

**Rule of law backsliding in the Czech Republic, Hungary, and Poland -  
Conditionality of EU funds to enforce the fundamental values of the Union**

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## Abstract

The European Union has dealt with several challenges in the recent years to tackle the rule of law backsliding in its Member States. The aim of this thesis is to contribute to the existing literature on the enforcement of the fundamental values of the EU by assessing the possible effectiveness of the rule of law conditionality of EU funds. To that end, drawing on the scope conditions derived from the literature on the EU's accession conditionality, this thesis systematically evaluates the European Commission's proposal on a new financial conditionality of May 2018 and the European Parliament's legislative resolution on the proposal of April 2019. Deficiencies regarding the rule of law are also present in Member States that joined in 2004 with the wave of the Eastern enlargement. Therefore this thesis also includes in-depth studies of the Czech Republic, Hungary, and Poland and examines the potential effect of the proposed conditionality on the countries. The study comes to the conclusion that the current proposal, as amended by the European Parliament, would constitute a plausible tool to enforce the fundamental values and the rule of law, especially compared to the existing mechanisms, and particularly in the examined countries. Still, its efficiency is uncertain in Member States that are less dependent on EU funds.

## Introduction

In 2004 the biggest enlargement in the history of the European Union (EU) took place when ten new countries joined to the Community. Most of these countries had been part of the Eastern Bloc, therefore democracy and the rule of law as such have not been as deep-rooted in their political and legal systems as they are in the case of the older Member States. To become a member of the EU, one has to comply with certain criteria. These standards are laid down in the so-called Copenhagen criteria, which consists of political- (stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities) and economic criteria (a functioning market economy and the capacity to cope with competition and market forces) and the ability to take on the obligations of the membership.<sup>1</sup> Therefore, this thesis relies on the presumption that – when joining the Union – all Member States have committed themselves to the fundamental values enshrined in Article 2 of the Treaty on European Union (TEU), according to which the EU was “*founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights[...]*”. Zakaria claims that the democracy, which “is not being backed up or counterbalanced by the rule of law is an ‘empty shell’.”<sup>2</sup>

In the recent years, the EU of 27 Member States faced several challenges. One of these challenges is the so-called democratic deficit, which - according to Kelemen - is experienced not on the Union level but on the national level.<sup>3</sup> The fundamental values are threatened by some of the “new” Member States, the situation in Hungary and in Poland as well as in the Czech Republic is particularly alarming. Although there are several safeguards to protect liberal democracy, in the recent years the limited enforcement actions of the Commission have been object to several criticisms. As also stated by Halmai, “the EU institutions so far have proven incapable of enforcing compliance.”<sup>4</sup> One of the reasons why the existing tools are not efficient in defending the values of the EU is that due to political considerations, there

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<sup>1</sup> European Commission, ‘Accession criteria’ (European Neighbourhood Policy And Enlargement Negotiations) [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en) accessed 10. May 2020

<sup>2</sup> Zakaria, F., *The Future of Freedom: Illiberal Democracy at Home and Abroad* (Norton and Company 2004) p. 256

<sup>3</sup> Kelemen, R.D., ‘Europe’s other democratic deficit: national authoritarianism in a democratic union’, (2015) Paper presented at the Council for European Studies, 22nd International Conference of Europeanists, Paris, 8–10 July

<sup>4</sup> Halmai G., ‘The possibility and desirability of Rule of Law conditionality’ (2019) *Hague J Rule Law* 11, 171–188.

is a lack of willingness to act (partisanship), which considerably undermined the legitimacy of the European Commission.<sup>5</sup> The ineffectiveness of the sanctions may also send a signal to the other Member States that they could behave the same way because they are likely to remain unsanctioned.

Due to the EU's failure to take adequate measures, various suggestions have been created to stop rule of law backsliding. One of the ideas tabled was the European Commission's proposal of 2018 'on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States'<sup>6</sup>, which was presented as part of the planned long-term EU budget for the 2021-2027 period. Pursuant to the proposal, EU funding would be made conditional on the respect for the fundamental values of the EU.

In the light of the discussion above, the aim of this thesis is to contribute to the existing literature on the enforcement of the basic values of the EU by assessing the possible effectiveness of the rule of law conditionality of EU funds. To that end, this thesis evaluates the European Commission's proposal and the European Parliament's (EP) legislative resolution on the proposal<sup>7</sup> and attempts to answer the following research question:

*Given the fact that the existing measures of the EU seem to be powerless when it comes to the serious and consistent breaches of EU law, would the proposed rule of law conditionality of EU funds constitute a plausible tool to protect the Union's budget and to enforce the rule of law compliance in the European Union?*

This thesis is divided into six chapters.

The first chapter gives an overview of the legal and political tools currently available at the EU level to fight rule of law backsliding.

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<sup>5</sup> Closa C., 'The politics of guarding the Treaties: 'Commission scrutiny of rule of law compliance' (2018) *Journal of European Public Policy*

<sup>6</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' (Proposal) COM (2018) 324 final

<sup>7</sup> European Parliament, 'Legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' P8\_TA-PROV(2019)0349

After presenting the existing instruments, the second chapter demonstrates the proposals on the academic and on the EU level, intended to enforce Member States' compliance.

The next (third) chapter consists of the theoretical framework, where the main characteristics of the External Incentives Model (EIM) developed by Schimmelfennig and Sedelmeier<sup>8</sup> are demonstrated, which basically assumes that the European Union drives Europeanization through sanctions and rewards that alter the cost-benefit calculations of the governments.

In the fourth chapter, this thesis focuses on the Czech Republic, Hungary, and Poland. Knowing that in these countries several problems in terms of the rule of law can be found, this thesis examines the activities of the governments of the three Member States and demonstrates the actions taken by the EU in case of non-compliance and their outcome.

The fifth chapter evaluates the European Commission's proposal and the European Parliament's legislative resolution 'on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' with the help of the scope conditions derived from the External Incentives Model. Furthermore, the potential impact of the rule of law conditionality on the Czech Republic, Hungary, and Poland is analysed in this section.

In the last (sixth) chapter, the recent events and developments regarding the issue are presented.

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<sup>8</sup> Schimmelfennig, F., & Sedelmeier, U., 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' (2004) 11:4 *Journal of European Public Policy*, DOI: 10.1080/1350176042000248089



## Chapter 1: Legal background

There are several mechanisms available on the EU level, which can be used against a Member State in case of non-compliance or in case of a suspected breach of the rule of law. These instruments can be divided into two - legal and political - groups. Although the available sanctions are weaker than the threat of withholding the membership during the pre-accession phase<sup>9</sup>, in some cases they proved to be effective. This chapter provides an overview of the existing tools, furthermore, it also clarifies the meaning of the term rule of law.

### 1.1. Defining the concept of rule of law

The rule of law - as mentioned in the introduction - is one of the founding values of the European Union. The question arises what exactly the term 'rule of law' means. Many scholars have tried to answer this question during the course of time. According to Zanghellini, Aristotle is considered as the founder of the rule of law tradition, who „provided the first coherent description or unambiguous statement of the rule of law as a normative ideal”<sup>10</sup> and advocated the predictability of the law. In the late 19<sup>th</sup> century, Albert Dicey was one of the firsts who sought to provide an alternative. In his book “Introduction to the study of the law of the constitution”, he stated that under one term at least three diverse, although similar conceptions can be found.<sup>11</sup> Firstly, Dicey declared the supremacy of the law, - where nobody can be subject to punishment unless there is a clear breach of the law – contrary to the arbitrary power on the part of the government.<sup>12</sup> Secondly, the author stated that nobody is above the law, thus every person is subject to the law irrespective of their rank in the society.<sup>13</sup> Thirdly, Dicey argues that in England - in contrast with other countries where the rights of the individuals are stemming from the constitution - the principles establishing the rights of individuals are developed by case law.<sup>14</sup> In 1960 an Austrian political theorist Friedrich Hayek

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<sup>9</sup> Sedelmeier, U., ‘Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession’ (2014) 52 *Journal of Common Market Studies* 105-121, DOI: 10.1111/jcms.12082

<sup>10</sup> Zanghellini A., ‘The Foundations of the Rule of Law’ (2016) 28 *Yale Journal of Law & the Humanities* 213

<sup>11</sup> Dicey, A.V., ‘The Rule of Law’ in Dicey, A.V., *Introduction to the study of the law of the constitution* (first published in 1885, Liberty Classics, 1982) 107

<sup>12</sup> *ibid.* 110

<sup>13</sup> *ibid.* 114

<sup>14</sup> *ibid.* 115

in his book “The Constitution of Liberty” presented the approaches of the concept of the rule of law throughout the centuries.<sup>15</sup> In the course of his systematic study, Hayek determined that all pieces of work he traced and analyzed (e.g., Aristotle, Cicero, Hume, Locke) promoted the same principles, namely that “the law should be superior, the law must be non-arbitrary, the law must be enforced by an independent judiciary separate from the lawmakers, the law must treat all persons equally.”<sup>16</sup>

In March 2011, the Venice Commission at its 106<sup>th</sup> plenary session defined rule of law - by referring to the Preamble of the Statute of the Council of Europe - as “one of the three “principles which form the basis of all genuine democracy”, together with individual freedom and political liberty.”<sup>17</sup> Today in the EU, the concept of rule of law is composed of several elements (as expressed by the European Commission<sup>18</sup>), where the key aspects – besides the separation of powers - are that the government should be limited by the law to reduce the arbitrariness, the law must be laid down in advance, must be general and available, furthermore, it must be enforceable by an independent judiciary.<sup>19</sup>

## 1.2. Legal tools

### 1.2.1. Article 7 TEU

The Article 7 sanctioning mechanism was introduced with the Amsterdam Treaty in 1997 with the purpose to deal with the breaches of the values of the European Union, *inter alia*, with the violation of the rule of law. As expressed by the Commission in its Communication on

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<sup>15</sup> Hayek, F.A., *The Constitution of Liberty* (first published in 1963, University Of Chicago Press, 1978)

<sup>16</sup> Stein R., ‘Rule of Law: What does it mean?’ (2009) 18 University of Minnesota Law School 293. DOI: 10.13140/RG.2.2.21250.63683

<sup>17</sup> Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (2016) CDL-AD(2016)007 (Venice, 11-12 March 2016)

<sup>18</sup> “Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.” see, Commission Communication ‘Further strengthening the Rule of Law within the Union: State of play and possible next steps’ COM(2019) 163 final 1

<sup>19</sup> European Parliamentary Research Service, ‘Protecting the rule of law in the EU: Existing mechanisms and possible improvements’ (Briefing) (2019)

Article 7 of the TEU, the aim of the procedure is “to remedy the breach through a comprehensive political approach, but it is not designed to remedy individual breaches.”<sup>20</sup> The instrument is composed of two distinct procedures, the preventive mechanism (Article 7(1) TEU) and the sanctioning mechanism (Article 7 (2)-(3) TEU), which can be activated without the former.

(i) *Article 7 (1) TEU*

The preventive mechanism was added to the procedure later by the Treaty of Nice in 2001.<sup>21</sup> Pursuant to Article 7(1) of the TEU, the Council - with the consent of the European Parliament - has the discretionary power to determine whether there is a clear risk of a serious breach by a Member State of the fundamental values of the European Union. This instrument may be initiated by one-third of the Member States, by the European Parliament or by the Commission and requires – besides the consent of the European Parliament - the majority of four-fifths of the members of the Council.<sup>22</sup> The purpose of the preventive mechanism is to send a warning signal to the offending Member State to avoid the breach of the values of the European Union and to maintain constant surveillance.<sup>23</sup>

(ii) *Article 7 (2)-(3) TEU*

The sanctioning mechanism - as stated above - can be triggered without the induction of the preventive one. The procedure is composed of two phases which are closely linked. In the first step (Article 7(2) TEU), the European Council may determine by unanimity – after obtaining the consent of the European Parliament – the existence of a serious and persistent breach of the values of the European Union by a Member State. The instrument may be initiated by one-

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<sup>20</sup> European Commission, ‘Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based’ (Communication) COM (2003) 606 final, 7

<sup>21</sup> European Parliamentary Research Service, ‘Understanding the EU Rule of Law mechanisms’ (Briefing) PE 573.922, p 4

<sup>22</sup> Article 7(1) TEU

<sup>23</sup> cf European Commission (n 20) 7

third of the Member States or by the Commission, but not the European Parliament. Prior to the determination of a serious or persistent breach by the European Council, the Member State in question has the opportunity to submit its observations.<sup>24</sup>

In the second step (Article 7(3) TEU), the Council acting by a qualified majority has the power to suspend certain rights of the Member State in question, “including the voting rights of the representative of the government of that Member State in the Council.”<sup>25</sup> Pursuant to the Communication of the European Commission, the penalty mechanism can only be activated if the breach has already taken place, and it must last some time.<sup>26</sup> The consent of the European Parliament is only necessary to determine the existence of a serious and persistent breach, but it is not needed for the second part of the sanctioning mechanism.<sup>27</sup> Furthermore, it is of great importance to note that the Council must take into account the possible consequences of the suspension and act in accordance with the principle of proportionality.

### 1.2.2. Articles 258-260 TFEU

Another legal mechanism in the toolkit of the EU in case a Member State does not comply with EU law is the infringement procedure. It may be initiated by the European Commission (Article 258 TFEU) or by a Member State (Article 259 TFEU) if it is considered that a Member State has failed to fulfil its obligations under the Treaties. Before the triggering of the procedure, the Commission as a first step - with the aim of an out-of-court agreement - sends a letter of formal notice to the Member State concerned, which then must send a detailed reply. If the Commission concludes that the Member State is failing to “implement a solution to rectify the suspended violation of EU Law”<sup>28</sup>, it may deliver a reasoned opinion, a formal request to comply with the Treaties.<sup>29</sup> If the Member State in question still does not comply within the given period (usually two months), the Commission may decide to refer the matter

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<sup>24</sup> Article 7(2) TEU

<sup>25</sup> Article 7(3) TEU

<sup>26</sup> cf European Commission (n 20) 8

<sup>27</sup> cf European Parliamentary Research Service (n 21) 4

<sup>28</sup> European Parliamentary Research Service, ‘An EU mechanism on democracy, the rule of law and fundamental rights’ (Study) PE 579.328, p 43

<sup>29</sup> Article 258(1) TFEU

to the Court of Justice of the European Union.<sup>30</sup> According to Article 260 of the TFEU, the Member State in question shall, upon the request of the Court of Justice of the European Union, take the necessary measures to comply with the judgement of the Court.<sup>31</sup> If the State fails to do so, the Commission may continue the procedure and refer the matter to the Court for the second time.<sup>32</sup> After the second referral, the European Commission may propose the Court to impose financial penalties, which can be either a lump sum of penalty payment.<sup>33</sup>

### 1.3. Political tools

After having presented the legal toolkit of the European Union in case of non-compliance or in case of a suspected breach of EU law, the present thesis continues by introducing the main political means of the EU available to address these issues. This part focuses particularly on the European Commission's Rule of Law Framework, on the Council's Rule of Law Dialogue, and on the Cooperation and Verification Mechanism.

#### 1.3.1. Rule of Law Framework

The Rule of Law Framework was created by the European Commission in 2014 with the aim "to prevent the emergence of a systemic threat to the rule of law"<sup>34</sup> as well as to strengthen it, by allowing the Commission to enter into dialogue with the Member State in question. The reason behind the establishment of this 'pre-Article 7' tool was the existing shortcomings of the instruments available, which do not always allow to respond quickly and effectively

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<sup>30</sup> Article 258(2) TFEU

<sup>31</sup> Article 260(1) TFEU

<sup>32</sup> Article 260(2) TFEU

<sup>33</sup> European Commission, 'Stages of an infringement procedure' (Europa.eu) [https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure\\_en](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en) accessed 5 July 2020

<sup>34</sup> European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union - State of play and possible next steps' (Communication) COM (2019) 163 final, 3.

enough to the threats relating to the rule of law.<sup>35</sup> As stated in the Commission Communication, the Framework was not designed to provide a remedy for individual breaches of the European Union Law, but for handling the situations where the actions of the authorities of a Member State have adversely affected the proper functioning of the rule of law.<sup>36</sup> This new procedure consists of three stages. In the first step, the European Commission conducts a preliminary assessment of the Member State in question to ascertain whether there is a systemic threat to the rule of law. At this phase, the content of the dialogue ('rule of law opinion') between the Commission and the Member State would be kept confidential.<sup>37</sup> If the Commission finds evidence of a systemic threat, it issues - as the second and public step - a so-called 'rule of law recommendation' to the Member State concerned, where it expresses its concerns. In its recommendation, the Commission also offers guidance in order to redress the problems and sets a time limit within the issues that have to be resolved.<sup>38</sup> In the third - follow-up - phase, the Commission monitors the implementation of its recommendations. If the Member State fails to put an end to its unlawful practices within the time limit set, the Commission has the possibility to activate one of the mechanisms set out in Article 7 of the TEU.<sup>39</sup>

### 1.3.2. Council's Rule of Law dialogue

In the same year the Commission adopted its Rule of Law Framework, the Council of the European Union decided to establish another political tool, "a dialogue among all Member States within the Council to promote and safeguard the rule of law", "based on the principles of objectivity, non-discrimination and equal treatment."<sup>40</sup> This annual dialogue was also intended to complement the existing tools in this field, where the discourses conducted are held - according to the principle of sincere cooperation – once a year in the Council's General

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<sup>35</sup> European Commission, 'Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 158 final, 5.

<sup>36</sup> *ibid.* 6

<sup>37</sup> cf European Parliamentary Research Service (n 21) 6

<sup>38</sup> cf European Commission (n 35) 8

<sup>39</sup> *ibid.*

<sup>40</sup> General Affairs Council meeting, 'Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law' (Press release) (2014)

Affairs meeting. In its meeting in 2014, the Council also expressed its role in safeguarding the rule of law, where it intends to play as a central actor “in order to contribute to a common understanding on compliance with the rule of law in accordance with the Treaties.”<sup>41</sup> After five years in 2019, the Council evaluated its annual rule of law dialogue and determined that it has been a useful mechanism, but also pointed out that the framework could be further developed to be ‘stronger’ more ‘result-oriented’ and ‘better structured’.<sup>42</sup> To that end - and to better contribute to the aim of strengthening the rule of law in the European Union -, the Member States in the Council noted that the dialogue should be more interactive, which could be accomplished in the form of seminars arranged by the Presidency and that “follow-up discussions on one or more particular themes could be organized” if it deemed to be necessary. Furthermore, the General Affairs Council also encourages other Council configurations to participate in the dialogue by organizing rule of law-related discussions falling within their competence.<sup>43</sup>

### 1.3.3. Cooperation and verification mechanism for Bulgaria and Romania

The Cooperation and Verification Mechanism (CVM) is a special temporary mechanism, which was set up by the European Commission in 2006. This transitional measure aimed to assist Bulgaria and Romania to remedy their shortcomings in the fields of judicial reform, corruption, and – in the case of Bulgaria - organised crime after their 2007 accession.<sup>44</sup> In order to evaluate the developments made by both of the countries, the Commission adopted certain country-specific benchmarks. The mechanism is still in place and reports<sup>45</sup> on the progress in the countries are published every six months. The assessments and reports made by the Commission are based on “careful analysis and monitoring, drawing on a continuous dialogue

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<sup>41</sup> Italian Presidency, ‘Ensuring respect for the rule of law in the European Union’ (2014) 15206/14

<sup>42</sup> Finnish Presidency, ‘Evaluation of the annual rule of law dialogue’ (2019) 14173/19, paras 4-5 and 7

<sup>43</sup> *ibid.* paras 12-14

<sup>44</sup> European Commission, ‘Cooperation and Verification Mechanism for Bulgaria and Romania’ (Europa.eu) [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en) accessed 10 July 2020

<sup>45</sup> European Commission, ‘The reports on progress in Bulgaria and Romania’ (Europa.eu) [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en) accessed 10 July 2020

between the Bulgarian and Romanian authorities and the Commission services.”<sup>46</sup>  
Furthermore, both countries have the obligation to communicate their progress to the Commission once a year until the objectives of the mechanism are met.<sup>47</sup>

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<sup>46</sup> cf European Commission (n 44) 'How does CVM work on practice?'

<sup>47</sup> cf European Parliamentary Research Service (n 28) 89



## Chapter 2: Possible tools and proposals against rule of law backsliding

In the previous sections, the currently available - legal and political - mechanisms have been presented in case an EU country has not fulfilled its obligations stemming from the membership and breached the values on which the EU was founded. These existing tools have often been subject to sharp criticism, where one would argue that they are not efficient enough. The experiences of the past years - in cases of certain Member States - have also shown that in order to be able to respond to the challenges effectively, the EU needs to improve its toolkit. In the recent years, there have been several proposals on the academic level as well as on the EU level to that end. In the next part of the thesis, the most frequently suggested potential tools are introduced.

### 2.1. Academic proposals

#### (i) Copenhagen Commission

The proposal of Jan-Werner Müller is one of the most quoted ideas regarding the enforcement of the fundamental values in the EU. He claims that there is no clear legal or political actor commissioned with the task to warn the others about a potential breach of the values of the European Union. Müller also questions the credibility of the European Commission as an impartial legal and political agent because of the recent proposals to politicise the body. Therefore, he suggests to create an entirely new institution “that could credibly act as a guardian of Europe’s *acquis normative*.”<sup>48</sup> This new institution would be called the ‘Copenhagen Commission’ and would be composed of credible legal experts and political leaders, who would be nominated by the European Commission with the consent of the European Parliament. According to his proposal, the Copenhagen Commission would then be empowered to investigate democracy and rule of law-related situations in the Member States

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<sup>48</sup> Müller, J-W., ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ (2015) 21(2) European Law Journal 150

and trigger a mechanism where it is necessary. Following the recommendation of the Copenhagen Commission, the European Commission would be required to cut EU funds or impose significant fines.<sup>49</sup>

(ii) Reverse Solange approach

The 'reverse Solange' approach was developed by von Bogdandy (et al.) in order to protect constitutional pluralism in case of a persistent breach of the fundamental rights by a Member State. The concept was influenced by the Solange doctrine of the German Federal Constitutional Court.<sup>50</sup> According to the proposal, the national courts would be entrusted with the protection of the fundamental rights as long as ('solange') it can be presumed that the very essence of the fundamental rights - as enshrined in Article 2 of the TEU – are ensured. However, in such situations where the systemic violation occurs, citizens of the Member State in question would be able to rely on their EU citizenship and seek legal remedy before their national courts. The authors claim that this approach would help to safeguard the general functioning of the EU, where the protection of the fundamental rights on the national level would coexist with respect "of each other's specificities, but mutually vigilant and helpful in order to preserve shared foundational principles."<sup>51</sup>

(iii) Horizontal Solange approach

Iris Canor's 'horizontal Solange' concept is one of the most talked-about proposals in the academic circles. It is horizontal because the approach was meant to be applied not only in traditional vertical conflicts, but also to situations among the Member States. She starts by saying that a gap between the Member States can be found due to social, political, ideological, and economic differences, where fundamental rights are of great importance in order to

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<sup>49</sup> *ibid.* 151

<sup>50</sup> BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß

<sup>51</sup> Bogdandy, v. et al., 'Reverse Solange – Protecting the essence of the fundamental rights against EU Member States' (2012) 50(2) *Common Market Law Review* 383-421

bridge this gap.<sup>52</sup> Canor's suggestion is composed of two levels. While the first level contains the Solange approach, the second level forms the 'horizontal' component, which allows the national courts to review whether there is a breach of the fundamental values by other Member States. This concept would allow the Member States to sanction their peers who do not comply with the values of the European Union by not respecting their obligations stemming from the Treaties vis-à-vis such Member States as long as they fail to comply. Carlos Closa's and Dimitry Kochenov's opinion was among the several critics which have been formulated as regards this possible approach. They stated that sanctions and penalties should be centralized, since the concept could put the "very existence of the Union in jeopardy, it is not the way to be taken."<sup>53</sup>

(iv) Systemic infringement procedure

Scheppele proposes the extended application of the above presented infringement procedures enshrined in Article 258 and 260 of the TFEU.<sup>54</sup> The difference between the systemic infringement procedure and the original one is, that the former would allow the Commission to bundle a 'group of specific alleged violations' together in order to prove that the breaches of the Member State in question are systemic and persistent. These infringements would be tied together with a legal theory that "links the allegations together, making the systemic violation clear and pointing to a systemic remedy."<sup>55</sup> This would allow to handle the breaches together and to determine a more serious infringement. Pursuant to Scheppele this method would result a higher degree of Member State's compliance, where systemic violations would be replaced by systemic compliance. However, if the systemic and persistent breach still exists, the CJEU - instead of imposing a lump sum or a penalty payment - would be able to suspend EU payments.<sup>56</sup>

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<sup>52</sup> Canor, I., 'My brother's keeper? Horizontal Solange: "An ever closer distrust among the peoples of Europe"' (2013) 50 Common Market Law Review 383

<sup>53</sup> Closa, C., Kochenov, D., Weiler, J.H.H., 'Reinforcing Rule of Law Oversight in the European Union' (2014) 25 Robert Schuman Centre for Advanced Studies Research Paper 19

<sup>54</sup> Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' (2015) Princeton University

<sup>55</sup> *ibid.* 7

<sup>56</sup> *ibid.* 18

## 2.2. Proposals on European Union level

After having demonstrated the academic proposals on the issue of the rule of law, this thesis proceeds by introducing the approaches suggested on the European Union level in order to strengthen the capacity of the EU in cases of rule of law deficiencies in the Member States.

### (i) Rule of Law Review Cycle

In 2019 the European Commission came up with the idea of a ‘Rule of Law Review Cycle’ with the aim to “deepen its monitoring of rule of law-related developments in the Member States.”<sup>57</sup> Besides monitoring the different elements of the rule of law, the review cycle would also include the examination of the efforts made against corruption and the enforcement of EU law in the single Member States. To ensure the smooth spreading of the information regarding the rule of law, the Commission would invite the Member States to engage themselves in a mutual exchange of information between the national authorities and the institutions of the EU. Furthermore, for the same purpose a “network of national contact points” would be set up, which would provide a forum for the Member States to discuss their rule of law-related observations and developments.<sup>58</sup> In addition to these developments, an ‘Annual Rule of Law Report’ summarising the situation in the single Member States would be published in order to “ensure the necessary transparency and awareness and to keep the rule of law on the political agenda.”<sup>59</sup> Moreover, the European Commission would “pursue a strategic approach to infringement proceedings” drawing on the ECJ case law on rule of law-related issues and improve the procedure leading to the use of Article 7 of the TEU along with the involvement of additional institutions via a slight modification of the Rule of Law Framework.<sup>60</sup>

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<sup>57</sup> European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - Strengthening the rule of law within the Union – A blueprint for action’ (Communication) COM (2019) 343 final 9

<sup>58</sup> *ibid.* 10

<sup>59</sup> *ibid.* 11

<sup>60</sup> *ibid.* 14

(ii) Cutting funding of Member States

The debate on the protection of the rule of law and the budget of the European Union has been a highly debated topic in the recent years, where scholars and the actors of the EU have also taken their sides. The possibility of cutting funding had already been raised by the European Parliament in 2016 in the form of “financial sanctions or the suspension of Union funding.”<sup>61</sup> In order to promote the fundamental rights and values of the European Union, Commissioner Věra Jourová in 2017 also talked about the probability of the introduction of a “fundamental rights and values conditionality of EU funding.”<sup>62</sup> The debate on the conditionality of EU funds intensified in 2018, when the European Commission published its draft regulation on the protection of the European Union’s budget as part of the new Multiannual Financial Framework for the period from 2021-2027. In this proposal, the Commission expressed that generalised rule of law deficiencies in one of the Member States could lead to the suspension or reduction of payments from the EU funds. One would argue that in those Member States where the rule of law is not stable, EU funds will not be spent effectively.<sup>63</sup>

In the following sections, this thesis further elaborates on the possibility of the proposed rule of law conditionality of EU funds and evaluates its potential effectivity.

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<sup>61</sup> European Parliament, ‘European Parliament Resolution of 25 October 2016 with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights’ (2016) 2015/2254(INL) para 20

<sup>62</sup> Speech by Commissioner Jourová, ‘10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law’ Vienna, 28 February 2017

<sup>63</sup> Šelih, J. & Bond, I. & Dolan, C., ‘Can EU funds promote the rule of law in Europe?’ (2017) Centre For European Reform

## Chapter 3: Theoretical framework

In the next chapter, the main features of the External Incentives Model are presented, which will be used during this thesis in order to assess whether the proposed conditionality of EU funds is likely to be effective in case of generalised rule of law deficiencies in the Member States.

### 3.1. External Incentives Model

The External Incentives Model is a ‘rationalist bargaining’ model, where conditionality is of key importance to Europeanization. The model basically assumes that the actors are ‘utility-maximizers’, therefore they seek to maximize their own power and welfare.<sup>64</sup> In order to receive the rewards, the actors have to fulfil the conditions which are set by the European Union. The EIM was developed by Frank Schimmelfennig and Ulrich Sedelmeier to systematically test scope conditions for the effectiveness of the conditionality of the European Union used by the accession negotiations. Although the model was originally established to examine the efficiency of the EU’s accession conditionality, it could also be used to evaluate the proposed rule of law conditionality of EU funds. To that end, this thesis focuses on three scope conditions - determinacy of conditions, the speed and size of sanctions, and the credibility of conditionality - provided by the model. Additionally, to the three scope conditions provided by the EIM, this thesis also addresses the legitimacy of the Commission’s proposal.

#### *(i) Determinacy of conditions*

The determinacy of conditions refers to both, “the clarity and the formality of a rule.”<sup>65</sup> According to the model, the clearer the rule, the higher its determinacy, whereby the

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<sup>64</sup> cf Schimmelfennig, F., & Sedelmeier, U., (n 8) 671

<sup>65</sup> *ibid.* 672

likelihood of its effectiveness increases.<sup>66</sup> On the one hand, “determinacy has an informational value”<sup>67</sup>, which helps the target governments to get the rewards if they comply with the rules by providing the necessary information on what exactly they need to do. On the other hand, it “enhances the credibility of conditionality”<sup>68</sup> which indicates the target governments that the adoption of a rule is only possible without the manipulation of it. Furthermore, it also has a binding effect on the European Union. As stated by Sedelmeier, conditionality as a tool “is only effective under clearly defined conditions.”<sup>69</sup> Therefore, when assessing the possible effectiveness of the rule of law conditionality of EU payments, one has to look first whether the conditions are sufficiently defined.

(ii) *Size and speed of sanctions*

Although the original model on accession conditionality focuses on the reinforcement by rewards, the draft regulation of the Commission is based on the negative conditionality in case of non-compliance. Therefore - as formulated by Michael Blauburger and Vera van Hüllen<sup>70</sup> - instead of assessing the ‘size and speed of rewards’, this thesis concentrates on the ‘size and speed of sanctions’.

Concerning the size, the original EIM claims that the rewards are only efficient if the costs of non-compliance are higher than the adoption costs<sup>71</sup>, which in the case of the rule of law conditionality can be converted as follows: the more sizeable and tangible the sanctions, the more likely the success of the conditionality. The speed of sanctions also plays a vital role, given the time limitations of the electoral systems. Pursuant to the model, the more time the sanctions require, the lower the incentive to comply, consequently, the quicker the sanction, the more likely the rule adoption.

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<sup>66</sup> Sedelmeier, U., ‘Europeanisation in new member and candidate states’ (2011) 6:1 Living Reviews in European Governance 12, DOI: 10.12942/lreg-2011-1

<sup>67</sup> cf Schimmelfennig, F., & Sedelmeier, U., (n 8) 672

<sup>68</sup> *ibid.* 672

<sup>69</sup> cf Sedelmeier, U., (n 66) 29

<sup>70</sup> Blauburger, M., & van Hüllen, V., ‘Conditionality of EU funds: an instrument to enforce EU fundamental values?’ (2020) *Journal of European Integration* 4, DOI: 10.1080/07036337.2019.1708337

<sup>71</sup> cf Schimmelfennig, F., & Sedelmeier, U., (n 8) 673

(iii) *Credibility of conditionality*

According to the EIM, the factor of ‘credibility of conditionality’ refers to both the credibility of the European Union to deliver the reward in case of compliance and to the ability to withhold the reward in case conditions are not met.<sup>72</sup> This thesis focuses on the negative conditionality, thus the latter is of great importance if one intends to assess the likelihood of the application of the rule of law conditionality of EU funds. Schimmelfennig and Sedelmeier claim that “credibility depends on consistency”, where an internal conflict about the conditionality would lead to disagreements.<sup>73</sup> The more united the EU on the specific issues, the more credible is its threat, hence voting requirements and the amount of the involved actors play a crucial role. Consequently, the fewer actors required with, the less strict prerequisites, the easier to adopt the sanctions.

(iv) *Legitimacy of the proposal*

The European Union is a “community of law and its values constitute the very basis of its existence.”<sup>74</sup> For that reason, it is of particular importance that its actions are in compliance with the Treaties. This has also been emphasized by Bernd Schlipphak and Oliver Treib.<sup>75</sup> They argue that in the case of an EU intervention, the accused government will challenge the legitimacy of the actions initiated and frame the measure as a threat. Therefore, the impartiality of the actors is just as essential as the fair and equal treatment of the Member States. As also stated by Schimmelfennig et al., if the “conditions are based on rules, which are shared among the Member States, clearly defined, and coherently applied in the EU, their

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<sup>72</sup> *ibid.* 673

<sup>73</sup> *ibid.* 674

<sup>74</sup> cf European Commission, (n6) 1

<sup>75</sup> Schlipphak, B., & Treib, o., ‘Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding’ (2017) 24:3 *Journal of European Public Policy* 352-365, DOI: 10.1080/13501763.2016.1229359



compliance pull is high and they are difficult to manipulate by the target governments. By contrast, 'double standards' fail to exert the same compliance pull."<sup>76</sup>

After having presented the main features of the External Incentives Model, the next chapter deals with the phenomenon of rule of law backsliding in the Member States of the former Eastern Bloc, specifically in the Czech Republic, Hungary, and Poland.

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<sup>76</sup> Schimmelfenig, F., & Engert, S., & Knobel, H., 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey' (2003) 41:3 *Journal of Common Market Studies* 500, DOI: 10.1111/1468-5965.00432

## Chapter 4: Empirics

This part of the thesis focuses on the rule of law backsliding in the Central and Eastern European region with special emphasis on the Czech Republic, Hungary, and Poland. In terms of the definition provided by the European Parliament, all three Member States experience generalised deficiencies as regards the rule of law that affect the financial interests of the EU, be it the endangering the independence of the judiciary, the limited availability of legal remedies or the arbitrary and unlawful decisions of the public authorities.

In order to better understand the relation between the three Member States and their behaviour, the history of the Visegrád Group must be briefly explained.

All three countries are members of the Visegrád Group, which was formed in 1991 by the Czechoslovak Republic, by the Republic of Poland, and by the Republic of Hungary with the aim of building a closer relationship and deepening the cooperation between the countries located in Central Europe. Since the split of Czechoslovakia in 1993, the Visegrád Group is comprised of four countries, as both successor countries, the Czech Republic and the Slovak Republic are full and independent members of the alliance. The motive behind the establishment of the group can be described by several factors. Most importantly, the countries wanted to eliminate the remains of the communist block and settle the animosities stemming from the long shared history. Furthermore, the states believed that through collective efforts, it would be easier to join in the European integration process and be full Member States of the European Union.<sup>77</sup> This objective was achieved in 2004, when the Visegrád countries became members of the EU within the framework of the Eastern Enlargement. Nowadays, the initial 'Euro-enthusiasm' of the group seems to have faded<sup>78</sup>, although differences exist between the countries with this regard. There is a shift towards illiberal democracy within the group, which is particularly observable in Hungary and in Poland, where the fundamental values of the European Union are being disregarded. The governing parties, PiS in Poland, Fidesz in Hungary, and ANO in the Czech Republic are dismantling the system of checks and balances and placing more and more power in the hand

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<sup>77</sup> Visegrád Group, 'History of the Visegrád Group' (Visegrád Group) <http://www.visegradgroup.eu/about/history> accessed 23 July 2020

<sup>78</sup> Skrzypek, A., & Skóra, M., (eds.) 'The Future of the Visegrad Group' (2017) Foundation for European Progressive Studies 4

of those politicians who are affiliated with the government. The actions of these governments in the recent years - such as the early retirement of judges or the limitation of the press independence - are challenging the decisions made in Brussels, while at the same time, these states are great beneficiaries of the advantages provided by the EU membership through structural and cohesion funds.<sup>79</sup> In spite of this behaviour, the countries in their 2018 joint statement emphasized the importance of the European values, moreover, it had been stated that the main objective of the Visegrád Group is - as it has always been – “making the EU stronger through constructive and open dialogue and effective cooperation.”<sup>80</sup>

In the next sections, this thesis concentrates on the country-specific issues related to the breaches of the rule of law and the fundamental values of the European Union. After presenting the outcomes of the past and ongoing cases against the countries using the instruments available currently on the EU level, this thesis assesses the possible efficiency of the rule of law conditionality of EU funds in the Czech Republic, Hungary, and Poland. For the assessment, the following hypothesis is tested:

*H1: The instruments currently available in the EU's toolkit are not efficient enough, which enables the Member States to avoid the more serious penalties by engaging only symbolically.*

## 4.1. The case of the Czech Republic

### 4.1.1. Actions of the governing party - Akce nespokojených občanů (ANO)

In the 1990s, after the regime change in Eastern Europe, the Czech Republic was one of the most prosperous countries in the region. With the help of its president Václav Havel, the country managed to transform the old one-party regime into a multiparty system, where the citizens were encouraged to take part in the civil society, which was considered by Václav

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<sup>79</sup> Morillas, P., (ed.) *Illiberal democracies in the EU: The Visegrád Group and the risk of disintegration* (2017) Friedrich Ebert Stiftung 5

<sup>80</sup> Visegrád Group, 'Stronger Together – Joint Statement of the Prime Ministers of the Visegrád Group' (2018) (Visegrád Group) <http://www.visegradgroup.eu/stronger-togetherjoint> accessed 9 June 2020

Havel as the foundation of a viable democratic system.<sup>81</sup> Furthermore, thanks to his efforts, the country was also able to join the NATO in 1999 and to the EU in 2004. After the accession to the European Union, Václav Klaus, the founder of the Civic Democratic Party (ODS) and the first Prime Minister of the Czech Republic took over the presidency, who was known from his Eurosceptic and nationalist views. However, in 2013 due to the people's dissatisfaction with the corruption in the country and due to several scandals, the then-governing party fell apart, which led to early parliamentary elections.<sup>82</sup> This event was beneficial for the opposition parties inter alia for ANO, which was created by the Czech billionaire, the owner of Agrofert holding company Andrej Babiš in 2011 and whose promise was to fight corruption.

In the 2013 parliamentary elections, the party received 18.65% of the votes, where during the campaign the belief in anti-corruption and hard work were particularly highlighted. Furthermore, Babiš, the leader of the party also emphasized that he is not a politician but a businessman and he wants to lead the country as if it was a business. However, some authors have argued that this way of thinking and the populist framing of politics shared with the illiberal governments<sup>83</sup> "adds up to the rejection of pluralism and contains the seeds of authoritarianism."<sup>84</sup> Besides the previously mentioned Agrofert, in 2013 Babiš also purchased one of the most influential newspaper publisher companies and the most popular radio station in the Czech Republic. Although the 2013 parliamentary elections can be considered a big success for ANO, it cannot be compared with the events of 2017. Four years later, the party with the lead of Babiš won the parliamentary elections by gaining 29.6% of the votes, thereby 78 out of 200 seats in the Chamber of Deputies of the Parliament of the Czech Republic.<sup>85</sup> Although ANO was not able to secure a majority support and lost a vote of confidence in 2018, Babiš was able - with the help of the pro-Russian President Miloš Zeman - to form a government. One might argue that the challenges the Czech democracy is facing are stemming neither from Babiš nor from Zeman, but from the cooperation of these two figures.<sup>86</sup> Similarly to the other Eastern European Member States, the Prime Minister started to replace high-

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<sup>81</sup> Pehe, J., 'Explaining Eastern Europe: Czech Democracy Under Pressure' (2018) 29:3 *Journal of Democracy* 65, DOI: <https://doi.org/10.1353/jod.2018.0045>

<sup>82</sup> Rod, A., 'The Czech Republic Faces Early Parliamentary Election in 2013' (4liberty.eu, 23 September 2013) <http://4liberty.eu/the-czech-republic-faces-early-parliamentary-election-in-2013/> accessed 27 July 2020

<sup>83</sup> Mudde, C., 'The Populist Zeitgeist' (2004) 39(4) *Government and Opposition* 542–563 and Kaltwasser, C. R., 'The Ambivalence of Populism: Threat and Corrective for Democracy' (2012) 19(2) *Democratization* 184–208

<sup>84</sup> Hanley, S., & Vachudova, M.A., 'Understanding the illiberal turn: democratic backsliding in the Czech Republic' (2018) 34:3 *East European Politics* 282, DOI: 10.1080/21599165.2018.1493457

<sup>85</sup> *ibid.* 277

<sup>86</sup> cf Pehe, J., (n 81) 69

level state servants and several important positions with his allies. Despite the fact that the Parliament of the Czech Republic consists of two chambers, where due to the Upper House's (Senate) veto power, any change to the constitution is particularly hard, there are still ambitions to circumvent the democratic values and the rule of law. In his book 'What I dream about when I happen to be Sleeping' Andrej Babiš expressed his personal vision regarding the future, where he advocates for a political change, which eliminates the system of checks and balances and abolishes the Senate.<sup>87</sup>

In December 2019, a survey was conducted by the European Commission, where the citizens of the European Union had been asked about the degree of corruption in their respective Member States.<sup>88</sup> Based on the survey, 87% of the Czech citizens consider corruption as a big problem in their home country, of which 22% thinks that they are personally affected by it in their daily life. Furthermore, 80% of the Czech people believe that a close link between business and politics leads to corruption. According to the Freedom House, the Czech Republic in 2020 is considered to be a 'free' country with a score of 91 out of 100.<sup>89</sup> However, the organization emphasizes that in the recent years the corruption has increased, thus the normal legislative activity is impeded where the influence of the business sphere to the political life is observable. As stated in the report, the deficiencies of the country reside in the ineffective tools against corruption, in the lack of independent media, and in the independence of the judiciary. If one compares the results of 2020 with the results of 2017<sup>90</sup>, a three point drop is noticeable since Andrej Babiš' ANO took over the leadership of the country.

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<sup>87</sup> cf Hanley, S., & Vachudova, M.A., (n 84) 282

<sup>88</sup> Special Eurobarometer 502 Corruption - Czechia , December 2019

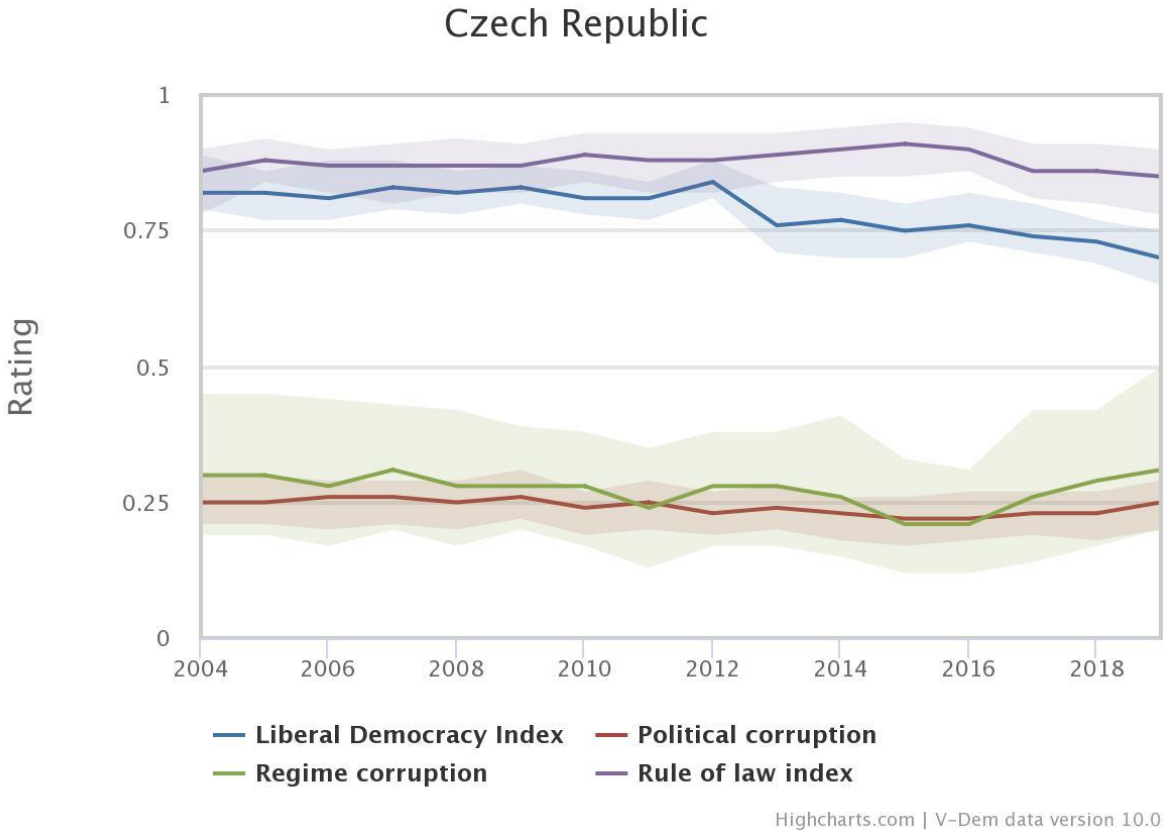
<sup>89</sup> Freedom House, 'Annual Report - Czech Republic 2020' (Freedom House)

<https://freedomhouse.org/country/czech-republic/freedom-world/2020> accessed 30 July 2020

<sup>90</sup> Freedom House, 'Annual Report - Czech Republic 2017' (Freedom House)

<https://freedomhouse.org/country/czech-republic/freedom-world/2017> accessed 30 July 2020

Figure 1.



Source: V-Dem, <https://www.v-dem.net/en/analysis/CountryGraph/>

The focus of this thesis is on the rule of law compliance in the Member States of the EU. Therefore it is particularly important to examine the countries in question in this regard. The graph shows information about the changes regarding corruption, liberal democracy, and rule of law from the 2004 accession up until the present day in the Czech Republic. It can be seen how the different aspects have been affected by the political events. The data retrieved from V-Dem shows that from the accession until 2017, the rule of law index remained relatively steady, however after the election of Andrej Babiš it started to decrease. The same tendency can be observed regarding the political corruption in the country, which was present before, but from 2017 on, the increase is considerable. Another essential aspect to analyse is the liberal democracy index, which also confirms that government change did affect the liberal values. The graph shows that after the government change in 2013 and after the parliamentary elections in 2017, there was a dramatic decrease in this regard. Regime

corruption - as mentioned before – has also been a significant factor in the Czech Republic, although it increased significantly - just as the other three aspects – after 2017. In light of this data, the survey conducted in April 2019 by the European Commission on the rule of law is of particular importance.<sup>91</sup> Pursuant to the survey, 31% of the Czech citizens consider the respect of the fundamental rights, the rule of law and democracy an essential and other 47% an important factor. Moreover, 69% of the Czech people deem media freedom as an essential or important issue.

#### 4.1.2. Measures adopted to address breaches of EU law

##### *(i) Conflict of interest and the protection of the EU budget in the Czech Republic*

In 2018 the European Parliament adopted a resolution ‘on conflicts of interest and the protection of the EU budget in the Czech Republic’.<sup>92</sup> The motion initially claimed that, because of being the beneficial owner of the Agrofert Group - that during the 2014-2020 period received a significant amount of EU fund -, Prime Minister Andrej Babiš violated the EU law on conflicts of interest. Therefore, the Commission was encouraged to recover the ‘illegally or irregularly’ paid funds amounting to EUR 17.5 million.<sup>93</sup> In June 2020, the European Parliament adopted another resolution ‘on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest’.<sup>94</sup> The resolution claims that Andrej Babiš as a Prime Minister has been actively involved in the implementation of the EU budget, while still remaining the head of the Agrofert Group, which as part of the so-called ‘Stork nest’ project “artificially created a medium-sized company, which remained in Agrofert’s control, in order to obtain funds [...] amounting to a

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<sup>91</sup> Eurobarometer 91.3 Rule of Law - Czechia, April 2019

<sup>92</sup> European Parliament, ‘Resolution on conflicts of interest and the protection of the EU budget in the Czech Republic’ P8\_TA(2018)0530

<sup>93</sup> Zachová, A., ‘Czech PM attacks ‘eurocrats’ over EU funds misuse suspicions’ (*Euractiv.com*, 11 June 2019) <https://www.euractiv.com/section/politics/news/czech-pm-attacks-eurocrats-over-eu-funds-misuse-suspicions/> accessed 16 September 2020

<sup>94</sup> European Parliament, ‘Resolution on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest’ P9\_TA(2020)0164

total of around EUR 2 million.”<sup>95</sup> Although, according to Directive 2014/24/EU<sup>96</sup> on the public procurement rules, Member States are obliged to avoid any kind of conflict of interests, the Agrofert Group - under the leadership of PM Babiš - received EU payments not only inside but also outside of the Czech Republic in 2018 and 2019. Therefore the Commission and the Council were called on to handle the issue, e.g., by urgently adopting the proposed regulation ‘on the protection of the Union’s budget in the case of generalised deficiencies as regards the rule of law in Member States’.

## 4.2. The case of Hungary

### 4.2.1. Actions of the governing party – Fiala Demokraták Szövetsége (Fidesz)

The regime change of 1989 led to the alteration of the political system in Hungary as well. The country was among the first countries in the former Eastern Bloc, where the institutional elements of constitutionalism had been established. Before the 2010 parliamentary elections, the dissatisfaction with the Socialist government and with the transition itself had grown. According to a survey conducted by the European Commission in 2009<sup>97</sup>, the majority of the Hungarian citizens claimed that they had been better off under the old regime, before the transition.

In 2010 Viktor Orbán won the general elections with an overwhelming 68% of the votes, gaining 264 seats out of 386 in the Hungarian Parliament and took over the leadership of the country. This two-thirds supermajority enabled the Fidesz government to shape the constitution pursuant to their will. In the first year, the government amended the constitution twelve times, with changes that mostly aimed to weaken the institutions that were originally established to monitor the executive power. Shortly after the elections, the office of the Head of State of Hungary was given to the party loyalist Pál Schmitt, who in 2012 was replaced with

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<sup>95</sup> *ibid.* Recital A

<sup>96</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ L 94

<sup>97</sup> Eurobarometer 71 – Public opinion in the European Union, July 2009



János Áder, the current President. The institution of the President in Hungary is comprised mainly of formal tasks (e.g., representing the country abroad), however, the Head of State also has the power to oversee the democratic functioning of Hungary, more importantly he or she has veto rights over the legislation. However, in the past ten years this veto power has not been used - in cardinal issues - by the previously mentioned Presidents, but they assisted in the dismantling of the system of checks and balances. The new constitution (Fundamental Law) contains a number of issues (e.g., family policy, pension system, public service provisions) that require a two-thirds majority to regulate, which makes for the future parliamentary majorities difficult to change.<sup>98</sup> As stated by the Venice Commission in its opinion on the Hungarian constitution, “the more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country’s legal order.”<sup>99</sup>

After the regime change for more than twenty years the Constitutional Court had been the guardian of the constitution, but with the win of Fidesz in 2010 it has also changed. The Constitutional Court (now Curia) became a subordinate to the government, where the decisions made are – except for some cases – in favour of the ruling party. The changes in the constitution affected the process of the appointment of the judges as well. While the old constitution first required a majority of the parties in the parliament to a nomination and then a two-thirds majority of the MP’s to the election of a candidate to the Court, the Fundamental Law allows the government to nominate judges and elect them with their two-thirds majority in the parliament.<sup>100</sup> As a result, the governing party replaced the judges in the Constitutional court with party loyalists and extended their mandate to 12 years from 9 years. This change in personnel resulted – as stated by Edit Zgut – with a drop of 300% in the number of the investigation into state corruption and with the fact that 77% of the cases were ruled in favour of the government between 2010 and 2014.<sup>101</sup> Another excellent example for the elimination of the checks and balances is the restructuring the office of the ombudsman in 2011. While the old system was composed of four separate ombudsmen with their own personnel and jurisdictions, the new system consists of only one commissioner for fundamental rights. The

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<sup>98</sup> Bertelsmann Stiftung, BTI 2014 Country Report – Hungary (2014)

<sup>99</sup> European Commission for Democracy Through Law, ‘Opinion on the new constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session’ (2011) CDL-AD(2011)016 para 24

<sup>100</sup> Bánkúti, M., & Halmai, G., & Scheppele, K.L., ‘Hungary’s Illiberal Turn: Disabling the Constitution’ (2012) 23(3) Journal of Democracy 138-146

<sup>101</sup> Zgut E., ‘Visegrád jövője az illiberalizmus és az uniós makropolitika árnyékában’ (2017) Political Capital

other three offices have been terminated and the remaining one position was given to a party loyalist.<sup>102</sup> In 2013, the fourth amendment of the constitution annulled all Court decisions prior to when the new constitution entered into force. As stated by Halmai, this act has undermined the legal security in terms of protection of constitutional rights, because it “annuls primarily the decisions that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law.”<sup>103</sup>

Thanks to the new electoral system, the 2014 and 2018 parliamentary elections both resulted in a two-thirds majority win for Fidesz, and the governing party used this power to continue to dismantle the checks and balances in Hungary. In 2014 in his speech in Tusnádfürdő, the Prime Minister expressed that his primary aim is to build a successful and competitive country. However, to reach this goal he does not intend to follow the doctrines which are accepted in Europe, but he prefers those systems (e.g., Singapore, China, Russia, Turkey) which are “not Western, not liberal, not liberal democracies and perhaps not even democracies.”<sup>104</sup>

The media outlets in Hungary are also often used by Fidesz to gain an advantage over the opposition. This trend could be witnessed at the 2014 parliamentary elections, which was given the ‘free but not fair’ stamp by the Organization for Security and Co-operation in Europe. István Hegedűs and Zsuzsanna Végh have summarized the characteristics of the government controlled media in the country. Pursuant to the authors, in the recent years the public service media has been politicized and replaced by the state media, which is primarily dominated by oligarchs loyal to the governing party. Moreover, these loyalists are often appointed to key positions (e.g., the Head of the Media Authority) to ensure that the will of the government is guaranteed.<sup>105</sup> Besides the public national television, the government also controls several private television channels, radio stations, furthermore, every printed local newspaper. Media outlets close to the government received almost 66% of state advertisements.<sup>106</sup>

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<sup>102</sup> Bíró-Nagy, A., ‘Illiberal democracy in Hungary: The social background and practical steps of building an illiberal state’ in Morillas, P., (ed) ‘*Illiberal democracies in the EU. The Visegrad Group and the risk of disintegration*’ (CIDOB Barcelona, 31-44., 2017)

<sup>103</sup> Halmai, G., ‘Illiberal constitutionalism? The Hungarian constitution in a European perspective’ in Kadelbach, S., (ed.), ‘*Verfassungskrisen in der EU*’ (Nomos, 89, 2018)

<sup>104</sup> Orbán Viktor’s speech at the XXV. Bálványosi Nyári Szabadegyetem és Diáktábor, Tusnádfürdő (Báile Tusnad), 26 July 2014

<sup>105</sup> Hegedűs, I., & Végh, Zs., ‘Illiberal Democracies: What can the European Union do in case a member state regularly and systematically breaches European values and regulations?’ (2015) Policy paper, Hungarian Europe Society

<sup>106</sup> ‘Állami reklámköltség 2006-2018’ (*Átlátszó.hu*, 16 April 2019) <https://mertek.atlatszo.hu/allami-reklamkoltes-2006-2018/> accessed 5 August 2020

According to the Bertelsmann Transformation Index, the freedom of expression in Hungary is deteriorating since 2010. While before Fidesz took over the leadership of the country, the freedom of expression reached the highest rating (10 out of 10), in 2020 this rate halved, gaining only 5 out of 10 points.<sup>107</sup> Despite the fact that in Hungary there are less and less independent media outlets, 88% of the citizens of the country consider that it is important or essential to provide an environment where the media and journalists can criticise the government without risk of intimidation.<sup>108</sup>

Pursuant to the survey on corruption, which was conducted by the European Commission in December 2019, 87% of the Hungarian people think that corruption is 'widespread' in their home country, and 57% that the level of it increased in the past three years. Furthermore, 32% of the persons asked believe that they are personally affected by corruption in their daily life.<sup>109</sup> As reported by the Freedom House, Hungary is no longer considered to be a 'free' country, but only 'partly free' receiving only 70 out of 100 points, being the only Member State in the European Union earning this label. According to the latest report of 2020, the main deficiencies are in the areas of political pluralism, corruption, the transparency of the government, the freedom of the media, and rule of law.<sup>110</sup> Moreover, since Fidesz took over the leadership, from being a 'consolidated democracy' the country had been transformed into a semi-consolidated democracy' in 2015, and during the past five years Hungary has been reconstructed to a 'hybrid regime'.<sup>111</sup>

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<sup>107</sup> Bertelsmann Stiftung, BTI 2020 Country Report – Hungary (2020)

<sup>108</sup> Eurobarometer 91.3 Rule of Law – Hungary, April 2019

<sup>109</sup> Special Eurobarometer 502 Corruption – Hungary, December 2019

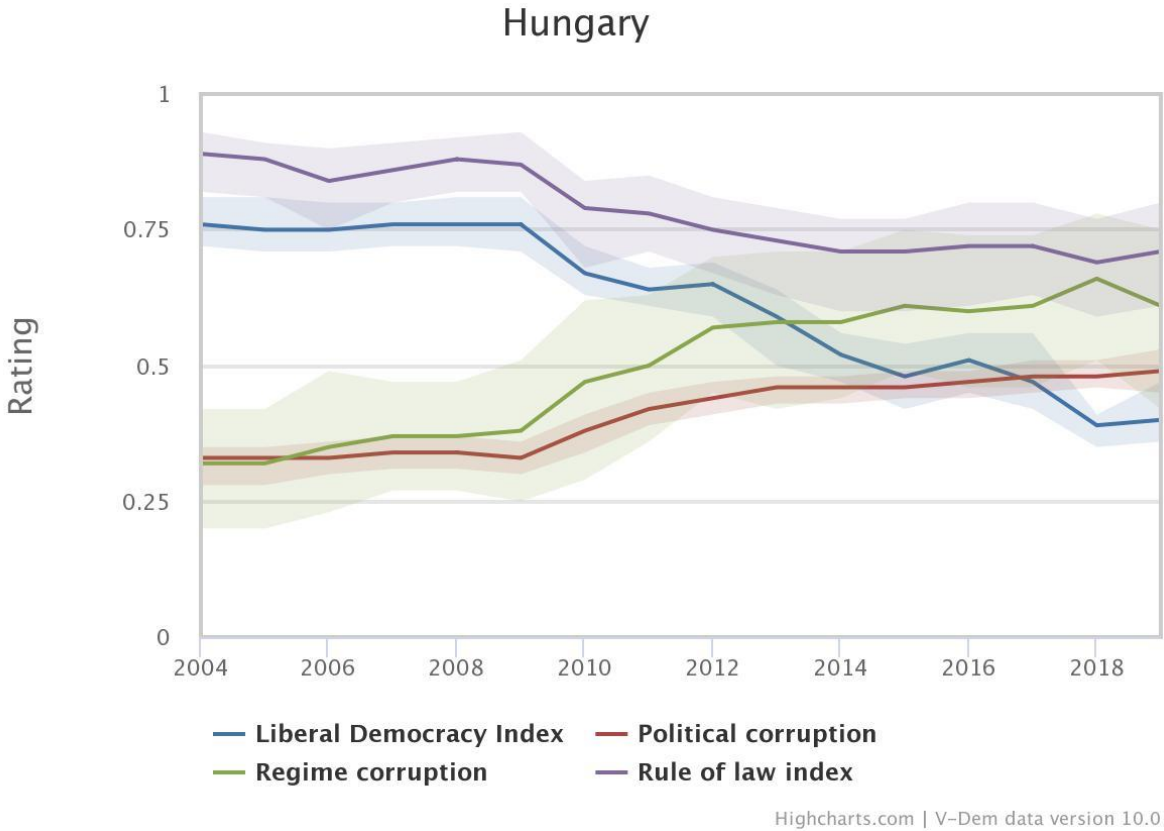
<sup>110</sup> Freedom House, 'Annual Report – Hungary 2020' (Freedom House)

<https://freedomhouse.org/country/hungary/freedom-world/2020> accessed 5 August 2020

<sup>111</sup> Freedom House, 'Nations in Transit – Hungary 2020' (Freedom House)

<https://freedomhouse.org/country/hungary/nations-transit/2020> accessed 6 August 2020

Figure 2.



Source: V-Dem, <https://www.v-dem.net/en/analysis/CountryGraph/>

The graph shows information about the changes regarding corruption, liberal democracy, and rule of law from the 2004 accession up until 2020 in Hungary. It is conspicuous how the particular spheres have been influenced by the different political events during time. It can be seen that all the examined areas have been relatively steady until 2010, nevertheless after the election of Viktor Orbán this tendency has changed. The political and regime corruption in the country had been relatively high before the government change as well, however with the end of the term of the Socialist government both have developed, especially the regime corruption increased considerably. At the same time with the increase of corruption, the liberal democracy index and the rule of law index started to decrease significantly in the country. The data retrieved from V-Dem shows that – just as in the case of the Czech Republic – the government change has negatively affected the functioning of Hungary.

Keeping these data in mind, it is of particular importance that according to the previously mentioned survey on the rule of law, 55% of the Hungarian citizens consider the respect of

the fundamental rights, the rule of law and democracy an essential and another 37% an important factor.<sup>112</sup>

#### 4.2.2. Measures adopted to address breaches of EU law

The above presented measures and ideological statements of the Orbán government drew the attention of the European institutions on the shortcomings of the Hungarian system when it comes to the rule of law and liberal democracy. The growing number of the actions and procedures against Hungary on the European level shows that the tension between the Member State and Brussels has increased.

##### *(i) Media Law*

The reform of the Hungarian Media Law of 1996 had been due for a long time on which – despite the several meetings – the parties had not been able to agree. However, the results of the 2010 parliamentary elections gave Fidesz the power to circumvent the other parties and shape the media law (as a result of its two-thirds supermajority) arbitrarily. The new Hungarian Media Law was adopted in 2010 and was heavily criticized for several reasons on the national as well as on the European level. Pursuant to the new legislation, the Head of the Media Authority – who is the only person with decision making power in the institution - is appointed by the Minister President for nine years and the members of the Media Council are selected – in the absence of consensus – by a two-thirds majority in the parliament.<sup>113</sup> These key positions have been filled up ever since with Fidesz party loyalists, whose term for nine years ensures the influence of Fidesz on the Hungarian public sphere, irrespective of its success in the subsequent elections. The newly established Media Council has a wide range of competences, most importantly, it can appoint the directors of public outlets, it controls and ensures the freedom of the press, it is able to impose fines where the report is not deemed to

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<sup>112</sup> Eurobarometer 91.3 Rule of Law – Hungary, April 2019

<sup>113</sup> 2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról, para 124

be politically balanced furthermore, it is entrusted with the task of tendering.<sup>114</sup> Neelie Kroes, then-Vice-President of the European Commission expressed her concerns regarding the Hungarian Media Law. The Commission decided not to launch an infringement procedure, but to reach compliance with the help of social pressure, exchange of letters, and personal meetings. In her speech, Vice-President Kroes - after a number of meetings with the Hungarian parties - communicated that the new legislation “risks jeopardizing fundamental rights in a number of ways”, which besides the fact that it is not in compliance with the Audiovisual and Media Services Directive of the European Union, might also violate one of the “essential foundations” of the democratic societies, the freedom of expression.<sup>115</sup> The European Parliament also expressed its concerns regarding the media law and called on the Hungarian government to change certain sections of the legislation so as to ensure the freedom of expression and the effective pluralism in the public sphere.<sup>116</sup> Even though the Hungarian government made a promise to change to rules of foreign media and the rules against unbalances coverage and offensive internet content, Sedelmeier argues that the measures used had been predominantly ineffective.<sup>117</sup>

(ii) *Early retirement of judges in Hungary (Case C-286/12)*

Hungary’s new constitution, the Fundamental Law entered into force in 2012, which included a number of contested amendments regarding the independence of the judiciary. One of the most criticized modification was the reduction of the retirement age of the Hungarian judges from seventy years to sixty-two years. The judges who were forced to retire brought their cases to the Constitutional Court, which declared the unconstitutionality of the measures brought by the Fundamental Law, which also violated the independence of the judges.<sup>118</sup> In spite of the judgement of the Constitutional Court, Prime Minister Viktor Orbán claimed that

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<sup>114</sup> 2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról paras 132,182-184

<sup>115</sup> Speech of Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda on Hungary’s new media law. European Parliament (Brussels, Belgium, 11 January 2011) [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_11\\_786](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_786)

<sup>116</sup> European Parliament, ‘European Parliament resolution of 10 March 2011 on media law in Hungary’ P7\_TA(2011)0094

<sup>117</sup> cf Sedelmeier, U., (n 9) 116.

<sup>118</sup> Jogi Fórum, ‘Alkotmányellenes a bírák kötelező nyugdíjazása’ (*Jogi Fórum*, 16 July 2012) <https://www.jogiforum.hu/hirek/27991> accessed 15 August 2020

the system would remain in place.<sup>119</sup> As a consequence of the dismissal of the judges, the European Commission initiated the infringement procedure under Article 258 of the TFEU against Hungary, and on 17 January 2012 it sent a formal notice to the Member State. After the response of Hungary, the Commission issued a reasoned opinion to the country requesting it to take the necessary measures to comply with EU law. The reply of Hungary was not deemed satisfactory, therefore the Commission moved to the next step of the procedure and brought the case before the Court of Justice of the European Union.<sup>120</sup> In its judgement, the Court held that Hungary had failed to fulfil its obligations under the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, because the lowered compulsory retirement age of the judges was not proportionate and gave rise to “unjustified discrimination”.<sup>121</sup> After the judgement of the Court, the Hungarian government took the necessary measures to comply with the decision. However, the decision of the ECJ was not able to help the injured judges to get their previous occupations back and to stop Fidesz from the dismantling of the checks and balances, since the ruling party had already reached its aim and replaced the former judges with new ones who are loyal to the Hungarian government.

(iii) *Preventive procedure concerning Hungary (2017/2131(INL) and 2020/2513(RSP))*

On 15 May 2017, the European Parliament adopted a resolution on the situation in Hungary, which according to the statement of the Parliament, represented a clear risk of a serious breach of the values referred to in Article 2 of the TEU.<sup>122</sup> The text was adopted by 393 votes to 221, with 64 abstentions and commanded the Hungarian government to comply with EU law in several issue areas. Furthermore, the European Commission was also entrusted with the task to monitor and ensure the legality of the use of EU funds in the Member State. On 4 July 2018, the instructed Committees submitted their report on a proposal calling on the

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<sup>119</sup> Halmai, G., ‘The early retirement age of the Hungarian judges’ in Fernanda and Davis (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) DOI: 10.1017/9781316340479.024

<sup>120</sup> Case C-286/12 *European Commission v Hungary* [2012] ECLI:EU:C:2012:687, paras 18-19

<sup>121</sup> *ibid.* paras 1 and 22

<sup>122</sup> European Parliament, ‘European Parliament resolution of 17 May 2017 on the situation in Hungary’ P8\_TA(2017)0216

Council to determine - under Article 7(1) of the TEU - the existence of a clear risk of a serious breach of the fundamental values of the EU, since Hungary - in spite of the discussions - had failed to take the necessary measures previously recommended by the Parliament.<sup>123</sup> The main concerns of the report by the Dutch Green MEP Judith Sargentini were the independence of the judiciary, the rights of the judges, corruption, and fundamental rights. After a debate on its plenary meeting in September 2018, the European Parliament adopted the resolution by 448 votes to 197, with 48 abstentions.<sup>124</sup> With this step, the European Parliament initiated the procedure laid down in Article 7(1) of the TEU that could eventually lead to sanctions such as the suspension of the voting right in the Council. However, after two years in 2020, the procedure is still ongoing without any progress, while the situation in Hungary has been deteriorating since the triggering of Article 7 of the TEU.

### 4.3. The case of Poland

#### 4.3.1. Actions of the governing party – Prawo i Sprawiedliwość (PiS)

Similarly to Hungary and the Czech Republic after 1989, the democratic transition began in Poland as well. Between 2007 and 2015, the country was led by the coalition of the Civic Platform (PO) and the Polish People's Party (PSL) with Donald Tusk in the position of the Prime Minister. Within this time, the coalition improved the relations between Poland and Germany and with the European Union as well, moreover, in 2011 it managed to win a second term, which had never happened before since the end of the communist era. However, during the second term several controversial reforms had been made that affected the assessment of the governing coalition, such as the statutory retirement age to 67 years from 65 years in the case of men and 60 years in the case of women.<sup>125</sup> These disputed decisions led to the

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<sup>123</sup> European Parliament, 'Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' A8-0250/2018

<sup>124</sup> European Parliament, 'European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' P8\_TA(2018)0340

<sup>125</sup> Marcinkiewicz, K., & Stegmaier, M., 'The parliamentary election in Poland, October 2015' (2016) Electoral Studies, DOI: <http://dx.doi.org/10.1016/j.electstud.2016.01.004>



decrease of the popularity of the party, of which the first sign was the presidential election of May 2015, where the nominee of the opposition party Law and Justice (PiS) won in the second round. The win of Andrzej Duda forecasted the possible outcome of the parliamentary elections of October 2015. After the presidential election, during the campaign, the opposition party successfully gained supporters for instance by criticising the government's controversial reforms. This tactic turned out to be profitable since PiS won the elections with 37,58%, gaining 235 out of 460 seats in the Sejm (the lower house of the Polish parliament) and 61 seats out of 100 in the Senate (the upper house of the Polish parliament).<sup>126</sup>

The results gave the party a simple majority, which allowed them to introduce several changes in the constitution that resonate with the Hungarian reforms. Similarly to Fidesz in Hungary, Law and Justice began to dismantle the checks and balances by undermining the legitimacy of the judiciary and by increasing the political control over public institutions. Starting in November 2015, the Act on the Constitutional Tribunal was amended so that the new government could nominate five new judges - who are loyal to PiS - by annulling the previous nominations of the former government. The first amendment was followed by another modification, which affected not only the functioning of the tribunal but also the independence of the judges.<sup>127</sup> This new law was deemed to be unconstitutional by the Constitutional Tribunal, but the governing party refused to recognize the judgment<sup>128</sup> and adopted the new law in spite of the fact that according to Article 190 of the Polish Constitution, "the judgments of the Constitutional Tribunal shall be of universally binding application and shall be final". The governing party continued with the political takeover of the key public institutions and with an amendment to the Act on Prosecution, it changed the rules on the appointment of the governing bodies in public media and made the prosecutor general a political position subordinate to the executive. These actions of the government led to the complete takeover of the Tribunal. Additionally, in 2017 the parliament adopted a new law that attacked the judicial independence of the Supreme Court and under which Supreme Court judges were forced to retire. The President of the Republic is the head of the executive branch, furthermore, he also has a veto power to stop laws deemed to be unconstitutional.

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<sup>126</sup> *ibid.* 3

<sup>127</sup> Szymielewicz, K., 'Poland after November 2015: The end of the rule of law or a phase of "radical democracy"?' in Morillas, P., (ed) '*Illiberal democracies in the EU. The Visegrad Group and the risk of disintegration*' (CIDOB Barcelona, 55-66., 2017)

<sup>128</sup> Kelemen R.D., 'Europe's other democratic deficit: National authoritarianism in Europe's democratic union' (2017) *Government and Opposition*, 52(2), 211-238.

However, despite of the protests and the sharp criticism on the European level, President Duda signed the new laws, thereby giving the president and justice minister more control over the judiciary.<sup>129</sup>

As experienced in Hungary, the independence of the media has been injured in Poland as well. The takeover of the public media begun with changes of the rules on the appointment of the personnel, whereby the government guaranteed itself a high degree of influence. By changing the personnel and creating a new supervisory body with politicians loyal to the ruling party in the key positions, Law and Justice took over the control of the public media.<sup>130</sup>

Pursuant to the Bertelsmann Transformation Index, in 2015 - before PiS took over the leadership of the country – there was a clear separation of powers with well-functioning checks and balances, where the independence of the judiciary was ensured, the stability of the democratic institutions and the freedom of expression was also guaranteed, gaining 10 out of 10 points in these regards.<sup>131</sup> However, these rates decreased by 2020 due to the recent political developments gaining only 6 and respectively 7 points out of 10.<sup>132</sup> The same tendency can be observed when one examines the Nations in Transit report of the Freedom House of 2015 and 2020. While Poland was deemed to be a ‘consolidated democracy’ before the current government won the elections, after five years of PiS administration, the country has been downgraded and is considered only as a ‘semi-consolidated democracy’.<sup>133</sup> As stated by the latest report, the Member State is still regarded as a ‘free’ country, receiving 84 out of 100 points, but there are several areas that need to be developed. The main deficiencies are in the fields of the freedom of the media, the transparency of the government, and the independence of the judiciary.

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<sup>129</sup> Hooper M., ‘Poland’ in ‘The anatomy of illiberal states: Assessing and responding to democratic decline in Turkey and Central Europe’ (2019) Foreign Policy

<sup>130</sup> Przyblyski W. ‘Poland: Illiberalism in the making’ in Zgut E. (ed), ‘Illiberalism in the V4: Pressure points and bright spots’ (2018) Political Capital and Friedrich Naumann Stiftung 24-36.

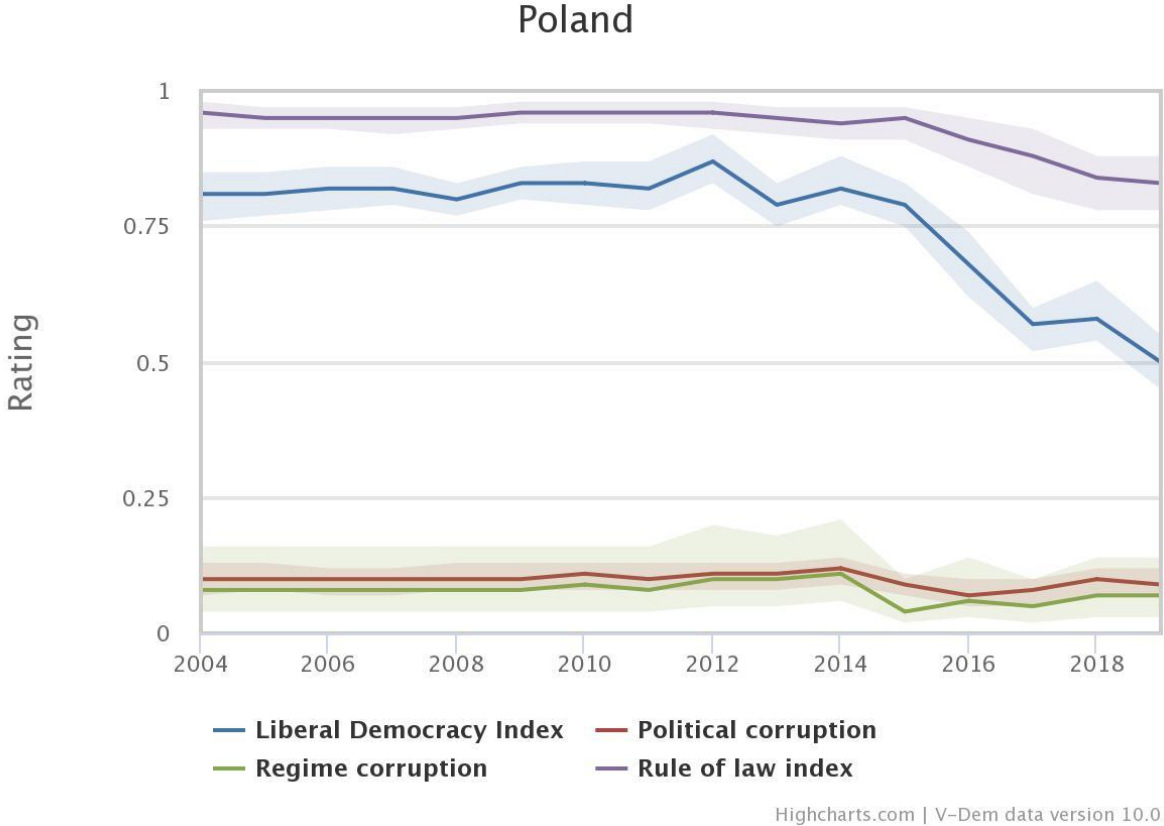
<sup>131</sup> Bertelsmann Stiftung, BTI 2015 Country Report – Poland (2015)

<sup>132</sup> Bertelsmann Stiftung, BTI 2020 Country Report – Poland (2020)

<sup>133</sup> Freedom House, ‘Nations in Transit 2020 – Poland’ (Freedom House)

<https://freedomhouse.org/country/poland/nations-transit/2020> accessed 19 August 2020

Figure 3.



Source: V-Dem, <https://www.v-dem.net/en/analysis/CountryGraph/>

The graph retrieved from V-Dem shows information about the changes regarding the rule of law, liberal democracy, and corruption from the accession up until 2020. It is noticeable how the various political events have influenced certain fields. In the case of Poland, the pattern is the same as it was in Hungary and in the Czech Republic, namely all the examined areas had been somewhat steady until the new government took office. In this particular case, the fracture occurred in 2015 and from that point on the rule of law and especially the sphere of liberal democracy have been deteriorating, which reflects the above listed activities of the leading party. Although pursuant to the graph, the level of corruption has remained relatively low and steady, 37% of the Polish citizens feel personally affected by corruption in their daily life.<sup>134</sup>

<sup>134</sup> Special Eurobarometer 502 Corruption – Poland, December 2019

#### 4.3.2. Measures adopted to address breaches of EU law

The afore-mentioned acts of the Law and Justice government in the recent years have attracted the attention of the institutions of the EU. The deteriorations of the rule of law and liberal democracy have led to the activation of several measures against Poland.

(i) *Activation of the Rule of Law Framework with regard to Poland (2016)*

The Rule of Law Framework was activated for the first time with regard to Poland in 2016, when the European Commission decided - as the first step of the Framework - to engage in a preliminary assessment of the developments made by the government. The Commission initiated a dialogue with the Polish authorities regarding the constitutional situation and the proposed reforms, with the aim to seek information. After several rounds of correspondence and personal meetings, the concerns expressed by the Commission had not been resolved, therefore - as the second step of the Framework - it adopted a recommendation on 27 July 2016.<sup>135</sup> The recommendation shed light on the rule of law deficiencies in Poland and offered solutions to the government on how to address the issues, such as the appointment of the judges of the Constitutional Tribunal, the implementation of the judgments of the Constitutional tribunal or the effective functioning of the Constitutional Tribunal. In order to address the systemic threat to the rule of law, the Commission suggested five concrete actions and gave the Polish government three months to solve the problems.<sup>136</sup> The Polish authorities failed to put an end to its unlawful practices within the time limit set and continued to challenge the independence of the judiciary. However, the Commission instead of activating one of the mechanisms set out in Article 7 of the TEU, decided to adopt another recommendation in December 2016. The Commission justified its step by claiming that although some issues had been addressed, several “important issues remain unresolved, and new concerns have arisen in the meantime”, such as the effectiveness of the constitutional

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<sup>135</sup> European Commission, 'Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland' OJ L 217

<sup>136</sup> *ibid.* paras 74-76.

review, the composition of the Constitutional Tribunal or the publication of its judgements.<sup>137</sup> Considering the continuing existence of the systemic threat to the rule of law, the Commission issued several additional recommendations to the Polish authorities and gave a two months time-limit to comply.<sup>138</sup> Despite the fact that the Polish government had not taken the necessary measures, the Commission still decided to procrastinate the immediate triggering of Article 7 of the TEU and chose to engage in further dialogues with the Member State and with the Council. This led to a complementary third Rule of Law Recommendation, which was justified by the lack of an independent and legitimate constitutional review and the nature of the new legislation adopted by the Polish Parliament. The Commission requested the Polish authorities to address these problems within one month, with the threat of triggering the Article 7 procedure. Moreover, the Commission emphasized that due to the restructuring of the Constitutional Tribunal, its “independence and legitimacy of the seriously undermined and the constitutionality of Polish laws can no longer be effectively guaranteed.”<sup>139</sup> Furthermore, the Commission decided to initiate an infringement procedure regarding the Law on the Ordinary Courts “on the basis of gender discrimination due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years)” and additionally on the basis of undermining the independence of Polish courts by “giving the Minister of Justice a discretionary power to prolong the mandate of judges which have reached retirement age.”<sup>140</sup> Although the infringement procedure had been launched against the Member State, the procrastination of the actions from the side of the Commission enabled the Polish authorities to further undermine the independence of the judiciary during the course of the Rule of Law Framework.

(ii) *Preventive procedure concerning Poland (launched by the Commission in 2017)*

After receiving the third recommendation, the Polish government – in its reply – disagreed with the assessment and did not take the necessary measures to address the concerns of the

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<sup>137</sup> European Commission, ‘Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374’ OJ L 22, para 61.

<sup>138</sup> *ibid.* paras 65-68.

<sup>139</sup> European Commission, ‘Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146’ OJ L 228, para 45(1)

<sup>140</sup> European Commission, ‘European Commission acts to preserve the rule of law in Poland’ IP/17/2161 (Press release) (2017)

Commission, moreover on 26 September 2017, two new draft laws on the Supreme Court and the National Council for the Judiciary were proposed, which would further undermine the independence of the judiciary. In December 2017, the new draft laws were adopted by the Sejm and by the Senate as well.<sup>141</sup> Since the Polish authorities had failed to take the necessary actions recommended, the Council of the European Union having regard to the reasoned proposal of the European Commission and the consent of the European Parliament stated, that there was a clear risk of a serious breach by the Republic of Poland of the rule of law and advised several actions to take (within three months) to comply with EU law.<sup>142</sup> Despite the fact that there have been several discussions between the Council and the Polish government since the initiation of the preventive mechanism, the Commission's concerns remained unanswered, and the procedure is still ongoing.

(iii) *Commission v Poland (Case C-192/18)*

On 15 March 2018, the Commission brought an action before the European Court of Justice under Article 258 of the TFEU regarding the issues of differentiated retirement ages for female and male judges and of the discretionary power of the Minister of Justice to prolong the mandate of those judges who reached the retirement age. The Commission argued that Poland had failed to fulfil its obligations under Article 19(1) of the TEU and Article 47 of the Charter of Fundamental Rights of the European Union.<sup>143</sup> In the meantime, the Polish authorities changed the laws in question and argued that the "Commission's application is generalised, hypothetical, abstract and a violation of Poland's competence to organise its own system for the administration of justice".<sup>144</sup> However, despite the argumentation of the Polish government, Advocate General Tanchev claimed that both complaints of the Commission were well founded.<sup>145</sup> The Court delivered its judgement on the case on 5 November 2019 in

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<sup>141</sup> European Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland' (Proposal) COM(2017) 835 final, paras 62,71,72,90

<sup>142</sup> European Commission, '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' 2017/0360 (NLE)

<sup>143</sup> Case C-192/18 *Commission v Poland* [2018], Application OJ 2006 L 204

<sup>144</sup> Case C-192/18 *Commission v Poland* [2019], Opinion of Advocate General Tanchev, ECLI:EU:C:2019:529, para 60

<sup>145</sup> Case C-192/18 *Commission v Poland* [2019], Opinion of Advocate General Tanchev, ECLI:EU:C:2019:529

which the ECJ declared that Poland has failed to fulfil its obligations under EU law and ordered the Republic of Poland to pay the costs.<sup>146</sup>

The initial assumption of this section was that under the current rules, Member States can avoid or delay compliance by engaging only symbolically. Based on the empirical evidence brought by the cases, this hypothesis is confirmed.

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<sup>146</sup> Case C-192/18 *Commission v Poland* [2019], Judgment of the Court, ECLI:EU:C:2019:924

## Chapter 5: Analysis

The actions taken at the EU level – which have been presented above in the country-specific part of this thesis - have shown the ineffectiveness of the tools currently available when it comes to the protection of the fundamental values of the Union. As stated by the Commission, “there is currently no mechanism in place to protect EU taxpayers’ money in case of deficiencies regarding the rule of law in a Member State.”<sup>147</sup> To that end, in May 2018, the European Commission proposed 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’, a new instrument - as part of the EU’s long-term budget from 2021 to 2027 -, which would make EU funding conditional upon the respect for the rule of law. The proposed rule of law conditionality would be financially “by far the most significant EU conditionality ever proposed in EU internal policies.”<sup>148</sup> The draft regulation is based on Article 322(1)(a) of the TFEU and Article 106a of the Treaty establishing the European Atomic Energy Community.

Conditionality as a principle is not a new measure within the EU’s toolkit, as it has also been used during the enlargement negotiations. According to the Commission’s proposal, if adopted, it would allow the withdrawal of EU funds from those Member States where generalised deficiencies as regards the rule of law can be found, that affect the financial interest of the EU, thus it would also ensure the lawful usage of the funds. This could be particularly effective since rule of law deficiencies arose mostly in those countries which have benefitted most from EU funds.

As stated in the introduction, the main aim of this thesis is to assess the possible effectiveness of the rule of law conditionality of EU funds. To that end, in the following section the European Commission’s original proposal and the European Parliament’s legislative resolution with the help of the External Incentives Model are evaluated. For the assessment, the following hypothesis is tested:

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<sup>147</sup> European Commission, ‘EU budget for the future – sound financial management and the rule of law’ (*Europa.eu*, 2018) <https://op.europa.eu/en/publication-detail/-/publication/20d5496b-526a-11e8-be1d-01aa75ed71a1/language-en> accessed 28 August 2020

<sup>148</sup> Policy Department for Structural and Cohesion Policies, ‘Conditionalities in Cohesion Policy’ (Study) (2018) PE 617. 498, p 47



*H2: Making EU funds conditional to the compliance with the fundamental values would be an effective measure to terminate rule of law backsliding in the EU.*

5.1. The European Commission's proposal on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States

(i) *Determinacy of conditions*

As described above, the clearer the rule, the higher its determinacy, and the more effective it is. Since the proposed regulation would focus on the rule of law deficiencies in the Member States, Article 2(a) of the draft regulation provides a detailed definition for the rule of law, which reads as follows:

*“the rule of law’ refers to the Union value enshrined in Article 2 of the Treaty on European Union 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.”*

Whereas there is a detailed interpretation regarding the rule of law, Article 2(b) describes the ‘generalised deficiency’ as regards the rule of law as a:

*“widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law.”*

This interpretation gives only a broad description of what is actually meant by ‘generalised deficiency’. As stated before, the efficiency of the conditionality as a tool is highly dependent

on the clarity of the conditions. Despite the fact that Article 3(2)(a)-(c) of the draft regulation provides a non-exhausting list of what is meant by ‘generalised deficiency’, several outlets criticized the clarity of the term. The importance of the clear criteria has also been emphasized by the expert group of the Friedrich Ebert Stiftung - be it the definition of ‘systemic violation’ or in this case, the term ‘generalised deficiencies’-, which is especially important when dealing with not obvious cases.<sup>149</sup> In order to identify the generalised deficiencies of the rule of law - as also pointed out by Blauburger and van Hüllen<sup>150</sup> - the Commission would need to improve the legal certainty by elaborating a more detailed assessment criteria or implement the recommendations of the European Parliament (which will be evaluated later in this section). In its opinion on the Commission’s proposal, the European Court of Auditors also highlighted that the criteria are not clearly specified and recommended that the “legislative bodies set clear and specific criteria for defining what constitutes a generalised deficiency as regards the rule of law, which puts sound financial management at risk, [...]”<sup>151</sup>

(ii) *Size and speed of sanctions*

The size and speed of sanctions play very important role if one intends to assess the efficiency of a conditionality. Whereas the existing mechanisms (Article 7 of the TEU and the infringement proceedings) do not provide for any deadlines, Article 5 of the draft regulation sets a specific timeframe for the Member States where the rule of law has been violated. The fact that there is a time limit laid down indicates the potential increase of the speed of the sanctions compared to the tools available.

As regards the size of the potential sanctions, the draft regulation would affect the Member States’ budgets to a more considerable extent than any other sanctioning mechanism before. As stated in Article 4, the draft regulation would apply to a significant part of the EU budget, including the EU funding under shared management, which amounts to non-negligible shares

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<sup>149</sup> Expert Group of the Friedrich-Ebert-Stiftung, ‘The other democratic deficit - A Toolbox for the EU to Safeguard Democracy in Member States’ (2018) Friedrich-Ebert-Stiftung 15

<sup>150</sup> cf Blauburger, M., & van Hüllen, V., (n 70) 10

<sup>151</sup> European Court of Auditors, ‘Opinion No 1/2018 concerning the proposal of 2 May 2018 for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States’ (2018) C 291/01, Recommendation 1

of Member States' GNI.<sup>152</sup> However, Article 4(2) of the Commission's proposal also points out that *"unless the decision adopting the measures provides otherwise, the imposition of appropriate measures shall not affect the obligation of government entities"* in the implementation of the programmes or in the execution of the payments to the beneficiaries. The European Court of Auditors expressed its position in this regard and recommended the Commission to detail how the interests of the beneficiaries would be safeguarded.<sup>153</sup> Although the sanctioning potential of the draft regulation is unprecedented, the Commission's actions need to be in line with Article 4(3) of the proposal which emphasizes, that the *"measures taken shall be proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law."*

(iii) *Credibility of conditionality*

As stated above, the credibility of the conditionality refers to the likelihood of the application of the measure. Article 5 of the draft regulation lays down the procedure of the mechanism, which would consist of several stages. As a first step, *"where the Commission finds that it has reasonable grounds to believe that"* generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union, *"it shall send a written notification to that Member State [...]"*<sup>154</sup> The next phase would allow the Commission - when it considers that after a dialogue with the Member State in question the conditions mentioned before are established - to *"submit a proposal for an implementing act on the appropriate measures to the Council."*<sup>155</sup> Once the proposal is submitted, the decision would be deemed *"adopted by the Council, unless it decides, by qualified majority, to reject the Commission proposal within one month of its adoption by the Commission."*<sup>156</sup> In addition, under Article 5(8) the Council - acting also by qualified majority - would also be able to amend the proposal of the Commission and adopt the text as the decision of the Council. These procedural steps -

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<sup>152</sup> cf Blauburger, M., & van Hüllen, V., (n 70) 11

<sup>153</sup> cf European Court of Auditors, (n 151) Recommendation 3

<sup>154</sup> cf European Commission, (n 6) Art 5 para 1

<sup>155</sup> cf European Commission, (n 6) Art 5 para 6

<sup>156</sup> cf European Commission, (n 6) Art 5 para 7

especially the rule regarding the adoption of the decision laid down in Article 5(7) - were also criticized by the Czech Senate.<sup>157</sup>

Given the fact that due to the reverse-majority rule, the decision-making threshold of the draft regulation is much lower than in the case of other mechanisms regulating the enforcement of the fundamental values of the European Union, it would constitute a more credible mechanism.

*(iv) Legitimacy of the proposal*

One could argue that the existing safeguards of the EU against democratic backsliding are lacking legitimacy, which can also be observed by the unequal and inconsistent treatment of the two most rebellious Member States in this regard (Hungary and Poland). This statement can be noticed by the actions of the EU when dealing with these countries. The lack of activation of the Rule of Law Framework in the case of Hungary on the one hand and the unnecessarily lengthy procedure after the quick initiation of the Framework in the case of Poland, on the other hand - as presented above - serve as good examples. In spite of these matters, the Commission's proposal would provide only a slight improvement in this regard. Moreover, the draft regulation – as also mentioned by Blauberger and van Hüllen<sup>158</sup> - “may be perceived as discriminatory” since the Member States are not equally dependent on the EU funds, thus those countries that rely on a proportionally large amount of EU funds will be affected to higher degrees.

Furthermore, the European Court of Auditors in its opinion on the proposal indicated, that the regulation would give the Commission a very broad margin of discretion due to the absence of clearly defined rules for launching the procedure and for the qualitative assessment.<sup>159</sup> This could also lead to the singling out of Member States, similarly to the decision on the suspension of the commitments from the Cohesion Fund in the case of Hungary in 2012<sup>160</sup>,

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<sup>157</sup> The Senate of the Parliament of the Czech Republic, ‘Resolution of the Senate on the Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States’ (2018) No. N 135/11

<sup>158</sup> cf Blauberger, M., & van Hüllen, V., (n 70) 12

<sup>159</sup> cf European Court of Auditors, (n 151) paras 12-16

<sup>160</sup> Council of the European Union, ‘Implementing Decision 2012/156/EU suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013’ (2012) OJ L 78/19;

which - was although lifted before it could gain effect - raised several questions (e.g., by Austria) about the fairness and impartiality of the EU.<sup>161</sup>

## 5.2. The European Parliament's legislative resolution of 4 April 2019

The Commission's draft regulation could be overall a useful initiative to tackle the rule of law deficiencies in the Member States and to safeguard to Union's budget at the same time. However, there had been some issues that needed to be improved and had to be addressed, thus on 4 April 2019 the Parliament adopted its first-reading legislative resolution on the proposal.

### (i) *Determinacy of conditions*

In order to a more efficient use of the draft regulation, the Parliament amended Article 2 of the Commission's proposal, thereby giving more detailed definitions to the terms 'rule of law' and 'generalised deficiency'. Regarding the rule of law, the Parliament proposed an amendment to Article 2(a) by including not only Article 2 of the TEU, but also a reference to the accession criteria referred to in Article 49 of the TEU.<sup>162</sup> One would argue that involving the 'Copenhagen criteria', thereby requiring the Member States to comply with the pre-conditions of the EU membership, would help to solve and give an answer to the so-called 'Copenhagen dilemma', since these prerequisites should not be forgotten after the accession either, but to serve as basic principles of the membership. The term 'generalised deficiency' was also further elaborated by complementing Article 2(b) of the draft regulation, including a reference to the "*principles of sound financial management or the protection of the financial interests of the Union*", moreover by adding a new article (Article 2a).<sup>163</sup> According to Article

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<sup>161</sup> BBC, 'Hungary aid frozen by EU over budget deficit' (*BBC.com*, 13 March 2012) <https://www.bbc.com/news/business-17357626> accessed 5 September 2020

<sup>162</sup> cf European Parliament, (n 7) Amendment 29

<sup>163</sup> cf European Parliament, (n 7) Amendments 30,32

2a of the Parliament's resolution, the following would be considered as generalised deficiencies as regards the rule of law:

*“a) endangering the independence of judiciary, including setting any limitations on the ability to exercise judicial functions autonomously by externally intervening in guarantees of independence, by constraining judgement under external order, by arbitrarily revising rules on the appointment or terms of service of judicial personnel, by influencing judicial staff in any way that jeopardises their impartiality or by interfering with the independence of attorneyship;*

*b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;*

*c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law;*

*d) endangering the administrative capacity of a Member State to respect the obligations of Union membership, including the capacity to effectively implement the rules, standards and policies that make up the body of Union law;*

*e) measures that weaken the protection of the confidential communication between lawyer and client.”*

In addition, the Parliament also suggested to establish a panel of independent experts, which would consist of experts in constitutional law and financial and budgetary matters, where the members would be appointed by the national parliaments of each Member State and by the European Parliament.<sup>164</sup> As stated in Article 3a(2) of the Parliament's resolution, the panel would assist the Commission in identifying generalised deficiencies as regards the rule of law in a Member State that would negatively affect the financial interest of the Union. Although the opinion of the panel would not be binding, the Commission - when dealing with the above

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<sup>164</sup> cf European Parliament, (n 7) Amendment 45

mentioned deficiencies - would be obliged to take into consideration the assessment of the panel.<sup>165</sup>

In sum, the suggested amendments of the European Parliament concerning the determinacy of the conditions regarding the rule of law conditionality would improve the legal certainty by further specifying the assessment criteria. Furthermore, the establishment of the panel of independent experts would lower the Commission's margin of discretion when determining generalised deficiencies as regards the rule of law.

(ii) *Size and speed of sanctions*

As stated above, Article 5 of the draft regulation sets a timeframe (not less than one month) for the Member States concerned to provide the required information and make observations. In its resolution, the Parliament amended this article and set the maximum time limit which shall not be more than three months.<sup>166</sup> Moreover, for a swifter process the Parliament also included a one month time limit to the Commission to decide on the 'follow-up' and a four weeks timeframe to the European Parliament and the Council to decide on the Commission's proposal at a later stage of the process.<sup>167</sup>

Through the proposed amendments of the Parliament, the speed of the procedure would be increased, which would contribute to its efficiency. This is particularly significant, given the fact that Article 7 of the TEU does not provide for any deadlines - which can contribute to a lengthy procedure - and the infringement proceedings can also last several years without bringing concrete results.

The draft regulation would bring measures that would affect the budgets of the Member States heavily, where the protection of end beneficiaries or final recipients is also of great importance. To that end - according to the resolution of the Parliament - the Commission would be obliged to provide information and offer guidance.<sup>168</sup> Furthermore, under Article 4(3b) of the Parliament's resolution, "*the Commission shall ensure that any amount due by government entities or Member States [...] is effectively paid to final recipients or*

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<sup>165</sup> *ibid.*

<sup>166</sup> cf European Parliament, (n 7) Amendment 53

<sup>167</sup> cf European Parliament, (n 7) Amendment 58

<sup>168</sup> cf European Parliament, (n 7) Amendment 49

*beneficiaries.*” In order to achieve that aim, the Commission - where necessary - would be obliged to sanction that country which does not comply by using measures such as recovery payments or the transfer of an amount “*equivalent to the amount not paid to final recipients of beneficiaries*”, which money could then be mobilized for the benefit of them.<sup>169</sup>

In sum, the sanctioning capacity of the draft regulation - as stated above - is unprecedented, which could help to get to the desired impact. Moreover, the Parliament in its resolution also addressed the concerns of the European Court of Auditors regarding the protection of the interests of the beneficiaries and provided a solution to that end.

### (iii) *Credibility of conditionality*

The European Parliament, in its resolution proposed several changes with regard to the decision-making process, which would ensure a greater role for itself. The differences of the procedure compared to the draft regulation lie, especially in the last stages of the process. According to Article 5(6a) of the resolution, when adopting a decision, the Commission would be obliged to “*simultaneously submit to the European Parliament and to the Council a proposal to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted.*” The submitted transfer proposal would be considered approved unless, (within four weeks) the Parliament acting by simple majority or the Council acting by qualified majority amend or reject it, and it would enter into force if neither the Parliament nor the Council reject it.<sup>170</sup>

Through the suggested amendments, the Parliament intends to grant itself an additional veto power, which would put it on the same footing with the Council when it comes to the adopting or lifting of measures. The increased power of the European Parliament would somewhat intensify the decision-making hurdles of the original proposal made by the Commission. However, it would still constitute a highly credible tool, especially compared to the Article 7 procedure, where a unanimous decision in the European Council and a two-thirds majority in the European Parliament is required.

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<sup>169</sup> cf European Parliament, (n 7) Amendment 50

<sup>170</sup> cf European Parliament, (n 7) Amendments 58,59



(iv) *Legitimacy of the proposal*

As stated above, the proposed amendments of the Parliament would provide a solution for the legitimacy problems of the draft regulation, where the new procedural rules would limit the Commission's discretionary power, and where the Panel of independent experts as a third party would provide an annual rule of law monitoring of the Member States. However, one would argue that the inclusion of the Parliament and the Council in the enforcement would lead to a "distortion of the treaty budgetary functions" since pursuant to Article 317 of the TFEU, the implementation of the EU budget is the Commission's responsibility.<sup>171</sup> Hence, the involvement of the Parliament and the Council in the budgetary implementation may result in the deformity "of the institutional balance provided by the Treaties in this area."<sup>172</sup>

It has been shown in the previous sections that the proposed rule of law conditionality may constitute an efficient tool when the analysed conditions are met. However, the efficiency of the conditionality may vary in the single countries, where compliance could be expected, especially if "the financial leverage of the EU budget in a given Member State is significant and the state concerned has no alternative financial resources to timely substitute for the loss."<sup>173</sup>

### 5.3. The potential impact of the rule of law conditionality on the Czech Republic

As mentioned above - in the country specific section of this thesis – when Andrej Babiš entered into politics, he also remained a businessman and clearly emphasized that he intends to run the country as if it was a business. The Czech Republic - unlike the two other countries - is not among the biggest beneficiaries of EU payments. Gaining almost EUR 30 billion from the EU funds over the 2014-2019 period, the country was in the middle among the Member States in

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<sup>171</sup> cf Policy Department for Structural and Cohesion Policies, (n 148) p 58

<sup>172</sup> Fiscaro, M., 'Rule of law conditionality in EU funds: The value of money in the crisis of European values' (2019) 4:3 European Papers 718, DOI: 10.15166/2499-8249/337

<sup>173</sup> cf Policy Department for Structural and Cohesion Policies, (n 148) p 51

this regard. In 2018 the Czech Republic received EUR 4.12 billion, amounting 2.10% of the GNI.<sup>174</sup> Although the impact of the EU payments in the country is lower than in Hungary and Poland, being a net beneficiary these subsidies are important for the Czech Republic and for Prime Minister Babiš. One would argue that Babiš cannot afford a disagreement with Brussels since being the head of the Agrofert Group, he benefitted from these EU funds through public procurement procedures and state contracts furthermore, his firm has interests in several EU countries.<sup>175</sup> Moreover, like the other countries, the Czech Republic was also heavily hit by the Coronavirus. According to the Czech Statistical Office, in the second quarter of 2020, the GDP decreased by 8.4% compared to the first quarter of 2020 and it decreased by 10.7% compared to the second quarter of the previous year.<sup>176</sup> In addition, a 1.6% increase in the unemployment compared to the first quarter of 2020 and a 2.1% increase in this regard compared to the second quarter of 2019 is observable.

Given the above mentioned data, the proposed rule of law conditionality could constitute a credible tool to enforce compliance.

#### 5.4. The potential impact of the rule of law conditionality on Hungary

It has been presented, that the actions taken at the EU level either did not reach the desired effects or only minor compliance could be attained. The dynamics of the authoritarian equilibrium described by Kelemen<sup>177</sup> can be observed in Hungary, which is based on three pillars: partial politicization, money, and migration. Firstly, instead of taking measures, the European People's Party - the faction of Fidesz in the European Parliament - has protected the Hungarian government, only because it wanted to maintain its decisive role in the European Parliament. Secondly, Hungary is a major recipient of EU funds, which is intended to improve the Hungarian people's life. However, the money of the European taxpayers - as also stated

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<sup>174</sup> European Commission, 'EU expenditure and revenue 2014-2020' (*Europa.eu*) [https://ec.europa.eu/budget/graphs/revenue\\_expenditure.html](https://ec.europa.eu/budget/graphs/revenue_expenditure.html) accessed 8 September 2020

<sup>175</sup> cf Pehe, J., (n 81) 71

<sup>176</sup> Czech Statistical Office, 'GDP Preliminary Estimate - 2nd quarter of 2020' (*CZSO.cz*, 31 July 2020) <https://www.czso.cz/csu/czso/ari/gdp-preliminary-estimate-2nd-quarter-of-2020> accessed 18 September 2020

<sup>177</sup> Kelemen, R.D., 'The European Union's Authoritarian Equilibrium' (2020) 27:3 *Journal of European Public Policy* 481-499, DOI: 10.1080/13501763.2020.1712455

in the report by Judith Sargentini<sup>178</sup> - is often being used for private purposes and to help out party loyalists or family members in their businesses by awarding them public procurement procedures. Furthermore, according to the recent report by the European Anti-Fraud Office, the ratio of irregular payments in the European Structural and Investment Funds and agriculture is ten times the EU average.<sup>179</sup> Thirdly, thanks to the free movement of persons provided by the EU membership, those citizens who are dissatisfied with the system are allowed to move to another Member State. The actions of the Fidesz government encouraged the Hungarian citizens to take this opportunity and start a new life abroad. In 2009 (before Fidesz took over the leadership of the country), only 1.5% of the working age population (20-64 years) of Hungary were living in another Member State. By 2019 the increase in the emigration of the working age population tripled and reached 4.5%.<sup>180</sup> As also stated by Kelemen, a significant fraction of the emigrants are supporters of the opposition parties, and only a small number of them decided to vote in the elections.<sup>181</sup> Thus, the less political opponents does benefit the Fidesz government.

To assess whether the rule of law conditionality of EU funds would be effective in Hungary, one has to look at what role the EU payments play in the budget of the country. In the 2014-2020 financial period, Hungary was proportionately one of the largest recipients of EU funds. The vast majority of the public investments between the 2006-2017 period had been co-financed by the EU.<sup>182</sup> Whereas in 2018, the Member State received more than EUR 6 billion from the EU spending (of which EUR 4.4 billion came from the Cohesion expenditure), amounting 4.97% of the GNI<sup>183</sup>, the national contribution of Hungary was slightly more than EUR 1 billion, only 0.85% of the GNI.<sup>184</sup> Given the fact that the contribution of the EU forms a significant part of the country's budget, the proposed rule of law conditionality would constitute a plausible tool to enforce compliance. This is especially relevant in the present

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<sup>178</sup> Committee on Civil Liberties, Justice and Home Affairs, 'Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (2018) (2017/2131(INL))

<sup>179</sup> European Anti-fraud Office, 'The OLAF Report 2019' (2020) p 39 DOI: 10.2784/8525

<sup>180</sup> Eurostat, 'EU citizens living in another Member State - statistical overview' (*Europa.eu*, 17 July 2020) [https://ec.europa.eu/eurostat/statistics-explained/index.php/EU\\_citizens\\_living\\_in\\_another\\_Member\\_State\\_-\\_statistical\\_overview](https://ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizens_living_in_another_Member_State_-_statistical_overview) accessed 8 September 2020

<sup>181</sup> cf Kelemen, R.D. (n 177) 12

<sup>182</sup> Keszthelyi, C., 'Hungary's economy heavily depends on EU funds, study finds' (*Budapest Business Journal*, 30 March 2017) [https://bbj.hu/economy/hungarys-economy-heavily-depends-on-eu-funds-study-finds\\_130880](https://bbj.hu/economy/hungarys-economy-heavily-depends-on-eu-funds-study-finds_130880) accessed 8 September 2020

<sup>183</sup> cf European Commission (n 174)

<sup>184</sup> European Commission, 'EU Budget 2018 – Financial Report' (2019) p 39 DOI:10.2761/027405

situation, where due to the Coronavirus the general government deficit reached the HUF 1837 billion (EUR 5.1 billion) in the first six months of 2020, which is five times more than the planned government deficit for the whole year.<sup>185</sup>

## 5.5. The potential impact of the rule of law conditionality on Poland

Similarly to Hungary, Poland is also one of the biggest beneficiaries of the EU funds receiving over EUR 86 billion during the 2014-2020 financial period.<sup>186</sup> In fact, in 2018 Poland was the largest overall recipient, being the only Member State exceeding the EUR 16 billion (of which EUR 11.4 billion was obtained from the Cohesion expenditure), amounting 3.43% of the GNI.<sup>187</sup> However, pursuant to the 2019 OLAF report<sup>188</sup>, there had been more than five thousand detected irregularities in the areas of European Structural and Investment Funds during the 2015-2019 period in the Member State, which is the second highest number among the EU countries. In 2019 seven investigations had been conducted concerning the misuse of EU funds. Several manipulated tenders had been discovered, where companies used 'fake and inflated invoices' and 'falsified project documentation' in order to obtain EU funding (amounting ca. EUR 5.2 million).<sup>189</sup>

At the beginning of the year, the first balanced budget in three decades was planned, and a 3.7% growth in the GDP was expected. However, the global pandemic has negatively affected the Polish public finances as well, which required unplanned economic measures. Instead of prosperity, the newly revised budget predicts a PLN 109.3 billion (EUR 24.8 billion) deficit with a 4.6% decrease in the GDP and at least 116% increase in the expenses.<sup>190</sup>

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<sup>185</sup> Portfolio, 'Gigantikus költségvetési hiányt okozott a koronavírus-járvány Magyarországon' (*Portfolio.hu*, 22 July 2020) <https://www.portfolio.hu/gazdasag/20200722/gigantikus-koltsegvetes-hiany-okozott-a-koronavirus-jarvany-magyarorszagon-442070> accessed 8 September 2020

<sup>186</sup> European Commission, 'European Structural and Investment Funds 2014-2020' (2015) p 45 DOI: 10.2776/10671

<sup>187</sup> cf European Commission (n 174)

<sup>188</sup> cf European Anti-fraud Office (n 179)

<sup>189</sup> *ibid.* 16

<sup>190</sup> Ptak, A., 'Poland expects 109.3 bln zloty budget deficit in 2020 due to virus' (*Reuters.com*, 20 August 2020) <https://www.reuters.com/article/poland-economy-budget/update-2-poland-expects-109-3-bln-zloty-budget-deficit-in-2020-due-to-virus-idUSL8N2FM2SY> accessed 10 September 2020

One could argue that the proposed conditionality would be an adequate tool to enforce rule of law compliance and end the misuse of the EU funds in Poland firstly because - similarly to Hungary - the payments coming from the Union constitute a large portion of the Member State's budget. Secondly, the unexpected situation demanded unplanned expenses, which led to a more significant government deficit than predicted.

The above conducted examinations seem likely to confirm the second hypothesis of this thesis. With the corrections and amendments suggested by the European Parliament on the Commission's draft proposal, the rule of law conditionality of EU funds could constitute a reliable tool to reach its aim.

## Chapter 6: Recent developments

The negotiations on the 2021-2027 Multiannual Financial Framework have already started in 2018, and since then several formal and informal meetings have taken place with the aim of finding a compromise. One of the most debated parts of the new long-term budget is the rule of law conditionality of EU funds. The Commission expressed its view and stated that the „respect for the rule of law is an essential precondition for sound financial management and effective EU funding”.<sup>191</sup>

Taking into consideration the Commission’s proposal and the European Parliament’s legislative resolution, the European Council held a special meeting between 17-21 July 2020 to reach an agreement based on the updated ‘negotiating box’ of Charles Michel. The President of the European Council also expressed its views regarding the rule of law conditionality, where he envisaged a strong link between the funding and the rule of law. However, the conditionality was significantly weakened compared to the earlier proposals by requiring qualified majority voting in the Council to adopt sanctions.<sup>192</sup> On the third day of the meeting, Prime Minister Orbán also shared his views regarding the conditionality and the rule of law. He questioned the legal basis of the proposal and emphasized that he is not against the creation of a new procedure - which is the aim of the proposal -, but it requires weeks to do it “seriously”.<sup>193</sup> Furthermore, PM Orbán refused the idea of financial punishment, especially in the case of Hungary, since the procedures are still ongoing and there is still no decision on the situation in the Member State.

As a result of the Special European Council meeting, the proposed rule of law conditionality has been accepted, but given its mitigated nature it did not reach the original expectations of the Parliament. Following the meeting, the leader of Hungary and the Prime Minister of Poland held a joint national briefing, where they expressed their satisfaction regarding the outcome of the negotiations. The Heads of the Governments stressed the importance of the

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<sup>191</sup> European Commission, ‘A Modern Budget for a Union that Protects, Empowers and Defends - The Multiannual Financial Framework for 2021-2027’ (Communication) COM(2018) 321 final 5

<sup>192</sup> Drachenberg, R., ‘Outlook for the special European Council meeting of 17-18 July 2020’ (*European Parliamentary Research Service Blog*, 14 July 2020) <https://epthinktank.eu/2020/07/14/outlook-for-the-special-european-council-meeting-of-17-18-july-2020/> accessed 20 September 2020

<sup>193</sup> Doorstep interview with Viktor Orbán (Brussels, Belgium, 19 July 2020) <https://video.consilium.europa.eu/en/webcast/111ef6ba-ebd4-47ff-abf0-140f465bf296> accessed 23 September 2020

cooperation between the Czech Republic, Hungary, and Poland, where due to their aligned position and their “very good coordination”<sup>194</sup>, the countries could reach the outcome they wanted.

After the Special European Council meeting, the EP adopted a resolution on the conclusions and emphasized its strong regret about “the fact that the European Council significantly weakened the efforts of the Commission and Parliament to uphold the rule of law, fundamental rights and democracy in the framework of the MFF” and stressed that “to be effective, this mechanism should be activated by a reverse qualified majority.”<sup>195</sup>

Although a political agreement had been reached in the European Council, the negotiations on the rule of law conditionality are still ongoing, where several disagreements have to be solved. The European Parliament is one of the most important actors during the process since its consent – as enshrined in Article 312 of the TFEU - is needed to adopt the new MFF.

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<sup>194</sup> Joint national briefing by Viktor ORBÁN, Prime Minister of Hungary, and Mateusz MORAWIECKI, Prime Minister of Poland, following the Special European Council (Brussels, Belgium, 20 July 2020) <https://newsroom.consilium.europa.eu/events/20200720-special-european-council-july-2020-day-4/128254-1-joint-national-briefing-poland-hungary-part-1-20200720> accessed 23 September 2020

<sup>195</sup> European Parliament, ‘European Parliament resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020’ P9\_TA(2020)0206

## Conclusion

The purpose of this thesis was to contribute to the existing literature on the topic of the enforcement of the fundamental values of the EU and to investigate whether the rule of law conditionality of EU funds would constitute a credible tool to that end.

The thesis firstly looked at the legal and political instruments available in the EU's toolkit to fight for the basic values of the Union. It was shown that - in theory - the EU is fully equipped to compel the Member States to respect the values they agreed upon when joining to the EU. The second chapter of the thesis demonstrated the proposals on the academic and on the EU level to enforce compliance, of which the possibility of cutting funding was further elaborated and examined in the analysis part. In the empirical section, the thesis focused on Member States (Czech Republic, Hungary, and Poland) that have experienced serious rule of law deficiencies in the recent past. The case studies of the countries suggested that the legal and political tools used against them were not efficient enough to terminate backsliding either because of the lack of political will or due to the fact the instrument was not powerful enough. Therefore they could avoid the more serious punishments by engaging only symbolically.

In the analysis section of this thesis, the scope conditions (determinacy of conditions, size and speed of sanctions, credibility of conditionality) derived from the External Incentives Model - complemented with the aspect of legitimacy - were used to examine the proposals. It was found that the proposed rule of law conditionality of the European Commission could constitute a plausible tool however, - inter alia - due to the lack of clarity regarding the key terms, it had some weak spots. Therefore, this thesis also examined the European Parliament's legislative resolution on the rule of law conditionality, which provided the necessary corrections to the original document. Through the suggested amendments, the rule of law conditionality of EU funds would enable the authorities a quicker and more efficient action. This research led to the finding that the proposed conditionality would indeed constitute an adequate tool, especially compared to the existing instruments. Moreover, it could be particularly useful in the examined Member States due to their financial dependence on the EU payments and the economic difficulties caused by the global pandemic.



However, the question arises whether it would form a proper mechanism in Member States that are less dependent on EU funds and whether it would not harm the citizens of the Member States that do not comply, which provides significant room for further research. To solve the latter, the Renew Europe Group proposed a so-called ‘smart conditionality’<sup>196</sup>, which would ensure that the countries that are violating the rule of law are punished, but their citizens, municipalities, and small businesses are not. The proposition consists of three steps (monitoring, freezing, and rerouting), which would enhance the efficiency of the spending of EU funds.

Taken together, the results suggest that the rule of law conditionality of EU funds, as amended by the European Parliament would constitute a credible tool to protect the Union’s budget in case of generalised deficiencies as regards the rule of law. It is also indisputable that if adopted, it would establish the most powerful instrument available to enforce rule of law compliance in the Member States. However, there are some open questions remaining, especially regarding the protection of the citizens’ interests and the net contributor countries that need to be addressed.

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## Declaration of Authorship

I hereby declare that this master thesis is my own intellectual work. All sources and tools used and quoted indirectly or directly during the thesis are acknowledged as references accordingly.

This work was not previously presented in the same or in a similar form to another examination board. This thesis has not been published earlier.

A handwritten signature in blue ink, consisting of a stylized 'E' followed by 'H' and a long horizontal flourish.

Edgár Haraszin, Olomouc, 28 September 2020