create a common factual understanding on which to base further action. Section 6.8 concludes.

6.1 The Council's rule of law dialogue

By 2015, the Parliament had criticized backsliding in Hungary four times, and the Commission had started several infringement proceedings. It had created the Rule of Law Framework, but the Council had stayed out of the fray. This became an increasingly untenable position. Not only had the Parliament called repeatedly on the Council to act, but so had four member states (Denmark,

that a mixture of strategic timing, de-politicization and lobbying tactics have been used to enable large parts of the EPP group to vote against Hungary's government (Hanelt 2024).

Finland, Germany, and the Netherlands) in a letter of 6 March 2013. Yet there was no reason for the Council to discuss a member state's rule of law situation in absence of an application under Article 7. There was no procedure for doing so. The Council Legal Service, in its May 2014 opinion on the Commission's Rule of Law Framework, had suggested an agreement among member states to review each other's rule of law situation (Council of the European Union 2014a, 26–27). Nevertheless, there was little political appetite for serious action against a member state in the Council.

The Italian presidency of the Council tabled on 12 December 2014 a paper entitled 'Ensuring Respect for the Rule of Law', which proposed an annual dialogue on the rule of law in the GAC, which would include 'debates on thematic subject matters' (Council of the European Union 2014c, § 18). This was adopted by the Council shortly after on 16 December (Council of the European Union 2014b). The language of the conclusions highlights the inter-institutional caution of the Council, basing it 'on the principles of objectivity, non discrimination and equal treatment of all Member States' (§ 2), while agreeing to conduct the dialogue 'on a non partisan and evidence-based approach' (§ 3). It would 'be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States' (§ 4). The dialogue was thus of a horizontal nature: it did not debate the rule of law in Hungary, but issues such as judicial governance in all member states. Finally, the Council decided to re-evaluate this tool after two years (§ 7).

The Council's decision was immediately criticized by academics. Kochenov and Pech (2015) said that 'the latest buzzwords are used to hide an unwillingness to meaningfully act'. The Council was reluctant to act more than symbolically. Oliver and Stefanelli (2016) suggest four reasons for the Council's reluctance to get involved: first, the party-political dimension in the EPP (Fidesz) and ECR

(PiS); second, other CEE countries' sympathy with Orbán's politics; third, a fear of other member states, that they could be targeted with sanctioning tools in the future; fourth, a worry that stronger action would backfire, given Hungary's media-savy public diplomacy. Hence, the horizontal discussion failed to even amount to a peer review, as the Council Legal Service had envisaged (Oliver and Stefanelli 2016).

The Rule of Law Dialogue created an avenue for the Council to discuss the rule of law in member states and offered a way for Council involvement. But by using a horizontal discussion, the Council chose the least stinging format, reflecting its political aversion for involvement.

6.2 Hitting the ceiling: the 2015 resolutions on Hungary

In the first four years of Fidesz's backsliding until 2014, the Council was essentially a non-actor. It took immense pressure to force the Council to get involved at all. This is in contrast to the European Parliament, which was clearly the champion of democracy, the rule of law and fundamental rights among the European institutions in its seventh term and had passed resolutions to condemn Hungarian backsliding four times. Yet it had not gone the final step and used Article 7. Two further resolutions in 2015 show the evolution of the Parliament's position, but also the limitations of its political support for sanctions.

The June 2015 resolution

The European Parliament debated 'the situation in Hungary' again on 19 May 2015, almost two years after the Tavares report. Two developments were mostly responsible for the renewed attention. Faced with protests and decreasing popularity in Hungary, Fidesz sought to benefit from the 'migration crisis' (Várnagy 2016). Orbán several times publicly considered the re-introduction of the death

penalty in Hungary (Traynor 2015), a taboo for both the European Union and the Council of Europe. The reintroduction of capital punishment would have been a violation of the ECHR's protocols 6 and 13 as well as Article 2 CFR. Secondly, the Hungarian government had sponsored several billboard campaigns against migration and asylum seekers, in which it also attacked the European Union (Nagy 2016). It undertook a 'national consultation', sending all Hungarian voters a questionnaire. The questions framed immigration and terrorism as one issue and were phrased suggestively. For example, the third question read: 'There are some who think that mismanagement of the immigration question by Brussels may have something to do with increased terrorism. Do you agree with this view?' (Hungarian Prime Minister's Office 2015). Question 7 asked whether the respondent would 'support the Hungarian Government in the introduction of more stringent immigration regulations, in contrast to Brussels' lenient policy'.

As he had done twice in the past for Parliament debates on the rule of law in Hungary, Viktor Orbán travelled to Strasbourg. This time, however, he was only given the floor after the leaders of the parliamentary groups had spoken. At the beginning of the debate, the representative of the Latvian Council presidency admitted that the Council had not discussed the situation in Hungary nor developed its own position, but welcomed the fact that the Hungarian government had been given the opportunity to participate in the debate.

The first Vice-President of the Commission, Frans Timmermans – a Dutch social-democrat – made clear that the Charter of Fundamental Rights bans the death penalty. Timmermans was adamant that if Hungary was to reintroduce the death penalty, it would lead to the imposition of Article 7. At the same time he stressed that Orbán had assured the Commission that his government had no concrete plans to reintroduce capital punishment. He condemned the national consultation:

> a public consultation based on bias, on leading and even misleading questions, on prejudice about immigrants, can hardly be considered a fair and objective basis for designing sound policies. Framing immigration in the context of terrorism, depicting migrants as a threat to jobs and the livelihood of people, is malicious and simply wrong. It will only feed misconceptions and prejudice. (European Parliament Debate, 19 May 2015, Item 10)

Nevertheless, as Sophie in 't Veld (Netherlands, ALDE) pointed out in her statement, Timmermans did not speak about any concrete actions the Commission could take against this. She realized the problems with the existing toolkit: 'we need a mechanism to fill the gap between weak legal tools on the one hand, and the nuclear option of Article 7 on the other hand', she said. Her colleague, Marie-Christine Vergiat, (France, GUE/NGL) said: 'Article 7 is a decoy, it is inapplicable, it is not even a deterrent'. Instead, she emphasized the need for more infringement procedures, which the Commission had to bring forward.

Manfred Weber, leader of the EPP group, highlighted Orbán's willingness to come for the debate, strong economic growth in Hungary, and strong election results for Fidesz (which he exaggerated).[2] The left, he alleged, ignored similar problems in Romania, where Victor Ponta, a Social-Democrat, ruled. Weber condemned the discussion on the death penalty and the language of the national consultation, but urged everyone to think substantively about the issue of the repatriation of asylum seekers, where Orbán rightly pointed out problems. While the prohibition of the death penalty reflects a large consensus of European elites, the migration issue was more polarized, with the right taking tougher lines than the left.

When Orbán took the floor, he referred to his country's economic performance as a source of legitimacy for his government. Compared to earlier appear-

2. Weber said: 'Orbán was since 2010 confirmed each time by over 50 per cent of his voters'; in fact, in the national election 2014, Fidesz–KDNP received under 45 per cent of the vote, resulting in two-thirds of the seats in the National Assembly.

ances, he struck a relatively civil tone. He spoke at lengths about migration and differentiated between European freedom of movement and migration from abroad. The latter he divided further between economic migration and refugees, arguing that Hungary was not able to absorb all the migrants. On the matter of the death penalty, he suggested that no European treaty bans debate, and stylized the debate as one of freedom of speech, not capital punishment. This prompted Josef Weidenholzer, an Austrian Social-Democrat, to reply to Orbán: 'No sooner have you spoken out in a provocative manner than you tone down what you said. You are a master of doublespeak, a master of the ambiguous'.

In his final statement, Timmermans acknowledged the resounding election victories of Orbán and the legitimacy they had created for him. Yet he tried to disentangle this issue, as well as the performance legitimacy through economic success from the rule of law issue:

> First of all, of course it is very important and interesting to hear of the economic success of Hungary, and I know Prime Minister Orbán is a formidable campaigner, who has won some of the most astonishing election victories and therefore has a huge democratic mandate. But neither economic success nor democratic mandate can weaken the position of the rule of law in any Member State of the European Union. You cannot use an electoral victory or economic success as a sort of condition to say 'we do not then have to observe the rule of law in a Member State'. So I am interested in hearing the stories about economic success and electoral success, but it is neither here nor there in this debate, frankly. This debate is about the rule of law. (European Parliament Debate, 19 May 2015, Item 10)

Yet Timmermans did not, as some MEPs had asked, talk about further measures the Commission would take. While Timmermans stood up to Orbán, all he had done was draw a red line against the reintroduction of the death penalty.

Three weeks after the debate, on 10 June 2015 the European Parliament voted on resolutions on Hungary. The Parliament agreed with the Commission that

the reintroduction of capital punishment would be seen as incompatible with the treaties and the CFR (European Parliament 2015a, § 1), and that it would set off Article 7 (§ 2). The Parliament also 'deplored the absence of a reaction from the Council' and urged the Council to debate the subject and adopt a position (§ 9). It asked the Commission to use the Rule of Law Framework (which it had created in 2014) on Hungary and set a deadline to the Commission in September 2015 (§ 11). Finally, Parliament demanded 'a proposal for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights' from the Commission. It referred the matter to the LIBE committee for a report (§ 12). The resolution was adopted with a clear majority, which roughly mirrored that of the Tavares report (over 59 per cent of votes cast). The political support had not shifted much in the subsequent two years, despite the prospect of capital punishment. Mass migration had polarized Europe. While Orbán went furthest in fighting it, he certainly had many sympathizers on the (centre) right.

On 23 September 2015, shortly before the deadline set by the Parliament, the Commission replied to the resolution.[3] It clarified its position on the use of the Rule of Law Framework:

> the Rule of Law Framework is intended to address emerging systemic threats to the rule of law ... in particular in situations which cannot be effectively addressed by infringement procedures and if the 'rule of law safeguards' which exist at national level no longer seem capable of effectively addressing these threats. These national 'rule of law safeguards' refer to all judicial and constitutional mechanisms and safeguards which aim to ensure the protection of democracy and fundamental rights in a Member State. The Commission considers that the conditions to activate the Rule of Law Framework regarding Hungary are at this stage not met.

Hence, the Commission suggested first that infringement proceedings might

3. https://oeil.secure.europarl.europa.eu/oeil/spdoc.do?i=25894&j=0&l=en.

be effective in the case of Hungary, as engagement yielded results. Second, Hungary viewed the constitutional and judicial safeguards of Hungary not as entirely inefficient, which speaks to the limitations of the EU's ability to effectively monitor member state developments, especially where informal modes of capture and control are used (Zgut 2022; Vincze 2023b; Hanelt and Vincze 2025). From the Commission's point of view, the framework was the wrong tool in the current situation. Similarly, on the idea of an EU mechanism, the Commission subscribed to the aims, but took the position that further monitoring mechanisms were not needed and would run the risk of duplicating work. The issue, in the Commission's opinion, was not a lack of knowledge, but a lack of 'capacity to act'.

The follow-up

In November, the Parliament's LIBE committee addressed a set of questions for oral answer to the Commission. It asked whether the Commission had started an in-depth monitoring procedure on Hungary, its assessment of the situation in Hungary, whether the Commission had used the Rule of Law Framework on Hungary, and, if not, why.[4]

On 2 December 2015, the Parliament held a debate in which Věra Jourová, a Czech liberal and the Commissioner for Justice, answered. She listed a long range of measures the Commission had taken, especially letters addressed to the Hungarian government, EU pilot procedures – structured exchanges of information preceding infringements – and infringement proceedings. Jourová also highlighted that Hungarian courts had been able to address concerns in their rulings, although she did not mention specific judgements. She implied

4. Question for oral answer O-000140/2015, https://www.europarl.europa.eu/doceo/document/O-8-2015-000140_EN.html.

that 'national rule of law safeguards' were still working and that concerns about Hungarian policy choices could be effectively addressed by the Commission. She summarized the Commission's position regarding the Rule of Law Framework:

> Considering that concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play, the Commission takes the view that the conditions to activate the Rule of Law Framework regarding Hungary are at this stage not met. (European Parliament Debate, 2 December 2015, Item 17)

Sophie in 't Veld, the Dutch ALDE MEP, drew her own conclusions from the Commissioner's words:

> the Commission is taking a fairly narrow legalistic approach, and I understand that it does not have that many instruments to do anything else, but the Commission is only assessing whether there is a strict violation of European Union laws. ... Maybe we do not really have a legal instrument to tackle this but we need a political instrument.

The parliamentarians of the left and liberal groups were, thus, accusing the Commission of inaction and showed their increasing unhappiness with its strategy. Judith Sargentini (Netherlands, Greens/EFA) disagreed with the sentiment that there was an epistemic problem: 'We don't need more mechanisms ... A lot is known, but not acted upon'. The problem was the lack of action by the European institutions. Referring to controversial comments made by the President of the European Council, Donald Tusk (Poland, EPP), she said: 'I quite understand that you do not have the space to deploy a rule of law mechanism. I understand that. ... Of course you will never get the support in the Council for any action towards Hungary or for any activity towards Poland'.

While the left judged the Commission harshly, Monika Hohlmeier, a German EPP member, defended the Commission and Hungary and pointed the finger at

other countries' rule of law problems. The Commission seemed to her 'factual' and 'fair'. Her Czech colleague, Stanislav Polčák, however, disagreed: 'if we examine the constitutional reforms that have been carried out in Hungary, even though I am a member of the EPP here in Parliament, I cannot hide the fact that they are embarrassing'. This sentiment remained isolated.

The resolution of 16 December 2015 focused on asylum and migration legislation as well as government communications and national consultations in Hungary and was designed as a follow-up on the June resolution. Most of the resolution's articles addressed the activities of the European Union. The European Parliament (2015b, § 4) criticized the Council's failure to act, discuss the Hungarian case, and adopt a position.

> [The European Parliament] believes that Hungary is a test for the EU to prove its capacity and political willingness to react to threats and breaches of its own founding values by a Member State; deplores the existence of similar developments in some other Member States and considers that the inaction of the EU may have contributed to such developments. (§ 5)

This was a reference to Poland, which, in the months before, had started a barrage of attacks on the Constitutional Tribunal. Furthermore, the Parliament regretted that:

> the Commission focuses mainly on marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights; believes that infringement proceedings, in particular, have failed in most cases to lead to real changes and to address the situation more broadly. (§ 7)

It reiterated its call for the use of the Rule of Law Framework (§ 8). Specifically, the resolution demanded that the Commission analyse and evaluate the 'combined impact of a number of measures' in Hungary, rather than analyse individual measures in isolation. It noted financial steps taken by the Commission

to protect European funds in light of flawed procurement processes in Hungary (European Parliament 2015b, § 9).

The support for this resolution dropped nearly seven percentage points compared to the June resolution and only mustered a fairly narrow majority short of 53 per cent. For the vote on the resolution, the EPP group requested roll-call votes on five points.[5] Two of the five paragraphs were voted down narrowly. Both took a substantive position on the use of Article 7. Section 5 of the draft resolution stated 'that the conditions for the activation of the rule of law framework and Article 7(1) TEU are fully met' (defeated by 325 to 322), while section 10 would have authorized the LIBE committee to make preparations to trigger Article 7(1) TEU (defeated by 329 to 320).

This shows that even within the European Parliament, which had stylized itself as the defender of European values against Orbán, support for Article 7 was limited. The champions of democracy, the rule of law, and fundamental rights were not able to command a majority and, much less, the two-thirds of the 'votes cast' required by the treaties for Article 7. Therefore, they asked the Commission to use its Rule of Law Framework, but since its penultimate step would require a two-thirds majority in the Parliament and an even higher majority in the Council, the Commission hesitated to use it. The Commission could not rely on the Council's support, whose Legal Service viewed the Framework as illegal. And despite the fact that a majority of the Parliament was pushing the Commission to do more, no own majority for Article 7 existed in the Parliament. Thus, there was no political support for the Commission to use Article 7 against Hungary in 2015 and the Commission did not view the Rule of Law Framework as an appropriate tool to deal with the concerns it had on Hungary.

5. Results of votes: https://www.europarl.europa.eu/doceo/document/PV-8-2015-12-16-VOT_EN.pdf; roll call votes: https://www.europarl.europa.eu/doceo/document/PV-8-2015-12-16-RCV_EN.pdf.

On top of this, the Commission had other choices. It opted to open an infringement case on asylum legislation, which it announced on 10 December 2015. It accused Hungary of violating two EU directives: the asylum procedures directive (2013/32/EU) and the directive on the right to interpretation and translation in criminal proceedings (2010/64/EU). In addition, the Commission argued that Hungary had violated Article 47 CFR by letting court secretaries, who lack judicial independence, decide legal cases (European Commission 2015).

6.3 A new rule of law mechanism?

By 2016, the European institutions had created a number of instruments. Yet every institution seemed to follow its own agenda. The Parliament criticized backsliding in Hungary and Poland, the Commission used infringement proceedings against Hungary and the Rule of Law Framework in the case of Poland. The Council only reluctantly and cautiously dipped its toes in the water, starting annual, horizontal discussions on the rule of law. The Parliament viewed backsliding in member states as a problem that needed tackling, but was unsatisfied with the existing tools. Furthermore, after authoritarian illiberalism had spread from Hungary to Poland, policymakers worried that other countries could follow, bringing prevention efforts to the fore. Even more urgent was to increase the political support available to sanction rule of law violators, which needed to involve all institutions. A tug of war is easier to win if everyone in a team pulls in sync – and in the same direction. Hence, an initiative emerged in the Parliament to mould the many instruments into a more coherent whole, while also trying to force the Council's hands, and extent the 'bite' of the EU to areas that were not under the *acquis*. This is the subject of this section.

The June 2015 resolution on Hungary had called on the Commission to 'present a proposal for the establishment of an EU mechanism on democracy,

the rule of law and fundamental rights, as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States' (European Parliament 2015a, § 12). It had also authorized a report by the LIBE committee. Writing on the subject, Sargentini and Dimitrovs (2016, 1086) suggested three aims for the report of the Parliament: first, appraising the tools the Commission and Council had created; second, suggesting a better toolkit; third, forcing the Commission to take a position. Yet, Sargentini and Dimitrovs (2016, 1090) admitted that it would be difficult to 'find an appropriate legal basis for this proposal', given the doubts of the Council Legal Service.

The Dutch liberal Sophie in 't Veld became the rapporteur. Her report was tabled in Committee on 10 October 2016, where it passed with forty-one to eleven votes (with two abstentions) – a majority of 79 per cent. It made no mention of Hungary and Poland, even though these were mentioned several times in the debate. The report demanded that the Commission create a proposal for an 'EU Pact for democracy, rule of law and fundamental rights (DRF)' based on an inter-institutional agreement between the Commission, Council and Parliament by September 2017 (European Parliament 2016a, § 1). It asked 'the Commission to engage in a meaningful dialogue with civil society' in drawing up its proposal (§ 2) and asked for the mechanism to contain 'preventative and corrective elements' (§ 3), including the possibility of sanctions (§ 4). The resolution also suggested amendments to the Treaties (§ 20).

In an annex to the resolution, the Parliament suggested a legal text for the inter-institutional agreement. It listed four main components: first, 'an annual report' including 'country-specific recommendations', which would take into account reports by other authorities, such as the Council of Europe and the EU's Fundamental Rights Agency. Second, the European Parliament would engage, based on the report, in inter-parliamentary debate with national counterparts.

Third, it would make 'arrangements for remedying possible risks and breaches'. Here, the report named Article 7 TEU. Finally, it would involve a 'DRF Policy Cycle' (Annex § 2).

The pact was meant to tie the many disarrayed tools together (Sargentini and Dimitrovs 2016). For this, the Parliament suggested expanding the DRF pact to include the Commission's Rule of Law Framework and the Council's Rule of Law Dialogue (Annex § 3), but also to incorporate a range of instruments such as the Justice Scoreboard, media-pluralism monitor and others (Annex § 5). Central to the Parliament's proposal was the role of a 'DRF expert panel' that would, together with the Commission, work on the annual report (Annex § 4). Section 7 of the agreement set out a list of topics that the report should evaluate, while the expert panel would assess each of the member states against this benchmark (Annex § 9). The report would also form the basis for a debate in the Council (Annex § 10). The three institutions would need to discuss without delay, if the expert panel found 'serious and persistent breach[es]' for two consecutive years in a member state (Annex § 10.3). Finally, the three institutions would create a joint working group (Annex § 12).

The report was debated in the plenary on 25 October 2016. The LIBE-rapporteur highlighted the good cooperation with her shadow rapporteurs and the opinion rapporteur of the Committee on Constitutional Affairs (AFCO), Hungarian Fidesz MEP György Schöpflin.[6] 'I note that the only party that is actively campaigning against my report is the Front National, which I find reassuring in a way'. She explained:

> We have the European Commission Rule of Law Framework, and

6. In many European Parliament procedures, more than one committee is involved. In this case, the committee in charge was LIBE, with AFCO asked for an opinion. In the opinion committee, a rapporteur, together with shadow rapporteurs from other political groups, prepares the opinion text, which is then voted on by the committee.

> that is very important. I think it is very good that you have triggered it in the case of Poland, but that same case also illustrates the weaknesses and the shortcomings of that mechanism, and therefore the European Parliament has proposed the DRF pact. The principles, I hope, will find their way into the proposals that the Commission will, hopefully, put forward. (European Parliament Debate, 25 October 2016, Item 3)

The principles, she explained, were the equal treatment of member states and EU institutions. The mechanism should be permanent, consistently monitoring the rule of law situation and not be activated on an ad-hoc and 'crisis-driven' basis. It would further need to be 'objective, evidence-based, and not politically motivated', while 'building on existing instruments' and involve the national parliaments.

Timmermans lauded the 'inclusive approach with all stakeholders – EU institutions, Member States and civil society' as well as the proposal of a dialogue of the European Parliament with national legislatures. 'The Commission and I assume that the Council will want to be involved as well'. He was more critical about the idea of an expert-driven policy cycle around an annual report, which would 'raise questions of legality, institutional legitimacy and accountability'. For an inter-institutional agreement, he predicted, it would 'be very difficult to find common ground'. Timmermans also worried that new tools were unnecessary, given that the Commission had just started using its new Rule of Law Framework and he pointed to the risk of duplication of tools. Nevertheless, he promised that the Commission would give this report a 'serious response'.

AFCO's opinion rapporteur, Schöpflin, highlighted 'three necessary conditions' for a DRF pact: a legal basis; its impartial application, which presupposes a monitoring regime; and that its application leaves room for subsidiarity. Frank Engel, a Luxembourgian EPP member and LIBE shadow rapporteur, saw the report's demands vindicated by Timmermans's speech, which had highlighted

different institutional preferences. 'That to me is the best proof that this is exactly the moment in which we need to kick off a process of engagement towards finding a veritable and a true European logic of governance'. The social-democrat's shadow rapporteur, Monika Flašíková Beňová (Slovakia), warned:

> The European Union currently has no legally binding mechanism that could successfully monitor the compliance of member states' legislation with the Union's values and fundamental values. Even if the tools you mentioned exist, they are currently unable to draw attention to the serious risk of damage to fundamental rights and freedoms.

Spanish liberal Maite Pagazaurtundúa Ruiz, agreed: 'We want – as Mr Schöpflin said – without opportunism, a mechanism with objective criteria, with the collaboration of all the agents and civil society'. Ulrike Lunacek (Austria, Greens/EFA), affirmed that the mechanism was not aimed solely at the new member states, but would equally be applied to the old ones as well.

Barbara Spinelli, an Italian member of the far-left GUE/NGL argued that a new mechanism was necessary: 'Article 7 of the treaty is unusable because it is in the hands of the governments, therefore not impartial'. The far-right MEP from France, Gilles Lebreton (ENF), on the other hand argued that the report was on shaky legal grounds, since it tried to circumvent Article 7, which had established vote thresholds in the Council. He cited the Council Legal Service's opinion from May 2014 that had made this argument. Secondly, he criticized that 'it allows experts without democratic legitimacy to rate states like children'.

Nevertheless, the vote was not very polarized, with a broad majority from GUE/NGL to EPP carrying the resolution, leading to 405 to 171 votes with 39 abstentions – a majority of seventy per cent of the votes cast. Opposition came from the groups right of the EPP, from a sizeable number of GUE/NGL rebels

on the left, and from Fidesz members who either voted against the resolution or did not vote (such as Fidesz's József Szájer).[7]

In its response dated 17 February 2017, the Commission mirrored Timmermans words during the debate. It voiced its support for engagement of civil society and inter-parliamentary debate. It was critical of a DRF policy cycle and annual report prepared by 'experts', which the Commission put in quotes.[8] The Commission, thus, did not immediately take up the opportunity to suggest a pact. Some of Parliament's ideas would later become part of the Commission's arsenal, but not before the Parliament reiterated its call for a DRF mechanism in a resolution in November 2018 (European Parliament 2018c).

The Commission and Council had a better range of tools than the Parliament, which could only shame member states through resolutions or, if it could muster a two-thirds majority, use Article 7(1) TEU. The Parliament's proposed DRF mechanism would have given the Parliament a stronger role in inter-institutional decision-making on the rule of law, furthered the building of a rule of law agenda, and created structures for Council involvement. Yet the Commission reacted negatively. It had only started using its Rule of Law Framework and did not wish to experiment further. It was unhappy with some of the Parliament's suggestions, such as the strong involvement of an independent expert panel, which would trigger discussions of who these experts were and who should appoint them. Furthermore, this would have led to discussions about their suitability, bias and legitimacy. Nevertheless, a few years later, the

7. Roll-call votes: https://www.europarl.europa.eu/doceo/document/PV-8-2016-10-25-RCV_EN.pdf.

8. Response by the Commission: https://data.europarl.europa.eu/distribution/doc/SP-2017-16-TA-8-2016-0409_en.docx.

Commission picked up some of the ideas floated by the Parliament (Section 6.7 and Chapter 7).

6.4 The Commission against Hungary

As discussed above in Section 6.2, the European Parliament had called in 2015 on the Commission to use its Rule of Law Framework. The left-liberal coalition also attempted to push for Article 7, but failed to assemble a majority for authorizing a report to trigger it. The Commission, meanwhile, was reluctant. It lacked political support from the Council and the EPP to use the Framework and Article 7 and did not believe that the situation in Hungary justified the use of these tools. Against Hungary, the Commission's tool of choice was the infringement procedure.

Already in December 2015, under pressure to act from the Parliament, the Commission brought a case concerning Hungary's asylum law. It alleged a number of contraventions of EU directives, especially regarding the appeals process against asylum decisions, where no new points of fact could be raised by appellants. Moreover, bringing an appeal did not suspend the underlying decision, which could force appellants to leave the country before their cases were decided. Furthermore, people subject to criminal proceedings for alleged illegal entry did not have a right to a translator and interpreter. Finally, judicial decisions were taken by court secretaries, who did not enjoy judicial independence, which was seen as a violation of Article 47 CFR (European Commission 2015). After this formal notice, the Commission did not publicly follow up on the case. It was busy with the quickly deteriorating situation of the rule of law in Poland, and, perhaps, felt not strongly compelled to act on Hungary in light of the Parliament's weakness in the December 2015 resolution.

This changed in 2017. With an election coming up in spring 2018 in Hungary, it was campaign season for Viktor Orbán. This meant doubling down on his authoritarian path. In 2015, Orbán's party lost two by-elections and thereby its supermajority in the Hungarian Parliament. 2018 was the chance to regain it. In short succession, Orbán's government started campaigning against George Soros and the Open Society Foundation, which the Jewish Hungarian-American billionaire and philanthropist established, and that funds initiatives supporting liberal democracy and the rule of law across post-communist countries.[9] The Hungarian government passed 'Stop Soros' laws, which regulated NGOs that received funding from abroad, and legally harrassed the Central European University (CEU) in Budapest, an American-style post-graduate University established by Soros (Bárd 2020). The CEU, despite its status as a top university for the social sciences in the CEE region, was subject to fast-changing demands that were impossible to meet and only affected this University (88–93).

In light of the renewed backsliding in Hungary, both the Parliament (see Section 6.5 below) and the Commission paid new attention. In May 2017, the Commission sent a second Letter of Formal Notice to Hungary regarding its asylum law. Three of the five earlier issues had still not been resolved, and in the meantime the Commission had found more points it objected to. In particular, Hungary made it nearly impossible to seek asylum on its territory, deported migrants who had illegally entered without due process, and detained some migrants, including minors, indefinitely in transit zones. The Commission argued that these breached three different EU directives as well as the CFR (European Commission 2017a).

In June 2017, the Commission started an infringement case concerning the

9. In 2023, the Open Society Foundation announced a strategic pivot to regions outside Europe (Soros 2023).

TABLE 6.1 Infringement actions against Hungary, 2014–19

Date	Topic	Action	Number
2015-12-10	Asylum law	Formal Notice	IP/15/6228
2017-05-17	Asylum law	Formal Notice	IP/17/1285
2017-06-14	Relocation	Formal Notice	IP/17/1607
2017-07-13	Foreign-funded NGOs	Formal Notice	IP/17/1982
2017-07-13	Higher education	Reasoned Opinion	IP/17/1952
2017-07-26	Relocation	Reasoned Opinion	IP/17/2103
2017-10-04	Foreign-funded NGOs	Reasoned Opinion	IP/17/3663
2017-12-07	Relocation	Referral to ECJ	IP/17/5002
2017-12-07	Foreign-funded NGOs	Referral to ECJ	IP/17/5003
2017-12-07	Higher education	Referral to ECJ	IP/17/5004
2017-12-07	Asylum law	Reasoned Opinion	IP/17/5023
2018-07-19	Asylum law	Referral to ECJ	IP/18/4522
2018-07-19	Stop Soros	Formal Notice	IP/18/4522
2019-01-24	Stop Soros	Reasoned Opinion	IP/19/469
2019-01-24	Food in transit zones	Formal Notice	IP/19/4260
2019-07-25	Stop Soros	Referral to ECJ	IP/19/4260
2019-10-19	Food in transit zones	Reasoned Opinion	IP/19/5994

relocation of refugees. This case targeted Hungary, but also Poland and the Czech Republic, who joined Orbán in non-compliance. In 2015, at the height of the 'refugee crisis', the Council had decided with a qualified majority, to relocate refugees from the countries most affected.[10] However, Hungary, Poland and Czechia had not complied with this decision (European Commission 2017l). The Commission sent a Reasoned Opinion a month later (European Commission 2017m), and referred the matter to the ECJ in December 2017 (European Commission 2017n). Since the member states had infringed a Council decision, finding a legal basis was no problem in this case.

In 2017, the Commission brought two more infringement proceedings against Hungary. These concerned the Law on Foreign-Funded NGOs and the Higher Education Act, which targeted the CEU. After Hungary adopted the latter, the

10. Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601.

Commission sent a Formal Notice that it had opened an infringement case on 26 April 2017.[11] On 13 July 2017, the Commission communicated its Reasoned Opinion, citing a long list of legal sources that the Hungarian law had violated, in essence related to 'fundamental internal market freedoms' (European Commission 2017g).

In July 2017, the Commission sent a Letter of Formal Notice to Hungary concerning the Law on Foreign-Funded NGOs, which made it a condition for NGOs receiving above €24,000 annually in funding from abroad to register with the authorities and term themselves in all publications as 'funded from abroad'. The Commission found several legal hooks to challenge this law: freedom of movement of capital, the freedom of association in the CFR as well as data privacy rights (European Commission 2017j). It followed up with a Reasoned Opinion in October 2017 (European Commission 2017f).

On 12 December 2017, the Commission referred several cases to the ECJ. These included the cases on relocation against Hungary and Poland (European Commission 2017n), and the procedure against the Law on Foreign-Funded NGOs (European Commission 2017i) and the Higher Education Act in Hungary (European Commission 2017d). Furthermore, the Commission sent a Reasoned Opinion on the topic of asylum procedures on the same day to Hungary (European Commission 2017o). Here, it dropped four out of eleven points, on which it claimed compromise had been reached with the Hungarian authorities. It took more than half a year, until the Commission referred the case to the ECJ on 19 July 2018 (European Commission 2018a).

The Commission simultaneously opened a case regarding Orbán's 'Stop Soros' legislation, which criminalized anyone helping asylum seekers. There were again several legal bases for the case, including several EU directives,

11. https://ec.europa.eu/commission/presscorner/detail/en/MEX_17_1116.

treaties, and the CFR (European Commission 2018a). A Reasoned Opinion was sent on 24 January 2019 (European Commission 2019a) and the matter was finally referred to the Court on 25 July 2019. On the same day, the Commission opened a new case regarding Hungary's failure to provide food to migrants detained in transit zones, which in the Commission's view violated the CFR and the Return Directive (European Commission 2019b). A Reasoned Opinion on the transit zones case was sent on 19 October (European Commission 2019d).

In the case of Hungary, the Commission opened from 2017 many infringement cases to deal with backsliding in the country. Other than in the Polish case, it had less trouble finding appropriate legal bases for the infringement procedures, as it could often rely on secondary law. Anders and Priebus (2021) note that the Commission did not directly refer to 'democracy' or the 'rule of law' in infringement cases against Hungary, but frequently to 'rights and freedoms'. They observe that the Hungarian government at first tried to downplay the conflict with the Commission, referring to disagreements as 'technical'. Yet this changed in 2017, when Orbán's regime began to take a more conflictual approach, framing infringements as 'political attacks' (249). This shift makes sense from the point of view of my theoretical framework. The Hungarian response in the earlier years had two purposes: first, to conceal backsliding; second, to signal willingness to engage in order to keep political support for stronger sanctions down. For this purpose, Orbán's government depoliticized issues as technical disagreements, which it was happy to resolve in dialogues with the Commission. Around 2017, the Hungarian government's approach shifted. Now that backsliding has become harder to hide and argue away, it instead attacked the Commission and portrayed itself as a victim of the Commission's double-standards.

While infringements were the tool of choice of the Commission to 'manage'

the rule of law in Hungary (Priebus 2022), the Parliament started a new attempt at Article 7. This is the topic of the following sections.

6.5 The May 2017 resolution

After the Parliament's attempt to declare that the conditions for Article 7(1) against Hungary were met failed in December 2015, the Parliament did not pass any specific resolution on Hungary until May 2017. This resolution broke ground in two ways: first, it significantly expanded the size of the majority ready to sanction Hungary; secondly, it successfully tasked the LIBE committee to prepare a Reasoned Opinion on the Parliament's prerogative to trigger Article 7(1) TEU – exactly what it had failed to achieve in December 2015.

In 2017, Orbán became more authoritarian, but the Commission only used infringement proceedings. For the Parliament, this was an opportunity. One policy advisor told me:

> In 2017 we came to the conclusion that the Commission [was] not going to do anything, because of this Fidesz factor in the EPP. And on the other hand, we got a certain level of being unsatisfied with the developments in Hungary, also within the EPP. Especially, I think, the people inside the EPP were disappointed about the treatment of the Central European University and the treatment of NGOs. It was a kind of breaking point in the whole saga when we realized that the Article 7 initiative by the Parliament might be successful in here. (Interview 10)

In fact, a press release by the EPP, released on 29 April 2017, had critized Orbán for his actions regarding the CEU and the national consultation. Orbán had 'reassured the EPP that Hungary will act accordingly' (EPP 2017).

Parliament debated this resolution on 26 April in the presence of Viktor Orbán. Frans Timmermans spoke for the Commission: 'recent developments in Hungary have got many people worried in the EU, but also in the outside

world. We share those worries and concerns' (European Parliament Debate, 26 April 2017, Item 14). He mentioned that the College of Commissioners had debated the situation in Hungary twice in two weeks and announced that the Commission had on that very day decided to send a letter of Formal Notice to Hungary to start an infringement procedure regarding its Higher Education Act. Timmermans also expressed his concerns regarding draft legislation on the funding of NGOs, asylum legislation, as well as 'the protection of pregnant working women'. The integration of Roma children in education settings was another problem the Commission identified. However, he was adamant on one point:

> Where the Hungarian authorities engage in a dialogue with the Commission, good progress can be made, and I want to be crystal clear about this. Whenever we ask for a dialogue with the Hungarian authorities, they always oblige and start a dialogue so I want there to be no misunderstanding about this. I want to mention two examples where we have reached good progress. With regard to the transposition of the Framework Decision on Racism and Xenophobia, we are pleased to see that in our discussions with the Hungarian authorities our concerns have been addressed in recently adopted amendments to the Hungarian criminal code. (European Parliament Debate, 26 April 2017, Item 14)

The Commission wanted to continue with the mixture of dialogue and the light pressure of infringement proceedings. Timmermans spent about a third of his speech refuting the Hungarian government's claims made in its 'Stop Brussels' consultation.

In his speech, Orbán first explained why he had come:

> With my participation here, I want to help you to make an informed decision when Hungary is on your agenda. I remember that the decisions of the previous Parliament about Hungary did not stand the test of truth. Just think of the spectacular and embarrassing failure of the Tavares report.

But this time, he said, the European Union, was not his only opponent:

> Our dispute is partly with you and partly with an American financial speculator. I know that the strength, size and weight of Hungary is much smaller than yours, and smaller than that of the American financial speculator George Soros, who attacked Hungary, who although he ruined the lives of millions of European people with his financial speculations, who was punished in Hungary for speculation, and who is also an openly admitted enemy, yet he is held in such high esteem here that he is received by the highest leaders of the European Union.

The conspiracy narrative concerning Soros was relatively new and connected several themes of the Hungarian government's backsliding. It tied together Orbán's hostile migration and asylum policies, his fight against NGOs, and even the attacks on the CEU. 'George Soros and his NGOs want to transport one million migrants to the European Union every year. He personally publicly announced this program and offered a financial loan for it. You could also read it. We reject this proposal'. Regarding the CEU, Orbán denied plans to shut it down and even quoted from an email of the University's rector, Michael Ignatieff, to staff and students, saying that the CEU would continue operation. Instead, the Higher Education Act was presented as a technical matter of equity in the university sector to make sure that foreign universities did not enjoy any privileges that Hungarian and European universities did not.

Orbán attributed the questions posed in the national consultation to a national culture of 'straight talk'. The Hungarian government, he claimed, wanted to stop Brussels accummulating more powers, protect the balance of powers between member states and the EU. On this view, the draft legislation on NGO funding was a matter of 'transparency' and followed the 'American model'. But Orbán was also adamant that his government had not broken EU law:

> we intend to abide by the rules of the club, and we have always obeyed them so far. I am aware that EU membership entails not only rights, but also duties. We tried to resolve the conflicts of the past years through dialogue and negotiations. I am happy to report that as a result of this, we were able to conclude by common agreement such complicated matters as, among others, media regulation, the new Hungarian constitution, the transformation of the court system or even the development of nuclear energy. These are successfully closed cases. I would like to assure the Vice President that we will also strive for this in the matters currently on the agenda.

Therefore, the history of compliance – even if largely creative or symbolic (Batory 2016; Anders and Priebus 2021) – was pointed to in order to show that engagement and dialogue were not futile.

After Orbán, Manfred Weber spoke for the EPP group. This time, he was less accommodating to Orbán. He made clear that Soros was not the topic of the discussion. Weber positioned himself clearly on the side of the CEU and academic freedom, asking Orbán to implement fully the changes requested by the Commission. Similarly, he rejected the tone of the national consultation, which was not a survey of arguments and opinions, but 'stirring up anti-European sentiment'. On the other hand, he showed symphathy for the bill on NGO funding and attacked the Greens for opposing it, even though they championed transparency in the European Union. Yet he was not totally dismissive of Orbán, who had done 'excellent work' in many areas and was not a 'bogeyman'. Orbán, he said, had never avoided debate and always remedied the points demanded by the Commission. He contrasted this with the socialist governments of Romania and Malta, which had not yet shown that they were willing to face debate in the European Parliament.

As usually, some of the strongest criticism came from Guy Verhofstadt, the leader of liberal ALDE. He recalled how he met Orbán the first time and re-

marked how Orbán had changed, going from a proponent of a liberal democracy to a champion of the 'illiberal state'.

> At the moment the list of what you have done is a long one: harassing NGOs, chasing critical media away, building walls, your attempt to reinstate the death penalty in your country, even when this is not possible based on our treaties, and now you have decided to close down a university. I would ask you how far will you go?

And, while Orbán did all these things, he did not even want to leave the EU, in contrast to the eurosceptics: 'You want to continue getting money from the European funds, taking the European Union's money, but you do not want the European values. They are not for you'.

Representatives of the left-wing parties all attacked Orbán over the CEU. But even some on the right-wing opposition found this case troubling. A member of the Hungarian Jobbik (NI in the Parliament), Zoltán Balczó, said he had agreed with Orbán's migrant policy and his views on Soros, but: 'the government wants to make the operation of the CEU impossible with such arbitrariness of power that would create an unacceptable precedent'.

Sophie in 't Veld, instead of arguing with Viktor Orbán, addressed the Commission and members of Parliament:

> I very much welcome the steps that have been taken by Mr Timmermans. I also recognise the limited instruments available, but I think we should all recognise, and I would also like to ask Mr Weber to recognise that we are not talking about single issues here. We should address this in the systematic nature of the problem: the systematic destruction of the democratic rule of law and fundamental rights. We should also recognise the contagion that is taking place in Poland, so if we fail to recognise that systematic nature then we fail to preserve the integrity of the European Union. Therefore, I think it is high time that we launch the Article 7(1) procedure and I hope that this House is going to vote for it.

While the instruments available to the EU were not great, the focus on infringement procedures was misguided, as it could not have addressed the systemic problem. Hence, the need for Article 7 and it was up to the Parliament to take the necessary steps. The Austrian MEP, Ulrike Lunacek (Greens/EFA), agreed on the need for Article 7, but demanded that the Commission triggers it. The Slovenian S&D MEP, Tanja Fajon, asked for her EPP colleagues' support for Commission action in the form of the Rule of Law Framework, but did not suggest Article 7 directly. István Ujhelyi, a Hungarian social-democrat, meanwhile, strongly disagreed on Article 7 and asked his colleagues to:

> investigate the situation of the Hungarian rule of law, but do not punish Hungary for the time being! They should not be punished, because it is not the Hungarian people, but Viktor Orbán who deserves to be punished. We will replace this government at home and bring Hungary back to European values.

A number of speakers from the EPP were unusually critical towards Orbán. Dutch Esther de Lange, was visibly fed up:

> I would say to Frans Timmermans that it is a good thing that the Commission is working on this. But the real question of course lies with you, Prime Minister. ... Is your place among the autocratic leaders we see in our neighbourhood, like Putin or Erdogan, or do you belong to a Europe based on the core values that you yourself fought for in 1989? The choice is yours, but so are the consequences.

Her Czech colleague, Michaela Šojdrová, pointed out that the demanding conditions and tight deadline in the new Higher Education Act did not match, and asked Orbán to extend the deadline so all universities could actually comply with them. Maltese MEP, Roberta Metsola, meanwhile pledged that Parliament would:

> defend those values whenever and wherever they are under threat, whether it is the corruption of the Socialist Government in Malta,

> the watering down of the rule of law in Romania, institutions under pressure in Poland, or what is happening in Hungary. This is what we stand for.

Frank Engel from Luxembourg, pointed out the discrepancy between taking EU money while funding a large anti-EU campaign: 'Somebody who does that, Prime Minister, leaves the Union out of their own accord'.

At the end of the debate, both Orbán and Timmermans made final statements. Orbán again confirmed that he was willing to seek dialogue with the Commission and find compromises. But he also defended his concept of 'illiberal democracy':

> The thing is that they [in the EU] think if the liberals in Central Europe do not win or are not part of the government that then there is no democracy. ... The truth is that we think that if the liberals don't win, it can still be a democracy. Illiberal democracy is when liberals do not win.

Timmermans promised the Parliament that '[t]he Commission will take legal steps when legal steps are warranted, when the Treaties are violated', but suggested that this was not enough. There were larger issues which could only be solved through dialogue, but made no mention of Article 7 or the Rule of Law Framework.

In May 2017, the European Parliament once more passed a resolution 'on the situation in Hungary'. The text was tabled by four groups, ranging from the centre (ALDE) to the left (GUE/NGL), notably without the EPP. Three sections were particularly important: Section 8 criticized the Commission for ignoring repeated requests of the Parliament to use the Rule of Law Framework on Hungary and stated that infringement proceedings 'have failed in most cases to lead to real changes and to address the situation more broadly'. In Section 9, the Parliament expressed its belief, 'that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and

warrants the launch of the Article 7(1) TEU procedure' (European Parliament 2017a). Section 10 of the resolution asked the LIBE committee to 'draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU'. Both these sections were supported by about 53 per cent of the Parliament and had only minimal support from EPP MEPs.[12] An amendment tabled by the EPP would have replaced Section 10 with one that deferred to the Commission's judgment on whether Hungary had systemically threatened or seriously breached the rule of law or EU principles. This amendment was not accepted.

The resolution passed the Parliament with a majority of 64 per cent: 393 to 221 votes, with 64 abstentions. Thus in May 2017, the Parliament succeeded in stating that Hungary had passed the threshold for Article 7 and in referring the matter for a report in the LIBE Committee. Most of the EPP again rejected these sections of the text in roll-call votes, but a sizeable minority of their MEPs voted in favour of the final resolution (which included those sections). Political support was slowly shifting in the European Parliament, especially in the EPP. But could the Parliament obtain two-thirds of votes against Hungary's government? The next section explores the strategies that extended this political support.

6.6 The Parliament's use of Article 7

In Section 6.2, I showed how an earlier attempt by the Parliament in December 2015 to initiate a report on Hungary to trigger Article 7 had failed. This later succeeded in May 2017 (Section 6.5). The supranational tug of war was fully

12. 342 MEPs voted in favour of Article 7 (303 against, 38 abstained), while 346 supported using Parliament's prerogative with a referral to LIBE (311 against, 29 abstained). Among EPP MEPs, the support for the use of Article 7 was particularly low: only 21 of their members voted in favour, with 174 voting against, and seven abstaining. https://www.europarl.europa.eu/doceo/document/PV-8-2017-05-17-VOT_EN.pdf.

on display: the Hungarian government actively engaged in the parliamentary debates to exploit the information deficit, discredit the main actors as well as the process, juxtapose its own democratic legitimacy, and challenge Article 7's appropriateness, while trying to maintain political support in order to deny the Parliament a qualified majority.

After the Parliament authorized a report to trigger Article 7, it had to make strategic choices to have a shot at finding the necessary qualified majority. While for regular resolutions, a simple majority sufficed, the treaties demanded a higher threshold for Parliament's votes on Article 7(1): 'a two-thirds majority of the votes cast, representing the majority of its component Members' (Article 354 TFEU). That meant the usual rule of law coalition needed expansion, requiring the rapporteur to convince more MEPs that Hungary's backsliding was threatening European values and that Article 7(1) was an appropriate tool to counter this.

Strategic Choices

The May 2017 resolution, had tasked the LIBE Committee 'to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU' (European Parliament 2017a, § 10). Until and including the May 2017 resolution, the Parliament had passed seven rule of law resolutions on Hungary. 'We had resolution after resolution and every text always had a majority. But a normal majority. Half plus one. Always without the right side of the house' (Interview 14). To activate Article 7(1), the threshold was higher, which none of the resolutions on Hungary had crossed. Therefore, interviewees familiar with the procedure stressed that the activation of the Article 7 procedure was not a done deal at the time of the May 2017 resolution: 'right until the end, it was

more or less a suicide mission' (Interview 10). Building this qualified majority required extra work.

The Article 7 report would create a precedent and was therefore of high visibility. With the referral to LIBE, the report had its committee, but it still needed to be assigned to a political group and to a rapporteur. Numerous studies attest to the rapporteur's importance in shepherding it through the Parliament (Kaeding 2005; Yoshinaka, McElroy and Bowler 2010; Finke 2012; Thierse 2019; Hanelt 2024). The European Parliament operates a points-system for the distribution of reports to political groups. Each group receives their points at the beginning of the electoral term according to their size in the Parliament (Kaeding and Selck 2005; Yoshinaka, McElroy and Bowler 2010; Yordanova 2011), however, the exact rules of the system vary by committee (Interviews 3; 5; 10; 14). In LIBE, the preemptive right to 'purchase' a report goes to the group, which has the highest percentage of their points left. This was, in this case, the Greens/EFA group (Interview 14). Judith Sargentini had been, for some time, coordinator in the LIBE committee for the Greens. Given the report's importance, a discussion took place in the Conference of Presidents – consisting of the President of the Parliament and the chairs of the political groups – about who should handle the report. There was some objection against Sargentini personally, who was seen as too radical by some while others favoured the Chair of LIBE, at the time the British Labour MEP Claude Moraes. Given Moraes's lack of interest, the usual practice was followed in the end and Sargentini got appointed as rapporteur just before the Parliament's summer break in 2017 (Interview 14).

Among the supporters of Article 7 action, opinions were divided about the best strategy. ALDE felt that all the information needed was available and wanted the report written and voted on as soon as possible (Interviews 10, 14). The rapporteur, however, disagreed and wanted to buy time, which she saw

as crucial to lobby MEPs, especially from the EPP, to support her report. To muster a two-thirds majority, the resolution not only needed a large number of votes from the centre to left groups, but needed to attract a substantial number of supportive and abstaining votes from the EPP as well. She reasoned that this was unlikely to happen until after the Hungarian national parliamentary election, which took place in spring 2018, as EPP members would not have the political space to vote in favour of Article 7 against Hungary in the midst of a Fidesz reelection campaign (Interview 14).

The rapporteur wanted an official LIBE delegation to visit Hungary. However, in September 2017, the Committee on Budgetary Control (CONT) had visited Hungary already (Budgetary Control Committee of the European Parliament 2018). ALDE joined the right-wing groups to vote against the approval of a delegation, given that they wanted the report to be created quickly and saw another delegation as superfluous. Sargentini still went on a three-day trip to Hungary, to visit a detention camp on the Serbian border, meet NGOs and academics, as well as a representative of the Hungarian government (Interviews 10; 14; 17).

To build a two-thirds majority for her report, Sargentini made some consequential choices. First, she wanted a very factual report that used only international organizations' reports as sources, such as EU or Council of Europe institutions, United Nations (UN), and OSCE. This meant, in return, not using NGO sources, as this would have opened the report to criticism (Interviews 10; 14). This has received praise from EPP sources. Second, she thought that a route to win over EPP votes was to ensure that people become familiar with what happened in Hungary. Therefore, she asked several committees for opinions:

> They had to go through these motions as well. That's also a way of buying time, but also a way to get all these members in these

> committees involved in the topic, because they need to take a vote in committee on their own report. So you force a serious group of members, that have not been spending time on this, because it's been in another committee, to get themselves educated. And then, of course, you can't do your own report until these subreports are done. (Interview 14)

The Committee on Budgetary Control (CONT), Committee on Culture and Education (CULT), Committee on Constitutional Affairs (AFCO), and Committee on Women's Rights and Gender Equality (FEMM) gave their opinions to the LIBE Committee. The results of the votes in each committee are shown in Table 6.2, with the respective number of votes among EPP MEPs parenthesized. Standing out is the opinion of CONT, which passed with no votes against and only two abstentions. Sargentini credited this to the leadership of CONT chair Ingeborg Gräßle (EPP). Gräßle had made it public that she felt that the Hungarian government had tried to interfere in the planning of the trip, when the CONT Commitee visited Hungary in September 2017. The Commitee came back with a very negative report (Budgetary Control Committee of the European Parliament 2018), finding irregularities, which were widely reported in the press (Bayer 2017; Byrne and Peel 2017).

TABLE 6.2 Committee votes on the Sargentini report

Committee	Total	For	Against	Abstentions
LIBE	56	37 (8)	19 (9)	0 (0)
CONT	14	12 (5)	0 (0)	2 (1)
CULT	25	13 (0)	4 (3)	8 (6)
AFCO	24	15 (2)	4 (1)	5 (5)
FEMM	26	18 (1)	5 (2)	3 (3)

Besides getting these committees involved, the rapporteur also had to win support from individual MEPs, especially from the EPP, who she lobbied on an individual basis, focusing on MEPs in leadership positions. Sargentini's team

created several Excel sheets detailing the roll-call votes of EPP MEPs, LIBE members, and those of other groups who displayed unusual voting patterns.[13] The point was to get an overview of which MEPs might be susceptible to persuasion and who might become strategic allies. While trying to build political support for one's initiatives is an everyday activity for politicians, the methodical approach and level of effort stand out in the case of Sargentini's report. Sargentini stressed that it was the only time she did this mapping exercise during her political career in the European Parliament (confirmed by interviews 10, 17).

An 'action group' of NGOs, including Amnesty International, Human Rights Watch, and Reporters without Borders helped with the lobbying. This was 'a very coordinated action' that also made use of the spreadsheets (Interview 12). My informant explained that compared to most cases, where it suffices to lobby the members of the responsible committee, due to the high threshold and the likely close vote, in the case of Article 7 the action group talked to members of the EPP regardless of committee as well as shaky candidates from other groups (Interview 12).

Days after the Hungarian parliamentary election, in which Fidesz again won a supermajority, Sargentini's draft report was released. In May 2018, LIBE debated the report. Highly unusual was the presence of the Hungarian Minister of Foreign Affairs, Péter Szijjártó, who caused a commotion by calling the Parliament's rapporteur 'a liar'. Afterwards, Sargentini declined any meetings with Hungarian officials (Interview 14).

As this was the first vote the Parliament would take under Article 7, the voting procedure needed to be clarified. Rule 178(3) of the Rules of Procedure for the eighth parliamentary term provided that '[i]n calculating whether a

13. I have obtained these files.

text has been adopted or rejected, account shall be taken only of votes cast for and against, except in those cases for which the Treaties lay down a specific majority'. Article 354(4) TFEU states that '[f]or 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'. It was therefore unclear whether Article 354 TFEU required counting abstentions, or if the Parliament could proceed on the basis of disregarding them as it normally does. The Parliament's President, Tajani, requested an opinion from the Parliament's legal service, Jurisconsult. In its opinion, which was leaked, the Jurisconsult expressed the opinion that the Parliament could keep its usual practice of only counting yes and no votes as casted (European Parliament 2018a).

The plenary debate

The plenary debate of 11 September 2018, a day ahead of the vote on the Sargentini report, was extraordinary. Viktor Orbán had announced himself once more, but when the Parliament's President Tajani called up the agenda item on 'the situation in Hungary', the Prime Minister was not there.

> So we were starting the debate, but Orbán was not yet in the room. So I looked at Tajani and he said: 'we're starting anyway'. Of course, I get the floor first, because it's my report. I stand up and say three sentences, in my story – which is prepped, which is timed, I got a certain amount of minutes for it – Orbán and entourage walks in and starts settling down. That is unheard of. And Tajani, of course, knew that. So I stopped and restarted and this was not helpful for Orbán or Tajani. … I mean, you don't do that. You just don't walk in for such an important debate a minute late, while the rapporteur is speaking. So it started off wrong. He wants to get me off my guard, whatever, a very strange tactic. (Interview 14)

Orbán did not come alone. He was followed by his most-trusted lieutenants including several ministers: the Minister of the Prime Minister's Office Gergely Gulyás, Minister of Foreign Affairs Péter Szijjártó, and Antal Rogán, the Minister of the Cabinet Office, who is better known as the 'propaganda minister' (Bayer and Plucinska 2018).

In this flurry, the rapporteur asked to start over again. She laid out the main theme of the report: the Article 2 values and whether they were upheld in all member states:

> I'm afraid not. The Hungarian Government has effectively silenced independent media. It has put academia on a leash ... it has replaced independent judges with those with a closer tie to the regime ... it makes life miserable for NGOs that provide services to citizens in need, such as homeless people, migrants and refugees and marginalised groups like Roma. ... On top of that, individuals in the government have enriched themselves, their family members and their friends by means of public funding from European taxpayers' money. (European Parliament Debate, 11 September 2018, Item 11)

Rather than reversing policy since the committee vote, she explained, Orbán had doubled down over the summer. She pointed out how, 'since 2010, the European Parliament has been urging the Commission and the Member States to act'. But Hungary was not only the Commission's job: 'We are all the guardians of the Treaties'.

Next up were the rapporteurs for the associated Committees. Ingeborg Gräßle, the German EPP chair of the CONT Committee, pointed to the two visits of the Committee to Hungary:

> We have noticed a downward trend in the management of EU funds. And the situation has gotten worse since the elections. We see problems such as corruption, conflicts of interest and nepotism, and a lack of investigation and clearing up. Specifically,

> we are dealing with pseudo-legal systems in tenders: only one company takes part in over a third of the procedures.

Hence, she underlined that for these reasons, the CONT Committee supported Article 7 without dissenting votes.

The presidency of the Council was represented by Karoline Edtstadler, the Austrian State Secretary of the Interior. She explained that the Council would examine democracy, the rule of law, and fundamental rights in its rule of law dialogue, but that the Council had not yet debated and taken a position on Article 7.

Timmermans spoke for the Commission. Other than the Council, the Commission did have a position. 'Sadly, the Commission shares the concerns expressed in the report, in particular, the concerns regarding fundamental rights, corruption, the treatment of Roma, and the independence of the judiciary'. He pointed out the list of infringement proceedings the Commission had started. But problems were also in the management of European funds:

> Through the supervisory role of the Commission, Hungarian operational programmes for EU structural and investment funds have been the subject of the highest amount of financial corrections in 2016 and 2017 of all the EU Member States. Moreover, the European Anti-Fraud Office has opened investigations where there was sufficient suspicion of fraud and other irregularities.

Timmermans also talked about the European semester reports that had addressed recommendations to Hungary on issues such as the judiciary and anti-corruption framework and reminded the Parliament that it was the Commission who had acted by triggering Article 7 on Poland. However:

> The Commission is using all the instruments at its disposal to address concerns, in the manner the Commission considers most effective. ... Unlike the European Parliament, the Commission has

> a right under the Treaty on European Union to launch infringement procedures and, in the case of Hungary, has launched many value-related infringement proceedings. It is also using other instruments, including audits and investigations relating to the use of EU funds and actions through the European Semester, the EU annual cycle of economic policy coordination.

Timmermans, while sharing the criticism contained in the report, did not say whether the Commission supported the triggering of Article 7 by the Parliament. But he explained the Commission's non-triggering of Article 7 by reference to the other tools available to it, which the Parliament lacked.

Expectations were high when Viktor Orbán gave his speech. The Prime Minister was in a combatative mood. He invoked the legitimacy from the fight for democracy, first, against the communists, and then from the elections in April 2018:

> Hungary's decisions are made by the voters in the parliamentary elections. You claim nothing less than that the Hungarian people are not reliable enough to judge what is in their interest. ... Therefore, I have to say that the report does not show respect to the Hungarian people. This report applies a double standard, abuses power, exceeds powers, and the manner of adoption violates the treaty. ... You are taking on a serious responsibility when, for the first time in the history of the European Union, you want to exclude a people from European decisions. You would deprive Hungary of the ability to represent its own interests in the European family to which it belongs.

What the report aimed to do, according to Orbán, was disenfranchise the Hungarian people, by denying its government the voice. But even more so, Hungarians had only months ago reaffirmed its government in elections, handing it a decisive majority: 'They want to exclude a country that also made clear decisions in the European elections. In 2009, a 56 percent majority voted for us; and in 2014, a 52 percent majority. ... We are the most successful party in the European Parliament'.

While the European Parliament had exceeded its mandate and acted against the will of the Hungarian people, Orbán complained that the content of the report was also wrong:

> Moreover, this report was written by people who do not even know the basic facts. The report admits that they failed to send an official delegation to Hungary, which means that you will make a decision without proper investigation of the facts. The report contains 37 serious factual errors. All representatives received a 108-page document about this yesterday.

What he did not say, was that there was no official delegation to Hungary, because the EPP had blocked it in the Committee. In addition, Hungary had updated the memorandum that it had circulated on the draft report when it was in the Committee stage. Then, it had 'only' 59 pages. This lengthy document was sent with short notice to the MEPs. It summarizes and contests the allegations made in Sargentini's report point for point. In particular, Orbán complained that the report included issues that had been solved through dialogue and engagement.

> Our union is held together by settling disputes within a regulated framework. On behalf of Hungary, I myself concluded agreements and compromises with the Commission on the media law, the judicial system, and even on certain passages of our constitution. This report upends agreements made years ago. But if you can do that and kick it, what's the point of making an agreement with any European institution? What you are doing is a blow to the Union and constructive dialogue.

By including points that had been solved in dialogue with the Commission, Orbán alleged the Parliament disincentivized engagement. Orbán did not offer any concessions or compromise: 'I respectfully inform you that, whatever decision you make, Hungary will not allow blackmail. Hungary will protect its borders, stop illegal migration, and defend its rights, if necessary, even against you'.

Group chair Manfred Weber was first up to reply to Viktor Orbán. He discussed how the EPP had 'worked constructively' with their shadow rapporteur in LIBE, Roberta Metsola, on this report and supported the infringement actions of the Commissioners. And 'in the past, Hungary was always ready to compromise'. This time, however, things were different:

> My political family will finally decide this evening about our voting list for tomorrow, but I have to tell everybody that without a readiness on the part of the Hungarian Government to resolve the current issues – the legal concerns which are on the table – the start of a dialogue based on Article 7(1) could be necessary.

Furthermore, Weber asked that the Council and European Council start dialogues with Hungary, something they had thus avoided doing.

The first speaker for Fidesz, József Szájer, accused 'those who criticize Hungary, Judith Sargentini, the left and the LIBE committee' of spreading a lie. They were the ones threatening the rule of law, by replacing the rule of law with their own 'arbitrariness'. This report, Szájer argued, was outside the acquis:

> Parliament is empowered by the Treaty of the Union to act on the basis of Community legislation. In point C, the report admits that it did not find enough cases under Community law against Hungary, so it also examines issues that do not fall under the scope of the Treaty. The majority of the report lists such cases under exclusive national competence. Expanding beyond the right of the Union is arbitrary, contrary to the Treaty, contrary to the rule of law.

Finally, he attacked the (pre-agreed) voting rules as another violation of the rule of law:

> In a state of law, it would not be possible for the special, guaranteed voting rules of the Treaty to be twisted at will, so that abstentions are not counted as votes cast, so that a better result for them comes out. Those who are constantly talking about the

> violation of the rule of law and democracy are the ones who educate Hungary, who do not even have the sense to follow their own rules.

The debate showed that the EPP was split. Several non-Hungarian EPP members spoke very critically of Hungary and in favour of the report: Roberta Metsola (Malta), Frank Engel (Luxembourg), Othmar Karas (Austria), Seán Kelly (Ireland), Anna Maria Corazza Bildt (Sweden), and Michał Boni (Poland). On the other hand, a number of MEPs rejected Article 7: Anna Záborská (Slovakia), Milan Zver (Slovenia), Marijana Petir (Croatia), and Elisabetta Gardini (Italy).

Two speakers of the Hungarian opposition are noteworthy. Zoltán Balczó, a member of right-wing Jobbik (NI), supported the Hungarian government on migration and rejected claims of anti-semitism and racism in the report as 'slander'. On the other hand:

> The report contains serious findings regarding the growth of corruption, the limitation of the rule of law, and the unprecedented governmental predominance of the media. These criticisms are real, based on facts, and the question can be asked: to what extent is Hungary a free country today?

Nevertheless, he would abstain from the final vote, he explained. The sanctions would hit the whole country, not only Orbán's government. From the left side of the Hungarian opposition, István Ujhelyi, a social-democrat, spoke. He attacked Orbán's government sharply. Nevertheless, in earlier debates he, too, had advocated against Article 7 with the argument that it would punish Hungary for Orbán's deeds. Now however, he had changed his mind and asked his colleagues to embrace the report.

Sophie in 't Veld (ALDE), tried to turn the tables in the fact-checking debate:

> Maybe we should do that by de-dramatising and de-politicising. You put a lot of drama in your speeches, Mr Orbán, but I actually

> prefer the approach of Ms Sargentini, which is very factual, fact-based and accurate. Her report is a very accurate picture of the state of play of democracy and the rule of law in your country, and it is not a pretty sight.

Several speakers questioned the place of Fidesz inside the EPP family.

The Fidesz members were eager to speak and several took the floor to defend their party against the report. Lívia Járóka, from the Roma minority, defended Fidesz against any claims of antiziganism. Ádám Kósa, who is deaf, spoke in sign language and pointed to the diversity of his party: 'Fidesz is the only party in the European Parliament that has sent a disabled MEP and a Roma MEP at the same time, and you want to lecture us on democracy?' Kinga Gál, meanwhile, attacked the factual basis of the report:

> [A]ll this has nothing to do with reality! This is why dozens of Hungarian NGOs have sent an open letter opposing the vote on the Sargentini report, with many of them refuting the errors as factual. Thousands of individual citizens are protesting in petitions. They are outraged that the text is not based on the activities of tens of thousands of well-functioning NGOs, and that Mr Timmermans is merely relying on the smears and falsehoods of a few foreign-funded NGOs.

The Sargentini report, according to her, furthered two goals: punishing Hungary for its migration policy and dividing the EPP to weaken it in the next elections of the European Parliament (which were due in May 2019).

My informants had additional perspectives, especially on Orbán's participation in the debate:

> privately, I might tell that I was extremely worried about [Orbán's] visit, because I was expecting him to suggest some concessions in his speech. Saying something like 'okay, maybe we should take into account some criticism, in particular the EU and the EPP, possibly the Central European University and also the treatment of NGOs are important for quite many national delegations'. So I

> was expecting him to say something in that sense. And then in the group meeting in the evening, where [the] EPP was expecting to decide the voting line, I think it could slide in favour of the Hungarian government, because some people would say that there are some concessions, maybe it's not the right time to start Article 7, we see that the pressure already yields some results. But Viktor Orbán came with a very militant speech, basically not recognizing any mistakes. (Interview 10)

The rapporteur expressed similar sentiments.

> And then [Orbán] didn't g[i]ve a thing and EPP members thought he would. For instance, I think everybody expected – and Weber as well – that he would say something about … the Central European University. Something about that settling for once and for all that nothing is going to happen, but he didn't give an inch (Interview 14).

This led her to conclude: 'Orbán has been useful that day' (Interview 14).

On the evening of 11 September, the EPP had a group meeting that Orbán attended. The meeting did not go in Orbán's favour. After the meeting, Weber spoke to journalists and announced that he would vote for the report (Baume and Heath 2018). The vote on the Article 7 resolution succeeded with 448 to 197 votes, which amounted to 69.5 per cent, and 48 abstentions. Crucial for the success of the resolution was the support of many EPP members. 115 MEPs of the EPP voted in favour of the resolution, with 57 opposing and 28 abstaining, a marked increase from the May 2017 resolution on the 'Situation in Hungary', which had 62 EPP votes in favour, 89 against, and 37 abstentions. The move was even bigger, if one considers the vote on Article 7 as the baseline, where only 11 per cent of the EPP had voted in favour. Hence, this vote marked a tectonic shift in the support for action against Hungary in the European Parliament and within the EPP.

The Sargentini report

Like the Tavares report of the previous Parliament, the Sargentini report was a long document of twenty-six pages. This was achieved through a procedural trick of adding a large appendix to a short resolution, as the appendix does not need to be translated in other languages and, therefore, is not subject to the page limits. The appendix took the form of a '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'.

Section 1 of the resolution set out a list of twelve areas about which the Parliament was concerned:

> 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; 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, and protection against hateful statements against such minorities; the fundamental rights of migrants, asylum seekers and refugees; economic and social rights (European Parliament 2018e, § 1).

These were mostly present in the authorizing resolution from May 2017, although economic rights were not mentioned there, while the Sargentini resolution omitted LGBTI people among the minorities that the earlier resolution had mentioned (European Parliament 2017a, § 2). Together, these amounted to 'a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof', the resolution stated (European Parliament 2018e, § 2).

The appendix goes through these twelve policy areas and describes the backsliding of Hungary under Viktor Orbán. Critically, it not only cites international organizations, such as the CoE, the OSCE and the UN, but it does not refer to

NGOs. Finally, the resolution suggests that the Council address recommendations to Hungary, which the country should implement within three months. However, the resolution made no specific suggestions for these recommendations, leaving them up for the Council to determine (European Parliament 2018e, Annexe, Article 2).

The follow-up

While for the Parliament the passing of the report was an end, it was only the start of the process in the Council. The Hungarian government started challenging the resolution politically as well as legally. Already before the report was voted on, Minister of Justice Judit Varga published an opinion piece on 5 September 2018 in the influential Politico Europe newspaper, in which she called the Parliament's procedure a 'witch hunt' (Varga 2018). She stated that the report contained many factual errors, included points that had been resolved through dialogue and many that were not part of the *acquis*. Furthermore, the Minister claimed, Sargentini 'constantly refers to the same small group of foreign NGOs' (Varga 2018), even though the report does not cite any. On 16 October 2018, the Hungarian Parliament passed a resolution that condemned the Sargentini report (129 yes, 26 no, 18 abstentions).[14]

On 13 November 2018, the Hungarian government sent a non-paper to the Council. This was essentially a longer version of the earlier note, which had now increased to 131 pages and which aimed to spread doubts about the Parliament's report (Council of the European Union 2018a). Sargentini explained the tactic behind this report:

14. https://abouthungary.hu/news-in-brief/hungarian-lawmakers-pass-resolution-that-calls-on-the-government-to-not-give-into-blackmail-over-sargentini-report, accessed 7 October 2023.

> They take my report paragraph by paragraph. And those topics that are still under investigation by a court case or through an infringement procedure by the Commission are off the table because they are still under investigation. Those topics that were part of a court case or under an infringement but were finalized were off the table because they were finalized. Those topics that are neither are not in the *acquis* and therefore not on the table. So nothing is on the table. (Interview 14)

Meanwhile, different organizations engaged in the fact-checking debate. However, for the rapporteur there was no eminent need to engage with the Hungarian accusations:

> [The Hungarians] claimed that we never responded to their text, but why would I? What they are trying … to make it into some sort of a court case between me and them. But I had [a] two-thirds majority of the house. I didn't need to prove my point again. I won the vote. It's not me against them; it's the European Parliament against a Member State. So why would I continuously … debunk their epistles? (Interview 14)

Besides trying to spread doubts about the content of the Sargentini report, the Hungarian government also challenged it in court and alleged that Parliament violated the law. On 17 October 2018, Hungary filed an application with the ECJ, in which it sought to annul the Parliament's resolution, arguing that Article 354 TFEU had required the counting of abstentions, which would have altered the outcome of the vote and defeated the motion for a resolution. Poland intervened on Hungary's behalf. AG Bobek issued his opinion on 3 December 2020 and supported the Parliament's interpretation that 'votes cast' only include votes cast in favour or against the resolution. The Court followed this interpretation in a grand chamber judgement of 3 June 2021.[15] Nevertheless, it took nearly three years until this verdict was reached, keeping a certain level of ambiguity

15. Case C-650/18, *Hungary v European Parliament*, ECLI:EU:C:2021:426.

over the process and allowing Orbán's government to claim in the meantime that the Parliament had violated the treaties.

The Council and the member states were not the only ones who had to define their position. The Commission had to make a choice as well. Before the vote, it had repeatedly rejected the Parliament's requests to activate Article 7, but criticized the Hungarian government and made use of infringement proceedings. What position would the Commission take in the Article 7 procedure now that the Parliament had triggered it? In several interviews I conducted with Commission officials, they suggested that the Commission was annoyed at being pushed by the Parliament on Article 7, while it had itself the right to use Article 7. They found it consequential that the Parliament followed through with it. At the same time, several Commission interviewees expressed privately unhappiness with the Parliament's resolution, finding it not meticulous enough, perhaps for a lack of country expertise in parliamentary procedures. One contrasted this with the work of the Commission, which had to be more careful to withstand legal challenge. This participant also explained that the Commission did not believe that the issues listed in the Sargentini report justified the use of Article 7 (Interview 20). Nevertheless, the Commission decided to back the Parliament and support its push for a stronger role in the Council procedure.

The treaties do not define the role of the Parliament after it uses its prerogative to start Article 7. In our interview, Sargentini discussed how the Parliament's President, Tajani (EPP, Italy), was not exploiting the opportunity to create momentum for Article 7 and simply sent a short letter to the Council informing it of Parliament's decision. Furthermore, Sargentini wanted to present her report to the Council, but the Austrian presidency was hostile to the suggestion (Interview 14). In the end, she was invited twice in the late autumn 2018 to short, informal early morning meetings, where interested ministers and am-

bassadors exchanged views with her. Sargentini explained the low character of the meetings, starting with shabby rooms and ending with the lack of name tags or introductions of participants. During these meetings, she explained the methodology of the report and pushed for a formal presentation of her report in the Council. Overall, these meetings showed little appetite of the Austrian presidency to grant the Parliament an equal or at least serious status in the Article 7 procedure, apart from its formal role of triggering the process. However, the Parliament's President showed no support (Interview 14).

With a two-thirds majority of the EPP backing Article 7 against Hungary, rifts within the party became obvious. Thirteen national delegations demanded the expulsion of Fidesz from the EPP alongside Commission President Juncker (Brzozowski, Rios and Fortuna 2019). On 20 March 2019, the EPP announced a compromise: the decision to 'suspend' Fidesz's membership. The catch was that this suspension was from the EPP party, not from the parliamentary group, where Fidesz members continued to sit and vote with their colleagues.[16] Reinstatement would be dependent on the fulfilment of three conditions, including that Orbán's government cease its attacks on Juncker, admit that this caused harm to the party, and clear up issues regarding the CEU. The compliance was to be evaluated by 'three wise men': Herman Van Rompuy, Hans-Gert Poettering and Wolfgang Schuessel.[17] Juncker was not satisfied with the compromise, and asked again for Fidesz's expulsion (Brzozowski, Rios and Fortuna 2019).

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16. Furthering the confusion was that this was announced by EPP group leader Manfred Weber.

17. Respectively, the previous President of the European Council, President of the European Parliament, and Chancellor of Austria.

While the European Parliament had for many years voiced concerns about Hungary's rule of law, this has to be put into perspective. The Tavares report in 2013 did not directly suggest Article 7 and an alternative motion for a resolution that did fell through. Even in 2015, no majority supported the use of Article 7. Instead, Parliament tried to offload the burden onto the Commission. In 2017 and 2018, majorities shifted, opening a window of opportunity that critics of the Hungarian government in the Parliament seized.

This section has looked at how political support for sanctions evolved in the European Parliament. The original political capital that Orbán enjoyed as an EPP member was slowly eroding. His increasingly authoritarian style of government made it harder to conceal his goals. Fellow EPP members' concerns were particularly aggravated by his attacks on the CEU. Despite the active engagement of the Hungarian government in the parliamentary process and its attempts to manipulate it, the Parliament made choices to counter Hungary's arguments. By relying on international organizations, Fidesz's claims of a politicized report were not convincing. The Parliament could refer to a fifteen year-old Commission communication to cover areas that were not in the acquis, even though the Hungarian government challenged this.

Whether it was a miscalculation or sheer hubris, Orbán's performance in the debate did little to win him protection by members of the EPP group. Without plausible compromise on the table, even in the EPP many felt that the time for Article 7 was ripe. Strategic timing avoided the report falling into the election season. This made it easier for EPP members to vote against Orbán. It also gave the rapporteur and NGOs more time to lobby undecided MEPs. On top of this, the strategic positioning of the report, which was stripped of political statements and NGO sources eased the report's passage.

While Orbán's defeat in the Parliament may have been a surprise, it was

not the end of the supranational tug of war. His government then went on to challenge the process both by political and legal means. The parliamentary battle was lost, but this only shifted the attention towards the member states and public opinion. The first Council hearing on Hungary took place a year after the Parliament passed its resolution and will thus be discussed in Chapter 7.

6.7 A glimpse into the future

Two new, structural developments warrant discussion, to which I return in the next chapter. First, the Commission made a legislative proposal in 2018 on a new rule of law conditionality regulation, which would allow the EU to suspend funding from countries with generalized rule of law deficiencies. The main negotiations took place in 2020 and will be discussed in the next chapter, but its seeds during the Juncker Commission are discussed below. Secondly, the Commission made some steps to meet the Parliament's demand towards a DRF mechanism. Both these proposals stemmed from the realization of the limits of the existing tools and were meant to increase the EU's capacity to tackle democratic backsliding and to address specific problems: the conditionality regulation would cut funding where general issues were identified, something the Commission struggled to target with infringement proceedings. The Rule of Law Mechanism would tackle the knowledge about the rule of law situation in member states.

One further institutional innovation needs mentioning, but is not considered further: the European Public Prosecutor's Office (EPPO). The purpose of the institution is to prosecute crimes against the EU budget. EPPO is a case of differentiated integration, using the enhanced cooperation mechanism, which allows member states to join together to deepen their integration on a voluntary basis. However, until then five countries had not joined EPPO: Ireland, Denmark,

Sweden, Poland and Hungary. Among these, Ireland and Denmark have opt-outs in the Area of Freedom, Security and Justice, Sweden has since stated its intention to join.[18] This left Hungary and Poland as member states without opt-outs, whose authoritarian governments had no intention of becoming members of EPPO as this would jeopardize their impunity.[19]

Laying the foundations for conditionality

The idea to withhold EU funding conditionally from member states was not entirely new. A German proposal to that end was rejected by Juncker in June 2017 (Chazan and Robinson 2017). Yet, on 2 May 2018, the Commission tabled a 'Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' (European Commission 2018b). The basic idea was to withhold payments from the EU budget to Member States that showed these general rule of law deficiencies. This was meant to follow a carrot-and-stick logic: the stick was the freezing of funding; the carrot was the resumption of the cash flow conditional on the implementation of demanded reforms. While the proposed tool was of a horizontal nature, not directed against a particular member state, it was at the same time clear that Hungary and Poland were potential targets. Both were vulnerable to this mechanism as net-recipients of the EU budget, that is, they paid less into the budget than they received. In fact, Poland was the largest

18. Both Sweden and Poland joined EPPO in 2024, the latter following parliamentary elections in Poland that the United Right lost.

19. In the case that OLAF, the European Anti-Fraud Office, detects fraud, it informs the member state's prosecution service to pursue the case. This is evidently not a solution in case the budget is corrupted by authoritarian regimes that tightly control the prosecution service (Donáth 2021, 8–10; Popova and Post 2018).

net-recipient in total numbers, while Hungary was the largest recipient on a per-capita basis (Kelemen 2020b, 490).

The proposal was noteworthy for several reasons. First, the Commission based its regulation on Article 322 TFEU, which deals with financial rules, and put it forward as part of a legislative package with a proposal for a new Multiannual Financial Framework (MFF), the EU's seven-year budget from 2021 to 2027. Second, the draft legislation included a definition of the concept 'rule of law', which:

> includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law. (Article 2)

Third, under the draft regulation, the Commission would be in control: It was the one deciding to implement sanctions and could only be *stopped* by the Council with Qualified Majority Voting (QMV)[20] – this was referred to as *reverse* QMV (European Commission 2018b, Article 5(7)).

The Council Legal Service (CLS) prepared an opinion on the Commission's proposal. This opinion was first leaked and then subject to Freedom of Information requests and finally to extensive legal proceedings.[21] The opinion

20. In the context of Council voting procedure, QMV refers to a double majority of 55 per cent of member states that represent 65 per cent of the EU's population. This voting procedure is applicable when the Council votes on a text proposed by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, else it is higher. https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/.

21. Despite the fact that the opinion was leaked, Laurent Pech requested the opinion from the Council, who rejected the request. After a confirmatory application – a kind of administrative appeal – was denied, Pech took the Council to the EU's General Court. Sweden intervened on Pech's behalf. The General Court sided with Pech (Judgment of the General Court (Second Chamber) of 21 April 2021, Case T-252/19, *Pech v Council*, ECLI:EU:T:2021:203). The Council appealed the decision. In its ruling, the ECJ confirmed the General Court's

considered three questions: whether the proposed regulation was compatible with Article 7 TEU, whether its legal basis was suitable and whether implementation of measures via reverse QMV was legally possible. On the first question, the CLS answered in the negative. The regulation would 'establish a parallel mechanism of verification and control of compliance with' EU values that could circumvent the provisions of Article 7 (Council of the European Union 2018b, § 34). On the other hand, the CLS was of the opinion that the Commission's legal basis was adequate and that, in principle at least, the implementation could be via the proposed reverse QMV procedure. Scholars criticized the CLS's reasoning (Scheppele, Pech and Kelemen 2018).

In the Parliament, two committees were jointly responsible for the legislative file: the CONT and BUDG committees. The Parliament's rapporteurs of the file were Petri Sarvamaa, a Finnish member of the EPP for CONT and Eider Gardiazabal Rubial, a Spanish MEP for the S&D group in BUDG. Additionally, under the associated commitee procedure (Rule 57), the LIBE Committee was associated. The Parliament adopted its negotiation position on 4 April 2019, following a report in the CONT and BUDG committees (European Parliament 2018d) and its adoption in plenary in January 2019 (European Parliament 2019a). On 4 April, the Parliament voted on its first reading position (European Parliament 2019b). This included a lot of amendments and additions to the Commission's text. A newly inserted Article 2a enumerated what would trigger the regulation and 'endangering the independence of judiciary' was among it. Article 3a would create an advisory expert panel to assist the Commission, something that the Commission had earlier rejected in the context of the proposed DRF mechanism. Furthermore, the text was amended to give the Parliament a stronger role

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decision (Judgment of the Court (Tenth Chamber) of 8 June 2023, Case C-408/21 P, *Council v Pech*, ECLI:EU:C:2023:461).

in the application of the procedure, putting it on par with the Council (Articles 5 and 6).

On 26 June 2019, Hungary and Poland sent a joint non-paper to the other delegations in the Council. They raised concerns that the proposed regulation was circumventing Article 7 TEU and about 'the proposed vague, not objectively assessable criteria and an open-ended list' of what would trigger sanctions that the draft regulation contained. The Commission's role would be too large and 'not balanced by the Council', whose role 'in the decision making process should be strengthened'. The governments demanded a tighter link between the rule of law deficiencies and the use of the Union's budget as well as 'proportionate' measures with a defined maximum penalty. Measures should be lifted if the link to the budget ceases to exist. Finally, the governments demanded 'clear political guidelines from the European Council' (Council of the European Union 2019d).

Afterwards, the file lay dormant. Legislative activity resumed in 2020 and is covered extensively in Chapter 7.

Strengthening the rule of law

In April 2019, the European Commission made another attempt to improve the rule of law protection in the EU. To this end, the Commission published a communication (European Commission 2019c), ran a consultation, and commissioned a Eurobarometer survey (European Commission 2019e).

In its communication, the Commission took stock of its arsenal. Reviewing the rule of law instruments available, it called Article 7 TEU an 'emblematic tool', noted that it had been used twice, but admitted that 'progress by the Council in these two cases could have been more meaningful' (European Commission 2019c, 3). Similarly, it said about the Rule of Law Framework's application: 'the

dialogue helped identifying problems and framing the discussion, it did not solve the detected rule of law deficiencies' (European Commission 2019c, 3). The Commission also included infringement proceedings, and – interestingly – the preliminary reference procedure among the rule of law tools. Here it noted the recent case law of the CJEU especially in the area of judicial independence. The Commission mentioned even more tools: among them the European Semester, the Justice Scoreboard, the CVM, OLAF and the EPPO, its new proposal for a budget conditionality regulation as well as some more technical policy tools.

The government of Poland submitted a response to the Commission's consultation. In it, the authorities expressed the opinion that existing mechanisms would be 'adequate and sufficient' and all innovations should stay within the remit of the existing treaties. 'There are no legal grounds to reach for "creative" alternatives to the procedure specified' in Article 7, argued Poland. It stated that if a case had been decided by the ECJ, any Article 7 TEU proceedings based on the same case should be terminated. Poland also wished that the definition of the rule of law should be based mainly on the ECJ's interpretation. In reference to the CLS opinion, Poland also argued against the connection of the budget with rule of law questions as this would have no basis in the treaties. The government argued in favour of open dialogue and against the imposition and threat of sanctions.[22]

Hungary's government also submitted a response. The rule of law, it argued, was first to be protected by the institutions of member states, not the EU. It too argued against the circumvention of treaty provisions with new tools, pointing at scepticism of the CLS regarding the Rule of Law Framework of 2014. Article 7 should only be used in cases where a member state breaks Union law and only

22. https://commission.europa.eu/system/files/2019-07/stakeholder_contribution_on_rule_of_law_-_poland.pdf, accessed 16 January 2024.

as the ultima ratio. The government also denied that there was a rule of law crisis in the EU or that the topic needed special attention. As for cooperation with other international institutions – it mentioned the CoE, OSCE and UN – the Commission would need to be cautious not to import requirements from other bodies into the EU.[23]

The Eurobarometer survey measured 17 elements of the rule of law accross Europe and found that each of the items could attract support of at least 86 per cent of respondents and that over 62 per cent found all 17 elements important. At the same time, only 43 percent of the respondents felt fairly well or very well informed about the EU's fundamental values (European Commission 2019e).

After the consultation process concluded, the Commission published a new communication in July, which outlined ways to strengthen the Rule of Law Framework in Europe by suggesting a three-pillar strategy of promotion, prevention and response (European Commission 2019i). For the first step of rule of law promotion, the Commission suggested building 'knowledge and a common rule of law culture' and enhancing cooperation with other international organizations, especially with the CoE and OSCE, and with 'European judicial and other networks'. The Commission was planning to organize 'an annual rule of law event open to national stakeholders and civil society organizations' and asked the European and national parliaments to 'develop specific inter-parliamentary cooperation on rule of law issues' (8–9).

To prevent rule of law problems, the Commission decided to create a 'Rule of Law Review Cycle'. The Commission would create an annual rule of law report, covering different areas of the rule of law, relying on both existing information (such as the Justice Scoreboard and European Semester reports as well as the

23. https://commission.europa.eu/system/files/2019-07/stakeholder_contribution_on_rule_of_law_-_hungary.pdf, accessed 16 January 2024.

CJEU's case law) and running an open consultation process, to which member states were invited to contribute alongside NGOs, the OSCE, the OECD, CoE and judicial networks. The report would both cover the EU and member state level. However, the buck would not stop there. The report would be the basis for further discussions and debates of the European Parliament and the Council.

Finally, the Commission reflected on its 'response'. The Commission pointed to the evolving case law of the ECJ and said it would pursue infringements strategically, 'requesting expedited proceedings and interim measures whenever necessary' (European Commission 2019i, 14). For Article 7, it suggested that hearings be prepared on 'technical level in a Council working group'. The Commission highlighted the importance of relevant expertise in its assessments, but also the need for the Commission to remain autonomous in its evaluation. Of particular importance for the Commission was a logic of conditionality: if member states started respecting the rule of law again, procedures should be stopped quickly. However, it suggested a 'specific follow-up monitoring' procedure in its stead (15).

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At the end of the Juncker Commission's tenure, it suggested to add several new tools to the toolbox, which were meant to address specific shortcomings of the existing instruments. On the one hand, the conditionality regulation would allow the Commission to address *general* rule of law problems in a member state by applying a carrot-and-stick logic to funding for member states. On the other hand, the Rule of Law Monitoring Cycle would give early warnings, keep the issue of rule of law on the agenda and provide a joint evidentiary basis for all EU institutions and member state parliaments.

6.8 Building capacity, finding support

This Chapter discussed the Hungarian case and initiatives for the creation of rule of law instruments in the EU in the 2014 to 2019 period. Compared to Poland's salvo of open attacks on the rule of law seen in the previous Chapter, Hungary seemed at the time less important to European policymakers. While backsliding in the country was well-known, the sense of threat to European values paled compared to Poland. It had over a longer time dismantled its institutions and often hidden its attacks well, often finding informal ways of co-optation and soft repression (Zgut 2022; Vincze 2023b; Hanelt and Vincze 2025). This also led to less resistance and mobilization of judges in Hungary (Puleo and Coman 2024). Orbán was at the beginning of this period still willing to engage and backtrack. With the Commission distracted by Poland and thinking it could manage Orbán with the occasional infringement procedure, the Parliament started to develop more ambitions to exert leadership. This was as much about backsliding in Hungary as about defining the Parliament's position in defending the rule of law.

In early 2014, the Commission had created the Rule of Law Framework. Rather than directly using Article 7(1) TEU, this gave the Commission a way to structure a dialogue with a member state, which could lead to the imposition of Article 7. As a Commission source had confirmed, this Framework was a direct result from the Commission's experience with Hungary. Yet the Commission defied requests by the European Parliament to use the Rule of Law Framework against Hungary from 2015: it did not view it as an appropriate tool in the case of Hungarian backsliding. Since it viewed Orbán's backsliding as legalistic, it preferred a legal response through the infringement procedure.

Another reason the Commission was vary of Article 7, was that it doubted it enjoyed enough political support for its use. In December 2015, not even a

simple majority of the European Parliament supported Article 7 against Hungary. This changed over time, but even in May 2017, the Commission could not be assured that a two-thirds majority of the Parliament would back it. Since the Commission was not willing to take that risk, the supporters of Article 7 in the Parliament were left to do the work themselves and extend the rule of law coalition. Since Article 7 required a qualified majority, which did not yet exist, coalition-building was in order. A large share of the EPP was needed to support the report.

By timing the report strategically after the Hungarian national elections, by referring to widely accepted sources, and by meticulously lobbying MEPs to educate them about backsliding in Hungary, the Parliament succeeded in passing the report. Orbán's hubris may have helped: not only did he not offer any last-minute concessions this time, but he also alienated parts of the conservative establishment in the EU. Orbán's government fought the report. In its public diplomacy, it sowed doubts about the contents of the report, delegitimated it, and then also claimed that Parliament had violated the law by disregarding abstentions. Nevertheless, the Commission decided to back the Parliament, increasing the pressure on the Council to act.

This Chapter has shown various ideas of how to extend the EU's toolbox. The Council decided to hold discussions on the rule of law regularly, but avoided putting individual member states on the spot. The Parliament wanted to create more opportunities for itself to exert influence and suggested a DRF mechanism to tie different instruments of the institutions together. Annual reports would serve as a joint basis of knowledge, on which the institutions could act. The Parliament hoped to engage with the Council regularly and push it into action. While the Commission first dismissed this suggestion, it later took up some parts of Parliament's proposal. Besides, the Commission proposed a new rule

of law conditionality regulation that would use the Union's finances as a sword against backsliding. The next Chapter explains the trajectory of those proposals and how EU policymakers continued to react to backsliding in Hungary and Poland.

7
Monitors and Sanctions

TOWARDS CONDITIONALITY

The May 2019 elections to the European Parliament opened a new chapter in the supranational tug of war. The Parliament had agreed to follow the *Spitzenkandidaten* process tried in 2014, in which one of the nominated candidates of the political parties would get the job of Commission president (Hamřík and Kaniok 2019). The *Spitzenkandidaten* process could be seen as a power grab by the Parliament, since the treaties handed the right to 'propose' a candidate for the position of Commission President to the European Council (EUCO), '[t]aking into account the elections to the European Parliament' (Article 17(7) TEU).

The main contenders were Manfred Weber for the EPP and Frans Timmermans for the PES. Since the EPP was the biggest group, Weber was the presumptive nominee. However, Weber had manoevred himself into an impossible position. Because he had for a long time protected Orbán, Weber lacked strong support from other political groups (Crum 2023, 206). His late decision to vote for the Sargentini report had also cost him the votes of Fidesz and Orbán's support in the EUCO (Bayer, Weise and Mischke 2019). Timmermans, meanwhile, faced stiff opposition from the Visegrád countries, after he championed the rule of law in the Commission. A first meeting of the EUCO on 20 June could not resolve the situation, necessitating a special meeting held from 1 to 3 July, from which Ursula von der Leyen emerged as a candidate.

The European Parliament failed to rally around either of its *Spitzenkandidaten* (Crum 2023), von der Leyen narrowly won the vote on 16 July: she gathered 383 votes, only nine votes above the required absolute majority of members. While the ballot was secret, PiS and Fidesz announced that they had voted for her and pointed out that her candidacy would have failed without either of their delegations' votes (Zalan 2019). The Hungarian government's spokesperson issued a thinly-veiled threat: 'Hungary's ongoing support is not unconditional: we have definite expectations of the new EC President and we will look out for the interests of the Hungarian people every step of the way' (Kovács 2019c).

The Hungarian government's candidate for Commissioner was László Trócsányi, the regime's former Minister of Justice (2014–2019). Trócsányi faced stiff opposition in the European Parliament and was twice voted down, after negative evaluations by the Committee on Legal Affairs. Then, von der Leyen asked Orbán for a new candidate.[1] Orbán sent his permanent representative to the EU, Ambassador Olivér Várhelyi, into the race and he was confirmed by the Parliament as Commissioner for Neighbourhood and Enlargement, a portfolio in which he would oversee the state of the rule of law and democracy in candidate countries. The Polish government, meanwhile, proposed Janusz Wojciechowski. He was confirmed by the Parliament as Commissioner for Agriculture.

Further personnel changes ensued in the Commission. Frans Timmermans stayed as First Vice-President of the Commission, but his new portfolio focused on the 'European Green Deal'. The rule of law portfolio was taken over by two people: Věra Jourová, a Czech Liberal, became the new Vice-President for Values and Transparency and Didier Reynders, also a Liberal, but from Belgium, became Commissioner for Justice. Johannes Hahn, an Austrian Christian-Democrat, stayed on as Commissioner for Budget and Administration, a position

1. The Romanian candidate met the same fate.

that continued to be important in the context of the rule of law conditionality regulation.

With both Hungary and Poland subject to the Article 7(1) TEU procedure, the rule of law gained in political salience in the term of the ninth European Parliament. Not only were the Article 7 procedures unresolved, but several new tools were in creation. The Commission had in 2019 announced a rule of law mechanism centred on an annual report. The institutions were also under pressure to negotiate a new MFF and, due to the havoc caused by the COVID-19 pandemic, an unprecedented economic support programme, which included joint debt secured against the EU's budget. To protect these substantial funds and gain some leverage over backsliding states, the institutions tried to negotiate a rule of law conditionality regulation. However, the ideas about what it should encompass were divided, and Hungary and Poland would have to agree.

This chapter covers the period from mid-2019 to the end of 2021. Starting with the 2019 Article 7 hearings on Hungary (section 7.1), I then describe the continued backsliding in Hungary and Poland as well as their internal politics (7.2), and discuss the institutions' efforts to keep Article 7 alive (7.3). The Chapter reveals a continuing tug of war for effective instruments. Section 7.4 describes the contestation around the Commission's first annual rule of law report. I then discuss how the European Parliament tried to link the monitoring with the sanctions and assign each of the institutions a clearer role (7.5). In Section 7.6, I show that the Council took some steps as well, using the rule of law report as a basis for its rule of law dialogue, and transforming this instrument into a regular peer-review exercise. The most contested tool, however, was the budget conditionality regulation, which I discuss in Section 7.7. Here, the ideas of Parliament and Council clashed, but the Council was far from united. The passing of this regulation was only a step, and political support was required to use it to

sanction backsliding in Hungary and Poland. This turned out to be a lengthy process, which I review in Section 7.8. Section 7.9 describes the Commission's infringement proceedings. The final section concludes (Section 7.10).

7.1 Article 7 against Hungary

In the last chapter, I described the first three hearings that took place under Article 7(1) TEU in the Council, all concerning Poland. No formal action was taken on the Hungarian case, where the Parliament had used its prerogative by approving the Sargentini report. This changed under the Finnish presidency of the Council in the second semester of 2019. The Finns were determined to make progress on the rule of law and European values agenda and made it a priority of their presidency programme (Finnish Government 2019; Tuominen 2023). Under Finnish leadership, the GAC scheduled two hearings on Hungary. At first, however, the Finns tackled the issue of procedural modalities for Article 7 hearings, which had previously been agreed ad-hoc for each meeting and led to long and unproductive meetings.

Standard modalities for Article 7 hearings

The presidency proposed, on 9 July 2019 'standard modalities' for Article 7 hearings (Council of the European Union 2019e). It argued that standard modalities would 'streamline' the Article 7 process and ensure that affected member states were treated equally. The member state subjected to the procedure could have a delegation of up to eight people, three in the front row, two behind, and three in the third row. Other delegations would be allowed two in the front row and up to three aids behind, allowing the delegation head (usually a minister) to be accompanied by advisors with subject matter expertise. This was to counter the imbalance discussed in Chapter 5.

The standard modalities also provided guidance on the conduct of meetings, depending on who had submitted the reasoned proposal, whether it was a third of the member states – which has not been tried to date – the Commission or Parliament. They also differentiated between initial hearings and subsequent hearings, with the latter leaving less time for the initial presentations in order to reduce redundancy (Council of the European Union 2019e). At the start of an Article 7 procedure, the reasoned proposal would be presented within 20 minutes, followed by observations from the concerned member state (one hour) and, if the Commission had not initiated the procedure, the Commission (10 minutes). The member state could also submit more observations in writing. Then the floor would be opened for the delegations to ask up to two questions (2 minutes each), to which the member state concerned could respond (10 minutes). Follow-up questions could be addressed by the member state in the end (not time-limited), followed by a Commission statement of 15 minutes.

Two working drafts were published (Council of the European Union 2019f, 2019g). While most changes were linguistic and inconsequential, a few loomed larger. According to the first version, the Council could invite a representative from the Parliament to present the Parliament's reasoned proposal. This would put the Parliament on the same footing with the Commission or member states and was one of the demands of Parliament's rapporteur. This was deleted after the discussion in the Antici group[2] on 2 July 2019. In the final version, the initial presentation of the Parliament's reasoned proposal would fall to the Council presidency (Council of the European Union 2019g, Annex § 12). These changes limited the role of the European Parliament. Furthermore, the initial draft would have allowed the Council to invite 'external guests' for a discussion, which was

2. The Antici group is a committee preparing COREPER II meetings. It consists of the assistants of the Permanent Representatives of member states.

deleted in subsequent versions (Council of the European Union 2019g, Annex § 26).

Hearings on Hungary

One year after the Parliament passed the Sargentini resolution, the Council discussed the reasoned opinion of the Parliament for the first time in an Article 7 hearing. Since there was resistance in the Council to the Finnish presidency's efforts to give the Parliament a role in the Council's procedure, the presidency invited the Parliament's rapporteur for breakfast along with other national delegations (Interviews 9; 11; 14).

The first hearing under Article 7 on Hungary took place on 16 September 2019 and lasted for two hours. It was recorded in relatively detailed minutes on nine pages (Council of the European Union 2019h). The presidency stated that it, together with representatives of Croatia and Germany,[3] had met the LIBE chair (Juan Fernando López Aguilar, S&D, Spain) as well as the Parliament's new rapporteur[4] for the file, Gwendoline Delbos-Corfield (Greens/EFA, France) and communicated the Parliament's request that it should be able to present its own reasoned proposal to the Council. The Parliament's representatives asked for this to be allowed, at least on this ocassion, making clear that this need not become a general rule. According to the Council's meetings, the Parliament's representatives were satisfied with the broad scope of the first hearing, but found further, thematic hearings useful. In addition, they confirmed that there was no positive trend in Hungary and highlighted a range of topics that they saw as critical: 'media pluralism; academic freedom; the independence of the

3. The next two countries to hold the presidency as part of a presidency Trio.

4. Judith Sargentini had not sought reelection to the Parliament.

judiciary and the reform of administrative courts; [and] the fundamental rights of migrants, asylum seekers and refugees' (Council of the European Union 2019h).

Interviewees explained that the Hungarian delegation appeared well prepared. Before the meeting, it had updated its memorandum, which now stood at 158 pages and had been sent to delegations on 12 September (Council of the European Union 2019a). The Hungarian delegation challenged the Article 7 procedure on legal grounds, saying that the Parliament's voting procedure was flawed. I also said it would make itself available and participate in the exchange. Furthermore, the government alleged that the Parliament's resolution was 'politically motivated, biased, and factually incorrect in many respects' leading to 'unjustified' conclusions (2). It argued that many contents were not part of the acquis and could not be subject to the Article 7 procedure. This was in direct opposition to the line taken by the Commission (Commission of the European Communities 2003) as well as the Parliament. The Hungarian delegation also argued that ongoing procedures should not be included in the scope of the Article 7 file and that those that were concluded had to be excluded too. The Hungarian delegation thus argued that the Parliament's reasoned proposal failed to show that there was 'a clear risk of a serious breach' of EU values by Hungary (Council of the European Union 2019h).

The Commission, in its starting statement, backed the Parliament's position that it should be included in the process. It also supported the Parliament's concerns in the area of judicial independence and pointed out that these were shared by the Council of Europe and GRECO. It highlighted that the Hungarian NJC had requested the resignation of NJO President Tünde Handó and mentioned the planned reform of administrative courts as well. The Commission also found Hungary's compliance with anti-corruption measures 'unsatisfac-

tory, across the board'. It disagreed with the Hungarian delegation that issues subject to separate infringement proceedings needed to be excluded from the Article 7 procedure (Council of the European Union 2019h, 4).

Eleven delegations intervened in the discussion: Sweden, Belgium, the Netherlands, Spain, Denmark, France (also on behalf of Germany), Italy, Luxembourg, Germany, Portugal, France (again). The Belgian representatives asked about the governance of the Hungarian Academy of Sciences. Hungary's delegation pointed out that this was not covered by the Parliament's reasoned proposal, but that it was willing to cooperate anyway. Denmark asked about judicial independence and Hungary's NJO President, who had tried to discipline members of the NJC. The Hungarian government maintained that the increased tensions between institutions were proof of functioning checks and balances. In its final statement, the Hungarian delegation re-iterated that the criteria of Article 7(1) TEU did not apply to its situation.

The pressure had some effect. At the end of October, Hungarian Minister of Justice Judit Varga announced that the government had given up plans to introduce a separate branch of administrative courts (Kovács 2019b).

Behind the scenes, members of the Hungarian government were angry about the detailed report on the meeting, which was made public days after the hearing. Later reports on Article 7 hearings were more general in nature. This was the case in the second hearing on Hungary on 10 December 2019, which ran to only three pages, compared to eight for the earlier meeting (Council of the European Union 2020d). This meeting had a narrower scope, namely 'independence of the judiciary and of other institutions and the rights of judges; freedom of expression; [and] academic freedom'. The brief report only indicated the twelve delegations that had posed questions: Belgium, Germany, Denmark,

Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Sweden and, as the only 'Eastern' country, Slovenia.

More illuminating than the report on the hearing was the Twitter feed of Zoltán Kovács, the Hungarian government's spokesperson, who was part of the delegation and live-tweeted from the hearing, starting with the observation that the 'Soros orchestra is about ready to take the stage'.[5] Other tweets included photos of participants, such as one that showed a sleepy Belgian staffer.[6] The general tone of the tweets was one of sarcasm and ridicule. During the meeting, news spread of Kovács's live-tweeting, which was badly received and resulted in him being asked to leave the room by the presidency. Kovács retorted that the presidency had released the transcript of the first meeting without consulting the Hungarian government beforehand.[7]

This exchange continued after the meeting in exchanges of strongly-worded letters between the Finnish presidency and the Hungarian government. On 11 December, Minister Tytti Tuppurainen sent a letter to her Hungarian colleague, Judit Varga, expressing her 'disappointment' over the breach of confidentiality and demanding a written explanation. Gergely Gulyás of the Hungarian Prime Minister's Office, responded on 13 December. Gulyás found it 'disturbing when European institutions breach, circumvent or bend procedural rules'. He listed the distribution of the transcript of the previous meeting without prior consultation, which he called 'an exceptionally flexible interpretation' of a regulation; the fact that the meeting took place even after Hungary had filed an action of annulment against the Parliament's vote; that a second hearing

5. https://x.com/zoltanspox/status/1204314950082158592.

6. https://x.com/zoltanspox/status/1204338061724856320.

7. https://x.com/zoltanspox/status/1204395424553033728.

was scheduled, which 'amounts to a blatant violation of neutrality expected from the Presidency of the Council'; and that the scope of the procedure had been ignored by discussion of further items. The Hungarian letter also decried 'that instead of genuine legal arguments', accusations by Soros's NGOs were repeated.

Kovács's conduct became subject of a discussion in COREPER on 16 December, where it was decided that Kovács would be a *persona non grata* (Interview 11). The response to Gulyás's letter came from Finland's EU ambassador addressed to her Hungarian colleague, dated 19 December. It refutiated Gulyás's claims with legal references, pointing out, inter alia, that actions of annulment had no suspending effect and that new facts could be discussed as long as they fell within the remit of the reasoned proposal.

Interviewees who had been present in the hearings highlighted the very different discussions in the two hearings on Hungary. The first meeting was described as more constructive, while the Hungarian delegation was said to have taken a harder stance in the second meeting. For instance, the Hungarian delegation laughed at the question posed by the Swedish delegation (Interview 9). Two participants pointed out that the Hungarian government simply stated that it had already answered a question. However, the mood fully changed once the members of the Council learned about Kovács's tweets, during the next agenda item on the state of play in Poland. One participant believed that the tactic was to make the hearing so unpleasant that others would not want to continue with hearings (Interview 9). Another participant, however, thought that the live-tweeting was done for a domestic political audience and that the Hungarian delegation had not thought through the consequences (Interview 11). One interviewee who was present in two hearings on Poland and the two on Hungary, described her impressions: Poland was constructive, but 'consuming',

speaking until the time ran out and ministers had to leave; the Hungarian delegation was well-prepared, as shown by the lengthy non-paper (Interview 9).

7.2 Authoritarian states

In this section, I provide an overview of further democratic and rule of law backsliding in Hungary and Poland in the period from 2019 through 2021. The COVID-19 pandemic provided an opportunity for the extension of executive power.

Hungarian pandemic authoritarianism

In 2019, the Hungarian government started paying more attention to the control of courts. One temporary set back was the demotion of the President of the NJO, Tünde Handó. Handó had tried to discipline judges of the NJC, who had in return demanded her dismissal. In November 2019 and before the expiration of her tenure, Handó resigned from her position and was elected as a judge to the Constitutional Court. This was due to her increasingly becoming a liability to her government. To facilitate a better control of the judiciary, Fidesz changed the law to allow the Chief Justice, the President of the Kúria, to be someone who had served on the Constitutional Court, which could be used to circumvent minimum service time requirements in the Hungarian judiciary. In 2020, the government appointed András Zs. Varga, a loyal party soldier, to tighten control over the judiciary. The government legislated a new legal remedy, which was created for him to exercise tighter control over judicial decisions in Hungary (Fleck and Sándor 2024; Hanelt and Vincze 2025; Vincze 2023b).

The spread of COVID-19 'prompted unprecedented government action around the world' (Hale et al. 2021, 529). In some countries, responses were authoritarian in nature (Edgell et al. 2021; Maerz et al. 2020). The Hungarian government

used the pandemic to justify emergency measures that had little to do with public health (Kelemen 2020a) and to extend executive power at the expense of the legislature (Edgell et al. 2021, 3, 5). The Hungarian government declared 'a state of danger' for the first time on 11 March 2020. A state of danger, as defined in the Fundamental Law, gave the government wide-ranging powers to sidestep the National Assembly. The law required an act of Parliament to extend a state of danger beyond fifteen days, which was enacted in the end of March. In a state of danger, the government could suspend the application of laws and rule by decree (Hegedüs 2020). The law gave the government dictatorial powers until it decided to end the state of danger. Given that the government's parties Fidesz and KDNP had a two-thirds majority in the National Assembly, there were no checks on the government (Krekó 2020). The National Assembly could anyway only repeal the law itself, but not reverse the government's declaration (Szentes and Vörös 2024, 17). Thus, Kelemen (2020a) called Hungary a 'coronavirus autocracy'.

This 'enabling act' also gave the government wide-ranging powers to curb freedom of speech and imprison people for up to five years for spreading misinformation that endangered the management of the pandemic (Kelemen 2020a). Orbán made active use of his new powers and governed by decree (Scheppele 2020; Antal 2023). Szentes and Vörös (2024, 19–20) point out that the government issued 651 decrees in only eleven months, most of which had nothing to do with the management of a health and economic crisis. One example was the special economic zone in the city of Göd, described in a vignette at the start of Chapter 1 (Karsai 2020; Szentes and Vörös 2024, 21).

In the Hungarian parliamentary election scheduled for April 2022, Orbán faced, for the first time, a united opposition. His main challengers from the left, liberal centre, and right agreed on the need to unseat Orbán and wanted

to lead the country back to democracy. For this, they held primaries to choose a candidate for Prime Minister, and to pick a single candidate to run against Fidesz in every election district. The small-town mayor of unpronouncable Hódmezővásárhely, Péter Márki-Zay, came initially third in the primary behind left-wing Klára Dobrev and the mayor of Budapest, Gergely Karácsony. Before the run-off, Karácsony dropped out and supported Márki-Zay's campaign, to avoid victory by Dobrev, who was seen as too divisive to unite the opposition.

Márki-Zay, a conservative, won the primary and had to hold the six-party coalition together. This unity was tested in the course of 2021 by Orbán's government. It introduced a 'wedge issue' to try to tear the opposition apart: in the summer of 2021 it passed a law to ban media content for children that depicted gay, lesbian, or transgender people (Scheppele 2022, 49). The government also changed the law to allow it to schedule a referendum on this issue on election day – Jobbik, part of the united opposition, supported this change – in which voters were asked four heavily leading questions.[8] The referendum failed to reach the quorum of half the voters, since the opposition asked their supporters to make their ballots invalid. The government's strategy succeeded however: Jobbik voters deserted their party in large numbers in the election and Orbán won comfortably (48–50).

Family disputes

Many scholars have alleged – not wrongly – that Fidesz received protection from the EPP (Kelemen 2020b; Wolkenstein 2022). Ever since two-thirds of the EPP

8. The questions were: 1. Do you support holding information events on sexual orientation to minors, in public education institutions without parental consent? 2. Do you support the promotion of gender-reassignment treatments to minors? 3. Do you support the unrestricted exposure of minors to sexually explicit media content, that may influence their development? 4. Do you support showing minors media content on gender changing procedures?

group voted for Article 7(1) against Hungary in September 2018, the relationship between Fidesz and its European party was troubled. In the last chapter, I described the 'suspension' of Fidesz from the EPP *party*. The EPP leadership tasked three 'wise men' to prepare a report to help decide on Fidesz's future in the EPP. In January 2020, the 'wise men' reported to the party leadership on the lack of progress in Hungary, and the EPP decided to maintain the suspension. In the same month, EPP member Petri Sarvamaa (Finland) published an op-ed in Politico – a daily newspaper – calling for Fidesz's expulsion from the EPP *group* (Sarvamaa 2020). At the next party congress in September 2020, EPP president Donald Tusk remarked that the party was split, without a majority to either exclude or include Fidesz (EPP 2020).

The relationship deteriorated further in the coming months. After Támas Deutsch, the long-standing leader of the Fidesz delegation in the European Parliament, publicly compared EPP group chair Weber with the Gestapo[9] due to his position on the budget conditionality regulation, the EPP group moved to expel him. The Austrian MEP Othmar Karas in particular, pushed for Deutsch's expulsion. After deliberations, the EPP group suspended Deutsch, barring him from rapporteurships and speaking on behalf of the group (Baume 2020). Afterwards, Karas campaigned for a change of the group's membership rules, to make it easier to expel a member party. This came to a vote in February 2021 and passed. Shortly after, Viktor Orbán declared that Fidesz had left the EPP group. As if to prove critics right, who complained that he had effectively merged his government and party office, Orbán wrote on headed paper of the Prime Minister's office (Baume 2021).[10]

9. Gestapo, short for 'Geheime Staatspolizei' ('Secret State Police'), was an organization used by the Nazis to persecute opponents.

10. A scan of the letter was posted on Twitter by Katalin Novák, then the Vice-President of

The effects were two-fold. First, the EPP was finally free from the increasingly impossible task of maintaining unity in the rule of law crisis. Without Fidesz, EPP members were free to vote on Hungary as they wished and subsequent votes showed stronger majorities against Hungary. Secondly, Fidesz was free to seek new alliances. Yet this proved difficult. No agreement with the eurosceptic ECR group was struck for the remainder of the ninth European Parliament. The exact reasons are not clear, but could be either policy disagreement, especially as regards of Russia where PiS and Fidesz were on opposite ends of the spectrum, or considerations of power, because PiS was not willing to weaken its dominating position within the ECR group, or both.[11]

The rule of law in Poland

In October 2019, Poles went to the polls to re-elect the 460 members of the Sejm and 100 Senators in the upper chamber. The governing United Right coalition received 43.6 per cent of the vote – six percentage points up from its 2015 result – although its number of seats in the Sejm remained at exactly 235. This was the highest vote share any party had won in free elections in Poland, on a historically high turnout of 62 per cent. In the Senate, on the other hand, the opposition could scoop a bare majority of 51 posts, as three major opposition parties agreed not to field candidates against each other in the election disctricts. After the election, PiS challenged the results in several districts, but the courts rejected the claims. Then PiS tried to co-opt opposition Senators with the offer of ministerial posts if they changed party, but all turned down these bribes. Since

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Fidesz and Hungarian Minister of Family Affairs: https://twitter.com/KatalinNovak_HU/status/1367053668458106881. Interestingly, the sole MEP of KDNP stayed in the EPP group.

11. Only after the election to the tenth European Parliament in 2024 did Orbán succeed in breaking Fidesz's isolation and find a new home: the 'Patriots for Europe' group.

the public broadcasters were clearly slanted towards pro-government positions, the elections did not take place on a level playing field, but were otherwise free (Markowski 2020). Freshly legitimized, the United Right government continued its assault on the judiciary and judges that dared to resist. The ECtHR, CJEU and even courts of other member states became increasingly involved in the discussion of judicial independence in Poland.

The Polish presidential election was initially scheduled for 10 May 2020. The government was eager to keep this date, as it hoped this would profit the incumbent candidate during the COVID-19 situation. To keep this date, the government planned to hold a postal ballot. Since the logistics proved harder than expected, the date was cancelled, and the first round was scheduled for 28 June and the second round for 12 July (Tatarczyk and Wojtasik 2023). This created legal problems, as the election date was not in accordance with the constitution (Kustra-Rogatka 2020). The election pitted the incumbent Andrzej Duda against the mayor of Warsaw, Rafał Trzaskowski, for the PO opposition and other candidates. Trzaskowski and Duda made it to the run-off, in which Duda won 51.3 per cent of the vote (Tatarczyk and Wojtasik 2023).

On 22 October 2020, the Constitutional Court voided the abortion law in case K 1/20. The law dated to 1993 and was already one of the strictest in Europe, but allowed for some exceptions such as cases of sexual violence, if the life of the mother was jeopardized by the pregnancy, or when the foetus was not viable (Bucholc 2022, 74). PiS had already attempted to achieve the repeal of these exemptions via legislation in 2016, but had to abandon the project in light of widespread opposition and mass protests (Korolczuk 2016). Now, the Constitutional Tribunal helped PiS achieve, what it could not achieve through the legislative process. It decided that the exemption in cases of foetal impairment were unconstitutional, thus forcing women to carry non-viable foetuses to term.

Since it was widely understood that the Tribunal was not independent any more, however, the resulting mass protests were also directed against the government and PiS's approval ratings dropped by ten percentage points to 26 per cent (Tilles 2020a).

The perceived politicization of courts in Poland was not a purely domestic problem. It also opened cracks in the project of European integration. Some courts in member states refused to execute European Arrest Warrants issued by Poland. Normally, these warrants are mutually recognized, but courts in Ireland and the Netherlands refused to do so, on the basis of doubts that the defendants would face a fair trial in front of a tribunal established by law in Poland. The courts of two member states made preliminary references to the ECJ, asking about their obligation to surrender defendants to Poland. The ECJ handed the responsibility back to member state courts to decide on a case-by-case basis (Pech, Wachowiec and Mazur 2021c, 36–38).

Another development in Poland was driven by local governments dominated by the far-right, which passed resolutions to declare themselves 'LGBT ideology-free zones'. The regional governors, who are appointed by the national government, did not intervene. Some ordinances in support of anti-discrimination in other places were voided by the respective governors (Ploszka 2022).

In a case brought by a private enterprise, the ECtHR had to rule about the legality of the pseudo-judges of the Polish Constitutional Tribunal.[12] *Xero Flor*, the applicant, was a producer of synthetic turf seeking compensation from the state for damages caused by wild boar. After exhausting all appeal stages, it filed a constitutional complaint with the Constitutional Tribunal. This was dismissed by a panel that included Mariusz Muszyński, one of the unlawfully appointed judges. In its application to the Strasbourg court, *Xero Flor* argued (*inter alia*)

12. Application No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland*.

that the inclusion of an unlawfully appointed judge violated its rights under Article 6(1) ECHR. The ECtHR found that Muszyński was unlawfully elected and his participation in the panel violated the applicant's right to 'an independent and impartial tribunal established by law' under the Convention (Szwed 2022).

After the ECtHR had questioned the status of some of the Constitutional Tribunal's judges,[13] the Prosecutor-General (who was the Minister of Justice, Ziobro), initiated proceedings in the Constitutional Tribunal against the judgement of the ECtHR. On 24 November 2021, in case K 6/21, the Tribunal decided that parts of the ECHR were incompatible with the Polish Constitution. This ruling was heavily criticized by legal experts: Ploszka (2023, 51) wrote that 'this judgment should be perceived as proof of the instrumentalisation of the Constitutional Tribunal for internal political purposes'. The Tribunal held that the ECtHR acted *ultra vires* by ruling on issues that were not covered by the ECHR (Ploszka 2023). Pseudo-judge Muszyński prepared this case as the rapporteur (Kustra-Rogatka 2023, 45).

In the fight between supranational law and domestic constitutional law, the German Federal Constitutional Court created ideas for illiberal governments (Grimm 2020, 949; Bobić and Dawson 2020; Biernat 2020). On 5 May 2020, the Second Senate of the Court ruled in the 'PSPP case' on the asset purchase programme of the European Central Bank, through which the Bank had stabilized government finances and spurred economic activity in member states. The CJEU had ruled in December 2018 in a preliminary reference case from the German Court that this was allowed under European law. In the PSPP case, the German Court argued that the CJEU had not explained its decision well and that the Court had acted *ultra vires*. The German Court did not substantively

13. Two of the three original pseudo-judges died in 2017, relatively soon after their election. According to Szwed (2022, 141–142), their successors have inherited their limited legitimacy, since it is questionable whether the death of pseudo-judges creates vacancies.

render the European Central Bank's PSPP programme unviable, but forced the German government to give better reasons for Germany's participation in the programme. The European Commission reacted with an infringement proceeding against Germany for its Court's ruling, as it had questioned the primacy of EU law, putting the German government in an uncomfortable place, since it had no way to alleviate the Court's judgment.

The German Federal Constitutional Court's PSPP decision gave ammunition to Poland and Hungary, who needed a pretext for refusing to apply European law and disregarding decisions of the CJEU. On 14 July 2021, the Polish Constitutional Tribunal issued its ruling in case P 7/20 – a case brought by the Supreme Court's (captured) Disciplinary Chamber. The Disciplinary Chamber challenged the interim order of the CJEU in case C 204/21, which obliged Poland to halt the work of that Chamber. The Tribunal found a conflict of that interim order with the Polish constitution, as it interfered with the working of the domestic judicial system. This was the first case in which the Tribunal openly called the primacy of EU law into question. However, it was not the last. The Polish Prime Minister, Morawiecki, lodged an application with the Constitutional Tribunal, to find the principle of primacy of EU law unconstitutional.

On application of Morawiecki, the Tribunal also found a conflict of EU law, as interpreted by the CJEU, in case K 3/21 on 7 October. The government's lawyers heavily referred to the PSPP case (Jaraczewski 2021). In both these cases, the Tribunal held that the CJEU acted *ultra vires* (Kustra-Rogatka 2023), following the reasoning established by the German Court's PSPP judgment (Spieker 2022).

Internal politics in the rule of law crisis

Orbán's Fidesz governed in a coalition with the Christian-conservative KDNP, which however lacks independence and is often referred to as a 'satellite party'

(Ilonszki 2019, 212; Donáth 2021, 6). In Poland, by contrast, the United Right was an unequal, but actual coalition of three parties, of which Kaczyński's PiS was the largest. It included the more moderate 'Agreement' of Jarosław Gowin and the far-right 'Poland United' of Zbigniew Ziobro, which had, in 2012, broken away from PiS. Gowin served as Economy Minister in the cabinet, but Ziobro was Minister of Justice – and in that function *ex officio* the Prosecutor-General – thus at the core of the supranational tug of war. Both partners, at times, developed a certain independence from Kaczyński, whose old age (born 1949) created incentives for a succession game (Tilles 2020b).

In 2020, PiS passed an animal protection law against the votes of Ziobro's party and with abstention of Gowin's party, thanks to the renegade votes of the PO coalition. The United Right government was then declared dead (Tilles 2020b). The coalition managed to hold together once more, but this was not the end of its troubles.

Kaczyński was the Prime Minister of Poland during his party's first government, from 2005 to 2007 and, reportedly, developed a strong disdain for the necessities and formal duties of that office. In 2015 he preferred to stay in the background, with Beata Szydło, then Mateusz Morawiecki, serving under him as Prime Ministers. In the summer of 2020, however, the conflicts in the cabinet between the coalition partners grew so much that Kaczyński felt it necessary to join the cabinet as Deputy Prime Minister. In that role, he was in charge of interior, defence and justice portfolios, creating a counterweight to Ziobro in the cabinet (Cienski 2020; Zgut 2022, 297).

At first, the problems escalated with Kaczyński's more moderate coalition partner, Gowin, who was not willing to go along with the media law. This bill was meant to force the American owner of independent broadcaster TVN to sell its shares. This received criticism both from the US administration and from the

EU. Gowin and his party walked out at first, once more leading to predictions of the imminent end of Kaczyński's government (Shotter 2021b). This was averted, as PiS offered other lawmakers rewards for joining its group (Zgut 2021, 299).

In the ensuing conflict with the Commission, media reported about internal disagreements between Kaczyński and Ziobro. While Kaczyński was ready to roll back some of the measures against the country's judges to reduce the conflict with the Commission, Ziobro took a hard, eurosceptic line and threatened a 'Polexit' (DW News 2021).

♣ ♣ ♣

This section has briefly discussed backsliding in Hungary and Poland from 2019 to 2021 as well as their internal politics. In Hungary, further judicial reforms were undertaken and the COVID-19 pandemic was used for further authoritarian measures and executive aggrandizement. This new push for authoritarianism came with costs, as big parts of the EPP wanted to rid themselves of Fidesz. This led to the split of Fidesz from the EPP in early 2021. In Poland, elections in 2019 and 2020 reaffirmed PiS. Yet their attacks on courts increased the threat to European integration. This made an EU response more likely. Since the Polish government was internally split on pursuing these policies, its abilities to engage effectively with the EU were limited.

7.3 The future of Article 7

The last hearing on Poland took place in December 2018 (described in Chapter 5), the last on Hungary in December 2019 (Section 7.1). Within the EU, there was a range of ideas on how to continue with the Article 7 hearings. This created a dilemma for the European Union: how to proceed with Article 7 in the light of unclear majorities? This section explores different positions.

The Parliament's resolution of January 2020

On 15 January 2020, the European Parliament debated separately the 'ongoing hearings' on Hungary and Poland. The Council was represented by Nikolina Brnjac, a State Secretary in the Croatian Ministry of Foreign and European Affairs, while Vice-President Jourová and Commissioner Reynders spoke for the Commission. The Council presidency's statement was generic, paying lip service to the rule of law and matter-of-factly mentioned the two recent hearings on Hungary as well as the informal meetings with the Parliament's representatives that preceded the hearings. Jourová on the other hand, pointed to a number of new developments in Hungary within the scope of the Parliament's reasoned proposal, including on the judiciary, the fast-tracking of legislation, and the Kúria's decision to prohibit a lower court judge from making a preliminary reference to the CJEU. Also, she pointed to the power imbalance between the NJO and the NJC, and lamented the state of media pluralism and academic freedom. The CEU, she pointed out, had moved its teaching from Budapest to Vienna.

Roberta Metsola (Malta, EPP) said that violations of the rule of law were never acceptable, but demanded a new mechanism: 'There is a need to introduce a scrutiny mechanism that applies to all countries in the same way, with the same measurement'. Sylwia Spurek (Poland, S&D) argued that the hearings on Hungary had not brought progress. She also wanted a new mechanism, one that would involve financial sanctions, a position shared by Malin Björk (Sweden, GUE/NGL). Ramona Strugariu (Romania, Renew) asked the Council for more sincere 'cooperation and transparency'. Gwendoline Delbos-Corfield (France, Greens) – the ninth Parliament's rapporteur for the Article 7 file on Hungary – saw some progress during the Article 7 proceedings, highlighting the 'serious, determined and courageous work' of the Finnish presidency and asked the

Croatian and forthcoming German presidencies to continue this work. She also demanded that the Parliament have the same rights in the Council hearings as the Commission in cases that it triggered. Speakers for the right-wing groups rejected the use of Article 7.

In his closing statement, Commissioner Reynders referred to the illiberal policies mentioned by Jourová and how the Commission was working to address them, as well as its crucial work on the rule of law toolbox. The Croatian presidency's short statement did not provide any hints that it planned to hold further hearings.

This debate was followed by one on Poland. Brnjac, for the Council, explained that the Commission informed the Council five times about the situation in Poland in 2019 in so-called 'states of play'. Jourová explained the ECJ's decisions as well as active cases against Poland. In particular, she highlighted developments based on the ruling of the CJEU of 19 November 2019, where the court had decided that the Polish Supreme Court needed to decide on the independence of its own Disciplinary Chamber. She pointed to the Court's ruling that the Disciplinary Chamber was not a court. Jourová warned about a new bill that would futher jeopardize the rule of law in Poland and aggrevate the EU's concerns. Hence, she had expressed her reservations about this bill to the Polish President, Prime Minister and speakers of Sejm and Senate in a letter of 19 December 2019 and asked them to seek advice from the Venice Commission and to refrain from pushing through this bill without consultations. The Polish Senate had then sought the advice of the Venice Commission.

Several speakers highlighted the 'bravery' of Polish judges – some of whom attended the debate as guests in the gallery – and their recent and large demonstrations. Juan Fernando López Aguilar, the chair of the LIBE Committee spoke for the S&D-group when he pointed out that the ECJ had found violations of Ar-

ticle 19 TEU and Article 47 CFR. Michal Šimečka (Slovakia, Renew) criticized the 'opaque and timid fashion' in which the Council had handled Article 7 thus far, but lauded the Commission for its request for interim measures. The speaker for the Greens/EFA, Terry Reintke (Germany), said: 'the Article 7 procedure has actually proven to very often come too late and be too inflexible to meet all these attacks that have been happening'. Thus, 'a more holistic vision' would be necessary, including the new rule of law mechanism and budget tool.

Beata Szydło, the former Polish Prime Minister and now an MEP, spoke for the ECR and denied problems of judicial independence in Poland. She explained how the Polish government had been re-elected by the people in democratic elections to continue its work, which included reforms of the judiciary. The justice system would need 'to serve citizens, not protect certain privileges that a specific group wants to keep'. The courts would be 'a relic of the communist state in a democratic member state of the European Union'.

In his closing statement, Commissioner Reynders explained the Commission's decision to seek interim measures in the case concerning the Disciplinary Chamber of Poland's Supreme Court, which was 'urgent and needed' to avoid 'irreparable damage' to the judicial system. While member states had the right to organize the functioning of their own judiciary, they were required to follow EU law in doing so. He promised the Parliament a 'comprehensive European rule-of-law mechanism', but emphasized that one could not simply compare individual provisions of member states, without taking the entire functioning of the judicial system and wider checks and balances into account. Finally, he invited the Polish Minister of Justice to engage in a dialogue.

The European Parliament voted on 16 January 2020 on a resolution regarding the ongoing Article 7 hearings (European Parliament 2020c). In the resolution, the Parliament criticized that Article 7 'hearings are not organised in a regular,

structured and open manner' and demanded that the Croatian Council presidency organize more hearings and address rule of law recommendations under Article 7 to the two member states (§ 1). It expressed its disappointment with the Council's standard modalities, especially that the Parliament was not allowed to present its own reasoned proposal to the Council in the same way as a third of member states or the Commission could do it. Parliament also appreciated the Finnish presidency's efforts to include the Parliament in an informal way, but saw this as not of equal value to a formal presentation (§ 2). It mentioned the lack of overall progress with the Article 7 procedure and the further deterioration of the situation regarding democracy, fundamental rights and rule of law in member states under the procedure. The Parliament demanded from the Council that it would assess newer cases of democratic backsliding. From the Commission, the Parliament demanded the full use of available tools and, in particular, expedited procedures and interim measures when referring cases to the ECJ (§ 3). Parliament mentioned the narrow scope of Poland's Article 7 procedure and asked the Council to consider the fundamental rights situation (§ 4). Finally, it held that a new DRF mechanism based on an inter-institutional agreement was necessary as well as a new conditionality regime (§§ 5–6).

The Council clearly did not have confidence that it had the votes, and in any way Fidesz and PiS could shield each other from real sanctions of Article 7(2–3). Orbán was willing to gamble that the supporters of Article 7 did not have the votes and demanded that the Council take a vote and conclude the procedure. This opened the question of what the role and prospect of Article 7 was. The ninth Parliament's rapporteur on the Hungary file, Gwendoline Delbos-Corfield, explained in an interview that in her regular meetings with Hungarian NGOs, they expressed confidence that the open Article 7 procedure had some restraining effect on the government and that without, the situation could be worse

(Interview 19). Other interviewees, even in those groups that supported Article 7 officially, privately stated that Article 7 was dead (Interview 6).

The Council's agenda is controlled by its presidency (Hernández 2024). The Parliament had hopes for the German presidency in the second half of 2020 but it disappointed many by focusing its energy solely on the rule of law conditionality regulation. Less clear was how much energy the Portuguese presidency in the first half of 2021 was willing to invest, while Parliament did not expect much from Slovenia under Janez Janša in the second half of 2021. More effort went into talking with the French presidency, which would take over in the first half of 2022 (Interview 10).

The Parliament's interim report on Poland

In 2020, the Parliament started another initiative: an interim report on the Article 7(1) TEU procedure on Poland. Since the first three hearings on Poland in the GAC took place in 2018, the Council had not held further hearings, although it had kept the issue on the agenda in the form of updates about the situation in the country by the Commission, so called 'states of play'. An interviewee attested to the difficulty of creating space for hearings that could span several hours on the packed GAC agenda. 'States of play', however, would take much less time, half an hour or less, and were easier to schedule (Interview 11). A Commission official emphasized their usefulness, saying that it would keep judicial independence on the agenda and force otherwise disinterested member states to engage with the issue (Interview 20). For the Parliament, however, this was not enough. The LIBE Committee prepared a comprehensive report titled 'determination of a clear risk of a serious breach by Poland of the rule of law'. The chair of the Committee, Juan Fernando López Aguilar (S&D, Spain) became the rapporteur of the procedure. On 17 September 2020, Parliament passed this

resolution with an overwhelming majority: 513 to 148 with 33 abstentions – over 77 per cent (European Parliament 2020a).

The report was based on Rule 105(5) of the Rules of Procedure. In procedures in which the Parliament's consent is required, this allows the responsible committee to present a report to the Parliament at any time. The report was an innovative and highly unusual idea, which however enjoyed huge support in the Parliament ever since it was proposed. Even the EPP's shadow rapporteur, Roberta Metsola, was very supportive (Interview 1). A source in the EPP also emphasized the creativity of this solution. One interviewee explained that the Parliament's legal service had doubts that Rule 105(5) allowed a report rather than a regular resolution, but this was ignored by the Parliament and no formal opinion by the legal service was given. The first draft was created by the secretariat of the LIBE Committee and amendments mostly added to the text (Interview 1).

The report was debated in plenary on 14 September 2020. The rapporteur highlighted that this was the seventh resolution on the rule of law in Poland. Lamenting that Poland moved away from the European project it had joined, he pointed to four infringement cases the Commission had brought as well as four other judgments by the ECJ that Poland had ignored. He described his own efforts as rapporteur: 'it is a precise resolution, based on the facts, factual, and it is also a resolution that avoids verbal excesses'. Commission Vice-President Jourová gave a long list of concerns and developments that the Commission monitored, and sought to reassure Parliament that the Commission was using all its tools. However, she emphasized that not everything could be addressed through infringement cases and that it was necessary also to solve issues through dialogue. In this respect, the planned annual rule of law report (see Section 7.4) provided an opportunity.

The EPP let Andrzej Halicki from Poland speak for the group. He assured the Parliament that the report was accurate and balanced. Birgit Sippel (Germany, S&D) saw the Council's inaction as 'encouragement' for further backsliding. She demanded an 'efficient rule of law mechanism in the next budget'. For Renew, Sophie in 't Veld spoke:

> Frankly, Madam Commissioner, after three years I don't want to hear the word 'dialogue' anymore. We've been in dialogue with Mr Orbán for 10 years and look at where we are now. It is impunity: dialogue equals impunity by now. It is time for action.

But she also knew where to direct her ire: 'I understand that Commissioner Jourová and Commissioner Reynders are ready to take action and to pursue the two pending procedures which are in court, but you're being blocked by Ms von der Leyen'. For the Greens/EFA group, Terry Reintke (Germany) stressed the need to not just side with the judges in Poland, but also 'with the EU citizens that are demanding access to justice in Poland'. From the Commission, she demanded an infringement procedure on the 'LGBTI-free zones'. The right groups (ECR and ID) disagreed either with the facts – Patryk Jaki (ECR, Poland) simply denied the existence of LGBT-free zones in Poland – or that what happened in Poland was violating European laws, values, or fundamental rights.

In her final statement, Jourová stressed that infringement cases required violations of EU law, which she admitted was legalistic. She pointed out: 'we, the Commission, are not activists'. Moreover, she underscored that she wanted to 'win cases', and that 'losing the cases would not be a good thing', as it would hurt the Commission's credibility. Then she spoke about Article 7, which she called 'toothless', since there were member states that would support those who were violating the rule of law. That is why more tools were needed and needed fast. She stressed the need for the conditionality regulation: 'I sometimes say in a rather cynical way that whoever doesn't understand the values usually

understands the money'. Jourová rejected claims that she held different member states to different standards. This, she argued, was why the rule of law report was necessary. She said that the Commission was exploring how to react to the declarations of LGBT-free zones, pointing out that they had no legal effect, which limited the reach of infringement procedures.

The report by López Aguilar listed rule of law problems in Poland across a range of three different areas: 'the functioning of the legislative and electoral system, the independence of the judiciary and the rights of judges, [and] the protection of fundamental rights' (European Parliament 2020a, § 1). The resolution of 17 September 2020 decried that

> the rule of law situation in Poland has not only not been addressed but has seriously deteriorated since the triggering of the procedure referred to in Article 7(1) TEU; [the European Parliament] is of the opinion that discussions in the Council … have been neither regular nor structured, and have neither sufficiently addressed the substantial issues that warranted the activation of the procedure nor adequately mapped the impact that the Polish government's actions are having on the values referred to in Article 2 TEU. (§ 3)

Since the Commission's reasoned proposal was narrowly focused on the rule of law, and especially judicial independence, one of the key points of the resolution was to 'widen the scope of the reasoned proposal by including clear risks of serious breaches of other basic values of the Union, especially democracy and respect for human rights', for which there was an 'urgent need' (§ 4). The Parliament took the opportunity to push for further institutional reforms, such as the DRF mechanism (§ 5) and the conditionality regulation (§ 6).

The concerns that Parliament adressed in its resolution spanned a wide area: besides the justice system, it referred to legislative and media issues, attacks on the Polish Ombudsman for Human Rights, freedom of information and freedom of expression, academic freedom, freedom of assembly and association, right

to privacy and data protection, access to abortion, sex education, and discrimination of minorities (European Parliament 2020a). An interviewee explained that the groups from the EPP to the left agreed on most of these, except perhaps matters of abortion rights, since the EPP's shadow rapporteur held conservative views on this topic. At the end of the 23 page resolution, the Parliament demanded that the Commission and Council 'refrain from narrowly interpreting the principle of the rule of law' (§ 66), and demanded from the Council the continuation of Article 7 hearings with a wider scope by incorporating the electoral, legislative and fundamental rights issues. Furthermore, the Parliament pushed them to address 'concrete recommendations' under Article 7(1) TEU to Poland (§ 67). Interestingly, the resolution did not demand the conclusion of the procedure with a vote, because of concerns that the Council would not obtain the qualified four-fifths majority (Interview 1). The Commission, meanwhile, was asked to use all its instruments, in particular to request interim measures when taking Poland to the ECJ and fast-track infringement proceedings (§ 68).

Double hearings

In the case of Hungary, the Parliament's rapporteur on the Article 7 file was active, too, seeking out the member states' permanent representations to see which position they would take if it came to a vote, which was not always straightforward, as many governments struggled to define their own position without an actual vote. She also championed the idea that the Council could address recommendations to Hungary. This would require the same four-fifths majority, but would not tank the entire procedure if the majority did not materialize. It could, thus, serve as a test balloon (Interview 10). The rapporteur believed that the Council would address recommendations to Hungary and that it would

be difficult for member states not to support this, due to political pressure (Interview 19).

After the Croatian and German presidencies failed to schedule hearings, the Portuguese Council presidency organized another set, this time scheduling hearings on both Hungary and Poland on the same day. The hearings were held in the GAC on 22 June 2021 according to the standard modalities agreed under the Finnish presidency. However, the report indicates that the number of people who were permitted in the room was reduced – it did not specify by how much – due to the pandemic. At the same time, the Council Legal Service had advised that a 'hearing' under Article 7 would need to take place in person and not virtually, which made it even harder to organize (Interview 10).

On the day, the meeting on Poland was conducted first. This time, it lasted 'only' two hours. The scope of the hearing was pre-agreed by COREPER II and spanned 'the topics included in the Commission's reasoned proposal of 20 December 2017' – meaning that the Parliament's attempt to widen the scope and include issues of fundamental rights was ignored (Council of the European Union 2021a). Ten member state delegations used the opportunity to ask questions to the Polish representatives, which all concerned the functioning of the judiciary and the implementation of EU law. These were Austria, Finland, Spain, Denmark, Germany (which also asked on behalf of France), Luxembourg, the Netherlands, Ireland, Greece, and Sweden. None of the post-2004 member states was included, furthering the 'West vs East' narrative. In their responses, the Polish delegation alleged double standards and stressed that its system of selecting members of the judicial council were similar to other member states (Council of the European Union 2021a).

In the hearing on Hungary, the Hungarian representative took the floor first,

> presented its initial remarks on the handling of the Article 7(1)

> TEU procedure itself as well as on certain topics of the reasoned proposal: the right to equal treatment, freedom of expression and the rights of persons belonging to minorities.

After the Commission's remarks, twelve member states posed questions. In addition to the above (with the exception of Luxembourg), they included Belgium, France and Italy. The scope of the meeting was encompassing, as it included all areas under the Parliament's reasoned proposal. The questions concerned: LGBTIQ rights, media pluralism, judicial independence, corruption, and academic freedom. This meeting also lasted two hours (Council of the European Union 2021b). The synopsis of responses by Poland and Hungary shows that the Polish government directly denied the existence of any problems. The Hungarian government, meanwhile, put more emphasis on justifying its decisions. Curiously, no final statement by the Commission to comment on the Hungarian delegations' remarks was recorded (Council of the European Union 2021b).

7.4 The Commission's rule of law mechanism

As discussed in the previous chapter, the Commission had run a consultation, a Eurobarometer survey, and published two communications about the rule of law in the spring and summer of 2019. Its key decision was to prepare an annual rule of law report, consisting of a horizontal report and country-specific chapters. The member states were involved through meetings as part of (due to the pandemic) 'virtual country visits'. Finally, each member state could 'provide factual updates on their country chapter' prior to release (European Commission 2020c, 5). Another key element in the preparation of the report was a stakeholder consultation. A plethora of international organizations, networks and agencies was invited to submit observations, but the call was also open to other civil

society actors and experts. The Commission received the most observations for Poland (36) and Hungary (30), after Bulgaria (54) and Spain (38).[14]

Before the Commission could publish its first rule of law report on 30 September 2020, however, the Hungarian government changed its tactics. During a media campaign to promote the report, the Commission's Vice-President, Věra Jourová, gave an interview to the leading German weekly, *Der Spiegel*, in which she said that Hungary was a 'sick democracy' (Becker and Müller 2020). This was published on 25 September. Three days later, the Hungarian Minister of Justice, Judit Varga, called on social media for Jourová's resignation.[15] A day later, the Hungarian government's international spokesperson, Zoltán Kovács, posted a letter by Orbán to von der Leyen, asking for the resignation of Vice-President Jourová and announcing the suspension of all bilateral contacts with Jourová.[16] The timing strongly suggests that this was a deflection strategy, meant to steal attention from the Rule of Law Report and at the same time delegitimize it.

The first rule of law report was published regardless. It covered four areas: 'the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances' (European Commission 2020c, 4). The report covered the time since January 2019.[17] This missed problems that were rooted in earlier developments, such as Hungary's 2012 constitution and original court packing.

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14. https://commission.europa.eu/document/download/a8ee98d6-390b-4b46-939e-3caa7ab0ec00_en?filename=2020_rule_of_law_report_-_summary_of_the_stakeholder_consultation_en.pdf.

15. https://twitter.com/JuditVarga_EU/status/1310541373892853761.

16. https://twitter.com/zoltanspox/status/1310807740332363776.

17. https://commission.europa.eu/document/download/458663dc-a9e5-4df7-813f-4aa5ee63d4a7_en?filename=2020_rule_of_law_report_methodology_en.pdf.

Regarding Hungary, the country chapter identified problems in all four areas surveyed. It criticized a decision by the Kúria that a preliminary reference to the ECJ by a lower court judge was unlawful (European Commission 2020a, 4).[18] Furthermore, the report mentioned the new special appointments regime for the Kúria, to make the appointment of András Zs. Varga as President of the Kúria possible (Hanelt and Vincze 2025). The report mentioned some continuing problems, such as the powerful head of the NJO and the status of the Prosecutor-General, but also highlighted positive developments, such as an increase in the notoriously low salaries of judges in Hungary, high levels of digitalization of the justice system and relatively high levels of efficiency. On the anti-corruption framework, the Commission noted *inter alia* widespread perceptions of endemic corruption, low levels of prosecution of high-level corruption and the decentralized sharing of anti-corruption responsibilities (European Commission 2020a).

Regarding the media, the Commission questioned the independence of the Media Council and the risk to media pluralism through the merge of over 470 media outlets in the government-friendly Central European Press and Media Foundation (KESMA), and the direction of state advertisement resources. Furthermore, the Commission reported 'systemic obstruction and intimidation' of independent media, as well as efforts to thwart the public's access to information from the government. On the point of checks and balances, the Commission noted the reduced use of public consultations and impact assessments during the legislative process, the 'state of danger' and 'state of public health emergency', which had been declared by the government in response to

18. Although the Commission's report mentioned the possibility that judges could be subjected to disciplinary proceedings for bringing preliminary questions to the ECJ, it does not mention that this was indeed the case with the judge in question, as the court's president initiated disciplinary proceedings against him for his on-bench decision, although he did not receive a sanction (Vincze 2023b, 1440).

the pandemic, and new legislation that allowed administrative bodies an appeal against final judicial decisions. But the Commission also reported the continued pressure on regime-critical civil society organizations (European Commission 2020a).

The chapter on Poland was most critical on the state of the justice system, but also identified shortcomings in the other three areas. On judicial independence, the Commission highlighted low trust by the general public and companies in the independence of the justice system, adverse decisions by the ECJ regarding the government's judicial reforms and many pending preliminary ruling cases on these reforms. It highlighted the problem of the captured Constitutional Tribunal, the NJC, newly-created and packed chambers of the Supreme Court, new procedures regarding the appointment of the First President of the Supreme Court, and the existence and use of the disciplinary regime for judges. The rules that forced judges to disclose personal information, prohibited them from questioning the powers of other courts and judges, were also criticized, besides the union of Minister of Justice and Prosecutor-General. On the efficiency of the justice system, the Commission noted a few positive developments, such as increased funding and an above-average performance of administrative courts (European Commission 2020b).

More positive was the Commission's assessment of Poland's anti-corruption framework, where it mostly found positive things to say, but identified shortcomings in the rules and monitoring of asset declarations of members of Parliament, as well as the regulation of lobbying. Another concern was the lack of independence of the Central Anti-Corruption Bureau from the Ministry of Justice. The report was mixed regarding media independence. For instance, the Commission noted risks of political influence over the media regulator, 'a lack of regulatory safeguards limiting political control over media outlets in

Poland' (European Commission 2020b, 14), some aspects of the criminal law that jeopardized journalists and cases of denial of their right to freedom of information.

Overall, regarding Hungary and Poland, the Commission's first report produced few new facts. According to Vice-President Jourová, the exercise was still helpful in the fight with those two governments. In an interview, she posited that these governments always argued that their laws were the same as in other member states. The report would help to compare the rule of law in member states and, therefore, dispel this rhetoric (Becker and Müller 2020; Priebus 2020). However, academics were generally sceptic that the report could help address the rule of law in these two member states: 'statements, dialogue and reports are *not* going to help contain, let alone solve Poland's rule of law crisis' (Pech, Wachowiec and Mazur 2021c, 4). Similarly, Priebus (2020) identified as the main shortcoming of the report 'that there are no sanctions attached'.

Nevertheless, the Hungarian government reacted with irritation to the report. Justice Minister Judit Varga published an op-ed in 'EU Observer' in which she criticized the Commission's report. She complained that its scope was 'arbitrary' and that it deployed double-standards: other member states were not criticized for similar things. Furthermore, the Commission relied on external sources as it lacked own monitoring capacity, leading to biased selection of sources with questionable quality, she wrote, especially since most of the civil society organizations had (allegedly) links to Soros's Open Society Foundation. She maintained that the references between these sources were circular. Hungary's own contribution, on the other hand, had been 'disregarded'. She concluded: 'But it clarifies the picture. We now see rule of law for what it is: a tool to advance a political agenda' (Varga 2020).

This section dealt with the first deployment of the Commission's new moni-

toring tool, an annual rule of law report for all member states. This was first suggested by the Parliament in 2016 and taken up by the Commission to dispel allegations of double standards and unequal treatment of member states. It would create an epistemic basis that EU institutions could refer to in their use of other tools, thus improving detection and, more importantly, classification of backsliding as a threat to the rule of law. As suggested by my theoretical framework, the first release of the annual report was accompanied by a Hungarian diversion tactic, as its government scandalized remarks by Commission Vice-President Jourová. The Hungarian government attempted to de-legitimate the report in its public diplomacy and counter that this was a neutral and reliable report.

7.5 A new DRF mechanism

In 2016, the Parliament's 'in 't Veld report' had suggested an EU mechanism on democracy, rule of law and fundamental rights (DRF) (European Parliament 2016a). The Commission had rejected the report, while the Council had not even reacted (Interview 1). Both ignored a further call of the Parliament in a 2018 resolution (European Parliament 2018c). Nevertheless, the prior section discussed how the Commission picked up some of the suggested elements of the DRF mechanism in the creation of its own annual rule of law report. For the Parliament, this did not go far enough, and it increased the pressure on the Commission with another report, based on Rule 46 of its Rules of Procedure, which allowed it to call for an inter-institutional agreement (Article 225 TFEU). This report built on the prior work by Sophie in 't Veld and was put to a vote on 7 October 2020.

This report was prepared by the liberal MEP Michal Šimečka, a Slovak politician, but the suggestion came from the group's LIBE coordinator, Sophie in 't

Veld (Interview 1). Yet the report's preparation was preceded by four months of contested jurisdiction: the Committee on Legal Affairs (JURI) wanted the file, because by 2020, the rule of law topic had increased in political salience. After discussions between the secretariats and later the chairs of the committees, the LIBE Committee kept the procedure (Interview 1).

Compared to Parliament's earlier position of 2016, the new text featured several main changes. First, the idea of having the country reports prepared by a panel of independent experts was dropped, since the Commission reacted very negatively to this suggestion. Instead, an expert group would have only an advisory function and the report's preparation would fall to the Commission. Secondly, it suggested to abolish the CVM for Romania and Bulgaria. This was an attempt to buy the support of these two member states. In background talks, the Romanian government was supportive of this DRF report, whereas the Bulgarian government remained sceptical (Interview 1). Third, this report allowed for the possibility of producing an 'urgent report' in case of a fast deterioration of the rule of law in a member state (Annexe § 18), meaning the Commission would not have to wait up to twelve months until it could publish a new report. Fourth, the role of the inter-institutional working group with delegates of Commission, Council and Parliament was strengthened. It would now be in charge of preparing the report's methodology (Annexe § 5) and be more closely involved in the entire process. Fifth, the inter-institutional agreement would tie different instruments together. The findings of the annual report would be used to determine whether the criteria of Article 7 TEU were met (Annexe § 22) and the institution activating Article 7 would have a right to present their reasoning to the Council (Annexe § 23). The report could also be used to determine whether 'generalised deficiencies' existed under the conditionality regulation (Annexe § 25) – which was negotiated at the time, see Section 7.7.

Further talks took place with the Commission and some member states. Some high-ranking representatives from the Council were unconvinced that such a DRF mechanism would be legal under the treaties. For the German Council presidency, the most important consideration was that no automatic sanctions would be connected with the Commission's report. Hungary and Poland were not consulted, as they were seen as hostile to the report. Within the Commission, meetings with the cabinets of Reynders and Jourová took place. Reynders was particularly supportive of the Parliament's work. Jourová, while also supportive of the cause, took a more cautious and consensual approach. However, as one interviewee explained, one obstacle was that the European Parliament politically 'owned' the procedure, thus making it unlikely that the Commission would be willing to spend political capital on it (Interview 1).

In the plenary debate on 5 October 2020 preceding the vote, Šimečka welcomed the Commission's monitoring through the new rule of law report, but bemoaned that enforcement was still inadequate.

> What we need is a permanent, legally binding mechanism that, first of all, streamlines and makes more effective the rule of law instruments that we have; second, covers all aspects of Article 2 and all values enshrined there; and, third, ensures that compliance by Member States is not just reviewed periodically but also enforced. (European Parliament Debate, 5 October 2020, Item 15)

Vice-President Jourová highlighted the difference of the scope of the Parliament's proposal and the Commission's rule of law mechanism. Whereas the Parliament combined the rule of law, democracy, and fundamental rights, the Commission's report would focus on 'four areas: the national justice systems; the anti-corruption frameworks; media pluralism and media freedom; and other institutional issues related to checks and balance'. Next, Commissioner Reynders highlighted the overlaps between the Parliament's report and the

Commission's mechanism and particularly welcomed the stakeholder consultation, engagement of national Parliaments, and the inter-institutional discussion of the rule of law report. However, he saw no need to tinker with the existing inter-institutional framework and asked for incremental improvements.

The motion for a resolution passed in plenary with a large majority of 521 to 152 (77 per cent), with 21 abstentions. In light of the Commission's statements there was little hope that it would accept the proposal. The point of the report was agenda-setting, to keep the rule of law issue alive and salient. Creating a new legal instrument, the proposal would have extended the reach of the acquis in the area of rule of law and brought new competencies to the European Parliament. It was meant as a preventative mechanism, not directed against the 'lost causes' of Hungary and Poland. The inter-institutional agreement would also have created obligations for all three institutions – especially the Council – to be part of the rule of law discussion (Interview 1).

7.6 Rule of law peer review

As I have shown, the Council's rule of law dialogue, established in 2015, was toothless. It was due to be reviewed in autumn 2019 under the Finnish presidency, which was then exploring options to strengthen the instrument. In November 2019, the Council re-evaluated the dialogue based on several discussions in the Council, COREPER, informal meetings and a survey of member states. Since no concensus was reached, the presidency opted for 'presidency conclusions', a level below unanimous 'Council conclusions'. It noted, however, that 26 delegations did not object to the text (Council of the European Union 2019c).

After reiterating the earlier agreed principles of the rule of law dialogue, the conclusions stated that the dialogue 'has proved to be a useful mechanism' (§ 5).

It noted that 'there is a wish for the dialogue to be stronger, more result-oriented and better structured, for preparations for the dialogue to be more systematic, and for proper follow-up to be ensured'. To achieve that, the dialogue would make use of the Commission's rule of law report (§ 10). To have enough time to prepare for the dialogue in the autumn, the Commission was asked to publish its report earlier. On top of this, the presidency could organize 'interactive exchanges' more frequently (§ 12) or follow-up discussions on a horizontal topic (§ 13). The conclusions reiterated the competence of the GAC to conduct the rule of law dialogue, but also encouraged other Council configurations to hold dialogues based on their policy areas (§ 14).

At the end, the conclusions 'note[d] the ongoing discussions among all Member States on the concrete elaboration of the procedure and modalities of a periodic peer review mechanism on the rule of law' (§ 15). This received another push under the Council's German presidency, which wanted to transform this *soft law* instrument and make it more concrete and useful. The presidency issued a note in September 2020, where it announced that in the coming dialogue, the debate would feature both a horizontal and a vertical, member state-focused discussion (Council of the European Union 2020a, § 5). This, in effect, established a peer-review mechanism in the Council: the member states would take turns in the hot seat.

On 13 October 2020, the GAC conducted its horizontal rule of law dialogue, which covered the four areas identified by the Commission: 'justice systems, the anti-corruption framework, media pluralism, and other institutional issues linked to checks and balances', (Council of the European Union 2020c). The first country-specific dialogue took place on 10 November in the GAC and covered

five countries in order of protocol.[19] The first five countries subject to this peer review were Belgium, Bulgaria, Czechia, Denmark and Estonia. For the future, the presidency envisaged an annual discussion in autumn following the Commission's rule of law reports and twice-annual member state reviews (Council of the European Union 2020c).

The development of the dialogue into a peer review of member states did not change the problem that the procedure lacked bite. Nevertheless, in light of a diverse set of interests in the Council, it was regarded by many as the best that could be achieved. Lobina (2023) discussed the very different positions of member states on the dialogue, based on a further round of member state feedback in 2023, disclosed after a freedom of information request by Laurent Pech. From the responses it becomes clear that there was no coherent understanding or preference regarding the development of the dialogue. Instead, governments disagreed which sources should be used, what the purpose of the exercise was, whether the outcomes of the dialogue should be publicized or remain behind closed doors. Confronted with this lack of unity, the careful steps taken to complete the dialogue with a peer-review went into the right direction. Nevertheless, expectations that this could change the trajectory of democratic backsliding in Hungary and Poland, were disappointed. The dialogue was never meant to tackle these cases. However, it could be understood as a contribution to the creation of a rule of law culture.

7.7 The negotiation of the conditionality regulation

The previous Chapter touched on the Commission's proposition of a rule of law conditionality regulation. This regulation was meant to enable the EU to

19. The EU's protocol order is alphabetically by name of the member state in its official language.

suspend funds from member states that exhibited 'generalised deficiencies' in their rule of law. The European Parliament appointed rapporteurs and created its first reading position in 2019. From the Council, despite intense negotiations,[20] no position emerged until 2020. The conditionality regulation has attracted much attention in the media in 2020, when it became the new silver bullet for policymakers to tackle backsliding.

As described in Chapter 6, the Commission's initial proposal had three cornerstones: first, the regulation was proposed as part of a package with the EU's next seven-year budget, the Multiannual Financial Framework (MFF). Second, under the proposed regulation, the decision to suspend funds would rest with the Commission and the Council would have the ability to stop the suspension with a qualified majority vote. This was known as reverse Qualified Majority Voting (RQMV). Third, the regulation was to apply in cases of 'generalised deficiencies of the rule of law' in member states. The Council Legal Service was highly sceptical of the Commission's proposal and demanded a close link between those rule of law deficiencies and the budget (Council of the European Union 2018b).

The first reading position by the Parliament was adopted in April 2019, still during the eighth Parliament's term. On 10 October 2019, the ninth European Parliament held a debate and passed a resolution titled 'Multiannual Financial Framework 2021–2027 and own resources: time to meet citizens' expectations' (European Parliament 2019c). In the debate, Finnish Minister of Foreign Affairs, Tytti Tuppurainen, confirmed the Council presidency's committment to the rule of law:

> One of the priorities of the Finnish Presidency is to ensure pro-

20. Council of the EU: https://www.consilium.europa.eu/en/policies/eu-long-term-budget/timeline-long-term-eu-budget-2021-2027/, accessed 15 October 2024.

> tection of the rule of law and to reinforce its links to the budget. Following the leaders' guidance, we will continue our work on this important matter. I am convinced that there is a way to create a balanced and legally sound instrument based on the Commission's proposal. (European Parliament Debate, 10 October 2019, Item 2)

Unusually for representatives of the Council, she mentioned the rule of law eight times in her opening statement and once in her closing statement.

In its resolution, the Parliament,

> [r]econfirm[ed] the necessity to put in place a new mechanism to protect the EU budget where the rule of law is not respected or where there is a systemic threat to the values enshrined in Article 2 of the Treaty on European Union (TEU), and where this affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union (European Parliament 2019c, § 6).

Furthermore, the resolution decried the lack of negotiation and engagement from the Council and demanded the start of an inter-institutional dialogue (§§ 12–13). In December 2019, the rapporteurs and shadow rapporteurs of the new Parliament met for the first time. A major concern was how to get the Council to adopt a position (Interview 2).

Heads of state and governments met for a special EUCO summit from 20 to 21 February 2020, but left without agreement. Charles Michel, the EUCO's President, said: 'we need more time'.[21] The Parliament decided to address a question for oral answer to the Council of the EU.[22] It warned the Council, that Parliament would 'not simply rubber-stamp a fait accompli from the European

21. https://www.consilium.europa.eu/en/meetings/european-council/2020/02/20-21/, accessed 17 October 2024.

22. Question for Oral Answer O-000029/2020 of 6 March 2020, https://www.europarl.europa.eu/doceo/document/O-9-2020-000029_EN.html.

Council without proper negotiations'. Parliament posed three questions: first, which points of the MFF were still under negotiation in the Council; second, on the role of the EUCO in the MFF negotiation,

> can the Council confirm that European Council conclusions on the multiannual financial framework will not address the substantive contents of the proposal, including on matters such as the decision-making procedure to be applied, since this would represent a clear encroachment on the legislative prerogatives of the co-legislators?;

third, when the inter-institutional negotiations would start. The second point is of particular importance, as it came from a fear that decision-making on the MFF and conditionality regulation would take place in the EUCO and the Parliament could be sidelined. While the EUCO decides on the general political direction of the EU, it has no legislative function. In particular, parliamentarians worried that the EUCO could decide on QMV rather than RQMV in the imposition of a sanctions regime, which would then not be subject to trilogue negotiations (Interview 2). The groups from the left to centre-right were united in protecting RQMV to give the Commission a powerful tool that could actually be used against member states (Interviews 2; 6; 7; 10).

On 17 July 2020 the leaders of member states convened again for a EUCO. They negotiated the cornerstones of the MFF, but also the package known as Next Generation EU (NGEU), in which the EU would for the first time raise joint debt to give (especially southern) European countries a fresh line of credit, as well as grants to aid recovery from the COVID-19 pandemic – the so-called Recovery and Resilience Facility (RRF). The summit beat the record for the longest EUCO, with results announced in the early morning of 21 July 2020. After intense negotiations that brought a conflict between Dutch Prime Minister

Mark Rutte and Viktor Orbán to the public spotlight,[23] the EUCO concluded that 'a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority' (European Council 2020b, Annex § 22). This was nearly the worst conceivable outcome from the Parliament's view: the leaders had just decided to drop RQMV. But Parliament was not willing to let it go just yet.

Trilogue negotiations

Since the Council did not adopt Parliament's version of the conditionality regulation, the institutions had to negotiate to find a compromise text that both could agree on. This was done in the 'trilogue' format, where both institutions and the Commission were sitting at the table.

One curious but important detail of the rule of law conditionality regulation is that it was introduced as part of a package with the MFF. The conditionality regulation is subject to the ordinary legislative procedure (Article 294 TFEU), in which the Council can adopt a bill with qualified majority (Article 16(4) TEU), whereas the MFF requires unanimity in the Council (Article 312(2) TFEU). Being part of a negotiation box linked those files' fate, despite their different legislative requirements. Some interviewees thought that the intention of the Commission may have been to give the Parliament more leverage by linking these files (Interview 2; 7).

To counter the unpopular EUCO conclusions, the chairs of the EPP, S&D, Renew, and Greens/EFA sent a joint letter to German Chancellor Merkel and

23. Bayer and Burchard (2020) quote Orbán: 'I don't know what is the personal reason for the Dutch prime minister to hate me or Hungary, but he is attacking so harshly, and making very clear that because Hungary in his opinion does not respect the rule of law, [it] must be punished financially. That's his position, which is not acceptable because there is no decision about what is the rule of law situation in Hungary'.

Commission President von der Leyen on 26 August 2020 before the start of the trilogue. The initiative for this letter, participants told me, came from the Renew group (Interviews 2, 3). Other groups were asked to co-sign with a short deadline (Interview 2). They outlined four priorities for the legislative process:

> to incorporate the Annual Monitoring Report on Union values, to maintain the 'reverse qualified majority' rule, to preserve the institutionalised procedural role for the Parliament and to foresee safeguards for final beneficiaries and recipients.

Moreover, they expressed their 'strong regret' about the EUCO conclusions of July, which had 'significantly weakened the efforts of the Commission and Parliament to uphold the rule of law, fundamental rights and democracy' and made clear that the MFF could not be passed without the prior agreement on the conditionality regime.[24] While the letter stated that RQMV was one of the red lines, many privately felt that it was highly unlikely that the Council would agree to this. Yet it was a powerful bargaining chip and the Parliament wanted to extract a high price from the Council in exchange for dropping it. The groups, however, were split over how far to take this game of brinkmanship, the Greens and Renew being in favour of dragging out an agreement (Interview 7).

The German presidency published its version of the rule of law conditionality regulation on 29 September 2020 (Council of the European Union 2020b). Indicative of the main problem was the change in title: 'Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget' – the rule of law was no longer in the title. References to 'generalised deficiencies' of the rule of law in member states were also purged from the text.

24. https://maria-noichl.eu/workspace/media/static/letter-to-a-merkel-and-u-von-d-5f4cc366c69b8.pdf, accessed 18 October 2024.

The new text extended the scope so that this regulation applied to the NGEU as well and also added more sources of information the Commission could use, including reports by OLAF, EPPO, the Justice Scoreboard, the Venice Commission and GRECO (Council of the European Union 2020b, Recital 12). This version also dropped the RQMV in favour of an adoption of measures in the Council with QMV (Article 5(7)), and the Council would be free to alter the Commission's proposal (Article 5(8)). The Commission would be required to give notice to the member state on the proposed measures, adding more opportunities for delay (Article 5bis). It also added a suspensive veto of the member state concerned, which could 'exceptionally' ask for a discussion in the EUCO, which would delay the adoption in the Council by up to three months (Recital 17b). In the proposed legal text, the requirement was that 'the breaches of the principles of the rule of law in a Member State affect in a sufficiently direct way the sound financial management of the EU budget or the protection of the financial interests of the Union' (Article 3(1)). Thereby, the proposed regulation would be tied even more closely to the budget. After one year, the Council would have to review the continuation of measures (Article 6(1)). Interviewees reported that the 'compromise' was very badly received in the Parliament and the negotiation team was united in opposition to the proposal (Interview 2, 3). The German EU ambassador explained to the Parliament's representatives that it was only possible to secure the agreement of the Hungarian and Polish governments with these compromises.

Reconciling the different priorities of Council, Commission and Parliament required five trilogues and more technical meetings. Due to COVID-19 restrictions, only about twenty people were in the room with many more joining online. Participants were the German permanent representative, Ambassador Michael Claus and the Council Legal Service, Budget Commissioner Johannes Hahn and

the Commission's Legal Service, the rapporteurs and shadow rapporteurs from BUDG, CONT and LIBE Committees and one advisor from each political group as well as the Parliament's legal service.

The negotiations came to a conclusion and a compromise was announced on 5 November 2020. Throughout the negotiation, Parliament and Council clashed over the scope and aim of the conditionality regulation. Dimitrovs and Droste (2020) – who were involved in the negotiations on the Parliament's and Council's side, respectively – pointed to two different understandings that the institutions had for the conditionality regulation: 'whether the aim of the regulation was to protect the rule of law principle through the protection of the EU budget (European Parliament) or to protect the EU budget through the protection of the rule of law (Council)'. These different understandings were deeply rooted in the legal views these institutions took. The Council maintained that the aim of the regulation must be different from Article 7's, hence the focus on the direct effects on the budget. On this view, measures had to be proportional to the effect on the budget, not on the severity of violations of the rule of law (Dimitrovs and Droste 2020). While the Council purged the 'generalised deficiencies', the Parliament succeeded in getting 'a non-exhaustive list of possible breaches of the principles of the rule of law' added to the text (Dimitrovs and Droste 2020). It included a list of three points which would be 'indicative of breaches of the principles of the rule of law', including 'endangering the independence of the judiciary' (Article 2a).

The Council's position was that the regulation should only apply to cases where breaches of the rule of law adversely affected the budget of the EU, while Parliament demanded that the regulation could be applied preventatively before damage was done. In the end, they reached a compromise: 'affect[s] or seriously risk[s] affecting the sound financial management of the EU budget

or the protection of the financial interests of the Union in a sufficiently direct way' (Article 3(1)). Article 3(2) then specified what would count as 'breaches' under the regulation. These included a wide range of issues, such as judicial review, proper audits, investigations of fraud, cooperation with EPPO if the member state is a member, and others. Furthermore, Article 3(3) provided for a portal through which recipients of EU funds could inform the Commission of wrongdoings. Article 4 established a duty on the Commission to inform the Council and Parliament if it gave formal notice to a member state under the procedure. The Parliament could then invite the Commission for a 'structured dialogue'.

Unsurprisingly, the Council 'won' with its demand to adopt measures via the QMV procedure in the Council. But the compromise also kept two possibilities for delays: first, the member state concerned could not only submit observations on the facts used by the Commission to trigger the regulation, but also on the proportionality of the proposed measures. Secondly, a suspensive veto was included in the compromise, which could delay the vote in the Council by a maximum of a quarter of a year by requesting a discussion in the EUCO (Dimitrovs and Droste 2020). The BUDG and CONT Committees adopted this version on 12 November 2020.

The veto

Shortly after the compromise was announced, the governments of Hungary and Poland stated that they did not agree with the regulation and would veto the own resources decision of MFF and NGEU, which required unanimity. On 18 November 2020, the Parliament issued a press release, stating that the Conference of Presidents had met and urged the Council to adopt the legislative

package, including the conditionality regulation. It stated that it would make no further concessions to the Council.[25]

Orbán and Morawiecki signed a joint declaration on 26 November 2020 in Budapest. The proposed regulation would 'undermine the Rule of Law within the Union by degrading it to a political instrument. The proposed regulation circumvents the Treaty, applies vague definitions and ambigious terms without clear criteria on which sanctions can be based and contains no meaningful procedural guarantees'.[26] They agreed to hold their position together and that neither would give up their veto until the other was satisfied.[27] This was a clever move by Orbán, who apparently wanted to avoid getting isolated. In fact, a recurring theme in my interviews was that people felt that the main resistance to the regulation came from Hungary, not Poland, and that the latter might have been willing to drop its veto (Interview 2, 16).

While the conditionality regulation was negotiated, Fidesz was still a member of the EPP group in the European Parliament (although it remained suspended from the EPP party). Nevertheless, in the Parliament it received little protection. The EPP rapporteur for the CONT committee, Petri Sarvamaa (Finland), was a known internal opponent of Fidesz and had in January 2020 published an op-ed in Politico calling for Fidesz's expulsion (Sarvamaa 2020). Several interviewees pointed out Sarvamaa's strong stance (Interviews 2; 7). Manfred Weber, the EPP group's chair, was getting tougher behind the scenes,

25. https://www.europarl.europa.eu/news/en/press-room/20201118IPR91990/statement-by-ep-conference-of-presidents-on-long-term-eu-budget-and-rule-of-law, accessed 20 October 2024.

26. https://twitter.com/PLPermRepEU/status/1331985997157044225.

27. https://twitter.com/PLPermRepEU/status/1331985997157044225.

after his shot at becoming Commission President collapsed, partly because of Hungarian opposition (Interview 7).

In their declaration, Morawiecki and Orbán proposed to limit the conditionality regulation to the 'financial interests of the Union' and suggested discussing at the next EUCO whether another regulation should be established to link the rule of law to the Union's finances, which would require further safeguards for member states.[28] Academics suggested a two-tier process, in which the Council should proceed adopting the conditionality regulation with a qualified majority, against the resistance of Hungary and Poland. After this *fait accompli*, these two would have no incentive to keep blocking the MFF and NGEU, from which they stood to gain as net recipients of the budget (Kelemen 2020c). Yet this is not how policymakers thought about it. Policymakers from different sides often said: 'nothing is agreed until everything is agreed' (Council of the European Union 2019b, § 5). Asked about whether the Council could not have adopted the regulation first, the German Minister of State for Europe, Michael Roth, confirmed that it could have been passed with QMV in the Council, but that then Hungary and Poland would have vetoed the own resources decision and the MFF regulation, leading to delays.[29]

Overcoming the veto

As the Council was gridlocked, due to the Hungarian and Polish veto, the conditionality regulation once more became *Chefsache*, with the leaders meeting to find a solution. At an EUCO summit on 10 and 11 December 2020, the draft conditionality regulation was back on the agenda. Under the EU's treaties, the

28. https://twitter.com/PLPermRepEU/status/1331985997157044225.

29. Tagesschau24, 15 December 2020: https://youtu.be/C1CK0w5fMUk?t=1045. I suggested asking this question.

EUCO 'shall define the political directions and priorities' of the Union (Article 15(1) TEU). However, it has no legislative function, which rests with the Council of the European Union and the European Parliament. Nevertheless, German Chancellor Angela Merkel brokered a deal with the Hungarian and Polish heads of governments, which entered into the EUCO's conclusions. The key points were that these governments would drop their vetoes. In return, following the adoption of the regulation, the Commission would

> develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment. Such guidelines will be developed in close consultation with the Member States. Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment. ... Until such guidelines are finalised, the Commission will not propose measures under the Regulation (European Council 2020a, § 2c).

The official reasoning was that such guidelines were needed to make sure that the Commission applied the regulation in an 'objective, fair, impartial and fact-based [way], ensuring due process, non discrimination and equal treatment of Member States' (§ 2b).

The conclusions also made clear that the regulation's objective was the protection of the budget, including the NGEU (§ 2a); that the measures adopted would need to be 'proportionate' and 'the 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' (§ 2e), and that it could only be triggered for one of the listed reasons, but not in case of 'generalised deficiencies' (§ 2f). An informal dialogue would precede any application of the regulation (§ 2g) and if the Commission proposed the imposition of measures against a member state, the member state could request this to be put onto the next EUCO's agenda (§ 2j).

This compromise opened the way for the adoption of the conditionality regulation in the Council, which took place three days later on 14 December 2020. On 16 December, the Parliament approved the regulation, so it could enter into force from 1 January 2021.[30] Yet this compromise came at a high cost. Academics pointed out that the conclusions were illegal. The non-binding conclusions de-facto suspended the application of the regulation until the ECJ had ruled on a Hungarian or Polish action of annulment and the Commission – the 'guardian of the treaties' – was complicit. Although actions of annulment have no suspensory effect in EU law, no actions could be taken before a ruling from the top court. Furthermore, EUCO gave instructions to the Commission: namely to prepare guidelines and to not apply the regulation. EUCO also assumed judicial functions by interpreting the regulation (Alemanno and Chamon 2020; Dimitrovs 2020; Scheppele, Pech and Platon 2020).

During the joint debate on the MFF, NGEU and budget conditionality regulation on 16 December, in the presence of the leaders of the other EU institutions – Charles Michel for the EUCO, Ursula von der Leyen for the Commission, and Michael Roth for the German presidency of the Council – many MEPs congratulated themselves for standing up for the rule of law and negotiating the conditionality regulation. But several MEPs were worried about the precedent set by the EUCO conclusions that interpreted the regulation. Petri Sarvamaa (EPP, Finland) said: 'Let me remind you that the European Council shall not, and does not, exercise legislative functions and therefore any political declaration of the European Council cannot be deemed to represent an interpretation of legislation'. Guy Verhofstadt (Renew, Belgium) went further: 'The reality is that

30. 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. OJ L 433I, 22.12.2020.

what the European Council did is not a coup d'état, but nearly a coup d'état' (European Parliament Debate, 16 December 2020, Item 4).

The Parliament's stance became more clear in a resolution titled 'MFF, Rule of Law Conditionality and Own Resources' (European Parliament 2020b), which it voted on shortly after having passed the MFF and conditionality regulation. This resolution took an extremely critical view of the EUCO's agreement. The Parliament pointed out that the conclusions were 'superfluous' as the 'applicability, purpose and scope … were clearly defined in the legal text' (§ 4). It stated that EUCO had no legislative function (§ 5), and made a thinly veiled threat to the Commission not to disregard the regulation in obedience with the EUCO and reminded the Commission of its accountability to the Parliament (§§ 6–9). This culminated in the threat to use Article 265 TFEU, with which the European Parliament could take the Commission to court for failure to act (§ 9). The resolution had the backing of 78 per cent of the house.

A year-long process of intense negotiations had come to an end. The EU had not only agreed on a new MFF, but also created unprecedented debt-financed own resources to fund the economic recovery from lockdowns and the COVID-19 pandemic, and agreed on a regulation to protect these funds from serious violations of the rule of law. To overcome the vetoes of the two backsliding states, the Council had to make serious concessions to these countries. While a conditionality regulation entered into force from 2021, it had effectively been suspended. Hungary and Poland could seek a review from the ECJ and the Commission would only act once it had created political guidelines on the application of the regulation, which it would only adopt *after* the ECJ's decision. Orbán and Morawiecki had bought time.

Compared to the earlier creation of monitoring tools, the conditionality regulation required a legislative process, which Hungary and Poland could use

to water down the regulation. Through the legislative linkage of the regulation with the MFF and NGEU, the stakes were high. Here the tug of war between different institutions became apparent. Since this tool would strengthen the EU's ability to sanction backsliding effectively, in line with my theoretical framework the resistance was fierce. But the Commission, Parliament and some member states were united in their demand for a conditionality regulation and isolated Hungary and Poland.

7.8 Using the conditionality regulation

The conditionality regulation gave the EU unprecedented powers. It could now suspend payments to member states if their rule of law situation threatened the Union's budget. This was qualitatively new: Priebus and Anders (2024) describe a long process of building supranational tools to enforce the rule of law, in which the conditionality regulation was the first 'effective supranational' tool; that it gave supranational actors the ability to overrule some member states and make authoritative decisions (229). The problem was that the EUCO had (illegally) decided that the Commission must not enforce the regulation for the time being. This turned its use into the next battlefield for EU institutions. Both Hungary and Poland brought actions for annulment on 11 March 2021 to the ECJ.[31]

Members of the European Parliament were unhappy with the political declaration entered by EUCO and the Commission. Initially, members internally debated how to react to this declaration: should they ignore or oppose it? Some suggested to sue the EUCO and seek to annul the conclusions, but since these were not legally binding no case could be found (Interview 2).

31. C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council*.

The Parliament's general unhappiness became clear during a debate on 11 March 2021. Commissioner for Budget, Johannes Hahn (Austria, EPP), explained that the powers of the Commission under the regulation gave it great responsibility, so the Commission had to excercise them with great care. While the Commission was preparing guidelines, it was also 'actively assessing information' on the rule of law in member states. However, 'the Commission does not expect to propose measures under the regulation before adopting these guidelines', he confirmed (European Parliament Debate, 11 March 2021, Item 11). The CONT rapporteur, Petri Sarvamaa (Finland, EPP), called the guidelines 'legally superfluous', but stated that the Parliament would make sure that they reflected the Parliament's wishes. In Hungary and Poland's annulment cases, the Parliament would defend the regulation and request an expedited process from the ECJ. But he also said that he saw the Commission as an 'ally' in the process. The rapporteur for BUDG, Eider Gardiazabal Rubial (Spain, S&D), stated that the Commission's guidelines must not 'interpret' the regulation.

On 25 March 2021, the Parliament passed a resolution on the regulation's application (European Parliament 2021a). The Parliament

> reiterate[d] its positions as laid down in its resolution of 17 December 2020; stresse[d] that the Rule of Law Conditionality Regulation has entered into force and is binding in its entirety for all commitment appropriations and payment appropriations in all Member States and for the EU institutions; underline[d] the importance of the direct applicability of the Regulation since 1 January 2021. (§ 1)

It also made clear that persisting breaches of the rule of law, which had started before the regulation entered into force, could also be grounds for the use of the regulation (§ 2). Parliament also reminded the Commission of its independence from member states and its accountability to the Parliament (§ 6) and 'urged' it to use its powers under the regulation to investigate and sanction breaches as 'the

situation as regards respect for the principles of the rule of law in some Member States warrants immediate consideration' (§ 7). While the Parliament saw no necessity for the Commission to adopt political guidelines, if the Commission disagreed it should adopt them 'as soon as possible, and no later than 1 June 2021' (§ 13). Parliament also gave notice that it would use Article 265 TFEU against the Commission should it fail to comply (European Parliament 2021a). As one interviewee put it, the Commission was 'between a rock and a hard place' (Interview 24).

On 9 June 2021, another debate took place in the European Parliament. The representative of the Portuguese Council presidency, Ana Paula Zacarias, highlighted the work done under the Portuguese stewardship, including a conference in Coimbra where the chairs of two Parliamentary committees (including LIBE) represented the Parliament. She argued that now that Hungary and Poland had brought actions of annulment, it would be best if the Commission waited until the judgment was handed down, as this would bring legal certainty and the Commission would have the chance to include the ECJ's reasoning in its guidelines. This 'would increase the legal solidity of the application of the regulation'. She promised: 'This robustness will also facilitate a speedy process on the Council's side once a proposal has been made by the Commission'. Commissioner Hahn started his speech with irony, before repeating the points he had made in March: 'I think it's always useful to have another debate on the rule of law conditionality mechanism'. Representatives of the political groups backing the rule of law, meanwhile, demanded action from the Commission (European Parliament Debate, 9 June 2021, Item 11).

On 10 June 2021, the Parliament passed the next resolution on the topic (European Parliament 2021c). If the threats were thinly veiled before, the veil was now removed. The Parliament asked for 'mutual sincere cooperation', 'in-

vite[d] other institutions to work together rather than obstruct the efforts to resolve the current crisis', and reminded the Commission 'that Parliament has the right to vote on a motion of censure of the Commission' (§ 2). Moreover, the Parliament also took a substantive position regarding the conditionality regulation: it expressed its belief that 'the situation as regards respect for the principles of the rule of law in some Member States warrants immediate use of the Rule of Law Conditionality Regulation' (§ 3). The resolution complained about the lack of progress on Article 7 proceedings in the Council and asked the Council to issue recommendations to the member states (§ 7). The Parliament wanted the Commission to include a section on how rule of law problems endangered the EU's budget in future rule of law reports. It made serious its earlier threat against the Commission and noted that the Commission had ignored the Parliament's deadline to finalize the political guidelines (§ 11). Hence, the Parliament's president was asked to give a final notice to the Commission, while Parliament would 'immediately start the necessary preparations for potential court proceedings under Article 265 TFEU against the Commission' (§ 12). Again, this resolution enjoyed widespread support from a coalition ranging from the far-left to the EPP and garnered 77 per cent of the vote.[32]

By keeping the issue on the agenda, the Parliament underlined that it was serious about the enforcement of the rule of law conditionality regulation. Already on 6 July 2021 it held another debate about the 'creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget'. The rapporteur for BUDG, Eider Gardiazabal Rubial (S&D, Spain) highlighted that the Parliament's report mostly reiterated what had been negotiated in the regulation; in fact, she said, the Commission's guidelines did

32. Results of votes: https://www.europarl.europa.eu/doceo/document/PV-9-2021-06-10-VOT_EN.pdf.

the same, showing how unnecessary they were to begin with (European Parliament Debate, 6 July 2021, Item 6). Petri Sarvamaa, the CONT rapporteur (EPP, Finland), highlighted that the Parliament had said everything that needed to be said and had used all its powers to the fullest extent, but lacked 'implementing powers'. The Council, he said, was 'blackmailed by the same group that posed a threat to the MFF and Next Generation EU negotiations last autumn'. Thus, progress depended on the Commission's actions. Hence, the Parliament needed to trigger Article 265 TFEU. He also pointed out that the Commission could immediately adopt these guidelines and start the implementation of the regulation: 'There can be no more delay, no more excuses'. Terry Reintke (Greens/EFA, Germany), the opinion rapporteur for LIBE, also highlighted that the Commission's guidelines had 'very little additional value'. She pointed out that all groups in the Parliament – bar the far-right – agreed that action was necessary. The Budget Commissioner, Hahn, promised that 'no case will be lost'. He said, that the Commission was already collecting evidence and building a case, which it would bring in due course. During the debate, most speakers apart from the far-right, urged the Commission to use the regulation.

The following day, the Parliament passed another resolution, which again attracted 78 per cent support (European Parliament 2021d). This was an own-initiative report originating from the BUDG and CONT Committees with opinions submitted by the LIBE and AFCO Committees. While the report contained many things that were criticized in the last three resolutions, it was more detailed. It took note of the Commission's draft guidelines, which it had shared, but also made clear that it did not endorse the existence of these guidelines, while maintaining that the regulation was sufficiently clearly drafted (§ 1). Parliament emphasized that systemic breaches were covered by the regulation, even though the EUCO conclusions had stated the opposite (§ 9). The text opposed

attempts to narrow down the applicability of the regulation and attempted to ensure that delays in the adoption of measures did not cause them to get lost altogether. Parliament also asked for a system whereby individuals and civil society could submit complaints (§ 16) and argued that 'persistent violations of democracy and fundamental rights' were grounds for the adoption of measures under the regulation (§ 20). The report argued against EUCO's understanding that the regulation should only be applied as a 'last resort'. Rather, it should be seen as a tool among several at the Commission's disposal (§ 21). The EUCO conclusions had also asked that the Commission have informal engagement with the member state before adopting measures. The Parliament resisted this, suggesting that this should 'remain exceptional' (§ 25). Instead, the deadlines for the Council to act were to be respected (§ 26). The Parliament asked the Commission to include these and its other suggestions in its guidelines (§ 35).

The Parliament had, within eight months, passed four resolutions regarding the application of the new regulation, each time with a large majority encompassing groups from far left to centre-right. The EPP had finally come around and was no longer a block in the Parliament's efforts to fight for the rule of law. The Parliament even threatened the use of Article 265 TFEU to bring the Commission to court for lack of action. This was legally unprecedented and risky given the lack of case law in this area (Platon 2021) and the Parliament's legal service was not happy about the decision to take the Commission to court (Interview 24).

Nevertheless, a crucial question for parliamentarians remained: what was the best way to deal with the Commission? The Commission was politically restrained by its committments to the EUCO, even if these were of questionable legality. While the Parliament did not want to create the precedent that a regulation was not applied due to political horse-trading, it also understood that it

needed the Commission as an ally on the rule of law, since only the Commission could propose measures. Thus, it needed to perform a tightrope walk: avoiding a precedent, pressuring the Commission without alienating it.

The Commission, meanwhile, in November 2021, sent written requests for information to the governments of Hungary and Poland under the conditionality regulation, but published no press releases at the time. It gave the governments two months to reply to the request (Wanat and Bayer 2021). Polish Minister of Justice Ziobro threatened that Poland could cut its EU contributions if the Commission was going to suspend its funds (Shotter 2021a).

Alongside these political battles, the legal fights took place in front of the ECJ's full court. Hungary and Poland had each brought actions of annulment against the Council and Parliament, and joined the other's case as interveners. The defendants were supported by Belgium, Germany, Ireland, Spain, France, Luxembourg, the Netherlands, Finland, Sweden and the European Commission. Hungary's case rested principly on two legal arguments: first, that the treaties did not allow for this regulation; second, that the regulation circumvented Article 7 TEU. AG Campos Sánchez-Bordona issued his opinion on the cases on 2 December 2021. One procedural issue he addressed at length was the reliance of both Hungary and Poland on the CLS's opinion that had taken a critical view of the legal basis of a conditionality regulation (Council of the European Union 2018b). The Council had asked the court to disregard its legal service's opinion, but the AG sided with Hungary and Poland to allow this. Substantively, however, the AG recommended dismissing all of the pleas of the two governments. On 16 February 2022, the full court followed suit and handed a victory to the co-legislators, upholding the regulation.[33]

33. Judgment of the Court (Full Court) of 16 February 2022, Case C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97. Judgment of the Court (Full Court) of 16 February 2022, Case C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

Shortly after this momentous decision, the Commission adopted their political guidelines on the application of the regulation, on 2 March 2022 (European Commission 2022b). A week later, Parliament adopted a resolution urging the Commission to propose financial sanctions in rule of law cases (European Parliament 2022b). On 2 April 2022, Hungary held a national election, which Orbán won with 54 per cent of the vote against an – almost – united opposition in a lopsided campaign (Scheppele 2022; ODIHR 2022). Shortly after, Commission President von der Leyen announced her intention to use the regulation in the Hungarian case (European Parliament Question Time, 5 April 2022, Item 9). The formal notice followed on 27 April.

7.9 Infringement proceedings

Whereas the Juncker-Commission had often used infringement proceedings to address rule of law issues from 2017, at the beginning of the first von der Leyen-Commission very few infringement proceedings were started. One cabinet advisor in the Commission confirmed that there was a gap bringing infringement cases at the start of the new Commission, but he explained that the personnel changes were also an opportunity to look at the rule of law problems and infringements with fresh eyes. At the same time, he argued that infringements do take time and cannot be done at the pace at which Twitter works (Interview 22).

TABLE 7.1 Infringement actions against Hungary and Poland, 2019–21

Date	Topic	Action	Number	Country
2020-04-19	independence of judges	Formal Notice	IP/20/772	Pl
2020-10-30	independence of judges	Reasoned Opinion	INF/20/1687	Pl
2020-12-20	independence of judges	Add'l Formal Notice	INF/20/2142	Pl
2021-01-27	independence of judges	Add'l Reasoned Opinion	IP/21/224	Pl
2021-03-31	independence of judges	Referral to ECJ	IP/21/1524	Pl
2021-06-09	electronic communications rules (Klubradio)	Formal Notice	INF/21/2743	Hu
2021-07-15	Banning LGBTIQ content and book disclaimer	Formal Notice	IP/21/3668	Hu
2021-07-15	'LGBT-ideology free zones'	Formal Notice	IP/21/3668	Pl
2021-07-15	restricting access to the asylum procedure	Referral to ECJ	IP/21/3424	Hu
2021-09-07	independence of judges	Request for Financial Penalties	IP/21/4587	Pl
2021-12-02	Banning LGBTIQ content and book disclaimer	Reasoned Opinion	INF/21/6201	Hu
2021-12-02	electronic communications rules (Klubradio)	Reasoned Opinion	INF/21/6201	Hu
2021-12-22	Constitutional Tribunal	Formal Notice	IP/21/7070	Pl
2022-07-15	electronic communications rules (Klubradio)	Referral to ECJ	IP/22/2688	Hu
2022-07-15	Banning LGBTIQ content and book disclaimer	Referral to ECJ	IP/22/2689	Hu

On 11 December 2019 a prominent group of public law and political science scholars, as well as civil society organizations, published an open letter on Verfassungsblog, urging the Commission to apply for interim measures regarding the case on Poland's disciplinary regime,[34] citing a quickly deteriorating situation (Pech, Scheppele and Sadurski 2019). On 23 January 2020, the Commission applied for interim measures and was supported by Belgium, the Netherlands, Denmark, Finland and Sweden. The Court granted interim measures on 8 April 2021, ordering Poland to suspend the disciplinary regime for judges until the main case was resolved.[35]

The same group of scholars and civil society organisations published another open letter on 9 March 2020 urging a further infringement case for Poland's 'muzzle law' (Pech, Sadurski and Scheppele 2020).[36] The Polish 'muzzle law' from December 2019 broadened the number of disciplinary offences for judges, which allowed judicial decisions to be sanctioned by the government and was seen as incompatible with judicial independence by the Commission. The law put in question the primacy of EU law and reduced the ability of courts to make preliminary references to the CJEU. Polish courts were also forbidden to question in their judicial proceedings the legal competence of other judges, which was a recurring issue given the anti-constitutional appointment and promotion of many judges since the Polish government terminated the terms of office of the NJC members. The law also introduced reporting duties of judges about their off-bench political and civic activities. On 29 April 2020, the von der Leyen Commission opened its first rule of law infringement case against Poland for

34. C-791/19 *Commission v Poland*.

35. C-791/19 R *Commission v Poland*, Order of the Court (Grand Chamber), ECLI:EU:C:2020:277.

36. Transparency notice: I signed this letter.

its 'muzzle law'. Thanks to the case law of the ECJ, especially the ASJP decision, the Commission could base the infringement largely on Article 19(1) TEU and Article 47 CFR (European Commission 2020d). The Commission sent a reasoned opinion citing these issues in October 2020 and gave Poland two months to comply.

On 3 December, rather than referring the case to the ECJ, the Commission sent a further formal notice, in which it added another complaint. This concerned the Disciplinary Chamber of the Polish Supreme Court, which the Commission alleged was not independent. According to the Commission, its existence would have a 'chilling effect' on judges in Poland due to its powers over them. After giving Poland one month to reply, the Commission followed up with an additional reasoned opinion on 27 January 2021 (European Commission 2021f). On the last day of March 2021, the Commission referred the case to the ECJ and requested interim measures. These were aimed at the arbitrary powers of the Supreme Court's Disciplinary Chamber and the suspension of decisions it had already taken, as well as the bans on judges to apply EU law and make preliminary references (European Commission 2021h).

Over the summer of 2021, the Commission brought more infringement cases. In June, the Commission acted against Hungary. It opened a case for the Hungarian Media Council's refusal to grant Klubradio – an independent radio station – the use of radio frequencies, which the Commission saw as disproportionate and discriminatory under the European Electronic Communications Code (European Commission 2021e). As part of the same infringement package, it also acted on asylum cases. The Commission gave formal notice, calling on the Hungarian government to implement the ECJ's ruling of 17 December 2020.[37]

37. C-808/18 *Commission v Hungary*, Judgement of the Court (Grand Chamber), ECLI:EU:C:2020:1029.

In a separate case regarding the asylum procedures directive, the Commission claimed that Hungary had not correctly transposed the directive into national law. It sent a reasoned opinion in September 2021 as well as another formal notice that included further grievances in the procedure (European Commission 2021e).

In July 2021, the Commission opened several new cases against Hungary and Poland, this time concerning LGBT rights. Hungary was given formal notice concerning a new law that limited access of people under 18 to content that 'propagates or portrays the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality"' (European Commission 2021c). The Commission sent another letter of formal notice to Hungary, because it ordered the publisher of a children's book to include a disclaimer that it depicted 'behaviour deviating from traditional gender roles'. Another case was opened against Poland, where 'LGBT-ideology free zones' were declared by several municipalities (European Commission 2021c). On the same day, the Commission referred Hungary to the ECJ for 'unlawfully restricting access to the asylum procedure', as asylum seekers had to visit a Hungarian embassy in a third country before entering Hungary. The Commission saw no justification for this restriction in the stated reason of controlling the pandemic (European Commission 2021a).

On 7 September, the von der Leyen Commission escalated the conflict with the Polish government. It referred the case on the independence of judges to the ECJ again, this time to force Poland to comply with the interim measures that the court had imposed (European Commission 2021d). To this end, the Commission requested a daily penalty to be paid by Poland for non-compliance. On top of this, it gave formal notice to Poland for non-compliance with that order, pointing out that the Polish government's plans to implement the judgment

were insufficient. While the Commission pointed out that Poland's government had stated its plans to discontinue the Supreme Court's Disciplinary Chamber, it found that the Chamber was continuing its work (European Commission 2021d).

At the beginning of December 2021, the Commission followed up with several reasoned opinions against Hungary. These concerned the mandatory disclaimer in children's books and the ban on content portraying LGBTQI, besides the case on media freedom concerning the radio frequencies that Klubradio was denied. Both cases were referred to the ECJ in July 2022 (European Commission 2022d, 2022a).

In December 2021, the Commision also closed the prior infringement against Poland for the early retirement of judges of the Supreme Court (see Chapter 5), since the ECJ had issued its ruling in June 2019 and Poland had implemented the judgment (European Commission 2021b). An additional, noteworthy closure concerned the case against Germany for its Constitutional Court's PSPP judgment, in which the Court had found that the EU had acted *ultra vires* the *acquis* – a finding which had reminiscence of the Polish Constitutional Tribunal's arguments. The case was closed, as the German government gave reassurances to the Commission that it respected the primacy of EU law, the CJEU, and would work towards avoiding a similar judgment in the future (European Commission 2021b), although it remained unclear how it would achieve that.

On 22 December 2021, the Commission gave formal notice to Poland of another case it opened. Background were the two decisions of Poland's Constitutional Tribunal, in which it had called into question the primacy of EU law. The Commission also questioned the independence of the Tribunal and whether it fulfilled Article 19(1) TEU's requirements of 'a tribunal previously established by law', citing the problematic status of several judges as highlighted earlier in its reasoned Article 7 proposal and in the judgments of the ECtHR. The

Commission followed up on this case with a reasoned opinion in July 2022 (European Commission 2022c) and referred it to the ECJ in February 2023 (European Commission 2023).

Several interviewees reflected on the Commission's use of infringements. Timmermans was said to have been more attentative to infringement proceedings (Interviews 3, 9), but not very eager to improve the infrastructure for rule of law enforcement. Jourová and Reynders, meanwhile, were lauded for doing a better job on the structural elements, but criticized for neglecting the infringement cases (Interview 3). Nevertheless, both were said to be strong supporters of the rule of law (Interviews 1, 3, 4). One participant explained that they would take too little action, even though they were rhetorically strong. However, she also felt that it was a resource problem and that the units were too small and understaffed. Ursula von der Leyen, the Commission President, said but did not do much on the rule of law (Interview 13) and had tightened her control of the legal service and made it harder to start infringement proceedings (Interview 1). Interviewees in the Commission also felt that the President was very involved in the decision-making process. Another interviewee reflected that despite that Jourová was supposedly nicer to the Hungarian government than Timmermans before her, she was still criticized constantly by the Hungarian government (Interview 12). While participants often lambasted the Commission for the lack of infringement proceedings, it needs to be pointed out that at the time of my fieldwork – much of it in the spring of 2021 – relatively few infringement proceedings had been started and that this changed from mid 2021.

7.10 Getting serious about the rule of law?

From 2019 to 2021, the EU faced a true 'polycrisis'. Hungary and Poland increasingly challenged EU values, the United Kingdom left the EU, and COVID-19 was

the greatest health emergency in Europe in many decades. Little did EU leaders know that another crisis was on the horizon when the Russian Federation amassed troops near the Ukrainian border at the end of 2021. The tug of war between the EU and the backsliding states intensified troughout.

This Chapter has shown that in the 2019 to 2021 period, policymakers were better able to detect the threats from democratic backsliding. They also realised some of the problems emerging from the legal and political contestation. It became clear that the Council, in particular, was not willing to act if there was no clear monitoring infrastructure in place. The Commission's annual rule of law report was an attempt to mend this. It was based on a wide variety of sources, including a public consultation, member state input, as well as reports from many bodies of international organizations including the Council of Europe. The best case for the annual rule of law report was brought by the Hungarian government, which put considerable effort into its delegitimation, including by calling for the resignation of Věra Jourová and suspending bilateral contacts with her.

The tool creation in this phase encompassed both monitoring and sanctioning instruments. The annual rule of law reports were just created by the Commission without formal legislation and then taken up by the other institutions. Both the Council and the Parliament agreed to use these reports for further discussions on the rule of law. In the Council, for the first time, this took the form of a peer-review, in which the rule of law situation in member states was discussed twice annually. Given the Council's reluctance to even hold hearings on the Article 7 cases of Hungary and Poland, this was a new development. The Parliament wished that an inter-institutional agreement would provide a legal basis for structured, regular activities on the rule of law, and wanted to

have a stronger link to the implementation of sanctions, thus providing less discretion to the institutions when to start sanction procedures.

Much more contested was the creation of a new sanctioning tool: the budget conditionality regulation. The Parliament was pushing for a strong and useable supranational instrument while the Council was split. Critically, the Council had to overcome the veto threat by Hungary and Poland, while also having to satisfy the 'frugal' northern European countries and 'rule of law friends'. The stakes were raised by the regulation's inclusion in a negotiation box together with the MFF – which was planned – and the NGEU – which was not. All member states as well as the Parliament were under considerable pressure to reach an agreement on these fiscal instruments; in this sense, one crisis influenced the other. This introduced an element of brinkmanship in the negotiations: who would blink first, the Parliament's rapporteurs, the Council, or the backsliding member states? Furthermore, while little the RRF – compared to the conditionality regulation – received little attention for its impact on the rule of law, it later turned out to be a formidable tool as well, which was only made possible by the COVID-19 crisis. Hungary and Poland took a gamble when they vetoed this new tool, showing their worry that this was an instrument that could actually hurt them. At the same time, Hungary seemed considerably more opposed than Poland, which had a better record of protecting EU money, whereas in Orbán's 'mafia state' (Magyar 2016) the theft of EU money had become policy. A EUCO meeting created political space for an agreement, by giving some extra time to Hungary and Poland until the regulation could be applied. In the case of Hungary, this was enough to suspend the proposal of measures until after its election in the spring of 2022. As proposed in my theoretical framework, the backsliding member states and the EU traded the short for the long term.

On the side of political support, the picture remained somewhat mixed. In

the beginning of the von der Leyen-Commission, the Commission was slow to bring new infringement procedures in cases of rule of law problems against Poland and Hungary. Over time it accelerated its activities. Moreover, the Commission worked perhaps more than the previous Commission on building instruments that could actually be used. Even on the Council's side, some of the presidencies had a stronger focus on the rule of law than others. The Finnish presidency in the second half of 2019 was strong in pushing forward the rule of law agenda. It attempted to strengthen the efficacy of Article 7 hearings by creating better standard modalities and scheduled two hearings on Hungary. The German presidency a year later was also one in whose term many decisions fell. Despite earlier announcements, it failed to schedule Article 7 hearings, but in this period the Commission published its first annual rule of law report, the Council started the rule of law peer-review, and the presidency brokered a compromise on the budget conditionality regulation.

The stakes rose further, by Poland putting the axe to the structure of the joint European enterprise. While the decisions by the Polish Constitutional Tribunal that challenged the primacy of EU law and held that decisions of the ECJ were made *ultra vires* were convenient from the Polish government's point of view, they also created an unprecedented threat to the functioning of the single market that required a joint legal system, in which national courts applied European law correctly. The Commission's reactions were thus stronger.

8
Conclusion

A UNION HANGING BY A THREAD

> 'The gloves are now off as we enter a new age.'
>
> *(Viktor Orbán, December 2021)*

Democratic backsliding in Hungary and Poland was an incremental process, driven by elected executives and their legislative majorities. In Hungary, Viktor Orbán successfully established a competitive authoritarian regime; in Poland, the rule of law deteriorated significantly, but the democratic opposition was able to wrest back control over the government before PiS could fully entrench itself. For those who saw a role for the EU as a democracy promoter, rule of law champion, protector of fundamental rights and guardian of the treaties, the slow and timid reactions are a puzzle. Rather than fighting for the survival of a democratic European project, the EU failed to impose high costs on backsliding governments and break the authoritarian equilibrium. Nevertheless, it would be unfair to say that the European institutions did nothing to protect Article 2 values. They used Article 7(1) TEU against Poland (the Commission) and Hungary (the European Parliament), started many infringement cases against both (the Commission), built monitoring tools, and legislated sanctioning instruments.

In this thesis, I have analysed the steps taken by the EU and asked why the European Union failed to contain democratic and rule of law backsliding in Central Eastern European member states, why it chose the actions it did, when it

did, and why it changed its approach over time. For this purpose, I have critically engaged with Kelemen's idea of an 'authoritarian equilibrium' and created a theoretical framework of decision-making in the European Union that allows for evolution of EU reactions and member state outcomes. My explanatory account of EU behaviour against backsliding in Hungary and Poland can explain differences between cases and behaviour changes over time, and factors in the agency of backsliding member states.

In this final Chapter, I conclude the thesis. In Section 8.1, I revisit and summarize my theoretical framework. Then, I summarize the findings from my four empirical chapters and show how they illustrate the usefulness of this framework in Section 8.2. I end with a discussion of limitations of my research and a brief outlook on the future of the European Union's authoritarian equilibrium (Section 8.3).

8.1 Summary of the theoretical framework

Many scholars put the blame on European policymakers for failing to contain democratic backsliding in Hungary and Poland. By contrast, I explain their behaviour. My starting point was that when trying to find a solution to the rule of law crisis, political constraints have to be taken seriously as well as legal ones. Politics is 'real' and cannot simply be wished away, as EU actions were subject to political constraints.

I have proposed a theoretical framework that is parsimonous, yet highly versatile in explaining a broad range of actions and inactions over a prolongued period. This framework can account for changing behaviour over a decade, without becoming generic or even arbitrary. In Chapter 2, I have proposed a theoretical framework of a 'supranational tug of war', which features an input, three decision-making steps, an output and an outcome. The main input, which

triggers a decision-making process is democratic backsliding in a member state. After this, I assume three steps. At first, the EU must evaluate this input as an authoritarian threat. Then, it must assess its toolbox to find a tool that is both legally and politically appropriate. Finally, it must have the required level of political support to make use of the tool. Only if all three steps are fullfiled, can the EU sanction backsliding and impose costs on the backsliding government.

My model has two special features: First, my framework is not static, but accounts for dynamic evolution based on feedback loops. While backsliding governments are initially at a 'tactical advantage' (Haggard and Kaufman 2021b, 28) due to information assymmetry, EU policymakers are able to learn from past mistakes and will get better at detecting and assessing backsliding threats. If no tools are deemed appropriate to handle a detected backsliding threat, a cycle of tool creation will ensue. The extension of the toolbox with new instruments takes time and this will in the short term make the imposition of costs on backsliding governments less likely. However, in the long run, the EU builds capacity to deal with backsliding threats better. Thus, it will have better and more appropriate tools in the future.

Regarding the growth of political support for sanctions, I have argued that this is bound to increase as well in the long run. Backsliding governments will over time use up the political capital they initially possessed. As some member state governments grow more authoritarian, their interests and values diverge more from those of the democratic governments in the European Union. Moreover, as the use of milder, dialogical engagement strategies evidently fails, support will grow for the use of tougher sanctions. Thus, in the long term, my model predicts a move towards the imposition of higher costs on backsliding governments. Over time, this has the potential to overcome the authoritarian equilibrium.

The second feature of 'the supranational tug of war' is that backsliding governments not only provide the initial backsliding input to a decision-making process, but that they are active participants in the process as well. They are not just helpless subjects, but agents who use their agency with the goal of avoiding costly sanctions. This they can achieve by exploiting weaknesses in the decision-making process. Thus, my theoretical framework allows for this as well. But just as the EU has its limitations, so do backsliding governments, whose ability to strategically act can be constrained by political factors, such as the rigidity of their political system, the size of their majority, and the unity of their government coalition. By allowing for feedback loops and member state interactions, my theoretical framework is dynamic and can be used to explain variance across cases and time.

Thus, my concept of a 'supranational tug of war' is a versatile explanation for decision-making on the supranational level in the European rule of law crisis, which also looks at the tactics used on national levels. It recognizes both the different starting positions of backsliding governments and the evolution of the toolbox and of political support over time. The next section summarizes the empirical case studies that substantiate this theoretical argument.

8.2 Summary of the case studies

The theoretical framework of the supranational tug of war is illustrated by the empirical analysis over four chapters. In Chapter 4, I have analysed the early years of democratic backsliding under Viktor Orbán in Hungary (2010–2014), the period of the seventh European Parliament and the second Barroso Commission. The years under Commission President Juncker and the term of the eighth European Parliament (2014–2019) was dealt with in two chapters. Chapter 5 analysed the Polish rule of law crisis from 2015, while Chapter 6 focused on

Hungary during the same period as well as horizontal initiatives of toolbox expansion. Finally, Chapter 7 has dealt with all of these topics for the time 2019 to 2021, the first half of the first von der Leyen Commission and the ninth European Parliament's term.

Chapter 4 shows that in the early years of democratic backsliding in Hungary, many policymakers in the EU did not perceive this as an authoritarian threat. While there was unease about some of the developments, little seemed outside the ordinary. Hungary adopted a new constitution and a large number of new laws. Individually, many of these measures where defensible, but combined, these went in an authoritarian direction. This was little understood early on. If criticism mounted, Orbán's government quickly agreed changes. At least temporarily the Hungarian government backtracked. This made it hard for the EU actors to follow the developments and understand the full picture. Furthermore, pressure seemed to work, as Orbán backtracked when faced with engagement. This decreased support for sanctions among many members of the European Parliament and the Commission. There were warnings to be sure and the European Parliament did quite early start paying some attention to Hungarian developments. But MEPs mostly voted along partisan lines in the first three resolutions. Only when the Parliament prepared the Tavares report in 2013, which listed the developments in Hungary, did a larger number of those who previously voted against such resolutions switch to abstentions. Still, ALDE's attempt to call for Article 7 failed.

The Commission attempted to address three issues, most importantly a reduction of the retirement age of judges, with infringement proceedings. The Commission won the case, but Orbán had in the meantime created facts on the ground that the ECJ judgement could not change. EU policymakers across the political spectrum felt that the tools and information available to them were

insufficent to enable them to respond effectively. So, the Commission created the Justice Scoreboard as a monitoring tool and the Rule of Law Framework as a softer engagement process which could lead to Article 7's use.

These events unfolded in line with the theoretical argument of this thesis. At first, Orbán enjoyed a first-mover advantage, due to information assymmetry between his government and the Commission. While he was busy demolishing democracy and the rule of law at home, in his dealing with the EU he was willing to engage, discuss, and backtrack while showcasing his enormeous democratic legitimacy as one of the strongest election winners in any member state. Where problems were seen by European policymakers, they felt that they did not have the means to address them. Thus, they created new instruments to solve similar issues. Tool creation came at the cost of the use of available instruments.

In Chapter 5, another actor entered the supranational tug of war: Poland under Jarosław Kaczyński's PiS party. As soon as PiS entered the government, it started a crusade against the Constitutional Tribunal, which refused to surrender quietly. For more than a year, the Tribunal fought back. This and the prior experience with the 'illiberal playbook' (Pirro and Stanley 2022) in Hungary, made the threat apparent to European policymakers. On top of this, the EU had new tools available, in particular the Rule of Law Framework. This gave the Commission a more appropriate tool, next to the legally risky infringement procedures (in cases of attacks on the judiciary) and escalation of starting Article 7 directly. Poland was the ideal test case.

The Framework's application helped formulate the rule of law agenda and specify the issues that needed mending. However, unlike Hungary's government, PiS was more reluctant to backtrack on key issues and engage with the Commission. The Commission tried over time to increase the pressure with threats of Article 7 in case of non-compliance. After receiving signals of politi-

cal support from powerful member states and a large qualified majority of the Parliament, the Commission broke the 'nuclear taboo' for the first time and used Article 7. Yet discussions in the Council also showed the limits of political support for sanctions. Orbán was not the only ally of Poland's government. Among the Central Eastern European member states, there was little appetite to put pressure on Poland.

Simultaneously to the developments in Poland, Hungary was backsliding further into a competitive authoritarian state. In Chapter 6, I showed that Hungary was not a priority for the Commission during this period. The Parliament tried to push the Commission to use the Rule of Law Framework and Article 7, but the Commission declined to do so. It did not view these as appropriate tools, since it considered that the legalistic backsliding in Hungary did not violate Article 2 TEU values in a grave enough way to justify these measures. On top of this, the Commission – with good reasons – had doubts that it would enjoy the required political support for the use of Article 7 against Hungary. A case in point was the European Parliament's resolution in December 2015, in which a majority of MEPs voted *against* the activation of Article 7. Until September 2018, it was unclear if the Parliament could find a qualified two-thirds majority for Article 7, which it finally achieved due to systematic work to expand the rule of law coalition. Renewed backsliding in Hungary in 2017 and the demands of the Parliament for the Commission to do more, prompted stronger use of infringement actions from then on.

The Hungarian government did not sit by idly, but used political and legal tools to contest the European Union's attempts to rein it in. Orbán himself regularly attended debates in the European Parliament, trying to show willingness to engage, showcasing his democratic legitimacy, while accussing his political enemies of spreading disinformation. In the crucial case of the Sargentini re-

port, the Hungarian government sent a long document detailing alleged errors. After it lost the vote, it brought a lawsuit, arguing that the Parliament should have counted abstentions in the total vote tally, which would have missed the two-thirds majority. These arguments were also part of public diplomacy efforts. Ironically, Orbán's behaviour in the Parliament was not helpful, as for the first time he did not offer concessions to his critics, especially in the case of the CEU, thus, giving undecided MEPs little reason to vote against the resolution.

Besides this, Chapter 6 also shows the EU's struggle to find more appropriate tools to tackle the rule of law crisis. Under pressure from the Parliament, Commission and some member states, in 2015, the Council reluctantly decided to hold a dialogue on the rule of law. By choosing horizontal discussions, it chose a format that was guaranteed to hurt little. Still, it dipped its toe in the water of the rule of law crisis for the first time. The Parliament, meanwhile, tried to achieve more structured engagement and voted in 2016 for a report that suggested a new DRF pact, based on inter-institutional agreement, with an annual cycle and member-state-specific reports. These would tackle the frequent allegations of double standards in the treatment of member states and provide an epistemic basis for further action. While the initial reactions of the Commission were negative, the Parliament reiterated its call in 2018. Eventually, the Commission took up some of the Parliament's ideas and suggested a new rule of law report. On top of this and in light of the difficulties of using Article 7, the Commission suggested the creation of a supranational rule of law conditionality regime, which would allow the Commission – not the Council – to make the decision to withhold funds from backsliding member states.

Thus in terms of my theoretical framework, Chapters 5 and 6 show that in 2015, the backsliding threat was correctly detected in the Polish case. The quick and severe escalation in Poland at first drew some of the attention away from

Hungary, which seemed more 'manageable' to the Commission. By 2017, this changed and the Commission and European Parliament wanted to do more. The institutions were united in the belief that they were limited by their tools, but disagreed on what was needed. Thus each institution suggested different tools.

Tool-creation during the eighth Parliament's term was mostly ineffective, but the seeds were planted for improvements. The strongest innovation came in the form of the expansion of European law in the crucial area of member state judicial independence, through the ECJ's case law. Political support for sanctions against Poland and Hungary grew in this period. In Poland it became apparent that a large majority of the Parliament wanted action under Article 7. Compared to Poland, finding political support in the Hungarian case was difficult. Not only did Orbán interfere more skillfully in the European decision-making processes, but he still enjoyed political capital from his successful elections and EPP membership. As Hungary became more authoritarian and stopped offering concessions, this started to erode and over time Orbán shared the spotlight with Poland's government. The Parliament's work to persuade EPP members further eroded Orbán's shield. However, the Article 7 hearings on the easier Polish case in the Council showed that many member states were not ready to punish a fellow government in this way. Thus the four-fifths requirements of Article 7(1) TEU in the Council and unanimity requirement of Article 7(2) in the European Council limited the efficacy of these procedures. Thus, attention shifted to creating new tools to deal with the new political reality.

Finally, in Chapter 7, I discussed the period from 2019 to 2021. This featured interwoven case studies of tool creation, and the tug of war between the EU and the backsliding member states. While the threat emanating from both countries' backsliding was readily realized, and new tools were created under

great pressure, it was still difficult to generate the required political support for their use. This proceeded through varied and incremental developments.

Without a clear avenue through which to force a resolution to the Article 7 procedures, as the support of four-fifths of member states was at best uncertain, the Council was reluctant to continue regular hearings. The focus shifted to new tools. The Commission presented its first annual rule of law report in autumn 2020. This monitoring tool featured a targeted stakeholder consultation and member state input. It was meant to collect information about the rule of law situation in all member states and diffuse knowledge-based contestation of facts, by providing a shared epistemic basis for further use of tools. In this period more than before, the Hungarian government took to the battlefield of public opinion and ramped up its public diplomacy in its tug of war with the European Union. It contested the EU's power more regularly and publicly and used vetoes against the most important legislative activities. Thus, while there was knowledge on the EU side in this period and much agreement on what constituted a threat, the EU worked on creating an epistemic basis that was better, shared, harder to contest, and which covered all member states equally.

The creation of the conditionality regulation was to add a new instrument to the EU's toolbox. The support for its creation was broad in the Commission and European Parliament, but the preferences of member states in the Council were more varied. Most importantly, Hungary knew that it was the main target for the regulation and was thus fiercely opposed and supported by Poland. While the regulation only required a qualified majority, not unanimity, Hungary and Poland held the MFF and NGEU – which did require unanimity – hostage. To overcome the veto threat, the European Council agreed on a problematic deal: to water down and delay implementation, to which the Commission agreed. The European Parliament was outraged and threatened to take the Commission

to court, pushing the Commission repeatedly and with broad majorities to disregard its promise to not enforce the law. The following process showed that political support for its use was possible to achieve, as the EPP united with the groups to its left in the demands for the tool and the emphasis placed on it. But Parliament knew that it needed the Commission on its side and could not risk to alienate it too much. Yet the Commission kept its promise to the European Council and did not enforce the regulation until after the ECJ had ruled on an annulment action, the Commission had drafted political guidelines, and the Council agreed on them, and until after the Hungarian election.

Thus, Chapter 7 shows how monitoring capacity was improved to build political support for sanctions, and that a new sanction tool was created that gave less power to individual member states in the Council to avoid vetoes. In line with my theoretical framework, the EU's power to do so was contested by the backsliding member states. This slowed down the process and slightly reduced the effectiveness of the instrument. Yet, the EU succeeded in building capacity with both instruments, although in the end of 2021, it had not yet been used.

The theoretical framework of a 'supranational tug of war' has guided this analysis and produced helpful insights into the contentious politics of the rule of law in the European Union. In the next and final section, I address some of the limitations of the research and end in brief thoughts on the future of the authoritarian equilibrium.

8.3 Limitations and outlook

This study has attempted an explanation of a large set of actions and inactions of the European Union for over a decade of democratic and rule of law backsliding in two member states. Engaged in a continuous supranational tug of war, both

sides adapted and refined their strategies over time. The EU institutions did not always pull together, nor in the same direction, limiting their success. While policy learning enabled better detection of backsliding threats, the creation of superior tools, and improved political support for sanctions over time, the EU has not visibly been able to destabilize the authoritarian equilibrium by imposing high costs on backsliding. This is not to say that the EU has been completely ineffective. The alternative outcome in a scenario without EU interventions would have likely been worse, as also recognized by Bozóki and Hegedűs (2018).

The case studies show differences in the reactions from EU institutions between cases and over time, but less variation in the outcome. The costs inflicted on backsliding governments have stayed, at best, at an intermediate level: painful for the member state, but neither threatening regime survival nor its membership in the European Union. One of the cases – Poland – was in 2023 brought back to a path of democracy and rule of law, yet the reason for this change was endogenous. While it is impossible to estimate the effect of EU policies on this outcome, it would probably be too charitable to attribute this change primarily to them. This raises the question of whether the EU is able to overcome the authoritarian equilibrium with the imposition of high costs on backsliding member state governments. As my theoretical framework acknowledges, the European Union's authoritarian equilibrium is not easily overcome as this requires complex policy coordination, which is challenging.

My thesis has developed a theoretical framework and traced it with two deep case studies of the most important cases of democratic backsliding in the European Union. However, episodes of democratic backsliding have been present in other member states as well and these are within the scope of my argument. I expect that the central theoretical insights to be applicable to other cases of democratic backsliding in EU member states as well, so that this

framework holds explanatory power there as well. The limitation is more of a practical nature: in smaller cases it is harder to find the evidence necessary to trace and apply this framework.

There are, however, some limitations arising from the chosen method of this research. This thesis has used interviews with policymakers in the EU and thus faces the limitations of qualitative research with elites and experts. Most importantly, the sample of interviewees is not representative of the group of policymakers. The Commission and its different Directorates-General, the European Parliament and the different political groups and the Council with its twenty-seven member states are neither equally nor fully represented. It was also harder to gain access to the European Commission than to the European Parliament and the people I talked to were more reluctant to share non-public information on the record. This means that in some cases I could not share things that I learned through these interviews, and in other cases, had to find other sources to make these points. My thesis has covered many political procedures over a long time, but the exposure derived from my interviewees varies between them. In some cases, I was able to get very detailed information from many sources, while for others, I had much less exposure and was only able to puzzle together individual pieces. For instance, few interviewees were in their positions in the early years of Viktor Orbán's backsliding. Thus Chapter 4 relied to a larger degree than other chapters on written sources. Because of this varied exposure, the emphasis in this thesis reflects to some degree the quality of information I could gather about them.

Overall, this thesis has prioritized a macro-explanation of behaviour in the rule of law crisis in the EU over more detailed studies of individual components. With this breadth of topics, not all processes could be dealt with exhaustively

and the thesis should not be read as a complete historiography of the rule of law crisis.

During the research on an ongoing rule of law crisis, I have come to appreciate the need to be able to account for external shocks with my theoretical framework. This became especially apparent in 2022, after Russia started its full-scale invasion of Ukraine. The invasion reconfigured the political landscape in the European Union in ways unforeseen. Suddenly, staunchly anti-Russian PiS in Poland became a crucial ally on defence and migration, while Orbán's Russia-friendly policies became increasingly a threat to the whole EU's security interests. While my framework can absorb this shock to some degree and integrate it into calculations of political support, future research would need to more systematically engage with this topic.

My theoretical framework with its concept of feedback loops that provide for policy learning, improved tools, and increased political support leads to a teleological prediction of stronger sanctions against backsliding governments over time. Thus, I predicted that in the long term, the authoritarian equilibrium would be destabilized through the imposition of costs on authoritarian governments. However, this is not inevitable. At the time of writing, at the end of 2024, authoritarian-populist parties are in government (or about to enter it) in Austria, Italy, the Netherlands, Finland, Slovakia, and Hungary, and have been on the rise in many more member states. This means that such parties are now well-represented in the Council. In the 2024 European Parliament elections, parties with an authoritarian agenda surged and three far-right groups were formed after the election, who together take over a quarter of the Parliament's seats. The first months after the elections indicate some willingness of the centre-right to co-operate with the far-right on policy and personnel issues. On

top of this, more MEPs without a group (Non-Inscrits) belong to authoritarian parties, such as Robert Fico's Smer (Slovakia).

Evidently, it is not possible to foresee whether the liberal, pro-European centre will hold in the future. If Parliament and Council move to the right they may well move the Commission to the right as well. This will undermine political support for sanctions against backsliding governments. My theoretical framework assumed a liberal consensus in the European Union, whose future is increasingly unclear. For the time being, the values of Article 2 TEU live on. Whether the Article's vision of democracy, rule of law and fundamental rights will be replaced by one of member state souvereignty, conferral and subsidiarity of Articles 4 and 5 TEU remains to be seen. The authoritarian equilibrium still exists, but the internal contradictions have multiplied. My takeaway is thus that there is no quick political fix and no magical legal solution. Overcoming the authoritarian requires more politics, not less. We should keep in mind Max Weber's words: 'Politics is a strong and slow drilling of hard boards' (Weber [1921] 1946, 48). Democratic backsliding is a hard board. It needs to be drilled patiently and consistently. This means realizing the limitations of political processes, learning about their problems and adjusting them where possible. This thesis was my attempt to make a small contribution to this effort.

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