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**SAFEGUARDING THE RULE OF LAW -
SHOULD'VE AND COULD'VE HUNGARY'S 2024 EU
COUNCIL PRESIDENCY BEEN PREVENTED?**

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Lisbon, September 2024,

Marine Véronique Yvette Ghislaine Boutet

A handwritten signature in black ink, appearing to read 'Marine', with a stylized flourish at the end.

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Quoting and Other Conventions

The present dissertation follows the rules of British English, unless directly citing documents written in American English. Italics are used to reference Latin words and terms from languages other than English. Sources will be identified in footnotes and the References section. To enhance readability, all footnote citations will follow this model:

- LAST NAME, First name – Title of the article.

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List of Abbreviations

CEU- Central European University
Charter- Charter of Fundamental Rights of the European Union
CJEU- Court of Justice of the European Union
ECHR- European Convention on Human Rights
ECtHR- European Court of Human Rights
EEA- European Economic Area
ENCJ- European Network of Councils for the Judiciary
EU- European Union
KESMA- Central European Press and Media Foundation
NGOs- Non-Governmental Organisations
NJC- National Judicial Council
NOJ- National Office of the Judiciary
NVB- National Election Commission
OSCE- Organisation for Security and Co-operation in Europe
RRF- Recovery and Resilience Fund
TEU- Treaty of the European Union
TFEU- Treaty of Functioning of the European Union
US- United States of America

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Number of Characters

The body of the present dissertation, including spaces and footnotes, occupies a total of 198 451 characters.

Abstract

The motto of the European Union, "United in Diversity", symbolises a commitment to unity amidst a rich diversity of traditions, religions, cultures, and models of governance. However, this sense of European identity has been challenged by a process of disintegration through differentiation. The question of whether Hungary should have been legally prevented from assuming the EU Council Presidency in the second half of 2024 due to rule of law concerns is complex and unprecedented. Against the backdrop of a broader democracy and rule of law crisis in Europe, an analysis of Hungary's rule of law trajectory is undertaken, highlighting critical moments of democratic backsliding. It assesses the effectiveness of the EU's responses to rule of law concerns, including the Article 7 TEU procedure, infringement procedures, and financial sanctions through the new Rule of Law Conditionality Mechanism, the Common Provisions and the Recovery and Resilience Facility Regulations. The functioning of the EU Council is examined, explaining the responsibilities of the rotating Presidency and its importance in EU decision-making. Possible consequences of Hungary's Presidency- both in practical and symbolic terms- for the governance and values of the EU are also analysed. Given the absence of explicit provisions preventing a Member State from assuming the EU Council Presidency, a literature review of the proposed solutions is conducted, and their legal feasibility and diplomatic implications are discussed. In light of the growing influence of far-right movements across Europe and the trend towards democratic backsliding, this study offers insights into possible legal and policy frameworks for dealing with future similar challenges to those imposed by the Hungarian Presidency.

Keywords: Council of the EU; EU Presidency; European Union; Hungary; Rule of Law; Democratic Backsliding; Fidesz; Viktor Órban.

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Resumo

O lema da União Europeia, "Unida na Diversidade", reflete o compromisso de unidade entre uma rica variedade de tradições, religiões, culturas e modelos de governação. Porém, esta ideia de identidade europeia tem vindo a ser posta em causa por um processo de desintegração por diferenciação. A questão de saber se a Hungria deveria ter sido impedida de assumir a Presidência do Conselho da União Europeia no segundo semestre de 2024, face a preocupações relativas ao Estado de Direito, é complexa e sem precedentes. Tendo como plano de fundo uma profunda crise democrática na Europa, é realizada uma análise do Estado de Direito na Hungria, destacando-se os momentos de retrocesso democrático mais preocupantes. A eficácia das respostas da União Europeia face a estas preocupações é examinada, incluindo o mecanismo previsto no artigo 7.º do Tratado da União Europeia, a instauração de processos por infração e a aplicação de sanções financeiras através dos regulamentos relativos à Condicionalidade do Estado de Direito, às Disposições Comuns e ao Mecanismo de Recuperação e Resiliência da União Europeia. O funcionamento do Conselho da União Europeia é examinado, sendo esclarecidas as responsabilidades da Presidência rotativa e a sua importância no processo de decisão da União Europeia. As possíveis consequências da Presidência Húngara- tanto em termos práticos como simbólicos- para a governação e valores da União Europeia são discutidas. Dada a ausência de disposições relativas ao impedimento do exercício da Presidência do Conselho por parte de um Estado-Membro na legislação europeia, são analisadas as soluções propostas pela doutrina, bem como a sua viabilidade jurídica e as suas implicações diplomáticas. Tendo em conta a crescente influência dos movimentos de extrema-direita observada na Europa e a tendência para o retrocesso democrático, este estudo oferece soluções para lidar com desafios semelhantes aos impostos pela Presidência húngara no seio da União Europeia.

Palavras-chave: Conselho da UE; Presidência da UE; União Europeia; Hungria; Estado de direito; Retrocesso democrático; Partido Fidesz; Viktor Órban.

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Introduction- United in Diversity, not Separated by Differentiation

Egyesülve a sokféleségben, Hungarian for “United in diversity”, has been the official motto of the European Union (EU) since 2000, signifying “how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages”¹.

From the very beginning, the European integration project has been about coming together in diversity². The flexibility of the EU's legal order has always left room for differentiate governance and, consequently, different levels of commitment to European integration³. This “unity in diversity”, however, does not allow for “disintegration through differentiation”⁴, being limited by the foundational values of the EU, which the Member States pledged to protect upon accession.

The rule of law crisis in which the EU finds itself is not new and has extensively been discussed in the literature, especially since its first signs became to appear, first in Hungary in the early 2010's when Viktor Orbán's party took power, followed by Poland and, to a lesser extent, in other Member States such as Bulgaria, Malta, Romania and Slovakia⁵.

Since the Hungarian Civic Alliance (Fidesz) took power in 2010, Hungary has seen the consolidation of what many describe as the “blueprint of consolidation of illiberal democracies”⁶, where media, judiciary, and civil society are increasingly under pressure, directly challenging the fundamental values outlined in Article 2 TEU⁷. This has led the European Parliament to question Hungary's ability to fulfil its 2024 EU Council Presidency duties effectively⁸, which is the focus of this research.

¹ EUROPEAN UNION - EU motto.

² RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 641.

³ UITZ, Renáta - The Rule of Law in the EU: Crisis, Differentiation, Conditionality, p. 948.

⁴ *Idem*, p. 945.

⁵ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 111.

⁶ RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 631.

⁷ *Ibidem*.

⁸ European Parliament resolution of 1 June 2023 on the breaches of the Rule of Law and fundamental rights in Hungary and frozen EU funds (2023/2691(RSP)), rec. T (11).

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Being responsible for driving forward the EU Council's work and ensure continuity and coherence in the EU Council's agenda, the EU Council Presidency is a role of great prestige and of significant importance to the proper functioning of the EU Council⁹, which is the most important decision-making body in the EU alongside the European Parliament¹⁰.

Although the literature has already dealt comprehensively with the EU's rule of law crisis, a noticeable gap remains concerning the possibility of preventing a Member State from assuming the Council Presidency due to rule of law concerns. This gap lies primarily in the fact that there are no specific provisions outlining such a scenario, which is of unprecedented nature. The focus of this research is therefore to determine whether such an action can be undertaken legally or if it would require the European Union to compromise its own rule of law principles to restore them.

Even though Hungary has, at the time of submission of the present dissertation, already taken over the Presidency of the EU Council, this does not diminish the relevance of the research, as similar situations could well arise again in the future, especially given the rapid rise of far-right movements that has been observed across the EU in recent years. Therefore, analysing the unprecedented Hungarian case could help to identify possible legal and policy frameworks for the EU to use in similar situations in the future.

The research question this study seeks to answer is the following: Should and legally could Hungary have been prevented from holding the EU Council Presidency in the second half of 2024 considering the country's status of the rule of law?

To answer the question, the study is structured as follows: Chapter I examines the EU's commitment to its fundamental values and defines key concepts such as democracy and the rule of law. It also provides a brief overview of how the rule of law crisis came about. Chapter II then addresses Hungary's democratic backsliding, focusing on the several factors that contributed to it. The EU's response to Hungary's decline in democratic governance is then examined in Chapter III, as well the effectiveness of the mechanisms deployed to stop this evolving trend. Afterwards, Chapter IV focuses on the functioning

⁹ EUROPEAN COUNCIL OF THE EUROPEAN UNION - What does holding the presidency of the Council of the EU mean?

¹⁰ EUROPEAN UNION - Types of institutions and bodies.

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and significance of the rotational EU Council Presidency and analyses the legal feasibility of preventing Hungary from assuming the Presidency in 2024, considering both legal precedents and proposed solutions. Finally, concluding remarks and reflections on the issues discussed in the study are presented, which will hopefully contribute to the ongoing efforts to restore the EU's commitment to its own foundational values and provide helpful insights on how to protect the integrity of the functioning of the Council and the EU in general.

Chapter I - From Commitment to Crisis: Democracy and the Rule of Law in the European Union

This first chapter addresses the current rule of law crisis threatening the EU as a legal order. It begins by examining EU's commitment to its foundational values, which are *conditio sine qua non* for Member State accession. Next, it provides definitions of key concepts such as democracy and rule of law to clarify the principles at risk. Finally, before delving into Hungary's descent into a hybrid regime, the chapter offers a brief overview of how the rule of law and democracy crisis emerged within the EU's own Member States.

1. The EU's Commitment to Democracy and the Rule of Law

The EU is not only an economic union, but also an entity based on common values¹¹. As stated by the President of the Court of Justice of the European Union (CJEU), “respect for freedom, democracy and the rule of law are three values that form part of our identity as citizens of the EU”¹². These founding values are enshrined in Article 2 of the Treaty of the European Union (TEU), which explicitly states that “(the) Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.

Initially viewed as primarily symbolic and political, Article 2 TEU was often considered too vague to impose specific obligations on Member States, particularly when acting outside the scope of EU law¹³. However, the CJEU has clarified that Article 2 TEU is “not merely a statement of policy guidelines or intentions but contains values which (...) are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States”¹⁴.

¹¹ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 111.

¹² LENAERTS, Koen - On Values and Structures: The Rule of Law and the Court of Justice of the European Union, p. 12.

¹³ CLAES, Monica - Safeguarding the European Union's Values Beyond the Rule of Law, p. 76.

¹⁴ CJEU, Case C-156/21, *Hungary v Parliament and Council*, 16 February 2022, para 232, and Case C-157/21, *Poland v Parliament and Council*, 16 February 2022, para 264.

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Recognition and adherence to these values are key eligibility conditions for a Member State's accession to the Union, as outlined in Article 49 TEU, known as the Copenhagen criteria¹⁵. A candidate State for EU membership must align its constitution and national identity with these values as *conditio sine qua non* for acquiring the status of Member State¹⁶. Upon accession, the Member State commits itself to upholding these values for as long as it remains an EU member¹⁷.

As explained by Koen Lenaerts, this ongoing commitment means that there is no “turning back the clock” on respecting the values contained in Article 2 TEU¹⁸. Accession marks the beginning of a journey in value protection, not its end. While a Member State can raise standards for value protection, EU law prevents it from democratic backsliding. As held by the CJEU, “(compliance) with those rules cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession”¹⁹. The Member States “adhere to a concept of the rule of law’ which they (...) have undertaken to respect at all times”²⁰.

The EU's foundational values thus serve as benchmarks for evaluating Member States, both at the time of their admission and during potential sanctions or suspensions for violating these values²¹.

And yet, despite its declared commitment to democracy and sanctioning mechanisms to protect its foundational values- which will be further analyzed in Chapter III- the EU has proved to be, as argued by Daniel Kelemen, a “hospitable environment for the emergence of increasingly autocratic member governments”²² in recent years. The regression is most pronounced in Hungary, where the “Orbán regime”- referencing to Prime Minister Viktor Orbán, leader of the Fidesz party- has replaced democracy with a hybrid regime that

¹⁵ EUROPEAN UNION - Accession criteria (Copenhagen criteria).

¹⁶ LENAERTS, Koen - On Values and Structures: The Rule of Law and the Court of Justice of the European Union, p. 13.

¹⁷ LENAERTS, Koen - The rule of law and the constitutional identity of the European Union.

¹⁸ LENAERTS, Koen - On Values and Structures: The Rule of Law and the Court of Justice of the European Union, p. 13.

¹⁹ CJEU, Case C-156/21, *Hungary v Parliament and Council*, 16 February 2022, para 126, and Case C-157/21, *Poland v Parliament and Council*, February 2022, para 144.

²⁰ *Idem*, para 234 and para 266, respectively.

²¹ RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 630.

²² KELEMEN, R. Daniel - The European Union's authoritarian equilibrium, p. 481.

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maintains formal democratic institutions but fails to meet minimum standards for true democracy²³.

2. Concepts of Democracy and the Rule of Law

Without attempting to provide a comprehensive definition of democracy or the rule of law, as this would exceed the scope of this research, it is essential to provide a basic understanding of these foundational concepts before addressing the challenges threatening them.

2.1. Democracy

The term “democracy” originates from the Greek word *demokratia*, derived from *demos*, (people), and *krato* (rule), translating to “rule by the people”. Despite its ancient origins, the concept of democracy has been object to continuous debate and differing interpretations. Scholars diverge in their focus, with some emphasizing substantive definitions- highlighting its content, for example, the need for economic equality, the existence of public deliberation and participation- while others focus on procedural definitions, centering on the presence or absence of an institutional framework consisting of characteristics such as competitive elections, civil liberties, and the rule of law²⁴.

Jørgen Møller and Svend-Erik Skaaning, building on Giovanni Sartori’s “ladder of abstraction”, created a typology of democracies. This typology places different concepts of democracy on metaphorical ladder rungs, where higher rungs represent more abstract definitions and lower rungs denote more specific and demanding criteria.

At the top of the ladder is “minimalist democracy”, based on Joseph Schumpeter’s definition of democracy: “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means

²³ *Idem*, p. 491.

²⁴ MØLLER, Jørgen; SKAANING, Svend-Erik - Democracy and democratization in comparative perspective, p. 5.

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of a competitive struggle for people's vote"²⁵. Here, democracy is primarily defined by the existence of competitive elections, even if they are flawed or restrictive.

The next rung is "electoral democracy", which requires competitive elections that are free, inclusive, and conducted with universal and equal suffrage, without significant irregularities or veto powers held by non-elected groups²⁶.

Further down is the concept of "polyarchy", introduced by Robert Dahl, which includes not only free and inclusive elections but also political and civil liberties like free speech and freedom of assembly²⁷.

At the bottom of ladder is "liberal democracy", the most demanding type- the maximal democracy. Here, free elections and political and civil liberties are complemented by the rule of law, ensuring consistent and regular administration of public rules²⁸.

In delineating between minimalist and maximalist definitions of democracy, it becomes clear that what truly sets democracy apart from autocracy is having political competition at the ballot-box. Even within the minimalist view, the existence of competitive elections is a necessary condition that separates democracy from autocracy. The *conditio sine qua non* of democracy thus lies in the existence of political competition²⁹- the main dividing line between democracy and autocracy³⁰.

In the EU, democracy is a foundational principle deeply embedded in its legal framework, aligning with the most demanding type of democracy at the bottom of the conceptual ladder- liberal democracy. While Article 2 TEU simply refers to the concept of democracy, its scope and practice application are further elaborated in Title II TEU, "Provisions on Democratic Principles", which includes equality of citizens (Article 9 TEU), representative democracy (Article 10(1) TEU), direct and indirect representation of citizens (Article 10(2) TEU), the right to participate in the democratic life of the Union (Article 10(3) TEU), as well as provisions on political parties at European level (Article

²⁵ *Idem*, p. 31.

²⁶ *Idem*, p. 44.

²⁷ *Ibidem*.

²⁸ *Ibidem*.

²⁹ *Ibidem*.

³⁰ MERKEL, Wolfgang - Embedded and defective democracies, p. 38.

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10(4) TEU), participatory democracy (Article 11 TEU), and the role of national parliaments (Article 12 TEU)³¹.

2.2. The Rule of Law

Similarly to democracy, the concept of the rule of law is not easily defined and varies across languages, legal orders, and perspectives³². Thomas Carothers, for example, defines it as “a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century”³³.

The common understanding is that the rule of law involves principles, or ideals, ensuring a just and orderly society where no one is above the law, everyone is treated equally and are held accountable to the same laws³⁴. As stipulated in the general regime of conditionality for the protection of the Union budget, “the rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected”³⁵. In short, “the concept is about limiting the abuse of power and sustaining the separation of powers”³⁶.

As held by the CJEU, respect for the rule of law is intrinsically linked to the respect for democracy and for fundamental rights³⁷- without one of them, the others cannot exist³⁸. Some scholars go as far as arguing that these concepts form an interdependent trinity

³¹ NERGELIUS, Joakim - The Rule of Law Crisis in 2023: More of the Same or Changes to Come?, p. 91.

³² LENAERTS, Koen - Introduction, p. 8.

³³ CAROTHERS, Thomas - The Rule of Law Revival, p. 96.

³⁴ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 111.

³⁵ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, rec. 3.

³⁶ LENAERTS, Koen - Introduction, p. 8.

³⁷ CJEU, Case C- 156/21, *Hungary v Parliament and Council*, 16 February 2022, para 6.

³⁸ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 113.

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where the absence of one undermines the others³⁹. Joseph Weiler articulates this by stating that “majority governance without the constraints of human rights and the rule of law is but a tyranny of the majority. Human rights without effective rule of law are but slogans. The rule of law outside a democracy is simply the most effective instrument of authoritarianism and worse”⁴⁰. This is why, he explains, the so-called “illiberal democracy” is an oxymoron. It is no democracy at all⁴¹.

In the EU law context, the concept of the rule of law has traditionally focused on judicial review⁴². As held by the CJEU, “Article 19 TEU, which gives concrete expression to the value of the rule of law set out in Article 2 TEU, requires Member States to provide effective judicial protection in the fields covered by Union law”⁴³. This link between the EU version of the rule of law and the interest in enforcing EU law in the Member States became clear⁴⁴ in the *Associação Sindical dos Juizes Portugueses (ASJP)* Case when the CJEU held that “the very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law”⁴⁵.

In the last few years, however, these fundamental values have been under attack by none other than the EU Member States themselves, driving the EU in a direction contrary to its identity⁴⁶.

3. Democracy and the Rule of Law Crisis in the European Union

Over the past decade, the EU has experienced a rise in extreme political parties, enabling anti-democratic forces to gain power in several Member States⁴⁷. Elected governments have undermined judicial independence and impartiality, reduced the autonomy of

³⁹ ROSAS, Allan - Democracy and Human Rights: Some Conceptual Observations, p. 89.

⁴⁰ WEILER, Joseph H. H. - Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and The Polish Circumstance, p. 5.

⁴¹ *Ibidem*.

⁴² REICHEL, Jane - The Rule of Law in the European Composite Administration: in Need of a New Approach?, p. 94.

⁴³ CJEU, Case C-156/21, *Hungary v Parliament and Council*, 16 February 2022, para 12.

⁴⁴ REICHEL, Jane - The Rule of Law in the European Composite Administration: in Need of a New Approach?, p. 95.

⁴⁵ CJEU, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018 paras. 32 to 36.

⁴⁶ RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 628.

⁴⁷ SOFFER, Dalya - Hungary's Democratic Backsliding as a Threat to EU Normative Power.

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universities and civil society, and curtailed media freedom⁴⁸. They have encouraged widespread corruption, constrained opposition parties' political scope, and violated human rights. These actions are gradually eroding the rule of law and, consequently democracy⁴⁹. This phenomenon, known as the rule of law crisis, first surfaced in Hungary in the early 2010's when Viktor Orbán's party took power, followed by Poland and, to a lesser extent, in other Member States such as Bulgaria, Malta, Romania and Slovakia⁵⁰.

Moreover, this erosion has slowly transformed some EU democracies into hybrid and authoritarian regimes, distinct from traditional coup dynamics and breakdowns of the past⁵¹. Nancy Bermeo describes this as democratic backsliding- a process where elected leaders implement institutional changes that steadily weaken checks on executive power and diminish the opposition's ability to challenge the incumbent executive⁵². These changes are typically ratified through democratic processes, such as legislative votes or executive decisions, which can mask their authoritarian implications⁵³. This process is both complex and multi-layered, progressing in an incremental and cumulative manner. Individually, each proposed reform or policy might seem inoffensive or even defensible, and it is only when they are added together in an interactive process that the true scope of their impact becomes apparent⁵⁴. The process is therefore often compared to a frog being placed in a pot of slowly boiling water, which is a useful analogy for how the population gradually becomes paralyzed and unable to see the true extent of the danger until the situation has developed beyond redress⁵⁵. This is exactly what happened in Hungary.

⁴⁸ LENAERTS, Koen - Introduction, p. 8.

⁴⁹ *Ibidem*.

⁵⁰ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 111.

⁵¹ BERMEO, Nancy - On Democratic Backsliding, p. 6.

⁵² *Idem*, p. 10.

⁵³ MOUNK, Yascha - The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It, pp. 10-14.

⁵⁴ SCHEPPELE, Kim Lane - Autocratic Legalism, p. 556.

⁵⁵ GINSBURG, Tom; HUQ, Aziz Z. - How to Save a Constitutional Democracy, p. 77.

Chapter II- From Democracy to a Hybrid Regime: Hungary's Rule of Law Challenges

In recent years, Hungary has undergone a notable shift away from democracy towards a hybrid regime, raising significant concerns about the state of its rule of law. This chapter provides the evolution leading to this transformation and offers a brief overview of all the terminology used to describe Hungary's current political system. Given that a comprehensive analysis of the breadth of concerns regarding the rule of law in the country would require a study of its own, only the most contentious are addressed in this chapter. These include the functioning of the constitutional and electoral system, judicial independence, threats to academic freedom, media pluralism and the shrinking space for civil society, as well as the growing challenges faced by vulnerable groups, such as LGBTQI+ individuals, Roma communities, migrants, asylum seekers, and refugees⁵⁶.

1. Hungary's Descent Towards a Hybrid Regime

Following the Revolutions of 1989, Hungary was celebrated as a success story in the post-communist region of Central and Eastern Europe. The country was praised for its efforts in transitioning to democracy and consolidating its democratic institutions, culminating in its accession to the EU in 2004⁵⁷. Hungary's identity as a free democratic nation respectful of the EU's foundational values seemed firmly established⁵⁸. However, the electoral triumph of the nationalist-conservative Fidesz-KDNP alliance in 2010 marked a clear departure.

Fidesz-KDNP capitalized on what has been described as a "perfect storm"⁵⁹- a convergence of multiple factors, including the dissatisfaction with the ruling socialist party, a robust populist party agenda, fallout from the 2008 economic crisis, corruption, political and party polarization and disappointment with the outcomes of the post-

⁵⁶ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)), rec. E (1).

⁵⁷ FUMAROLA, Andrea - Fidesz and electoral reform: How to safeguard Hungarian democracy.

⁵⁸ MOUNK, Yascha - The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It, p. 13.

⁵⁹ BOGAARDS, Matthijs - De-democratization in Hungary: diffusely defective democracy, p. 1490.

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communist transition process⁶⁰. Securing 53 % of the vote, which translated into 68 % of parliamentary seats due to Hungary's disproportionate electoral system, the Fidesz-KDNP alliance granted itself a two-thirds majority- known in the literature as "supermajority"- a threshold that enables unilateral amendments to the Constitution⁶¹.

Since then, over the past decade, the Fidesz party has successfully reflected its "populist, right-wing, national-conservative, anti-immigrant, and anti-cultural diversity" agenda on the State⁶². This has entailed dismantling checks and balances, consolidating control over public institutions under party loyalists, and narrowing decision-making to a select circle aligned with Fidesz—a self-styled "political family"⁶³ claiming to embody the will of the people. For Viktor Orbán, this transformation was a "revolution through the ballot box", while critics characterized it as a "constitutional *coup d'état*"⁶⁴.

These systemic changes were accompanied by populist speeches promising to restore power to "the true people", denouncing liberal democracy as an elite project amounting to a betrayal of the Hungarian people by post-communist alliance with the new liberal aristocracy and international bodies such as the EU⁶⁵.

In 2010- the year of the elections- the V-Dem Institute's index classified Hungary as an "electoral democracy"⁶⁶ and one year before that, as a "liberal democracy"⁶⁷, whereas Freedom House categorized the country as a "consolidated democracy"⁶⁸. Today, more than a decade later, Hungary is regarded by the V-Dem Institute as an "electoral

⁶⁰ *Ibidem*.

⁶¹ BARD, Petra; PECH, Laurent - How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The 'Hungarian Model', p. 6.

⁶² ŽIVIĆ, Katarina - Rise of the Far Right in Europe and the Effect on Democratic Backsliding: Insights from Hungary and Italy., p. 75; LI, Qirui; TENG, Xiongzhen; YUAN, Tianhao - An Analysis on Factors That Contributed to the Popularity of the Hungary Right-Wing Populist Fidesz Party between the Years 2008-2020, p. 548.

⁶³ KERPEL, Aron - Pole and Hungarian Cousins Be? A Comparison of State Media Capture, Ideological Narratives and Political Truth Monopolization in Hungary and Poland, p. 70.

⁶⁴ BOGAARDS, Matthijs - De-democratization in Hungary: diffusely defective democracy, p. 1481.

⁶⁵ KAROLEWSKI, Ireneusz Paweł - Towards a Political Theory of Democratic Backsliding? Generalising the East Central European Experience, p. 302.

⁶⁶ V-DEM INSTITUTE - Autocratization Turns Viral: Democracy Report 2021, p. 19.

⁶⁷ V-DEM INSTITUTE - Autocratization Surges- Resistance Grows: Democracy Report 2020, p. 16.

⁶⁸ FREEDOM HOUSE - Dropping the Democratic Facade: Nations in Transit 2020, p. 3.

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autocracy”, which it has been since 2020⁶⁹, while Freedom House downgraded the country to “partly free” in 2019⁷⁰.

Scholars offer varied interpretations of Hungary's democratic regression since Orbán's ascension, resulting in a lack of consensus on how to define Hungary's current regime⁷¹. As summarised by Matthijs Bogaards⁷², some scholars emphasize the autocratic side of the regime, calling it a "semi-dictatorship”, “semi-authoritarianism”, “elected autocracy”, or even an “operetta dictatorship”. Others refer to it as a “hybrid regime”, a mixture of democratic and autocratic practices, a regime somewhere in the grey area between liberal democracy and full-blown authoritarianism. A third group focuses on the weakening of the democratic side of the regime and describes Hungary as a representative of “deconsolidation of democracy”, “democratic backsliding” “simulated democracy”, “populist democracy”, “selective democracy,” or even “diminished form of democracy”.

Regardless of terminology used to describe the Hungarian regime, the truth of the matter is that Viktor Orbán's victory in 2010 introduced a new era for Hungarian democracy⁷³, or rather a lack thereof, converting what was “initially a consensual system toward a strongly majoritarian one”, as argued by Aron Buzogány and Mihai Varga. This transformation has been heavily criticised by the European Parliament⁷⁴, which, as of 2022, no longer considers Hungary as a fully-fledged democracy. In its resolution⁷⁵, the Parliament speaks of a “breakdown in democracy (...), turning the country into a hybrid regime of electoral autocracy”, which has since been associated with Vladimir Putin's Russia⁷⁶ and Recep Tayyip Erdoğan's Turkey.

⁶⁹ V-DEM INSTITUTE - Autocratization Surges- Resistance Grows: Democracy Report 2020, p. 6.

⁷⁰ FREEDOM HOUSE - Democracy in Retreat: Freedom in the World 2019, p. 13.

⁷¹ BOGAARDS, Matthijs - De-democratization in Hungary: diffusely defective democracy, p. 1482.

⁷² *Ibidem*.

⁷³ ŽIVIĆ, Katarina - Rise of the Far Right in Europe and the Effect on Democratic Backsliding: Insights from Hungary and Italy., p. 75.

⁷⁴ BUZOGÁNY, Aron; VARGA, Mihai - Against “post-communism”, p. 72.

⁷⁵ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), rec. DS (2).

⁷⁶ APPEL, Hilary - Can the EU Stop Eastern Europe's Illiberal Turn?, p. 258.

2. Specific Rule of Law Concerns in Hungary

Since gaining a parliamentary supermajority, the Fidesz government has persistently undermined key elements of democratic governance⁷⁷. The illiberal turn in Hungary includes constitutional and administrative reforms that harm political participation, representativeness, and equality, as well as strict media control and the suppression of freedom of expression⁷⁸. Although the government has used legal means following democratic elections to consolidate power, the resulting state capture deviates from democratic principles and compromises essential components of liberal democracies. The following sections examine the most alarming changes.

2.1. Functioning of the Constitutional System

Since the 2010 elections, constitutional and legislative changes have allowed the Fidesz party to consolidate its control over Hungary's previously independent institutions, threatening the separation of powers and weakening the national system of checks and balances⁷⁹. The "Fundamental Law", adopted on 25 April 2011 in an exclusive political process⁸⁰, replaced the 1949 constitution and has been amended 12 times since it took effect on 1 January 2012. This process faced a lot of criticism from the Venice Commission for its lack of transparency and sincere consultation, insufficient involvement of civil society and very limited timeframe⁸¹.

The constitutional reform and its subsequent amendments have significantly restricted the Hungarian Constitutional Court's powers. For example, the Fundamental Law removed a wide range of issues from the Court's jurisdiction, including matters related to the state budget and taxes⁸². The abolishment of *actio popularis* also limited citizens' ability to appeal before the Constitutional Court the constitutionality of legal norms without

⁷⁷ RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 631.

⁷⁸ ŽIVIĆ, Katarina - Rise of the Far Right in Europe and the Effect on Democratic Backsliding: Insights from Hungary and Italy, p. 75.

⁷⁹ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

⁸⁰ BIEN-KACAŁA, Agnieszka; DRINÓCZI, Tímea - Preface, p. xiv.

⁸¹ CSINK, Lóránt - Rule of Law in Hungary: What can law and politics do?, p.159.

⁸² JAKAB, András; BODNÁR, Eszter - The Rule of Law, democracy, and human rights in Hungary: tendencies from 1989 until 2019, p. 111.

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demonstrating personal interest⁸³. Instead, a German- inspired constitutional complaint system was introduced, limiting the procedure to those whose rights or lawful interests are directly affected by the challenged court decision⁸⁴. This change, which had long been called for by constitutional lawyers, was intended to reduce the workload of the Constitutional Court⁸⁵. *De facto*, however, this limited the Constitutional Court's ability to counterbalance legislative and executive powers⁸⁶.

Further changes included invalidating all pre- 2012 Constitutional Court judgements, prohibiting the Court from referring to its prior case law, and limiting its ability to review amendments to the Fundamental law, except in formal matters, thereby preventing any activist efforts of the Court⁸⁷. Additionally, increasing the number of members of the Constitutional Court from 11 to 15⁸⁸ allowed Orbán to “pack it” it with Fidesz loyalists, further concentrating power in the government's hands ⁸⁹.

To ensure long-term control and limit the possibility of future governments reversing their policies, the Fidesz government maintained the system of cardinal laws⁹⁰, enacting numerous new ones from 2011 to 2013. These laws, covering various policy areas and requiring a two-thirds majority to be altered⁹¹, entrenched the government's ideological preferences into the constitutional framework, allowing the construction of a constitutional order “of the ruling party, by the ruling party, and for the ruling party”⁹².

Another source of concern has been the government's extensive and prolonged use of emergency powers since the global pandemic, which has severely compromised legal

⁸³ KELEMEN, Katalin - Access to Constitutional Justice in the new Hungarian Constitutional Framework: Life after the Actio Popularis?, p. 64.

⁸⁴ GÁRDOS-OROSZ, Fruzsina - The Hungarian constitutional court in transition - from actio popularis to constitutional complaint, p. 311.

⁸⁵ JAKAB, András; BODNÁR, Eszter - The Rule of Law, democracy, and human rights in Hungary: tendencies from 1989 until 2019, p. 111.

⁸⁶ *Ibidem*.

⁸⁷ *Idem*, p. 109.

⁸⁸ *Idem*, p. 111.

⁸⁹ KELEMEN, R. Daniel - Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union, p. 222.

⁹⁰ KORNAI, János - Hungary's U-Turn: Retreating from Democracy, p. 47.

⁹¹ JAKAB, András; BODNÁR, Eszter - The Rule of Law, democracy, and human rights in Hungary: tendencies from 1989 until 2019, p. 110.

⁹² BARD, Petra; PECH, Laurent - How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The 'Hungarian Model', p. 12.

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certainty⁹³. The “state of danger” declared in March 2020 under the widely denounced Authorization Act has been extended several times⁹⁴, granting the executive sweeping powers that it has used “without accountability to restrict civil liberties unrelated to public health or safety”⁹⁵. In May 2022, the Tenth Amendment expanded the concept of a state of danger to include armed conflict, war or humanitarian disasters in neighboring countries⁹⁶, such as the ongoing situation in Ukraine. The government instantly declared the new type of state of danger, which has been continuously extended and is still in force at the time of writing⁹⁷. This has given the government a *carte blanche* mandate to issue hundreds of emergency decrees⁹⁸, many of which had nothing to do with the declared state of danger- formerly the pandemic, now the war in Ukraine- but instead served the government’s political purposes, severely undermining the rule of law⁹⁹.

The most recent constitutional problem is the twelfth- and so far, last- amendment, which gave the National Authority for the Defence of Sovereignty wide-ranging and vaguely defined powers to investigate activities suspected of serving foreign interests¹⁰⁰. This move, criticised by the Council of Europe Commissioner for Human Rights¹⁰¹ and various NGOs¹⁰², is seen as an attempt to silence dissent, further eroding pluralism and

⁹³ ⁹³ EUROPEAN COMMISSION - 2023 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p. 31.

⁹⁴ HUNGARIAN HELSINKI COMMITTEE - Government gains excessive powers from forever renewable state of danger, p. 4.

⁹⁵ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

⁹⁶ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report; European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), rec.V.

⁹⁷ ⁹⁷ FREEDOM HOUSE - Democracy in Retreat: Freedom in the World 2019, p. 13.

⁹⁸ HUNGARIAN HELSINKI COMMITTEE - Contributions of Hungarian CSOs to the European Commission’s Rule of Law Report, p. 74.

⁹⁹ HUNGARIAN HELSINKI COMMITTEE - Hungary: Perpetuated states of Exception Undermine Legal Certainty and Human Rights, p. 1.

¹⁰⁰ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

¹⁰¹ COUNCIL OF EUROPE - Hungary: The proposal for a “defence of national sovereignty” package should be abandoned – Statement of the Commissioner for Human Rights.

¹⁰² For example, HUNGARIAN HELSINKI COMMITTEE - The Proposed Regime Defence Law is Bound to Fail; EUROPEAN CIVIC FORUM - Hungary: ECF condemns new Defence of Sovereignty law and calls on EU institutions to act; CIVILISATION COALITION - Over 100 NGOs protest against the Defence of Sovereignty Law.

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democracy¹⁰³. Consequently, the European Commission initiated an infringement procedure in February 2024, which is currently pending¹⁰⁴.

To summarise, the Constitution has become a political tool, with amendments catering to the ruling party's daily needs. Through a combination of a new constitution, constitutional amendments and "cardinal laws"- often enacted without public consultation¹⁰⁵- Fidesz has codified its policies and personnel preferences for the foreseeable future, even if it loses power¹⁰⁶.

2.2. Functioning of the Electoral System

Fidesz's instrumentalization of power is further evidenced by the changes made to the electoral framework to benefit itself and its political interest. These changes include constituency reshaping and winner compensation, replacing the previous two-round elections in single-member constituencies. These modifications have consistently disadvantaged opposition parties¹⁰⁷, making it significantly easier for Fidesz to secure reelections in 2014, 2018 and 2022.

In April 2022, the Fidesz-KDNP coalition won the parliamentary elections with 54.13 % of the vote, securing a fourth consecutive term in office and a two-thirds majority with 135 seats¹⁰⁸. However, civil society raised concerns about the fairness of these elections, prompting the Organisation for Security and Co-operation in Europe (OSCE) to deploy a full-scale international election observation mission- a rare occurrence for EU Member States¹⁰⁹.

The observation mission found that while the elections were well administered and professionally conducted¹¹⁰, they did not provide a level playing field and equal opportunities for all candidates¹¹¹, which is of utmost importance for democratic integrity.

¹⁰³ SCHULER, Miriam - Regime Defence Disguised as a Defence of Sovereignty: The Hungarian Defence of National Sovereignty Bill as a violation of European values.

¹⁰⁴ EUROPEAN COMMISSION - February infringement package: key decisions, p. 7.

¹⁰⁵ European Parliament Resolution of 15 September 2022, rec. W.

¹⁰⁶ SITTER, Nick; BAKKE, Elisabeth - Democratic Backsliding in the European Union, p. 9.

¹⁰⁷ European Parliament Resolution of 15 September 2022, rec. S.

¹⁰⁸ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

¹⁰⁹ European Parliament Resolution of 15 September 2022, rec. U.

¹¹⁰ OSCE - ODIHR Election Observation Mission Final Report, 29 July 2022, p. 2.

¹¹¹ *Idem*, p. 3.

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A free and fair election requires not only an election day without irregularities, but also an environment in which political parties and candidates can freely register and campaign, in which information is available to the public and in which votes are fairly translated into seats¹¹². Without such conditions, the electoral process risks becoming “a mere façade for the biases and manipulations behind the scenes”¹¹³.

The OSCE International Election Observation Mission found that voters' ability to make an informed choice was severely limited¹¹⁴. Overall, a lack of balance in public and private media coverage was noted, as well as a lack of debates between the main candidates, excessive government spending on public information advertising and an absence of transparency and control of campaign finances¹¹⁵. Although the candidates were largely free to organise their campaign, the election campaign was very negative and characterised by extensive overlap between the governing coalition and the government, which provided Fidesz with a dominant campaign platform that ultimately led to its fourth consecutive victory¹¹⁶. The OSCE/ODIHR report also pointed to the lack of effective legal remedies against irregularities, as the electoral authorities often ruled in favour of the Fidesz–KDNP coalition¹¹⁷.

Furthermore, the electoral authorities' independence and impartiality have been called into question as members of the National Election Commission (NVB) are appointed by the President and confirmed by Parliament for a nine-year term without any formal parliamentary debate or public hearing to select NVB members¹¹⁸.

2.3. Judicial Independence and Judges' Rights

Judicial capture and court packing in Hungary include various measures that have curtailed judicial independence and weakened judicial oversight over executive powers.

¹¹² GORNI, Sándor Adám - Elections in Hungary: 'Free and fair' is much more than election day- The Electoral Integrity Project EIP.

¹¹³ *Ibidem.*

¹¹⁴ OSCE - ODIHR Election Observation Mission Final Report, 29 July 2022, p. 2.

¹¹⁵ *Ibidem*, p. 1.

¹¹⁶ European Parliament Resolution of 15 September 2022, rec. U.

¹¹⁷ *Ibidem.*

¹¹⁸ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

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As the shortcomings regarding the independence of the judiciary are extensive, only the most controversial are highlighted. At the end of this section, an overview of the judicial reform adopted by the Hungarian government on 3 May 2023 is provided to understand the changes that led to the European Commission's decision of December 2023 to release €10.2 billion of previously frozen EU funds under the Hungarian RRF, which are assessed in more detail in Chapter III.

2.3.1. Early Retirement of judges

In 2011, a law without any meaningful transitional period was passed, lowering the mandatory retirement age of the judges from 70 to 62 years¹¹⁹. This resulted in the forced and early retirement of almost 10% of the judiciary, opening the way for 274 new appointments of judges closely aligned with executive powers by the newly established central court administration, as will be discussed in section 2.3.3¹²⁰. Although the law was later declared unconstitutional by the Constitutional Court¹²¹- and in violation of EU law by the CJEU as it represented age discrimination at the workplace, and thus violated Council Directive 2000/78/EC¹²²- very few judges returned to their positions.

2.3.2. Overruling Judicial Decisions by the Executive

In 2011, a legislative bill known as the “nullity law”¹²³ rendered null and void all convictions related to the 2006 protests¹²⁴ based solely on police reports or confessions. This bill was controversial as it suggested that police testimonies were always false, questioning judges' decisions to believe police officers. Regardless of the merits of the individual cases, this legislative action crossed the limits imposed by the principle of the

¹¹⁹ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 175.

¹²⁰ Sitter, Nick; Bakke, Elisabeth - Democratic Backsliding in the European Union, p. 9.

¹²¹ Hungarian Constitutional Court, 33/2012. (VII. 17.) AB decision.

¹²² CJEU, Case C-286/12, *Commission v Hungary*, 06 November 2012.

¹²³ Act XVI of 2011.

¹²⁴ These protests were sparked by the release of a private speech by Hungarian Prime Minister Ferenc Gyurcsány, in which he confessed that his Hungarian Socialist Party had deceived voters to win the elections.

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separation of powers and created a precedent for nullifying court decisions that do not favour political interests¹²⁵.

Since then, high-ranking government members have routinely criticised judgments considered unfavourable to government interests, raising serious concerns about judicial independence and the judiciary's susceptibility to external pressure¹²⁶. For instance, in 2018, when the Supreme Court (renamed *Kúria*) invalidated over 4000 postal votes in the parliamentary elections, Viktor Orbán accused the court of interfering with the elections, alleging it took away a seat from Fidesz¹²⁷.

Similarly, in 2020, the Prime Minister publicly criticised the judiciary for awarding compensation in cases relating to school segregation of Roma students and prisoners' detention conditions, claiming that these decisions violated "people's "sense of justice"¹²⁸. These attacks were supplemented by legislative steps to overturn the corresponding judicial rulings, representing blatant examples of the violation of the principle of separation of powers. First, the government proposed a bill aimed at suspending the payment of compensations for cruel and inhumane detention conditions¹²⁹. Second, in response to the Supreme Court's decision to uphold lower courts' decisions regarding financial compensation for victims of segregation in schools, Parliament passed the amendment to the National Public Education Act, known as "Lex Gyöngyöspata", which prohibited the payment of damages for similar future claims¹³⁰.

¹²⁵ HUNGARIAN HELSINKI COMMITTEE - Jogállamban a törvényhozó nem ítélezik - magyar helsinki bizottság.

¹²⁶ HUNGARIAN HELSINKI COMMITTEE - Unfettered Freedom to Interfere Ruling Party Politicians Exerting Undue Influence on The Judiciary in Hungary 2010–2020, p. 1.

¹²⁷ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 13.

¹²⁸ *Ibidem*.

¹²⁹ GYŐRY, Csaba - Fighting Prison Overcrowding with Penal Populism- First Victim: the Rule of Law.

¹³⁰ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 13.

2.3.3. New Model of Court Administration

In 2012, Hungary introduced a new model of court administration, replacing the former system of judicial self-governance with a highly centralised system based on a strong, one-person leadership.

Under this new model, the President of the National Office of the Judiciary (NOJ)- appointed by the government for a nine-year term- was given extensive powers¹³¹. The self-governing body- the National Judicial Council (NJC)- composed of 15 judges (14 elected by their peers and the President of the Supreme Court as an *ex-officio* member), was relegated to a limited supervisory role over the NOJ President's activities¹³².

The NOJ President's extensive powers included the authority to hire, promote, demote, transfer, and discipline any judge in the system, manage the court system's budget, and oversee judicial affairs. This concentration of power in the hands of the NOJ President, with minimal checks and balances, raised significant concerns regarding the new system, which was criticised by the Venice Commission for concentrating too much power in a single, non-judicial figure¹³³.

These "institutional weakness of the NJC *vis-à-vis* the President of the NOJ"¹³⁴ became particularly evident in 2018 when a newly elected NJC began scrutinising the Fidesz-appointed NOJ President, Tünde Handó. Handó, the wife of a prominent Fidesz politician and a friend of the Orbán family¹³⁵, faced accusations of irregularities and abuse of power, particularly in connection with the appointment of court officials, who play an important role in judicial appointments and promotions, case distribution, the working conditions of individual judges, the initiation of disciplinary proceedings against judges and decisions on salary bonuses¹³⁶.

¹³¹ *Idem*, p. 9.

¹³² *Ibidem*.

¹³³ VENICE COMMISSION - Opinion on Act CLXII Of 2011 on the Legal Status and Remuneration of Judges and Act CLXI Of 2011 on the Organisation and Administration of Courts of Hungary, p. 13.

¹³⁴ BÁRD, Petra [et al.] - *Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit*, p. 9.

¹³⁵ FLECK, Zoltán - Judges under Attack in Hungary.

¹³⁶ BÁRD, Petra [et al.] - *Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit*, p. 9.

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Since her appointment in 2012, Handó frequently declared application procedures unsuccessful without adequate reasons and cancelled appointments even when the candidates had overwhelming support¹³⁷. Leadership posts were frequently filled by the temporary appointment of judges who had been rejected by their colleagues, did not participate in the application process, or did not work at the court where the position was vacant¹³⁸. This practice allowed Handó to bypass the NJC and appoint court leaders loyal to her.

In 2018, after several NJC members resigned, Handó declared the NJC's activities unlawful and refused further cooperation with the self-governing body¹³⁹. The NJC attempted to remove Handó in 2019, but ruling party MPs rejected the move without much debate. Later, the governing majority nominated Handó to the Constitutional Court, and György Barna Senyei took over as the NOJ's new president¹⁴⁰.

2.3.4. Premature Termination of the Mandates of the President and Vice President of the Supreme Court

In 2012, the mandates of both the President of the Supreme Court, András Baka, and the Vice President, Lajos Erményi, were prematurely terminated. This occurred in the context of Hungary's sweeping constitutional and legislative reforms, which restructured the judiciary and introduced new eligibility criteria for judicial positions.

András Baka, a former judge at the European Court of Human Rights (ECtHR), saw his mandate cut short three and a half years before his six-year term was set to end¹⁴¹. Officially, this was due to new legislation, which introduced different eligibility criteria for the Presidency of the Supreme Court to have at least five years of judicial experience within the Hungarian judiciary¹⁴². As Baka's 17 years of work at the ECtHR did not meet

¹³⁷ *Ibidem*.

¹³⁸ As argued by Bárd and others, although the President of the NOJ may appoint court presidents and other high-ranking officials to higher courts, the NJC must approve the appointment if the nominee does not receive the support of the plenary session of the judges or the judicial collegium.

¹³⁹ HUNGARIAN HELSINKI COMMITTEE - [Timeline of undermining the independence of the judiciary in Hungary 2012-2019](#), p. 6.

¹⁴⁰ BÁRD, Petra [et al.] - *Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit*, p. 10.

¹⁴¹ *Idem*, p. 14.

¹⁴² *Idem*, p. 15.

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this criterion, he was no longer eligible for the position. However, his dismissal coincided with his vociferous criticism of the general constitutional and legislative changes in Hungary, which suggested a politically motivated move.

Similarly, the mandate of Vice President Lajos Erményi was also cut short by the same legislative reform, which introduced structural changes to the court organisation and administration¹⁴³. Judge Lajos challenged the termination through a constitutional appeal, but the Hungarian Constitutional Court- by a narrow 8 to 7 majority- upheld the decision, citing the judicial reorganization as sufficient justification for ending its mandate¹⁴⁴.

Unable to seek remedy at national level due to the specific legislative provisions terminating his mandate¹⁴⁵, Baka turned to the ECtHR, which saw the matter differently from the Hungarian Constitutional Court. The ECtHR found that the termination of his mandate through *ad hominem* legislative measures violated Article 6(1) of the European Convention on Human Rights (ECHR) because he was denied access to justice due to the lack of judicial review¹⁴⁶. Furthermore, the ECtHR found that the measures violated Article 10 ECHR, as they were prompted by his public criticisms of the judicial reforms, thus lacking a legitimate aim, and had a “chilling effect” on judicial independence¹⁴⁷. This was perceived to be discouraging not only for András Baka, but also “other judges and court presidents [...] to participate in public debate on [...] issues concerning the independence of the judiciary”¹⁴⁸, thus hindering judge’s ability to perform their duties without undue political interference.

Following a similar path, Judge Erményi later submitted an application to the ECtHR¹⁴⁹. In addition to violating his rights to property and a fair trial, he argued that the termination of his mandate violated his right to privacy. The ECtHR decided in his favour, concluding

¹⁴³ *Ibidem*.

¹⁴⁴ Hungarian Constitutional Court, 3076/2013. (III. 27.) *AB* decision.

¹⁴⁵ Judge Baka's mandate was terminated by the Transitional Provisions of the Fundamental Law, which stated that "The mandate of the President of the Supreme Court and of the President and members of the National Council of Justice shall terminate upon the entry into force of the Fundamental Law," in contrast to Judge Lajos, whose term was terminated in accordance with the Act on the organisation and administration of courts.

¹⁴⁶ ECtHR, *Baka v. Hungary*, Application no. 20261/12, 27 May 2014.

¹⁴⁷ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 186.

¹⁴⁸ *Idem*, p. 173.

¹⁴⁹ ECtHR, *Erményi v. Hungary*, Application No. 22254/14, 22 November 2016.

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that Article 8 ECHR was breached by the *ad hominem* legislation because it did not pursue a legitimate goal.

These cases raise serious questions about the independence of the judiciary in Hungary. The premature termination of judicial mandates through legislative measures aimed at specific individuals- especially those who criticise its reforms- threatens the role of the judiciary as an independent branch of government.

2.3.5. The (Unsuccessful) Restructuring of the Administrative Court System

An additional noteworthy attempt to limit judicial independence was the suggested- but ultimately unsuccessful- restructuring of the administrative court system. The government began working on creating a distinct administrative court system in 2016, with the goal of creating the Supreme Administrative Court as a high court only for administrative cases. However, the Minister of Justice was unable to present strong arguments for altering the current administrative justice system, which led to strong criticism, even from the NOJ¹⁵⁰.

When, all the sudden, the government announced the suspension of the reform in May 2019, some saw this for what it was - “the calm before the storm”. In fact, later that year, Act CXXVII of 2019¹⁵¹ was introduced as an *omnibus* bill, producing similar results to the initial administrative court reform without establishing an independent administrative judicial system¹⁵².

2.3.6. The 2019 *Omnibus* Bill

The 2019 legislative package included significant changes affecting the judiciary. One of the major changes allowed judges of the Constitutional Court- considered a separate constitutional body rather than an integral part of the judiciary- to be appointed as ordinary judges without meeting the usual eligibility criteria or going through an

¹⁵⁰ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 11.

¹⁵¹ Act CXXVII of 2019 on the Amendment of Certain Acts in Relation to the Single-instance Administrative Procedures of District Offices.

¹⁵² KAZAI, Viktor Z. - One Step Back, Two Steps Forward.

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application process¹⁵³. This amendment enabled constitutional judges to be appointed to the Supreme Court without fulfilling the required 5 years of experience in the judiciary. Considering the loyalty of most Constitutional Court judges to the government, this change opened an escape route to the Supreme Court, paving the way for its capture by the government¹⁵⁴.

2.3.7. The Limited Precedent and the Uniformity Complaint Systems

The *omnibus* package also introduced measures that greatly increased the influence of the Supreme Court within the ordinary legal system¹⁵⁵. A significant change was the implementation of a “limited precedent system”, which requires judges to follow the Supreme Court’s published decisions and justify any variation from the established legal interpretation. In addition, the 2019 Act introduced the “uniformity complaint procedure”, allowing parties to challenge said deviations from the Supreme Court’s jurisprudence¹⁵⁶.

The underlying problem with this system, as highlighted by the Venice Commission¹⁵⁷, is that the President of the Supreme Court, who determines the composition of the “uniformity panels”, can influence overall jurisprudence. This, combined with the fact that the election of the President of the Supreme Court is heavily politicised¹⁵⁸, raises concerns that limiting judicial discretion in legal interpretation further endangers the independence of the judiciary.

¹⁵³ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 188.

¹⁵⁴ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p.12.

¹⁵⁵ *Ibidem*.

¹⁵⁶ *Ibidem*.

¹⁵⁷ VENICE COMMISSION - Opinion on the amendments to the act on the organisation and administration of the courts and the act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020, p.13.

¹⁵⁸ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 12.

2.3.8. The *Ad Hominem* Appointment of the President of the Supreme Court

The 2019 reform package also reamended the eligibility requirements for appointing the President of the Supreme Court¹⁵⁹. The amendment expanded the criteria for five years of judicial experience to include time spent as a justice or senior adviser in the Constitutional Court or an international tribunal¹⁶⁰. This change was seen as paving the way for András Varga's 2020 election as President of the Supreme Court, a move that was heavily criticised by the Executive Board of the European Network of Councils for the Judiciary (ENCJ)¹⁶¹. The ENCJ argued that laws tailored to benefit- or disadvantage, as was the case for Judge Baka- specific individuals violates the rule of law, as emphasised by the ECtHR in the Baka case¹⁶².

András Zs. Varga, nominated by the President of the Republic and solely supported by the governing party, lacked prior experience in the judiciary before being appointed as a Constitutional Court judge by the government. His career path is said to have been significantly influenced by his close ties to Fidesz¹⁶³. The NJC, which represents the judiciary, rejected his nomination by a non-binding 13 to 1 vote, citing his lack of professional experience as a judge and a court executive in the ordinary court system¹⁶⁴. His candidature was only possible because of legal reforms enacted in 2019, raising concerns about his independence from political influence¹⁶⁵. Regardless, the National Assembly proceeded with the election anyway¹⁶⁶.

The European Commission's 2020 annual report on the rule of law¹⁶⁷ also emphasised concerns about the 2019 reform package, noting that judges of the Constitutional Court elected by Parliament could take up a judicial position in the ordinary court system

¹⁵⁹ *Idem*, p. 6.

¹⁶⁰ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 188.

¹⁶¹ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 17.

¹⁶² EUROPEAN NETWORK OF COUNCIL FOR THE JUDICIARY (ENCJ) - Letter to the European Commission about rule of law concerns in Hungary, p. 2.

¹⁶³ KAZAI, Viktor Z.; KOVÁCS, Ágnes - The Last Days of the Independent Supreme Court of Hungary?

¹⁶⁴ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 17.

¹⁶⁵ *Ibidem*.

¹⁶⁶ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 189.

¹⁶⁷ EUROPEAN COMMISSION- 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, pp. 5-6.

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without the need to apply. This allows the legislature to exert undue influence on the appointment of judges and the composition of the judiciary, particularly in the Supreme Court¹⁶⁸.

2.3.9. Act X of 2023

On 3 May 2023, the Hungarian Parliament adopted Act X of 2023¹⁶⁹, a large-scale judicial reform designed to meet EU Council's so-called "super milestones". These milestones are preconditions for accessing frozen EU funds under Hungary's Recovery and Resilience Fund (RRF), a topic further discussed in Chapter III. Among other things, the reform gives the NJC more authority to counterbalance the powers of the NJO president and increases the Supreme Court's independence¹⁷⁰, but observers have expressed concern about its adequacy¹⁷¹.

While the reform adopted in May 2023 was considered to be an improvement over the draft proposal from January 2023, NGOs such as the Hungarian Helsinki Committee, Amnesty International Hungary, and the Eötvös Károly argue that it stills fall short of fully complying with the EU's requirements.

Firstly, the adoption process itself "did not comply with the principle of legality, which requires a transparent, accountable, democratic, and pluralistic law-making process"¹⁷². The reform was enacted without public consultation and parliamentary debate, violating the Hungarian Parliament's Rules of Procedure¹⁷³.

Secondly, three of the four judicial milestones were inadequately addressed. The removal of obstacles to preliminary references to the CJEU remains flawed due to a Supreme

¹⁶⁸ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 17.

¹⁶⁹ Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan.

¹⁷⁰ EUROPEAN COMMISSION - Commission considers that Hungary's judicial reform addressed deficiencies in judicial independence, but maintains measures on budget conditionality, p. 2.

¹⁷¹ HUNGARIAN HELSINKI COMMITTEE; AMNESTY INTERNATIONAL HUNGARY; EÖTVÖS KÁROLY INSTITUTE - Assessment of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan.

¹⁷² *Idem*, p. 5.

¹⁷³ *Ibidem*.

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Court precedent which still declares unlawful any preliminary references that are not directly relevant to the legal dispute in question¹⁷⁴.

Furthermore, the absence of transitional rules undermines the effective exercise of the NJC's new powers¹⁷⁵. The independence of the Supreme Court remains compromised as the Supreme Court President can remain in office indefinitely with the support of only a one-third parliamentary minority. Additionally, the reform allows Constitutional Court justices- who are appointed without a transparent application procedure- to be transferred to the ordinary court system¹⁷⁶, thereby maintaining concerns about *ad hominem* judicial appointments by the ruling majority.

Despite these shortcomings, the reform does meet several key requirements of the super milestones. The NJC's legal status and powers were strengthened, granting it legal personality, budgetary autonomy, access to relevant data and information, and a system of legal remedies to enforce its powers¹⁷⁷. In addition, changes regarding the eligibility criteria for the appointment of the President and Vice-President strengthened Supreme Court's independence¹⁷⁸.

However, several rule of law concerns remain. These include the government's limitless ability to rule by decree¹⁷⁹, the Constitutional Court's power to review final judicial decisions and settle legal disputes involving the NJC and other authorities¹⁸⁰, the Supreme Court's ability to determine compulsory law interpretation through uniformity decisions¹⁸¹, the lack of freedom of expression guarantees for judges¹⁸², and the risk of the NJC being usurped by the Constitutional Court's new jurisdiction to protect the NJC's rights¹⁸³.

The European Parliament has expressed its concerns over these reforms, remaining unconvinced that they will have a practical impact and “believes that even after the recent

¹⁷⁴ *Idem*, p. 10.

¹⁷⁵ *Idem*, p. 6.

¹⁷⁶ *Idem*, p. 8.

¹⁷⁷ *Idem*, p. 2.

¹⁷⁸ *Ibidem*.

¹⁷⁹ *Idem*, p. 12.

¹⁸⁰ *Ibidem*.

¹⁸¹ *Idem*, p. 9.

¹⁸² *Idem*, p. 16.

¹⁸³ *Idem*, p. 13.

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reforms, Hungary does not meet the standard of judicial independence set out in the Charter of Fundamental Rights of the European Union (Charter), as indicated by experts in Hungary and internationally, as the measures adopted do not ensure sufficient safeguards against political influence and can be either circumvented or inadequately applied”¹⁸⁴. This is why the European Parliament has been highly critical of the European Commission’s decision to release the related frozen EU funds, a topic that will be further explored in Chapter III.

In conclusion, while the reform is not a step backwards, significant deficiencies and risks remain to be addressed.

2.4. Academic Freedom

Another element of Orbán’s long-term attack on democratic institutions, which led Hungary to become the first EU Member State to lose its “free” status in Freedom House’s leading “Nations in Transit and Freedom in the World index”¹⁸⁵, is the increasing control over academia. This move aims to suppress critical voices by changing policies and rules governing the higher education system, which are supposed to be safeguarded by domestic and international laws governing academic freedom, the freedom of expression and assembly, and the right to, and freedom of, education¹⁸⁶.

The challenges for Hungary’s higher education system began in 2011 with the introduction of a new Higher Education Law that reduced university autonomy¹⁸⁷. The most controversial change came in 2017 with “Lex CEU”, which imposed new conditions on higher education institutions based outside the EU or the European Economic Area (EEA), specifically targeting the Central European University (CEU)¹⁸⁸.

Founded in 1991 by George Soros, a Hungarian-born billionaire philanthropist, the CEU aimed to be an internationally respected institution promoting democratic transition¹⁸⁹.

¹⁸⁴ European Parliament resolution of 18 January 2024, rec. 5.

¹⁸⁵ FREEDOM HOUSE - Democracy in Retreat: Freedom in the World 2019, p. 13.

¹⁸⁶ European Parliament Resolution of 12 September 2018, rec. 33.

¹⁸⁷ Act XXV of 2017 of 4 April 2017 on the amendment to Act CCIV of 2011 on National Higher Education.

¹⁸⁸ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 182.

¹⁸⁹ CANPOLAT, Ece Adviye Işık - A Process-Oriented Approach Towards Democratic Backsliding: Evidence from Hungary and Turkey, p. 180.

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Soros intended to educate a new generation of political leaders and scholars in a free academic environment that encouraged critical thinking. This mission, however, clashed with Orbán's agenda and Soros became an "enemy figure", with pro-government media targeting activists, academics, programmes, and institutions critical of Orbán's ideology, often labeling them as "Soros agents"¹⁹⁰.

The 2017 amendment required foreign institutions outside the EEA to operate in their country of origin and sign a bilateral agreement with the Hungarian government to continue their operations¹⁹¹. The government, however, has full discretion in concluding such agreements. As a result, the CEU needed a campus in the United States to continue its operations in Hungary, which was not the case.

The European Commission referred the case to the CJEU¹⁹², which ruled that the amended Higher Education Law was incompatible with EU law and aimed to weaken institutional checks and balances. The CJEU's decision made it abundantly clear that the Lex CEU was contrary to the General Agreement on Trade in Services (GATS-WTO), the Lisbon Treaty, the Services Directive 2006/123, and the Charter, namely, Article 14(3) on the freedom to found educational establishments and Article 16 on the freedom to conduct a business¹⁹³. The verdict, unfortunately, arrived too late. The Hungarian government's refusal to sign the necessary international agreement forced the CEU to leave the country by the time the judgment was issued, making the case "moot"¹⁹⁴.

After the CEU's expulsion, the government further tightened control over the higher education system. In 2019, it began restructuring universities, starting with Corvinus University, transitioning it from state-funded to privately funded, overseen by an unelected board of trustees¹⁹⁵. This board, composed of Fidesz loyalists and government officials, holds unlimited authority over policies, spending, appointments, and *curriculum* decisions, significantly reducing university independence and autonomy. While the

¹⁹⁰ FREEDOM HOUSE - [Hungary: Freedom in the World 2024 Country Report](#).

¹⁹¹ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 182.

¹⁹² CJEU, Case C-66/18 *Commission v Hungary*, 6 October 2020.

¹⁹³ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 182.

¹⁹⁴ *Ibidem*.

¹⁹⁵ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 126.

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government claims privatization enhances independence by reducing state ties, the Venice Commission remains skeptical and suggests that these foundations should be regulated by statutory law, with clear duties of transparency and accountability for fund management and safeguards for the board of trustees' independence¹⁹⁶.

Other concerning changes include the removal of Gender Studies from the list of Master's programmes eligible for accreditation and public funding in 2018¹⁹⁷, the adoption of amendments to a number of laws stripping the 200-year-old Academy of Sciences of its autonomy in 2019¹⁹⁸, the forced appointment of a government-appointed board at the University of Theatre and Film Arts (SZFE) leading to management resignations in protest in 2020¹⁹⁹ and, finally, the adoption of the 2023 "Status Law", abolishing teachers' statues as public servants and removing certain labour protections. Critics of the legislation label this a "revenge law" as retaliation for teachers' strikes and protests in 2022 and 2023 for better pay and working conditions²⁰⁰.

2.5. Freedom of Expression- Media Freedom and Pluralism

Although Hungary's Fundamental Law and sectoral legislation²⁰¹ establish a sound legal framework for the protection of media freedom and pluralism²⁰², recent years have shown a gradual and systemic appropriation of the media.

In its latest report, Freedom House argues that "since 2010, Fidesz has gradually taken over artistic and cultural institutions and film and publishing industries and redirected funding for projects and artworks openly promoting nationalistic and Christian values"²⁰³.

Indeed, the media environment has been increasingly "skewed in favour of the government through the manipulation of media ownership"²⁰⁴. Fidesz-friendly oligarchs

¹⁹⁶ VENICE COMMISSION - Opinion of the constitutional amendments adopted by the Hungarian Parliament in December 2020, para. 71.

¹⁹⁷ European Parliament Resolution of 15 September 2022, rec. BQ.

¹⁹⁸ *Idem*, rec. BR.

¹⁹⁹ *Ibidem*.

²⁰⁰ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

²⁰¹ Act CLXXXV of 2010 on media services and on mass media.

²⁰² EUROPEAN COMMISSION - 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary, p. 20.

²⁰³ FREEDOM HOUSE - Hungary: Freedom in the World 2023 Country Report.

²⁰⁴ European Parliament Resolution of 15 September 2022, rec. BC.

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and companies have acquired newspapers, magazines, TV stations and electronic media by making attractive offers to owners, persuading them to part with their properties²⁰⁵. By the end of 2017, this resulted in 90% of media outlets being owned by either the state or a company aligned with Fidesz²⁰⁶.

In 2018, media owners transferred their holdings to the Central European Press and Media Foundation (KESMA), a newly established conglomerate controlled by the government²⁰⁷. The government classified KESMA as of “national strategic importance”²⁰⁸, thereby exempting it from Competition Office reviews on media concentration²⁰⁹. This move cemented the monopolisation of Hungarian media by the governing party, which attracted significant criticism. The European Parliament noted that the consolidation of over 470 media outlets under KESMA has resulted in less space for independent and opposition media, allowed the use of government funds to discredit the opposition and non-governmental organisations (NGOs), and limited access to information for Hungarian citizens²¹⁰.

The 2023 Rule of Law Report by the European Commission expresses regret over Hungary’s lack of commitment to addressing challenges related to media pluralism and freedom, as highlighted in previous reports²¹¹. Concerns persist about the lack of functional independence of the Media Authority, whose decision-making body- the Media Council- is composed entirely of members appointed by the ruling party-controlled Parliament²¹². This body has the power to regulate the market and decide who is included or excluded.

Additional issues include the unfair and non-transparent distribution of advertising expenditure by the state and state-owned companies²¹³, the targeting of journalists and

²⁰⁵ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU’s rule of law protection, p. 19.

²⁰⁶ BEAUCHAMP, Zack - It happened there: how democracy died in Hungary.

²⁰⁷ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 21.

²⁰⁸ Government Decree 229/2018 (XII.5).

²⁰⁹ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 21.

²¹⁰ European Parliament Resolution of 15 September 2022, rec. BC.

²¹¹ EUROPEAN COMMISSION - 2023 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p. 1, abstract.

²¹² *Idem*, p. 7.

²¹³ *Ibidem*.

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other media professionals through the “Pegasus spyware” and smear campaigns²¹⁴, and the unreasonable rejection to extend the broadcasting licence of the independent radio station, Klubrádió²¹⁵. This refusal led to the radio being taken off air, prompting the European Commission to refer Hungary to the CJEU²¹⁶. A similar fate befell the newspaper Népszabadság, once Hungary’s largest opposition newspaper and often compared to the New York Times. It was abruptly shut down after publishing investigative articles that embarrassed the government²¹⁷. While the official reason given for its closure was financial difficulties, opposition parties, activists, and journalists believe it was due to Prime Minister Viktor Orbán’s intent to control the media²¹⁸.

2.6. Freedom of Association- NGO’s

The restrictions on civil society organisations in Hungary have tightened over the years, creating a rather hostile environment for NGOs. This trend culminated in the adoption of two major pieces of legislation: "Lex NGO" and "Lex Stop Soros" in 2017 and 2018, respectively, both of which were found by the CJEU to be in breach of EU law²¹⁹.

2.6.1. Lex “NGO”

The Act on the Transparency of Organisations Receiving Financial Support from Abroad, a dangerous law that stigmatizes and places restrictions on the independent work of NGO’s- referred to in the literature as Lex NGO- was introduced in Parliament by three prominent members of the Fidesz governing majority as a private bill instead of the government²²⁰. However, it was evident that the government’s apparatus prepared the legislation, allowing them to bypass the legal obligation to make the draft available for public debate and conduct preliminary public consultations²²¹. This lack of public consultation raised concerns, which were noted in the Venice Commission’s review of the

²¹⁴ *Idem*, p. 29.

²¹⁵ *Idem*, p. 21.

²¹⁶ CJEU, Case C-92/23, *Commission v Hungary*, pending.

²¹⁷ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU’s rule of law protection, p. 19.

²¹⁸ DE LA BAUME, Maïa - [Hungarian newspaper closure raises press freedom concerns](#).

²¹⁹ KOCHENOV, Dimitry; BÁRD, Petra - Rule of law crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement, p. 13.

²²⁰ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 177.

²²¹ *Idem*, p. 179.

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draft bill²²². While it was noted that the Ministry of Justice had met with some NGOs, this was deemed insufficient²²³. The Venice Commission reminded the Hungarian government a public consultation should include, to the greatest extent feasible, all civil society organisations affected by the new legislation²²⁴.

The stated purpose of Lex NGO was to introduce requirements related to the prevention of money laundering or terrorism²²⁵. The Venice Commission recognised the legitimate reasons for a state to restrict foreign funding but stressed that these aims should not be used as a pretext to control NGOs or restrict their legitimate work, especially when human rights are concerned²²⁶. On 26 April 2017, the Council of Europe Commissioner for Human Rights sent a letter to the Speaker of the Hungarian National Assembly, noting that the bill was introduced against the background of continued hostile rhetoric from some ruling coalition members, who publicly labelled some NGOs as “foreign agents” due to their funding sources and questioned their legitimacy²²⁷.

Ultimately, the CJEU concluded that Lex NGO imposed “discriminatory and unjustified restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 of the Treaty of Functioning of the European Union (TFEU) and Articles 7, 8 and 12 of the Charter”²²⁸.

2.6.2. Lex “Stop Soros”

Despite pending proceedings, the Hungarian governing majority adopted a new legislative package in May 2018, known as “Lex Stop Soros”²²⁹, referring to George Soros, accused by Fidesz of encouraging illegal migration to Hungary²³⁰. This legislation

²²² VENICE COMMISSION - Opinion on the Draft Law on The Transparency of Organisations Receiving Support from Abroad, paras. 25-28 and 67.

²²³ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p.179.

²²⁴ *Ibidem*.

²²⁵ European Parliament Resolution of 12 September 2018, rec. 41.

²²⁶ *Ibidem*.

²²⁷ *Ibidem*.

²²⁸ CJEU, Case C-78/18, *Commission v Hungary*, 18 June 2020, para. 143.

²²⁹ The Act on the social responsibility of organisations supporting illegal migration; the Act on the immigration financing duty; and the Act on immigration restraining orders.

²³⁰ THAN, Krisztina - Hungary to criminalise aiding illegal migration in 'Stop Soros' bill; BEAUCHAMP, Zack - Hungary just passed a “Stop Soros” law that makes it illegal to help undocumented migrants.

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severely restricted NGOs' rights to support asylum seekers and criminalized activities in support of asylum seekers²³¹.

Amnesty International Hungary initiated a constitutional complaint proceeding against Lex Stop Soros²³², asserting its unconstitutionality on several grounds, including the violation of the *nullum crimen sine lege certa* principle and the clarity requirement. Important concepts of the legal provision, such as the term “organising activities”, were not defined, resulting in broad and arbitrary application by state authorities²³³. The Hungarian Constitutional Court rejected the petition²³⁴, but the Venice Commission criticised the law for lacking “the required clarity to qualify as a legal basis within the meaning of Article 11 ECHR”²³⁵.

In contrast to Lex NGO, Lex Stop Soros was introduced to Parliament by the Minister of Justice²³⁶. Nonetheless, the formulation of the legislative proposal did not meet the required legal criteria, as no prior public consultation was conducted, prompting repeated criticism from the Venice Commission²³⁷.

The European Commission challenged two aspects of this legislative package as non-compliant with EU asylum law and the Charter²³⁸. The Commission was particularly concerned about the criminalisation of acts that assist asylum seekers and the disproportionate restriction of the right to asylum caused by the establishment of additional grounds for the inadmissibility of asylum applications²³⁹. In November 2021, the CJEU released its decision, which substantially accepted the Commission's complaint

²³¹ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 177 -178.

²³² *Idem*, p. 181.

²³³ *Ibidem*.

²³⁴ KAZAI, Viktor Zoltán - Stop Soros Law Left on the Books – The Return of the “Red Tail”?

²³⁵ VENICE COMMISSION; OSCE/ODIHR - Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs, para. 102.

²³⁶ BÁRD, Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 179.

²³⁷ VENICE COMMISSION; OSCE/ODIHR - Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs, para 69.

²³⁸ Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 177.

²³⁹ *Idem*, p. 178.

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and concluded that Hungary had failed to comply with the Procedures²⁴⁰ and Reception²⁴¹ Directives²⁴².

Although the Hungarian Parliament amended Lex Stop Soros in December 2022, the revisions maintained a chilling effect on NGOs, failing to fully address the Court of Justice's ruling²⁴³. The language of the revision granted excessive discretionary power to public authorities, perpetuating the deterrent effect on NGOs providing legal assistance to asylum seekers.

2.7. Rights of Vulnerable Groups, including Women, LGBTQI+ people, Roma, Migrants, Asylum seekers and Refugees

Hungary's departure from the EU's foundational values of democracy and human rights is further highlighted by the ongoing struggles of vulnerable societal groups. This section examines the most concerning challenges faced by women, LGBTQI+ individuals, Roma communities, migrants, asylum seekers, and refugees within Hungarian society. These include systemic disregard for their rights, instances of violence, discrimination, marginalisation, exacerbated by the lack of adequate institutional protection²⁴⁴.

2.7.1. Women

Since 2010, women's rights have been severely impacted by the Orbán government's anti-gender ideology. Key changes undermining the protection of women's rights include the Ninth Amendment to the Fundamental Law, which emphasises traditional gender roles, stating, "the mother shall be a woman, the father shall be a man," and defines the family as "the basis of the survival of the nation"²⁴⁵. Additionally, the introduction of the Family

²⁴⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

²⁴¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

²⁴² Petra; KAZAI, Viktor Zoltán - Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study, p. 178.

²⁴³ HUNGARIAN HELSINKI COMMITTEE - Criminalisation continues- Hungary fails to implement CJEU judgement, p. 1.

²⁴⁴ European Parliament resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (2024/2512(RSP)), rec. C.

²⁴⁵ VENICE COMMISSION - Draft Opinion of the Venice Commission on the Constitutional Amendments Adopted by The Hungarian Parliament in December 2020.

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Protection Act entrenches discriminatory stereotypes about the roles of women and men in family and society²⁴⁶. At European Level, Hungary's refusal to ratify the Istanbul Convention on combating violence against women further exacerbates the issue²⁴⁷.

In everyday life, outdated portrayals of women in school textbooks often depict them primarily as mothers and wives, sometimes suggesting they are less intelligent than men²⁴⁸. Derogatory and sexist comments from political figures and pro-government media²⁴⁹, particularly regarding women in Parliament²⁵⁰, further reflect and reinforce these stereotypes.

Hungary ranks poorly among EU Member States in terms of gender equality, primarily due to the underrepresentation of women decision-making positions within the public sector, especially in ministries and the Hungarian Parliament²⁵¹. For instance, Orbán's 14-member government has only one female minister- the Minister of Justice- who recently resigned to run in the 2024 European Parliament elections²⁵². Furthermore, only 13% of seats in the Hungarian Parliament are held by women, compared to the EU average of 33%²⁵³.

The two-year Presidency of Katalin Novák²⁵⁴- Hungary's first female President- from 2022 to 2024, was an anomaly in the Hungarian political environment and not much of a victory for women in Hungarian politics. As a close ally of Fidesz, she actively promoted views and policies that hindered women's equality, such as those in the Family Protection Act, which incentivise women to become full-time housewives²⁵⁵.

²⁴⁶ GRZEBALSKA, Weronika; PETŐ, Andrea - The gendered modus operandi of the illiberal transformation in Hungary and Poland, p. 4.

²⁴⁷ Hungary signed the "Istanbul Convention" in 2017, although it did not ratify it. The reasons for the refusal included a conflicting definition of gender in the Convention, which "denies that there are only two biological genders, male and female", with Hungary's constitutional definition of marriage, "the matrimony of one man and one woman", and fear that expanding the Convention's definition of persecution to include gender-based violence against women would increase "illegal migration".

²⁴⁸ European Parliament resolution of 12 September 2018, rec. 46.

²⁴⁹ *Ibidem*, para 47.

²⁵⁰ FREEDOM HOUSE - [Hungary: Freedom in the World 2024 Country Report](#).

²⁵¹ European Parliament resolution of 12 September 2018, rec. 47.

²⁵² BAYER, Lili - [Hungary's Judit Varga will lead Orbán's party in EU elections, report says](#).

²⁵³ EUROSTAT - [EU women hold third of seats in national parliaments](#).

²⁵⁴ Katalin Novák also recently resigned after coming under pressure for the pardon of a convicted accomplice of a child molester.

²⁵⁵ BAKÓ, Júlia - [Hungary's first female president is no win for women](#).

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Orbán's patriarchal vision of society and the definition of the family as "the basis of the survival of the nation"²⁵⁶ have also challenged women's sexual and reproductive health and rights. Although abortion is broadly available- despite the Constitution defining life "from the moment of conception"²⁵⁷- its access has been restricted through measures such as banning the medical abortion pill, mandating counselling and waiting periods, and requiring pregnant women to listen to their baby's heartbeat before an abortion²⁵⁸. The government's nationwide anti-abortion billboard campaign in 2011- which portrayed women who had or were considering having an abortion as murderers- was also a regrettable event for both women and society as a whole²⁵⁹.

2.7.2. LGBTQI+ people

In recent years, the Fidesz government has also escalated its discriminatory practices against LGBTQI+ individuals. In 2020, the National Assembly ceased to legally recognise transgender people's identity. Resulting from its Ninth Amendment, the Constitution now states that "Hungary protects children's right to their identity in line with their birth sex". Moreover, the law restricts the ability to adopt children to married couples, thereby excluding single individuals and unmarried partners, including couples of the same sex²⁶⁰.

On 15 June 2021, the government adopted Act LXXIX of 2021²⁶¹, commonly known as the "Anti- LGBT+ Law". Initially intended to address pedophile offenders more severely, the law included amendments to various legal provisions concerning media services, advertising, electronic commerce and education²⁶². However, rapid amendments and a lack of transparent public consultations²⁶³ allowed for the introduction of provisions that were not originally there. These provisions prohibit the portrayal or promotion of

²⁵⁶ Article L of the Fundamental Law of Hungary.

²⁵⁷ Article II of the Fundamental Law of Hungary.

²⁵⁸ FREEDOM HOUSE - [Hungary: Freedom in the World 2024 Country Report](#).

²⁵⁹ VIDA, Bianka - New waves of anti-sexual and reproductive health and rights strategies in the European Union: the anti-gender discourse in Hungary, p. 14.

²⁶⁰ FREEDOM HOUSE - [Hungary: Freedom in the World 2024 Country Report](#).

²⁶¹ Act LXXIX of 2021 adopting stricter measures against persons convicted of pedophilia and amending certain laws for the protection of children.

²⁶² VENICE COMMISSION - [Opinion on The Compatibility with International Human Rights Standards of Act LXXIX Amending Certain Acts for The Protection of Children, December 2021](#), p. 5.

²⁶³ *Ibidem*.

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homosexuality and gender reassignment to minors²⁶⁴. Consequently, discussions of homosexuality and gender reassignment are banned in sex education classes, which can now only be taught by registered organizations²⁶⁵. Advertisements and content featuring LGBTQI+ people must be rated as unsuitable for minors, and children's booksellers are required to wrap books and media depicting homosexuality in closed packaging²⁶⁶. Additionally, the sale of any books or media depicting same-sex relations or gender changes is forbidden within 200 meters of any school or church²⁶⁷.

On 19 December 2022, the European Commission brought a case before the CJEU against Hungary regarding the adoption of this law²⁶⁸, which is still pending. The European Commission claims that Hungary failed to fulfill its obligations under various EU directives and articles related to audiovisual media services, electronic commerce, services in the internal market, general data protection, and fundamental rights, including Article 2 TEU. This case is of particularly importance as it marks the first time the Commission has explicitly invoked Article 2 TEU as a self-standing ground²⁶⁹, representing a significant step for the EU in addressing the rule of law crisis. Further discussion on this matter will be held in Chapter III.

2.7.3. Roma

Another persistent concern is the long-lasting and deeply entrenched racism and xenophobic rhetoric, with antigypsyism being the most blatant form of intolerance²⁷⁰. Roma- Hungary's largest ethnic minority, -"continue to suffer systemic discrimination and inequality in all fields of life, including housing, employment, education, access to health and participation in social and political life"²⁷¹. While Hungary's policies to promote national minorities are considered to be founded on a strong statutory

²⁶⁴ European Parliament resolution of 15 September 2022, rec. CE.

²⁶⁵ *Ibidem*.

²⁶⁶ Amendment to Act CLXXXV of 2010 on media services and mass communication, New Section 9(6) in combination with Section 9(1) of the Media Act.

²⁶⁷ European Parliament resolution of 15 September 2022, rec. CE.

²⁶⁸ CJEU, Case C-769/22, *Commission v. Hungary*, 19 December 2022.

²⁶⁹ OKUNROBO, Sharon - Case C-769/22: A further step in the protection of the fundamental rights within the European Union?

²⁷⁰ European Parliament resolution of 12 September 2018, rec. 51.

²⁷¹ *Idem*, rec. 72.

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foundation, actual enforcement is lacking, and immediate action is required to address this matter²⁷².

Among the most concerning issues are segregation in schools- particularly in church and private schools²⁷³-, the disproportionately high number of Roma children placed in schools for children with mild disabilities²⁷⁴, the extremely low number of registered hate crimes due to police often failing to investigate and prosecute credible allegations²⁷⁵, and the persistent practice of racial profiling of Roma by the police²⁷⁶. In addition, racist hate speech against Roma remains a problem, especially from leading politicians and in the media²⁷⁷. For instance, in his speech in July 2023 at Baile Tusnad Summer University, Prime Minister Viktor Orbán publicly stated his opposition to Hungarians becoming “peoples of mixed race”²⁷⁸.

Various judgements of the European Court of Human rights (ECtHR), including cases such as *Balázs v. Hungary*²⁷⁹, *Horváth and Kiss v. Hungary*²⁸⁰, *Király and Dömötör v. Hungary*²⁸¹ and *M.F. v. Hungary*²⁸², highlight these long-standing discriminatory practices and human rights violations against the Roma.

²⁷² European Parliament resolution of 15 September 2022, rec. CV.

²⁷³ European Parliament resolution of 12 September 2018, rec. 58.

²⁷⁴ *Ibidem*.

²⁷⁵ *Ibidem*.

²⁷⁶ *Ibidem*.

²⁷⁷ European Parliament Resolution of 15 September 2022, rec. CU.

²⁷⁸ THAN, Krisztina - [Hungary's Orban says his anti-immigration stance not rooted in racism after backlash](#).

²⁷⁹ ECtHR, *Balázs v. Hungary*, Application no. 15529/12, 20 October 2015. The ECtHR held that there had been a violation of the prohibition of discrimination due to the failure to consider the purported anti-Roma motivation behind an attack.

²⁸⁰ ECtHR, *Horváth and Kiss v. Hungary*, Application no. 11146/11, 29 January 2013. The ECtHR determined that the applicable Hungarian legislation, when implemented in practice, did not offer sufficient protections and resulted in the disproportionate representation and isolation of Roma children in special education because of the repeated misdiagnosis of mental illness, which constituted a violation of the right to education without discrimination.

²⁸¹ ECtHR, *Király and Dömötör v. Hungary* Application no. 10851/13, 17 January 2017. The ECtHR found that insufficient inquiries into the claims of abuse motivated by race had resulted in a violation of the right to privacy.

²⁸² ECtHR, *M.F. v. Hungary*, Application no. 45855/12, 31 October 2017. The ECtHR determined that there was a violation of the prohibition of discrimination in relation to the prohibition against cruel or degrading treatment due to the authorities' failure to look into potential racial motivations for the alleged occurrence.

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2.7.4. Migrants, Asylum seekers and Refugees

Regarding the rights of migrants, asylum seekers and refugees, successive and overlapping measures taken by the government since the beginning of the refugee crisis in 2015 have made access to the asylum procedure virtually impossible²⁸³, leaving thousands of people without protection. In this context, Viktor Orbán has not shied away from openly defending its anti-immigration policy, criticising the EU's refugee relocation quotas and describing the influx of asylum seekers in Europe as "poison" and a threat to public security²⁸⁴.

In October 2016, the Hungarian government went as far challenging the 2015 Council Decision on the mandatory relocation quotas of asylum seekers²⁸⁵ by organizing a national referendum²⁸⁶. The question asked in the referendum was: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?"²⁸⁷. Although a large majority (over 98%) of those who voted in the referendum rejected the EU's migrant quotas, the referendum was declared invalid because the turnout was only 41,32%²⁸⁸ - below the 50% threshold required for it to be legally binding²⁸⁹. Nevertheless, the Hungarian government used the referendum result to justify its refusal to comply with the EU's migrant relocation plan, which aimed to address the influx of migrants and refugees by requiring all EU member states to share the burden of the migrant crisis and relocate the asylum seekers from Member States that were heavily burdened by the crisis, specifically Greece and Italy²⁹⁰. According to this plan, Hungary would have been required to accept 1,294 out of a total of 160,000 applicants²⁹¹.

Central to the policy changes that made lawful entry into Hungary nearly impossible was a 2015 amendment allowing the government to designate Serbia as a safe third country

²⁸³ European Parliament resolution of 15 September 2022, rec. DO.

²⁸⁴ STAFF AND AGENCIES - [Hungarian prime minister says migrants are 'poison' and 'not needed'](#).

²⁸⁵ [COUNCIL DECISION \(EU\) 2015/1601 of 22 September 2015](#) establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

²⁸⁶ NEMZETI VÁLASZTÁSI IRODA - [Data relating to the result of the national referendum](#).

²⁸⁷ HALMAI, Gábor - [The Invalid Anti-Migrant Referendum in Hungary](#).

²⁸⁸ NEMZETI VÁLASZTÁSI IRODA - [Data relating to the result of the national referendum](#).

²⁸⁹ MACDOWALL, Andrew - [Voters back Viktor Orbán's rejection of EU migrant quotas](#).

²⁹⁰ SZENTE, Zoltán - [The Controversial Anti-Migrant Referendum in Hungary is Invalid](#).

²⁹¹ *Ibidem*.

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by decree²⁹², thereby rejecting applications from asylum seekers arriving through Serbia. Another key element was the establishment of transit zones²⁹³ where only a minimal number of people were allowed to enter each day (by January 2018, this number was reduced to one per day per transit zone)²⁹⁴. Reports indicated poor conditions in these zones, with instances of denial of access to basic necessities such as food and medical care²⁹⁵. The clear operational goal of these zones was to reduce- and ultimately eliminate- the number of applications made at the Southern border of Hungary²⁹⁶. To further discourage potential applicants, a fence was built along the Southern border, irregular entry was criminalised, and a policy of pushbacks was introduced²⁹⁷.

The CJEU has issued several judgements in which parts of Hungary's asylum policy were declared to be in breach of EU law. These include the rejection of applications from asylum seekers who come from countries where they are not at risk²⁹⁸ and the illegal detention of asylum seekers in transit zones²⁹⁹. The ECtHR also ruled in favor of the applications concerning similar issues³⁰⁰ ³⁰¹. Following these decisions, the government shut down the transit zones but enacted legislation mandating asylum applicants to go through the Embassy protocol for pre-screening before submitting a claim for international protection³⁰². However, in 2023, the CJEU also determined that this Act

²⁹² Government Decree No. 191/2015, Act on Asylum.

²⁹³ European Parliament resolution of 12 September 2018, rec. 66.

²⁹⁴ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 33.

²⁹⁵ MIJATOVIĆ, Dunja - Commissioner for Human Rights of the Council of Europe - Report Following Her Visit to Hungary from 4 to 8 February 2019, p. 14.

²⁹⁶ BÁRD, Petra [et al.] - Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit, p. 29.

²⁹⁷ *Ibidem*.

²⁹⁸ CJEU, Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*, 19 March 2019.

²⁹⁹ CJEU Joined Cases, C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020.

³⁰⁰ ECtHR, *R.R. and Others v Hungary*, Application no. 36037/17, 02 March 2021. The ECtHR determined that the deprivation of food and the conditions under which the applicants—a pregnant woman and her children—were held in the transit zone constituted a violation of the prohibition against inhuman or degrading treatment. Additionally, the applicants' stay amounted to a *de facto* deprivation of liberty, and the absence of any official ruling from the authorities or legal procedures resulted in violations of their right to liberty and security.

³⁰¹ ECtHR, *Ilias and Ahmed v Hungary*, Application no. 47287/15, 02 December 2021. The ECtHR found a violation of Article 3 of the ECHR to examine the danger of ill-treatment before deporting asylum seekers to Serbia by relying on the general presumption of a 'safe third country'. The Court further held that the applicants' right to liberty and security, as well as their right to an effective remedy, were violated by the conditions of incarceration at the Röszke transit zone.

³⁰² European Parliament resolution of 15 September 2022, rec. DO.

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violated EU law³⁰³. Most recently, on 13 June 2024³⁰⁴, the CJEU issued an unprecedented judgement ordering Hungary to pay a record penalty payment of €200 million, as well as a penalty payment of €1 million per day of delay for failure to comply with a previous judgement of December 2020³⁰⁵. That judgement found that Hungary had failed to guarantee access to international protection procedures and had wrongfully maintained a provision permitting the expulsion of illegal third-party nationals³⁰⁶.

Notwithstanding these judgements and the repeated pleas from European bodies, the Hungarian government has not yet stopped the practice of “pushbacks” or the deportation of asylum seekers to Serbia³⁰⁷. According to reports, no effective security measures have been taken to prevent the ill-treatment of persons being returned to Serbia by Hungarian police officers across the border fence³⁰⁸. Furthermore, there are still no legal remedies that could provide these individuals with effective protection against forced removal and/or refoulement³⁰⁹.

These condemned changes in asylum law, however, represent just a small part of a much broader landscape of blatant violations of EU values, as evidenced throughout this chapter. From constitutional amendments to the erosion of judicial independence, media censorship, and the curtailment of the rights of vulnerable groups, these measures stand in stark contradiction with the foundational values that the EU strives to uphold, transforming a legal system once tied by democracy and rule of law into one that undermines the EU as an order. In the next chapter, the efforts made by the EU to address this ongoing shift towards values contrary to its identity are analysed.

³⁰³ CJEU, Case C-823/21, *Commission v Hungary*, 22 June 2023.

³⁰⁴ CJEU, Case C-123/22, *Commission v Hungary*, 13 June 2024.

³⁰⁵ CJEU, Case C-808/18, *Commission v Hungary*, 17 December 2020.

³⁰⁶ BARRETT, Gavin - Rule of Law Chickens Coming Home to Roost: The Ruling in Case C-123/22 European Commission v Hungary.

³⁰⁷ FREEDOM HOUSE - Hungary: Freedom in the World 2024 Country Report.

³⁰⁸ European Parliament resolution of 15 September 2022, rec. DH.

³⁰⁹ *Ibidem.*

Chapter III- Surveying EU Mechanisms for Addressing Rule of Law Issues: Actions Taken to Encourage Hungary's Compliance

The previous chapter highlighted Hungary's failure to honour the commitment made 20 years ago in 2004- along with nine other new Member States- to protect and uphold the values on which the Union is founded. This chapter examines the EU's response to such regrettable developments through its mechanisms and assesses their effectiveness in addressing the rule of law issues that hinder the fulfillment of EU's "promise of freedom and stability, peace and prosperity"³¹⁰. It focuses on the measures deployed by the EU between 2018 and 2024, including (1) the Article 7 TEU procedure, (2) the launch infringement procedures, and (3) the application of financial sanctions through the new Rule of Law Conditionality Mechanism, the Common Provisions and the Recovery and Resilience Facility Regulations.

1. Article 7 TEU Procedure

On 12 September 2018, the European Parliament adopted a resolution³¹¹ by 448 votes cast in favour, 197 against and 48 abstentions³¹², calling on the Council to determine, in accordance with Article 7(1) TEU, whether there was a clear risk of a serious breach by Hungary of the fundamental values of the EU. Hungary contested this, arguing that, when calculating the votes cast, the European Parliament should have taken account of the abstentions and brought an action under Article 263 TFEU for annulment of the resolution. However, the CJEU dismissed this action, which considered that MEPs' abstentions did not have to be counted to determine whether the required two-thirds majority of votes cast, as referred to in Article 354 TFEU, had been reached³¹³.

The mechanism of Article 7 allows the EU to act when there is a clear risk of a serious breach of the values enshrined in Article 2 TEU. Often referred to as the EU's "nuclear

³¹⁰ EUROPEAN COMMISSION - Speech by president von der leyen at the European Parliament formal sitting on the 20th anniversary of the 2004 EU enlargement, p. 1.

³¹¹ European Parliament resolution of 12 September 2018.

³¹² NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 25.

³¹³ CJEU, Case C-650/18, *Hungary v European Parliament*, 03 June 2021.

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option”³¹⁴ and understood as a threat never to be applied, it is considered to be the most powerful instrument in the EU’s rule of law arsenal because it can lead to the suspension of the State’s voting rights in the Council³¹⁵.

Although Article 7(3) promises strong sanctions, the intricate process required to impose them make the mechanism not so much of a “nuclear option” after all³¹⁶. Article 7 TEU is a rather complex instrument containing both preventive and sanctioning mechanisms³¹⁷, which do not have to be applied sequentially³¹⁸, and involves the participation of three key institutions of the EU- the European Commission, the European Parliament, and the Council³¹⁹.

The preventive mechanism outlined in Article 7(1) establishes a process by which the Council- with the consent of the European Parliament and a four-fifths majority- may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU upon a reasoned proposal from either the European Commission, the European Parliament, or one-third of the Member States. After making such a determination, the concerned Member State is asked to defend its conduct, and the Council can address recommendations to rectify or prevent the serious breach³²⁰.

The sanctioning mechanism, on the other hand, can only be triggered by one-third of the Member States or by the European Commission (Article 7(2)). Once triggered, the Council- acting unanimously and with the permission of the European Parliament- can determine a serious and persistent breach of the rule of law once the Member State concerned provides its observations. If such a breach is indeed discovered, the Council

³¹⁴ SPIEKER, Luke Dimitrios - Beyond the Rule of Law- How the Court of Justice can Protect Conditions for Democratic Change in the Member States, p. 82.

³¹⁵ CSINK, Lóránt - Rule of law in Hungary: what can law and politics do?, p.166.

³¹⁶ KELEMEN, R. Daniel - Article 7’s Place in the EU Rule of Law Toolkit, p. 23.

³¹⁷ MOBERG, Andreas - Article 7 TEU: Difficult by Design, p. 35.

³¹⁸ KELEMEN, R. Daniel - Article 7’s Place in the EU Rule of Law Toolkit, p. 23.

³¹⁹ RAUBE, Kolja; COSTA REIS, Francisca - The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 632.

³²⁰ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 117.

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may- acting by qualified majority- impose sanctions on the Member State, such as suspending its voting rights in the Council (Article 7(3) TEU)^{321 322}.

This mechanism, however, has been increasingly criticised for its cumbersome and ineffective procedural framework³²³, which has so far been little used due to the demanding quorums and unanimity required³²⁴. As Bárd and Carrera argue, the too high activation thresholds in Article 7 make it almost impossible for sanctions to ever be imposed³²⁵. Article 7(2) is especially ill-suited for addressing situations where more than one Member State is facing serious and persistent breaches of Article 2 values, as the non-compliant states can easily veto each other's sanctions³²⁶. This was the case with Hungary and Poland, at least until the 2023 parliamentary elections in Poland, when the political changeover brought hope for restoring the rule of law, which had also been defied by the PiS party during its eight-year rule³²⁷. Until then, however, Poland and Hungary had mutually vouched to shield each other from any possible EU punitive measure³²⁸, promising to veto any sanctions against either country³²⁹. While this is hopefully in the past, this situation can very well reoccur in the future in relation to other countries, such as Slovakia. This demonstrates the need for a reformulation of Article 7 to prevent Member States of rendering the mechanism void by simply making use of their veto rights³³⁰. Regarding this matter, suggestions have been made to reform Article 7.

One proposal is to exclude the Member States already subjected to the Article 7(1) procedure from participating³³¹. In alternative, actions under Article 7(2) TEU could be taken against multiple Member States simultaneously to exclude both or all of them from

³²¹ RAUBE, Kolja; COSTA REIS, Francisca - *The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis*, p. 632.

³²² MOBERG, Andreas - *Article 7 TEU: Difficult by Design*, p. 36.

³²³ CARRERA, Sergio; BÁRD, Petra - [The European Parliament vote on Article 7 TEU against the Hungarian government- Too late, too little, too political?](#)

³²⁴ ATANASOVA, Angelina; RASNAČA, Zane - *The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland*, p. 117.

³²⁵ CARRERA, Sergio; BÁRD, Petra - [The European Parliament vote on Article 7 TEU against the Hungarian government- Too late, too little, too political?](#); KELEMEN, R. Daniel - *Article 7's Place in the EU Rule of Law Toolkit*, p. 24.

³²⁶ SCHELPELE, Kim Lane - [EU can still block Hungary's veto on Polish sanctions](#); KELEMEN, R. Daniel - *Article 7's Place in the EU Rule of Law Toolkit*, p. 24.

³²⁷ SZWED, Marcin - [Rebuilding the Rule of Law](#).

³²⁸ SOFFER, Dalya - [Hungary's Democratic Backsliding as a Threat to EU Normative Power](#).

³²⁹ SITTER, Nick; BAKKE, Elisabeth - *Democratic backsliding in the European Union*, p. 12.

³³⁰ BÁRD, Petra [et al.] - *Is the EU toothless? An assessment of the EU rule of law enforcement toolkit*, p. 4.

³³¹ *Ibidem*.

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the vote³³². Of course, the criteria could be loosened by a treaty modification, but this is extremely unlikely to occur for as long as the EU continues to harbour authoritarian Member States³³³.

Another issue with Article 7 TEU is its slow and politically sensitive nature, which seriously undermines its effectiveness. In this sense, the European Parliament found on 16 January 2020 that “the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) TEU” and that “failure by the Council to make effective use of Article 7 TEU continues to undermine the integrity of common European values, mutual trust and the credibility of the European Union as a whole”³³⁴.

The reality is that several years have passed since the European Parliament first triggered Article 7, and the procedure is said to be in a state of “suspended animation”, as it remains blocked at the European Council with no “signs of active life”³³⁵. Since the start of the Article 7(1) TEU, the Council has held six hearings on the situation in Hungary³³⁶, which have been considered ad hoc, opaque, and overall unsatisfactory by the European Parliament³³⁷ as a decision regarding the situation in Hungary has yet to be taken³³⁸. The Council has gone as far as refusing Members of the European Parliament to participate in the hearings³³⁹.

Despite the preventive mechanism of Article 7 being initiated by the European Parliament, no sanctions have been imposed and likely never will be. As Bárd argues, the full implementation of Article 7 is a very high hurdle to overcome politically, and even though the European Parliament was able to surpass the vested interest of party groups to

³³² *Ibidem*.

³³³ *Ibidem*.

³³⁴ BOGOJEVIĆ, Sanja; GROUSSOT, Xavier - Illiberal Democracy and Rule by Law from an EU Perspective, p. 54.

³³⁵ KELEMEN, R. Daniel - Article 7's Place in the EU Rule of Law Toolkit, p. 24.

³³⁶ European Parliament Motion for a Resolution of 19 April 2024 to wind up the debate on the statements by the Council and the Commission pursuant to Rule 132(2) of the Rules of Procedure on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications (2024/2683(RSP)), rec. D.

³³⁷ European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary (2022/2647(RSP)), recs. 5-7.

³³⁸ European Parliament Motion for a Resolution of 19 April 2024, rec. D.

³³⁹ *Idem*, rec. 4.

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take action, it has ultimately failed to influence other EU institutions to go further into the procedure against backsliding Member States³⁴⁰.

Notwithstanding the ongoing Article 7(1) procedures against Hungary coming to a standstill, they should not be forsaken³⁴¹. Terminating the procedure could have devastating consequences, as the national government would indubitably broadcast such an outcome as confirmation that the rule of law is not under threat in the country³⁴². Instead, the ongoing procedures should be left open, and the EU institutions should exert pressure on the Council not only to hold hearings as provided for under Article 7(1) but also address specific recommendations to the Hungarian Government. Leaving the proceedings open holds symbolic value, serving as an “enduring mark of shame”³⁴³ and reminder that the backsliding regime in Budapest is under constant watch.

2. Infringement Procedures

The other formal mechanism that can be used against breaches of the rule of law is the infringement procedure under Article 258 TEU, which enables the European Commission as “Guardian of the Treaties” to act against Member States that fail to comply with their EU obligations³⁴⁴.

Infringement proceedings are narrower in scope than Article 7 as they must concern an element of EU law- unlike the latter, which can also cover matters that fall outside the scope of EU law³⁴⁵. Infringement proceedings under Article 258 TFEU are divided into two separate but closely linked phases³⁴⁶.

In the pre-litigation phase, the European Commission and the concerned Member State enter into an informal bilateral dialogue (known as the “EU Pilot”) to find solutions to the problems relating to the application of EU law. If the Member State does not remedy

³⁴⁰ NEWSOME, Akasemi; STENBERG, Matthew - The European Parliament, p. 270.

³⁴¹ KELEMEN, R. Daniel - Article 7's Place in the EU Rule of Law Toolkit, p. 24.

³⁴² *Idem*, p. 25.

³⁴³ KELEMEN, R. Daniel - Article 7's Place in the EU Rule of Law Toolkit, p. 6.

³⁴⁴ SMITH, Melanie - Staring into the abyss: A crisis of the rule of law in the EU, p. 571.

³⁴⁵ ŚLEDZIŃSKA-SIMON, Anna; BÁRD, Petra- The Teleos and the Anatomy of the Rule of Law in EU Infringement Procedures, p. 441.

³⁴⁶ EUROPEAN COMMISSION - Report from the Commission Monitoring the application of European Union law, 2019 Annual Report, p. 13.

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the alleged infringement of EU law, the European Commission may send a letter of formal notice requesting the Member State to comment on the non-compliance issue, granting a two-month term to the Member State to submit its observations. If the European Commission does not receive a satisfactory reply, it may send a reasoned opinion identifying the notified infringement in fact and in law and requesting its remedy within a specified period. If the Member State fails to comply with the reasoned opinion, the European Commission may initiate legal proceedings by taking the case before the CJEU, which will then decide on the matter. Should the Court find that the Member State has failed to fulfill its obligations, and the Member State doesn't comply with the judgment, the CJEU may, on a proposal from the European Commission, impose a lump sum and/or daily penalty fines (Article 260 (2) of TFEU)³⁴⁷.

As argued by Petra Bárd and Anna Sledzinska-Simon, infringement proceedings have great potential to ensure compliance with the rule of law, but they also have weaknesses. To address these shortcomings, they propose several changes³⁴⁸. First- as infringement actions are usually too narrowly framed to address systematic rule of law attacks-, they suggest that the European Commission should follow Kim Lane Scheppele's proposal of grouping together cases with similar root causes to argue that "the infringement is not minor or transient, but systemic and persistent"³⁴⁹. Second, they claim that the European Commission should stop wasting time by prolonging legal actions in the pre-litigation phase while a Member State blatantly violates the Rule of Law³⁵⁰. Third, also because these are time sensitive issues, they propose the immediate use of interim measures³⁵¹, as well as the automatic prioritisation and acceleration of infringement cases with a Rule of Law element by the CJEU³⁵² as the delay in the rendering of the judgements may allow for serious and irreparable harm to be caused, which even a final judgment handed down in the distant future cannot remedy³⁵³. Fourth and most importantly, for Article 258

³⁴⁷ OBLAT, Rudolf - Unravelling the Tug of War: Hungary's Ongoing Infringement Battles with the EU.

³⁴⁸ BÁRD, Petra [et al.] - Is the EU toothless? An assessment of the EU rule of law enforcement toolkit, p. 6.

³⁴⁹ SCHEPPELE, Kim Lane; KOCHENOV, Dimitry Vladimirovich; GRABOWSKA-MOROZ, Barbara - EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union, pp-19-20.

³⁵⁰ ŚLEDZIŃSKA-SIMON, Anna BÁRD, Petra - The Teleos and the Anatomy of the Rule of Law in EU Infringement Procedures, p. 441.

³⁵¹ *Idem*, p. 442.

³⁵² *Ibidem*.

³⁵³ BÁRD, Petra; ŚLEDZIŃSKA-SIMON, Anna - Rule of law infringement procedures- A proposal to extend the EU's rule of law toolbox, p. 11.

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infringement procedures to be successful, they argue that the European Commission should start calling “a spade a spade”³⁵⁴ and address rule of law violations as such, identifying the problem explicitly³⁵⁵, rather than continuing to play it safe by concentrating on less sensitive issues³⁵⁶.

Indeed, the European Commission has so far proceeded cautiously, avoiding deploying Article 2 TEU in its enforcement actions against Hungary and instead focusing on technical issues, rather than the fundamental principles at stake³⁵⁷ ³⁵⁸. This approach has often downplayed the crisis and favoured low-key solutions³⁵⁹. In 2012, for example, when infringement proceedings were launched for the wholesale replacement of the judiciary by forced retirement, the European Commission deliberately chose a more technical approach by considering the lowering of the retirement age of Hungarian judges as age discrimination under Directive 200/78/EC, claiming it was disproportionate given the stated objective of the measure, which was to harmonise retirement rules and facilitate the entry of young lawyers in courts³⁶⁰, rather than arguing the clear and blatant violation of the principle of the rule of law³⁶¹.

In another case, Case C-288/12, *Commission v. Hungary*³⁶², concerning the lack of independence of the head of the Hungarian data protection authority, the European Commission obtained a declaration of non-compliance with Directive 95/46/CE on data protection from the CJEU³⁶³. The Hungarian government had abolished the data protection office and established a new one, appointing a new (Fidesz-affiliated) director. This situation could not be reversed without infringing the directive again. By reaching an agreement with the plaintiff, the government formally complied with the Court's decision, though the fundamental issue of independence remained unresolved³⁶⁴.

³⁵⁴ *Idem*, p. 11.

³⁵⁵ *Idem*, p. 20.

³⁵⁶ CLAES, Monica - Safeguarding the European Union's Values Beyond the Rule of Law, p. 77.

³⁵⁷ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 28.

³⁵⁸ CLAES, Monica - Safeguarding the European Union's Values Beyond the Rule of Law, p. 77.

³⁵⁹ SMITH, Melanie - Staring into the abyss: A crisis of the rule of law in the EU, p. 571.

³⁶⁰ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 27.

³⁶¹ NERGELIUS, Joakim - The Rule of Law Crisis in 2023: More of the Same or Changes to Come?, p. 100.

³⁶² CJEU, Case C-288/12, *Commission v Hungary*, 08 April 2014.

³⁶³ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 27.

³⁶⁴ *Ibidem*.

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The European Commission's reluctance to address rule of law issues head-on- or, as Bard puts its "call a spade a spade"- is also evident in more recent actions³⁶⁵. In Case C-718/17, *Commission v. Hungary*³⁶⁶, for instance, concerning the treatment of migrants, the European Commission avoids referencing Article 2 TEU³⁶⁷. Instead, it pleads breaches of several provisions of the Charter, as well as Directives 2013/32/EU, 2008/115/EC, and 2013/33/EU. Similarly, in Case C-78/18, *Commission v. Hungary*³⁶⁸, regarding "Lex NGO", the European Commission argues that the law infringes the free movement of capital by indirectly discriminating and disproportionately restricting donations from abroad to civil society organizations³⁶⁹. It also quotes breach of the rights to freedom of association and private life, enshrined in the ECHR in conjunction with the TEU provisions. In Case C-66/18, *Commission v. Hungary*³⁷⁰, concerning the "Lex CEU", the European Commission asserts that the new legislation violates the rights to academic freedom, education and the freedom to conduct a business, as well as the freedoms of establishment and to provide services³⁷¹.

The absence of references to Article 2 TEU in any of these cases is often attributed to the European Commission's political pragmatism. By framing the disputes in terms of market, the European Commission places legal arguments on firmer ground where EU roles are clearly defined, avoiding potential disruptions to its broader agenda. However, this strategy has drawn criticism. By not explicitly naming rule of law issues, it becomes harder to prevent backsliding, allowing offending Member States to continue to break their promise to protect and uphold EU values, setting a detrimental example for others, which undermines the EU's unity and stability³⁷².

The latest action against Hungary concerning its anti-LGBTQI+ legislation suggests³⁷³, however, that there may be a sliver of hope after all. This case is of particular importance as it marks the first time the European Commission has based an action on Article 2 TEU

³⁶⁵ *Ibidem*.

³⁶⁶ CJEU, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and the Czech Republic*, 02 April 2020.

³⁶⁷ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 28.

³⁶⁸ CJEU, Case C-78/18, *Commission v Hungary*, 18 June 2020.

³⁶⁹ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 28.

³⁷⁰ CJEU, Case C-66/18 *Commission v Hungary*, 06 October 2020.

³⁷¹ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 28.

³⁷² *Ibidem*.

³⁷³ CJEU, Case C-769/22, *Commission v Hungary*, 19 December 2022.

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as a stand-alone provision. While the proceeding involves various EU legislations, Treaty provisions, and Charter rights, the European Commission also claims that “by adopting the [anti-LGBTIQ] legislation, Hungary has infringed Article 2 TEU.” However, it does not specify which value Hungary is allegedly violating, nor how this relates to the first, more detailed plea³⁷⁴. More than being a deciding provision, it seems that Article 2 TEU serves the purpose of characterizing the gravity of the breach³⁷⁵.

By invoking Article 2 TEU for the first time in an infringement proceeding, the European Commission has taken an important step in safeguarding the Treaties and enforcing European law. This move aims to give substance to the CJEU’s finding in the Conditionality Regulation case which states that the values of Article 2 TEU “define the very identity of the European Union as a common legal order”³⁷⁶, as further discussed in section 4.1. of the present Chapter.

3. The Rule of Law Framework and Other Mechanisms

In 2014, partly at the request of the European Parliament due to constitutional developments in Hungary³⁷⁷, the European Commission adopted the “Rule of Law Framework” as an additional instrument to protect the integrity of the European Union³⁷⁸.

This framework complements Article 7 TEU and the formal infringement procedure under Article 258 TFEU³⁷⁹. Its primary aim is to empower the European Commission to engage in dialogue with the Member State concerned to resolve issues and prevent the escalation of systemic threats to the rule of law³⁸⁰ without immediately resorting to the controversial and politically challenging procedure under Article 7 TEU³⁸¹.

³⁷⁴ CLAES, Monica - Safeguarding the European Union’s Values Beyond the Rule of Law, p. 79.

³⁷⁵ *Ibidem*.

³⁷⁶ BARLEY, Katarina; WEINZIERL, Quirin - Op-Ed: “Fulfilling the Lisbon Treaty’s promise: The Article 2 TEU Values for the First Time in Court”

³⁷⁷ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU’s rule of law protection, p. 22.

³⁷⁸ RAUBE, Kolja; COSTA REIS, Francisca - The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 636.

³⁷⁹ SEDELMEIER, Ulrich - Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, p. 344.

³⁸⁰ MAJKOWSKA-SZULC, Sylwia - Safeguarding the European Union’s core values- The EU Rule of Law mission in Poland, p. 179.

³⁸¹ NERGELIUS, Joakim - The Rule of Law Crisis in 2023: More of the Same or Changes to Come?, p. 10.

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Often referred to as the "pre-Article 7 mechanism", the Rule of Law Framework³⁸² is designed as a three- step procedure³⁸³. In a first step, the European Commission evaluates whether there is a systemic threat to the rule of law by collecting and analyzing all relevant information on the situation³⁸⁴. If it finds that such a threat does indeed exist, it formulates its concerns in a "rule of law opinion" to which the Member State can respond³⁸⁵. If, by then, the matter remains to be resolved, the European Commission can- now entering the second phase- issue a "rule of law recommendation" addressed to the Member State to remedy the problems identified within a specified period of time³⁸⁶. In the third stage, the European Commission surveils the execution of its recommendation, and if no satisfactory action is taken within the time limit set, the European Commission can then resort to the mechanisms outlined in Article 7 TEU³⁸⁷.

Instead of imposing sanctions, the mechanism seeks to resolve emerging crises by issuing opinions and recommendations on possible measures to resolve the situation³⁸⁸. The emphasis on dialogue makes this mechanism very persuasion-based, although the public nature of the process also carries an important element of social pressure and embarrassment³⁸⁹.

Nevertheless, in the absence of credible sanctions and being essentially reliant on the good faith and cooperation of Member States³⁹⁰, this political tool faltered when it was first used against Poland in early January 2016³⁹¹. Polish Prime Minister Beata Szydło rejected the European Commission's recommendation as "incompatible with the interests

³⁸² NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 23. SEDELMEIER, Ulrich - Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, p. 344.

³⁸³ HALMAI, Gábor - The Alternatives to a Bite or a Bark: After Launching Article 7 TEU Against the Hungarian Government, p. 67.

³⁸⁴ DAMINOVA, Nasiya - Rule of law vs. Poland and Hungary - an inconsistent approach?, p. 242.

³⁸⁵ SEDELMEIER, Ulrich - Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, p. 344.

³⁸⁶ DAMINOVA, Nasiya - Rule of law vs. Poland and Hungary - an inconsistent approach?, p. 242.

³⁸⁷ SITTER, Nick; BAKKE, Elisabeth - Democratic backsliding in the European Union, p. 7.

³⁸⁸ RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 636.

³⁸⁹ SEDELMEIER, Ulrich - Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, p. 342.

³⁹⁰ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU's rule of law protection, p. 23.

³⁹¹ HALMAI, Gábor - The Alternatives to a Bite or a Bark: After Launching Article 7 TEU Against the Hungarian Government, p. 67.

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of the Polish State”³⁹². The Polish government unsurprisingly invoked the “interference in domestic affairs” defence³⁹³ and referred to the requirement of respect for national constitutional identity³⁹⁴, as provided in Article 4(2) TEU. However, this does not permit a Member State to violate Article 2 TEU by manipulating its political and constitutional structures to undermine fundamental EU values³⁹⁵. An assertion to the contrary would render Article 2 into a “dead letter”³⁹⁶.

In addition to the Rule of Law Framework, the EU rule of law toolbox includes other instruments, such as the European Semester, the Rule of Law Mechanism- which provides for annual Rule of Law Reports-, the EU Justice Scoreboard, , the Cooperation and Verification Mechanism, and EU support for civil society, networks and projects or structural reforms, designed to promote the rule of law and detect new challenges at an earlier stage³⁹⁷. Similarly to the Rule of Law Framework, these mechanisms are non-binding and thus lack effectiveness in addressing significant issues such the ones at hand.

4. Financial Sanctions

Considering the funds withheld based on the decisions taken under the new Rule of Law Conditionality Regulation, the Recovery and Resilience Facility Regulation and the Common Provisions Regulation, Hungary is currently facing the suspension of around €20 billion. In addition, Hungary has also been excluded from the Horizon Europe and Erasmus+ programmes³⁹⁸.

4.1. The New Rule of Law Conditionality Mechanism

The idea of introducing a specific mechanism that would make the availability of EU funds conditional on a Member State’s compliance with the rule of law first emerged in a

³⁹² SITTER, Nick; BAKKE, Elisabeth - Democratic backsliding in the European Union, p. 2.

³⁹³ GOULARD, Hortense - [Poland rejects Commission’s rule of law request](#).

³⁹⁴ NEUWAHL, Nanette; KOVACS, Charles - Hungary and the EU’s rule of law protection, p. 24.

³⁹⁵ *Ibidem*.

³⁹⁶ *Ibidem*.

³⁹⁷ EUROPEAN COMMISSION - [The EU’s rule of law toolbox- factsheet, 30 September 2020](#); ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 112.

³⁹⁸ SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 43.

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letter from the foreign ministers of four Member States on 6 March 2013, in which they expressed their grave concern about the state of the rule of law in the EU³⁹⁹. The first concrete step in this direction was taken by the Juncker Commission, which presented the flagship Conditionality Regulation towards the end of its term in 2018, when the rule-of-law folder was still managed by Frans Timmermans- one of the four foreign ministers who had initially written the letter to the second Barroso Commission⁴⁰⁰.

Contrary to Article 7 TEU, the procedure introduced by the Conditionality Regulation, adopted in 2020, is not a sanction mechanism that covers all issues related to the rule of law⁴⁰¹. It applies only when the infringements identified jeopardise "in a sufficiently direct way" the sound management of the budget or the protection of the Union's financial interests⁴⁰². Consequently, the CJEU determined that the mechanism was compatible with the procedure set out in Article 7 TEU and dismissed both Poland and Hungary's actions for annulment of the mechanism in February 2022⁴⁰³. In its judgement, the CJEU emphasised that the conditionality requirement and the respect for the financial integrity of the Union budget was a sign of solidarity among the Member States of the EU⁴⁰⁴. The CJEU also made very clear that the obligation to respect and protect the rule of law "is a specific expression of the requirements resulting, for the Member States, from their membership of the European Union, pursuant to Article 2 TEU"⁴⁰⁵ and "compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession"⁴⁰⁶.

On 27 April 2022, two months after the CJEU gave the Regulation the green light, the European Commission initiated the mechanism against Hungary, observing "a systemic inability, failure or unwillingness on the part of the Hungarian authorities to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption. They constitute breaches of the principles of the rule of law, in particular the principles of legal certainty

³⁹⁹ *Idem*, p. 39.

⁴⁰⁰ *Idem*, p. 40.

⁴⁰¹ MAURICE, Eric - Rule of law: the uncertain gamble on conditionality, p. 2.

⁴⁰² *Ibidem*.

⁴⁰³ CJEU, Case C-156/21, *Hungary v Parliament and Council*, 16 February 2022.

⁴⁰⁴ *Idem*, para 129.

⁴⁰⁵ *Idem*, para 231.

⁴⁰⁶ *Idem*, para 126.

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and prohibition of arbitrariness of the executive powers and raise concerns as to the separation of powers”⁴⁰⁷. On 15 December 2022, the Council- by the required qualified majority- adopted the European Commission’s decision, which suspended €6.3 billion, corresponding to 55% of the funds allocated for Hungary under three operational programmes⁴⁰⁸.

These suspended programmes⁴⁰⁹ are part of Hungary’s Partnership Agreement on Cohesion Funds 2021-2027, approved by the European Commission in December 2022, which sets out the national authorities’ plans for the use EU funds under shared management and is worth €22 billion⁴¹⁰. The European Commission had originally proposed a suspension of 65% in September 2022, but the Hungarian Parliament passed a series of anti-corruption laws in autumn 2022, which, although not considered sufficient by the European Commission to address the problem, were recognized as a step in the right direction and therefore led to the decision to suspend fewer funds⁴¹¹.

The release of the funds is conditional on the proper implementation of seventeen remedial measures aimed at addressing weaknesses and irregularities related to public procurement procedures, the national anti-corruption framework and the effectiveness of investigations and prosecutions of corruption⁴¹². To date, the implementation of the seventeen anti-corruption measures has not yet been completed and the financial restrictions therefore remain in force.

⁴⁰⁷ COUNCIL IMPLEMENTING DECISION (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, rec. 3.

⁴⁰⁸ MAURICE, Eric - Rule of law: the uncertain gamble on conditionality, p. 3.

⁴⁰⁹ HUNGARIAN HELSINKI COMMITTEE [et al.] - Frozen EU funds for Hungary - interactive scrollytelling tool.

⁴¹⁰ COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS (CEMR) - Handbook on cohesion policy funds- An overview of the management and implementation of European Structural and Investment Funds in the European countries, p. 40; EUROPEAN COMMISSION - EU Cohesion Policy 2021-2027: Investing in a fair climate and digital transition while strengthening Hungary’s administrative capacity, transparency and prevention of corruption, p. 1.

⁴¹¹ SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 41.

⁴¹² EUROPEAN COMMISSION - Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds, p. 2.

4.2. The Recovery and Resilience Facility Regulation

Additionally, a total of €9.5 billion have also been frozen under the Recovery and Resilience Facility Regulation⁴¹³, which now includes conditionality clauses linking the issuance of recovery funds to the fulfilment of country-specific recommendations under the European Semester⁴¹⁴.

All Member States are now required to submit a National Recovery and Resilience Plan, which must comply with the country-specific recommendations formulated by the Council in the context of the European Semester to be approved. If not, the European Commission has the authority to reject the plan or postpone the distribution of funds until the country-specific recommendations are addressed⁴¹⁵. When the European Commission assessed Hungary's plan in December 2022, its approval was recommended to the Council with rule of law conditions attached. Due to the systemic corruption and issues related to the independence of the judiciary, Hungary's recovery plan includes twenty-seven “super-milestones” designed to upgrade the national anti-corruption framework and strengthen the integrity of the judiciary for the protection of the Union's financial interests⁴¹⁶. A significant part of the milestones coincides with the already mandated actions by the Conditionality Mechanism, while four super-milestones focus specifically on reinstating judicial independence⁴¹⁷. Until Hungary fully and correctly fulfills all twenty-seven “super milestones”, it cannot receive any payment under the EU's Recovery and Resilience Facility⁴¹⁸.

4.3. The Common Provisions Regulation

Finally, an updated version of the Common Provisions Regulation, which entered into force in 2021, introduced the so-called “enabling conditions” that must be respected

⁴¹³ On December 7, 2023, the Council adopted Hungary's updated recovery and resilience plan, which now includes a new REPower EU Chapter. The overall financial contribution available to Hungary is €10.4 billion, which includes €6.5 billion in grants and €3.9 billion in loans. Out of the €10.4 billion, €0.9 billion has been issued as pre-financing through REPowerEU with no constraints.

⁴¹⁴ SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 42.

⁴¹⁵ MAVROULI, Roila; VAN WAEYENBERGE, Arnaud- EU Responses to the Democratic Deficit and the Rule of Law Crisis: Is It Time for a (New) European Exceptionalism?, p. 422.

⁴¹⁶ SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 42.

⁴¹⁷ HUNGARIAN HELSINKI COMMITTEE [et al.] - [Frozen EU funds for Hungary - interactive scrollytelling tool](#).

⁴¹⁸ EUROPEAN COMMISSION - [Questions and answers on Hungary: rule of law and EU funding](#), p. 4.

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throughout the entire programming period for expenditure to be reimbursed⁴¹⁹ (Articles 9(1) and 15(1)). To ensure the effective and efficient implementation of cohesion policy and home affairs programmes, there are four horizontal enabling conditions related to the horizontal aspects of programme implementation, namely in the areas of public procurement, State aid and in relation to the application of the Charter and the United Nations Convention on Persons with Disabilities, as well as sixteen thematic enabling conditions, setting out sector-specific conditions⁴²⁰. When the European Commission approved Hungary's Partnership and concluded that Hungary did not fulfil the Charter's horizontal enabling condition on the independence of the judiciary and that the provisions of several laws posed serious risks to LGBTIQI+ rights, academic freedom and the right to asylum⁴²¹, all EU funds allocated to Hungary's 2021-2027 Cohesion Policy were blocked, amounting to €21.9 billion.

However, in December 2023, the European Commission considered that Hungary's judicial reform package of May 2023 sufficiently addressed the deficiencies in the independence of the judiciary and therefore released part of the Cohesion Policy funds, thus allowing Hungary to start applying for reimbursements of up to around €10.2 billion⁴²².

The European Commission's positive assessment of the judicial reforms undertaken in Hungary, however, was deemed incomprehensible by the European Parliament⁴²³, which referred the matter to the CJEU on 24 April 2024⁴²⁴ to annul the European Commission decision. The European Parliament claims that the European Commission abused its power to decide on the fulfilment of the horizontal enabling condition under the Common Provisions Regulation in exchange for Hungary lifting its veto over certain urgent decisions that required unanimity in the European Council- namely Hungary's veto on the aid package for Ukraine and its opposition to start membership talks⁴²⁵- and considers

⁴¹⁹ European Parliament resolution of 18 January 2024, rec. J.

⁴²⁰ EUROPEAN COMMISSION - Questions and answers on Hungary: rule of law and EU funding, p. 1.

⁴²¹ European Parliament resolution of 18 January 2024, rec. J.

⁴²² EUROPEAN COMMISSION - Commission considers that Hungary's judicial reform addressed deficiencies in judicial independence, but maintains measures on budget conditionality, p.1.

⁴²³ EUROPEAN PARLIAMENT - Rule of law in Hungary: Parliament condemns the "Sovereignty Act", p. 2.

⁴²⁴ CJEU, Case C-225/24, *European Parliament v European Commission*, 25 March 2024.

⁴²⁵ HARMASH, Olena - Orban opposes Kyiv's EU accession bid; not all Hungarians in Ukraine agree.

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the European Commission's decision to release the frozen funds as succumbing to Hungary's veto power abuse which undermines strategic interests of the EU⁴²⁶.

While financial sanctions have already proven to be more effective than any other mechanism in addressing the pressing rule of law concerns in Hungary, as they have made the government fulfil some of the EU conditions for the release of frozen funds, they should still be considered a measure of last resort due to their detrimental impact on the final beneficiaries. Cutting funds allocated to social infrastructure, technical assistance, job growth, retraining the unemployed, or reducing youth unemployment gravely affects the general population and not just their leaders⁴²⁷.

Academics argue that these sanctions could have unintended consequences, potentially driving citizens away from the EU and closer to their illiberal governments. Furthermore, such measures could undermine the unity among European citizens and leave behind those who have the misfortune of living in Member States with authoritarian regimes⁴²⁸.

However, it is also worth considering that these sanctions could incentivize citizens to rise against their authoritarian leaders and seek political change, even in the face of unfair electoral systems. This duality highlights both the significant drawbacks and potential benefits of implementing financial sanctions and while the immediate negative effects on citizens cannot be ignored, the possibility of long-term benefits must also be considered⁴²⁹. Nevertheless, connecting the allocation of funds to rule of law reforms can be seen as a very important step for the EU in its long-running battle against the rule of law crisis.

5. Judicial Enforcement- CJEU's Rule of Law Judgements

The CJEU has played a pivotal role in combating rule of law backsliding. An analysis of the extensive CJEU rule of law case law, especially in cases involving Hungary and

⁴²⁶ European Parliament resolution of 24 April 2024 on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications ([2024/2683\(RSP\)](#)), rec. 12.

⁴²⁷ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 129.

⁴²⁸ HALMAI, Gábor - The Alternatives to a Bite or a Bark: After Launching Article 7 TEU Against the Hungarian Government, p. 74.

⁴²⁹ *Idem*, p. 75.

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Poland, demonstrates its significant influence in addressing the ongoing rule of law crisis, which has approached a breaking point with Hungary's 2024 EU Council Presidency.

At the time of writing, seventeen rule of law cases have been brought against Hungary, some of which have already been examined where relevant. Overall, the judgements can be categorised into three main categories⁴³⁰: (1) those that address the judiciary's and judges' independence⁴³¹; (2) those addressing the erosion of fundamental rights in the context of regression to the rule of law – the majority of these cases deal with the rights of asylum seekers⁴³², the defence of NGOs⁴³³ and academic freedom⁴³⁴ - and (3) those concerning the attempts to contest the ongoing reform of the framework protecting the rule of law, including the Conditionality Regulation⁴³⁵ and the Article 7 TEU Resolution⁴³⁶.

While a detailed analysis of each individual case falls outside the scope of this research, the review of the most prominent cases involving rule of law issues throughout this study- although most of the time not addressed as such by the European Commission, as it has already been evidenced-, bares proof of Hungary's blatant disrespect for EU's foundational values, as confirmed by the CJEU itself. This illustrates, in part, the reason why doubts regarding Hungary's ability to credibly fulfil its duties in its upcoming EU Council Presidency have been raised. Indeed, a scenario where a country can promote respect for the same values it has consistently violated for years is difficult to envision.

Moreover, 2022 is said to have been a turning point in the European Union's initiatives to address rule of law violations within its Member States⁴³⁷. Unprecedentedly, an array of

⁴³⁰ ATANASOVA, Angelina; RASNAČA, Zane - The Rule of Law Crisis and Social Policy: the EU response in the cases of Hungary and Poland, p. 120.

⁴³¹ CJEU, Case C-286/12, *Commission v Hungary*, 06 November 2012; CJEU, Case C-564/19, *IS*, 23 November 2021.

⁴³² CJEU, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and the Czech Republic*, 02 April 2020; CJEU, Case C-406/18, *PG v Bevándorlási és Menekültügyi Hivatal*, 19 March 2020; CJEU, Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*, 19 March 2020; CJEU, Case C-808/18, *Commission v Hungary*, 17 December 2020; CJEU, Case C-556/17, *Torubarov*, 19 July 2019; CJEU, Case C- 821/19, *Commission v Hungary*, 16 November 2021; CJEU, Case C- 823/21, *Commission v Hungary*, 22 June 2023; CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020.

⁴³³ CJEU, Case C-78/18, *Commission v Hungary*, 18 June 2020.

⁴³⁴ CJEU, Case C-66/18, *Commission v Hungary*, 06 October 2020.

⁴³⁵ CJEU, Case C-156/21, *Hungary v Parliament and Council*, 16 February 2022.

⁴³⁶ CJEU, Case C-650/18, *Hungary v European Parliament*, 03 June 2021.

⁴³⁷ MAURICE, Eric - Rule of law: the uncertain gamble on conditionality, p. 1.

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both old and new instruments was deployed in an attempt to halt the further erosion of the liberalising values on which the EU's legal architecture is based on.

Until recently, the European Union had several rule of law tools, but they showed their limitations. The EU's "nuclear option" grows weaker by the day as it remains stalled at Council level, where only a handful hearings were conducted since the procedure was opened in September 2018. Despite extensive documentation and, in certain instances, condemnation by the CJEU and the ECtHR of the violation of EU's values- including the rule of law⁴³⁸-, it is very unlikely that the European Council will ever achieve the unanimous vote required by Article 7 to declare "the existence of a serious and persistent breach" (Article 7(2)), nor will there ever be a vote in the Council of Ministers determining "a clear risk of a serious breach" (Article 7(1))⁴³⁹. Furthermore, the European Commission appears to have exhausted the effectiveness of the infringement procedures, as Hungary continues to refuse to comply with the CJEU's judgments and despite the European Parliament's restless effort, it is not empowered to act alone⁴⁴⁰.

Taking everyone by surprise, the inability of the EU institutions to halt the decline in the rule of law took a decisive turn in 2022 when the European Commission and the Council implemented the most significant measures ever taken against EU's rogue Member States by making the release of EU funds conditional on adequate reforms to restore the rule of law.

However, "the potential power of the budgetary Conditionality Mechanism, the favourable conditions in cohesion programmes, and the milestones in Recovery and Resilience Plans will only be effective if the Commission maintains a clear and demanding line in their application⁴⁴¹" and if they are combined with traditional instruments- namely infringement procedures, the rule of law mechanism and the European semester. This combination is vital because, as mentioned earlier, a direct link between the violation of the rule of law and the EU budget is required for the

⁴³⁸ *Ibidem.*

⁴³⁹ *Ibidem.*

⁴⁴⁰ SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 39.

⁴⁴¹ MAURICE, Eric - Rule of law: the uncertain gamble on conditionality, p. 6.

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conditionality to be applicable meaning that it alone cannot address all rule of law violations.

The determination with which the institutions acted, and the scale of the funds involved are to be commended⁴⁴², as they have been instrumental in strengthening EU's hand in dealing with Member States, such as Hungary, that systematically question its values⁴⁴³. However, for these mechanisms to remain effective, the European Commission must stand firm and not give in to Hungarian pressure and blackmail when it comes to decisions requiring unanimity, as was the case when, recently, the payment of €10.2 billion was released in the face of Hungary's veto on monetary aid to Ukraine.

⁴⁴² SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 39.

⁴⁴³ MAURICE, Eric - Rule of law: the uncertain gamble on conditionality, p. 7.

Chapter IV- EU Council Presidency: Should and Legally Could Hungary Have Been Prevented from Holding its 2024 Presidency?

By explaining how Hungary has managed to top global rankings for the furthest and fastest falls from democracy and the rule of law⁴⁴⁴, and by examining the EU's efforts to counteract this decline, the previous chapters have shed light on the legitimate concerns regarding Hungary's ability to effectively fulfil its EU Council Presidency duties in the second half of 2024. This chapter delves into the functioning of the EU Council, examining its legal and policy framework, as well as the *raison d'être* of the rotational Presidency to understand the importance of assuming such role.

Subsequently, the chapter then distances itself from the reasons why Hungary should have been prevented from assuming the Presidency and focuses on assessing the legal feasibility of such a possibility. This involves analysing the legislative framework (or lack thereof) for such an unprecedented scenario in European history, as well as assessing proposed solutions and drawing parallels with past adjustments made to rotating presidencies.

Finally, the chapter explores the political implications of either permitting or preventing Hungary's Presidency, aiming to determine whether the EU should be commended for upholding a zero-tolerance stance towards violations of the rule of law or criticised for potentially compromising its own principles in the quest to restore them.

1. The Functioning of the EU Council and its Presidency: Legal and Policy Framework and Tasks

The Council of the EU- also known as the "Council of Ministers" or simply "the Council"- is, alongside the European Parliament, the main decision-making legislative body in the EU⁴⁴⁵. Its key responsibilities include (1) negotiating and adopting EU laws in collaboration with the European Parliament based on proposals from the European Commission, (2) coordinating EU countries' policies, (3) developing the EU's foreign

⁴⁴⁴ SCHEPPELE, Kim Lane; MORIJN, John - What Price Rule of Law?, p. 39.

⁴⁴⁵ EUROPEAN COMMISSION - The European Union- what it is and what it does, p. 53.

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and security policy in accordance with the European Council guidelines, (4) concluding agreements between the EU and other countries or international organisations, and (5) adopting the annual EU budget in tandem with the European Parliament⁴⁴⁶.

At the heart of the Council's operational structure lies its rotating Presidency, which is primarily based on Article 16(9) of TEU and Article 236(b) of the TFEU. These provisions establish an equal rotation of the Presidency among the Member States, which reflects the principle of equality enshrined in Article 4(2) TEU, aiming to ensure burden-sharing and promote coherence and coordination⁴⁴⁷.

Supplementing these provisions, additional details on the Presidency and its effective exercise are provided by European Council Decision 2009/881/EU⁴⁴⁸, Council Decision 2009/908/EU⁴⁴⁹, the Council's Rules of Procedure⁴⁵⁰, a commentary on the Rules of Procedure⁴⁵¹, and a dedicated handbook⁴⁵².

According to Article 16(9) TEU, the Presidency rotates among the 27 Member States every six months following a previously agreed order. Building upon this system, the presidencies are held by groups of three Member States, called "trios" which set long-term objectives and prepare a shared agenda specifying the matters and key issues to be handled by the Council during an 18-month period⁴⁵³. These long-term goals are guided by the priorities adopted by the European Council in its strategic agenda. On this basis, each country then prepares its own six-month programme⁴⁵⁴.

⁴⁴⁶ *Ibidem*.

⁴⁴⁷ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, p. 7.

⁴⁴⁸ EUROPEAN COUNCIL DECISION of 1 December 2009 on the exercise of the Presidency of the Council (2009/881/EU).

⁴⁴⁹ COUNCIL DECISION of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (2009/908/EU).

⁴⁵⁰ COUNCIL DECISION of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU).

⁴⁵¹ GENERAL SECRETARIAT OF THE COUNCIL - Comments on the Council's Rules of Procedure.

⁴⁵² GENERAL SECRETARIAT OF THE COUNCIL - Handbook of the presidency of the Council of the European Union.

⁴⁵³ Article 2 (6) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

⁴⁵⁴ Article 2 (7) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

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As the Council explains “the presidency is a true reflection of Europe's motto “United in diversity” since the Member States bring in different aspects of policy or different expertise, which between them all will benefit the entire EU”⁴⁵⁵.

The Council Presidency is of great significance to the proper functioning of the Council as an institution as it has several key tasks, which include planning, coordinating, and chairing the meetings of the Council (except for the Foreign Affairs Council), as well as most of the Council’s preparatory bodies⁴⁵⁶. Additionally, the Council Presidency organises formal and informal meetings held in Brussels, Luxembourg and the host country, represents the Council in relations with the European Commission and the European Parliament and negotiates with the other EU institutions on behalf of the Council to reach agreements on legislative files⁴⁵⁷.

According to Article 237 TFEU the Council meets “when convened by its President on his own initiative or at the request of one of its members or of the Commission”⁴⁵⁸. A Minister of the Member State holding the Presidency organises and chairs the Council’s meetings and draws up the provisional agenda for each session⁴⁵⁹. The Presidency will usually organise the agenda by grouping together items that belong to the same area⁴⁶⁰. At the meetings, the Presidency ensures that the Council’s Rules of Procedure are observed and that discussions run smoothly⁴⁶¹. An important part of its task is to assist in finding compromises and achieve consensus within the EU Council of Ministers. Furthermore, the Presidency has the authority to control the number of persons per delegation in meetings⁴⁶², determine the order of agenda items, and manage the duration and order of discussions⁴⁶³. It can also request written proposals for text amendments under discussion⁴⁶⁴.

⁴⁵⁵ EUROPEAN COUNCIL OF THE EUROPEAN UNION - What does holding the presidency of the Council of the EU mean?

⁴⁵⁶ Handbook of the Presidency of the Council, p. 9.

⁴⁵⁷ Handbook of the Presidency of the Council, p. 9; EUROPEAN COUNCIL OF THE EUROPEAN UNION - What does holding the presidency of the Council of the EU mean?

⁴⁵⁸ Article 19 (1) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

⁴⁵⁹ Handbook of the Presidency of the Council, p. 35; Article 3 (1) Council Decision of 1 December 2009.

⁴⁶⁰ GENERAL SECRETARIAT OF THE COUNCIL, Comments on the Council’s Rules of Procedure, Annex 1- List of Council Configurations, footnote 149.

⁴⁶¹ Article 20 (1) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

⁴⁶² Article 5 (3) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

⁴⁶³ Article 20 (1)(b) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

⁴⁶⁴ Article 20 (1)(d) Council Decision of 1 December 2009 adopting the Council's Rules of Procedure.

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Through these tasks, the Presidency holds both formal and informal influence over the functioning of the Council in most configurations⁴⁶⁵ and is, overall, responsible for driving forward the Council's work and ensure continuity and coherence in the Council's agenda⁴⁶⁶- a role of great prestige and responsibility. Because of this, the Member State holding the Council Presidency must, by definition, act in the best interest of the Council⁴⁶⁷, which implicitly entails acting as an honest broker, behaving neutrally, and rising above its own national interests.

As the Council's website itself explains⁴⁶⁸, the Presidency is like "someone hosting a dinner, making sure their guests all gather in harmony- able to express differences during the meal but leaving on good terms and with a common purpose". This concept of diversity, however, must always be balanced with the shared values that make the EU a true union⁴⁶⁹. Under no circumstances should this diversity lead to disintegration through differentiation, as it has been observed in Hungary⁴⁷⁰. Many have therefore expressed concern as how a Member State can be expected to promote the same values for which it has been systematically condemned for disrespecting.

Nonetheless, at the time of submission of the present dissertation, Hungary is, as of July 1st, the last Member State of its two "trio- partners"- Spain and Belgium- to take over the Presidency. The trio's programme⁴⁷¹ published on 20 June 2023 focuses on key issues of the EU's 2021-2029 Strategic Agenda such as strengthening the EU's global competitiveness, building international partnerships, developing a balanced trade policy, and enhancing EU's security and defence capabilities. However, one cannot help but think of the irony behind Hungary's involvement in the elaboration of a programme which

⁴⁶⁵ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, p. 6.

⁴⁶⁶ EUROPEAN COUNCIL OF THE EUROPEAN UNION - What does holding the presidency of the Council of the EU mean?

⁴⁶⁷ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, p. 6.

⁴⁶⁸ EUROPEAN COUNCIL OF THE EUROPEAN UNION - What does holding the presidency of the Council of the EU mean?

⁴⁶⁹ UITZ, Renáta - *The Rule of Law in the EU: Crisis, Differentiation, Conditionality*, p. 945.

⁴⁷⁰ *Ibidem*.

⁴⁷¹ GENERAL SECRETARIAT OF THE COUNCIL - Taking forward the Strategic Agenda 18-month Programme of the Council (1 July 2023- 31 December 2024).

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promotes measures and defends values that are in stark contrast to its recent practice and established views.

In Section III, entitled "Protecting citizens and freedoms," the programme calls for the rule of law to be upheld to safeguard European freedom, security, and prosperity⁴⁷². Hungary's monitoring under Article 7(1) TEU and the suspension of EU funds in relation to the rule of law effectively encapsulates Hungary's position on this. This section also highlights migration as a "European challenge requiring a European response" and reaffirms the trio's commitment to continue working on the reform of the Common European Asylum System and the Pact on Migration and Asylum, as well as doing everything in their power to guarantee their implementation⁴⁷³. This is, of course, in stark contrast to Hungary's strict anti-migration policy and rhetoric, which has so far fallen short of the EU's migration agenda. Still in this section, the trio places a particular focus on combating all sorts of intolerance such as gender-based violence, hate speech, hate crimes, racism, antisemitism, xenophobia⁴⁷⁴ - issues for which the Hungarian government has also been heavily criticised and, in some cases, condemned by European Courts.

In Section V, entitled "Promoting Europe's Interests and Values in the World," the trio reaffirms the EU's unwavering support for Ukraine's right to self-defence against Russia's illegal aggression and commits to help coordinate long-term financial support for Ukraine's reconstruction⁴⁷⁵. Hungary's actions, such as its veto of EU support for Ukraine to leverage the release of its frozen funds, stand in clear contradiction with this vision and undermine the unified front that the EU seeks to present in its foreign policy.

Further evidence of Hungary's divergence from the EU's collective stance is its pro-Russian stance, exemplified by Viktor Orbán's congratulatory message to Russian President Vladimir Putin on his re-election despite many Western governments denouncing the win⁴⁷⁶. Hungary has also supported the reelection of former United States

⁴⁷² *Idem*, p. 5.

⁴⁷³ *Ibidem*.

⁴⁷⁴ *Ibidem*.

⁴⁷⁵ *Idem*, p. 8.

⁴⁷⁶ REUTERS - [Hungary's orban congratulates Russia's Putin on re-election](#).

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(US) President Donald Trump and has maintained close ties with Chinese President Xi Jinping, who has called Orbán a “friend” of Beijing⁴⁷⁷.

In his annual speech to the Hungarian Parliament in February⁴⁷⁸, Orbán’s declaration to “Make Europe Great Again” reflected the divisive rhetoric of US politics hinting at a push for a new European right to which Hungary feels it belongs. This feeling, encapsulated in his phrase “Down with Brussels. Long live Europe,” emphasises the potential of the Hungarian Presidency to reflect its national interests, which are known to diverge from the EU’s strategic objectives. This discrepancy calls into question the EU’s collective efforts to achieve a cohesive and unified agenda and risks internal discord and undermining the EU’s credibility on the global stage.

2. Options Available for Preventing a Member State from Assuming its Rotational Presidency

This section analyses the Meijer’s Committee “Comment on the exercise and order of the Presidency of the Council the EU” from May 2023⁴⁷⁹, offering 3 possible options for preventing the Hungarian Presidency. The Meijer’s Committee is an independent group of Dutch experts that provides technical and legal commentary on EU policy⁴⁸⁰. Its work focuses primarily on asylum, migration, criminal law, institutional matters, non-discrimination, data protection, the rule of law, and EU agencies.

The aim is to identify the three proposed avenues to prevent Hungary from holding its Presidency, namely (1) a partial transfer of responsibilities, with the troika partners of Hungary taking over the chairing of meetings related to rule of law issues; (2) the postponement of the Presidency using existing legal and policy rules; and (3) the modification to the legal and policy framework, with the European Council formulating conditions for when a Member State can hold the Council Presidency after resolving its

⁴⁷⁷ LYNCH, Suzanne - Occupy Brussels!- Viktor Orbán’s plan for Europe.

⁴⁷⁸ ABOUT HUNGARY - Prime Minister Viktor Orbán’s “State of the Nation” address.

⁴⁷⁹ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU.

⁴⁸⁰ MEIJERS COMMITTEE - About the project.

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rule of law problems. This will set the stage for the next the subsequent section, where a literature review on the legal feasibility of these options is provided.

2.1. Partial Transfer of the Presidency's Responsibilities Among the Members of the Trio

The mildest option proposed by the Meijers Committee was for the trio partners to take over the chairing of meetings on all matters directly or indirectly related conflicts of interest under to Article 2 TEU in the Council during Hungary's term⁴⁸¹. This would have included meetings regarding Article 7 procedures, discussions on the European Commission's rule of law report, the implementation and evaluation of the Conditionality Regulation and the Recovery and Resilience Facility or other rule of law matters, such as the formulation of country-specific recommendations under the European Semester. In addition, the trio partners would have been responsible for conducting negotiations with other EU institutions on behalf of the Council.

The legal basis invoked by the Meijer's Committee to put this option forward are Article 1(2) of the 2009 European Council Decision and Article 2(2) of the 2009 Council Decision which stipulate that the three members of a trio "may decide upon alternative arrangements for the responsibilities of the Presidency among themselves". Article 2(3) of the 2009 Council Decision states that they may "by common accord determine the practical arrangements for their collaboration". Furthermore, the Presidency Handbook provides that the Presidency may, pursuant to Article 20(2) of the Council's Rules of Procedure, ask another delegation to chair a configuration of a Working Party on behalf of the Presidency throughout its designated term⁴⁸². The Council is then requested to agree to these arrangement as provided in Article 19(4) of the Council's Rules of Procedure⁴⁸³.

⁴⁸¹ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, pp. 7-8.

⁴⁸² Handbook of the Presidency of the Council, p. 20.

⁴⁸³ *Ibidem*.

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This option highlights the direct interest of Spain and Belgium as members of the trio, in ensuring that the values of the EU are respected and protected during the Presidency, for which they share responsibility.

While this option did not seem particularly advantageous for Hungary and would have required its cooperation, it would have been certainly more appealing than the two following options, which, if implemented, would have had far-reaching repercussions.

2.2. Options Using the Current Legal and Policy Framework (or Lack Thereof)

Although there are no specific provisions directly addressing the possibility of preventing a Member State from assuming the Council Presidency due to rule of law concerns, the Meijers Committee suggests that existing legal and policy options could have been used to postpone the Hungarian Presidency by rearranging the order of presidencies⁴⁸⁴.

One approach would have been for Spain and/or Belgium to initiate a discussion by indicating, in accordance with Article 1(2) of the 2009 European Council Decision and/or Article 2(2) and/or Article 2(3) of the 2009 Council Decision, their inability to agree on alternative arrangements⁴⁸⁵. Had they chosen to, they could have argued that their capacity to "fulfil responsibilities" under Article 1(2) of the European Council Decisions was jeopardised, thereby putting their own role and responsibility at risk. After all, as trio-partners, they share responsibility for what happens under the Hungarian Presidency and the impact it might have on the proper functioning of the Council.

Alternatively, other Member States could have also put this on the agenda, expressing their concerns regarding Hungary's capacity in fulfilling its role in line with the relevant European Council Decision, Council Decisions, Rules of Procedures and policy measures, especially in light of Article 7 TEU proceedings and budgetary suspensions currently faced by Hungary⁴⁸⁶. At the very least, Member States are allowed to request

⁴⁸⁴ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, pp. 8-9.

⁴⁸⁵ *Idem*, p. 8.

⁴⁸⁶ *Idem*, p. 9.

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clarification from the trio partners on how they plan to address conflicts of interest and ensure smooth Council proceedings and interactions with other EU institutions.

In addition, the Meijers Committee's report draws attention to instances where relevant developments have led to adjustments to the previously agreed order of the Presidencies. These changes occurred on six occasions, for different reasons: after the accession of new Member States in 1995⁴⁸⁷, 2005⁴⁸⁸, and 2007⁴⁸⁹; in 2002 at the request of Germany due to scheduled general elections during its Presidency⁴⁹⁰; in 2009 because of the Treaty of Lisbon⁴⁹¹; in 2016 to accommodate Croatia's accession in 2013, and as a result of the United Kingdoms' decision to renounce its Presidency in the second half of 2017⁴⁹², following the "Brexit" referendum.

As argued by the Meijers Committee, these amendments to the rotation calendar demonstrate the established legal and political practice of reconsidering Presidency order under relevant circumstances, even if close to the scheduled rotation date. So, the only difference between the aforementioned occurrences and the current situation is that the initiative has, so far, always been with the Member State that is due to take up the Presidency.

2.3. Options Requiring Changes to the Existing Framework

The third avenue advanced by the Meijers Committee to address issues such as the one at hand is to modify the existing legal and policy framework⁴⁹³. Article 236, under b), TFEU, establishes the European Council's authority to regulate how the Presidency is to be exercised. This competence has only been used once, essentially incorporating the literal wording of Declaration 9 to the Lisbon Treaty- unanimously agreed upon by

⁴⁸⁷ Council Decision of 1 January 1995.

⁴⁸⁸ Council Decision of 12 December 2005, (2005/902/EC, Euratom), L 328/60, determining the order in which the office of President of the Council shall be held.

⁴⁸⁹ Council Decision of 1 January 2007, L 1/11 determining the order in which the office of President of the Council shall be held.

⁴⁹⁰ Council Decision of 28 January 2002, OJ 2002, L 39/17 on the order in which the office of President of the Council shall be held.

⁴⁹¹ Council Decision of 1 December 2009/908/EU.

⁴⁹² Council Decision 2016/1316, Recitals 2 and 3.

⁴⁹³ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, pp. 9-10.

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Member States- into the format of secondary legislation through a European Council Declaration.

The Meijers Committee suggests that the European Council could again use this power, but this time only by a qualified majority, to amend the 2009 European Council Decision, clarifying the conditions under which the Presidency may be exercised. According to Article 4 of the 2009 European Council Decision, the Council could then adopt a decision establishing the measures for implementing the amended European Council Decision⁴⁹⁴.

Specifically, the Meijers Committee proposes that the European Council could make access to the rotating Presidency conditional on compliance with the rule of law⁴⁹⁵. This would entail establishing conditions for when Member States presently or formerly subject to rule of law related budgetary conditionalities, or under Article 7 TEU monitoring, could resume their Council Presidency following the resolution of such issues. To achieve this, the European Council could insert a general provision in Article 1 of European Council Decision 2009/881/EU of 1 December 2009 exercising its powers under Article 236 (b), TFEU. The rule would stipulate that if a procedure based on Article 7 TEU is pending against a Member State, or if rule of law based budgetary conditionalities are triggered against a Member State, that Member State would be barred from holding the Presidency for three years following the conclusion of the Article 7 TEU procedure⁴⁹⁶. The Council would then establish the new order of Presidencies by amending Council Decision 2016/1316. The additional three years would give the Member States concerned sufficient time to prepare for their Presidency.

The Meijers Committee indicates that, in practice, this could mean postponing the Presidencies of countries like Hungary so that they can focus on addressing current rule of law issues, only assigning them a new Presidency once these issues have effectively been redressed. This rule would evidently also be applicable to other future Member States subject to Article 7 procedures or rule of law-related budgetary conditionalities.

⁴⁹⁴ *Idem*, p. 9.

⁴⁹⁵ *Ibidem*.

⁴⁹⁶ *Idem*, p. 10.

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By establishing a general rule, the European Council avoids targeting specific Member States and future clarity is ensured.

The Meijers Committee acknowledges that if there is disagreement about whether the Council itself could regulate the new order of Presidencies, the European Council could instead resort to its powers under Article 236(b) TFEU to instruct the Council to adjust the rotational schedule set out in the 2016 Council Decision⁴⁹⁷. This would ensure that Presidencies of Member States that are in the process of solving their rule of law issues are postponed.

However, the Meijers Committee also presents a counterargument against its own proposal: the use of Article 236(b) TFEU to clarify the requirements and implications of Article 2 TEU issues could violate the Treaties, as Article 7 TEU is the only way to regulate issues related to Article 2 TEU. This is precisely what Hungary and Poland argued before the CJEU in their action for the annulment of the new rule of law Conditionality Mechanism. Nevertheless, this argument was firmly rejected by the CJEU, which, in the end, gave the green light for the Regulation.

In particular, the Court held that “in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State” and that “it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU”⁴⁹⁸.

In brief, the Meijers Committee considers that the legislative actions discussed would ensure the proper functioning of the Presidency of the Council in conformity with the values enshrined in Article 2 TEU. These measures are about setting clearer conditions for the exercise of the Presidency. This is different from the measures covered by Article

⁴⁹⁷ *Ibidem*.

⁴⁹⁸ CJEU, Case C-156/21, *Hungary v Parliament and Council*, 16 February 2022, paras. 159 and 168.

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7(3) TEU. The objective and subject matter of the proposed measures therefore differ from the procedure under Article 7 TEU. The Meijers Committee is therefore of the opinion that it is perfectly possible for the European Council and the Council- as the EU legislators- to implement additional measures to safeguard the proper functioning of the Council and to avoid conflicts of interest, as was the case with the Conditionality Regulation⁴⁹⁹.

3. The Legal Feasibility of the Proposed Solutions to Prevent Hungary's Presidency- a Literature Review

The Meijers Committee's report has sparked different reactions among scholars, receiving both praise and criticism. While supporters- such as Petra Bárd- describe the options proposed in the report as feasible and argue in favour of their adoption by the EU institutions, critics- such as Martyn van den Brink-, question these proposals and claim that they are inconsistent with the EU's own rule of law. In this subsection, both perspectives are analysed in order to understand the reasons for such different opinions on the recommendations contained in the Meijers Committee's report.

Martijn van den Brink offers a comprehensive critique of the proposed solutions, specifically concerning the second and third options. He argues that these proposals are incompatible with Article 16(9) TEU, which states that "the Presidency of Council configurations...shall be held by Member State representatives in the Council on the basis of equal rotation"⁵⁰⁰. Van den Brink claims that while delaying a Hungarian Presidency for some time could have been feasible, sanctioning a Member State indefinitely for ongoing rule of law violations is not in line with this provision⁵⁰¹. Such actions, he contends, can only be imposed through the procedure outlined in Article 7, and bypassing this mechanism would go against the EU's own rule of law⁵⁰².

⁴⁹⁹ MEIJERS COMMITTEE - Comment on the exercise and order of the Presidency of the Council of the EU, p. 10.

⁵⁰⁰ VAN DEN BRINK, Martijn - Taking the Gamble? A Legal and Political Analysis of the Possible Suspension of the Hungarian Council Presidency, p. 7.

⁵⁰¹ *Ibidem*.

⁵⁰² *Ibidem*.

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Van den Brink identifies the first proposal- finding alternative arrangements among the three Presidency trio- as “the least controversial, legally speaking”⁵⁰³. This solution is supported by the 2009 Council Decision on the exercise of the Council Presidency and Article 20(2) of the Rules of Procedure of the Council, which could have permitted the three members to agree that Hungary would not have chaired Council meetings involving rule of law matters. However, he points out a significant flaw: such an arrangement could only have happened at Hungary’s request and instructions, which would have been unlikely to relinquish the chairmanship of dossiers that most directly affected its interests⁵⁰⁴. Therefore, although this proposal is legally sound, it lacks practical feasibility.

The second and third proposals- changing the order of the presidencies using the existing framework and amending this framework to exclude Member States under rule of law related procedures- appear more promising as they would have not required Hungary’s cooperation. However, they are “more difficult to reconcile with EU law”⁵⁰⁵ because of the limits outlined in Article 16(9) TEU.

Van den Brink contends that even though Article 236(b) TFEU gives the Council the authority to decide- by a qualified majority- how the Presidency rotates between Member States, and Article 16(9) TEU allows for greater flexibility in the rotation sequence -since it does not require strict equality in the rotation of the Council Presidency as Article 17(5) TEU does with regard to the appointment of European Commission members-, any political decision affecting the order must adhere to the equal rotation principle. Consequently, any use of the authority granted by Article 236(b) TFEU that violates this condition is inadmissible⁵⁰⁶.

Van den Brink challenges the argument put forward by the Meijers Committee which suggests that previous changes to the rotating presidencies set a precedent for the proposed changes⁵⁰⁷. He notes that past modifications to the order of the presidencies were primarily made to accommodate new Member States or to respond to specific

⁵⁰³ *Idem*, p. 9.

⁵⁰⁴ *Idem*, p. 10.

⁵⁰⁵ *Idem*, p. 11.

⁵⁰⁶ *Idem*, p. 13.

⁵⁰⁷ *Ibidem*.

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political developments- such as Brexit-, or at the request of Member States themselves- as was the case with Germany-, and not to deny a Member State its right to hold the Presidency against its will⁵⁰⁸.

Van den Brink argues, however, that this does not clarify the question of whether- or when- the prevention or postponement of a Hungarian Presidency would violate the principle of equal rotation⁵⁰⁹. He suggests that a reasonable interpretation of the equal rotation principle is that Member States cannot be easily sidestepped and must have the chance to lead the Council before other countries are granted a second opportunity⁵¹⁰. He argues that each Member State should hold the Presidency once in the present 13.5-year period, which began in 2017 with the Estonian presidency and ends in 2030 with Malta taking over the position. Therefore, Van den Brink argues that it would have been indeed possible to propose a change to the rotation calendar, as advocated by the Meijers Committee, to prevent Hungary from holding its Presidency in the second half of 2024. However, Hungary would still have had the right to be given the opportunity to take over within the next seven years⁵¹¹. This casts doubt on the Meijers Committee's suggestion that Member States should not hold the Presidency for as long rule of law proceedings are in progress and for three years years after these have been concluded⁵¹². Van den Brink argues that unless Hungary's serious and persistent rule of law deficiencies were to be remedied in the next three years- which he admits is very unlikely to happen-, this recommendation could not have been implemented to Hungary without breaching the equal rotation principle.

In addition, Van den Brink critiques the insufficient consideration of Article 16(9) TEU by those that were in favor of suspending Hungary's Presidency⁵¹³. He asserts that this provision, which underpins the equal rotation of Council presidencies, cannot be overridden by arguments related to the demanding nature of the Presidency's tasks as

⁵⁰⁸ *Idem*, p. 14.

⁵⁰⁹ *Ibidem*.

⁵¹⁰ *Ibidem*.

⁵¹¹ *Ibidem*.

⁵¹² *Idem*, p. 15.

⁵¹³ *Ibidem*.

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nothing in the provision suggests that this right can be suspended or removed if States are unable to fulfil their duties for any reason⁵¹⁴.

Furthermore, he also rejects the use of Article 10 TEU as a legal basis for excluding autocracies from participation and emphasises that this article concerns the representation of Member States in the Council, not their right to chair over it⁵¹⁵. The latter issue cannot be regulated by Articles 16(9) TEU and 236 TFEU or the secondary legislation adopted on that basis. This would require a (controversial) ruling by the CJEU, rather than a decision by the Council⁵¹⁶. However, as Van den Brink argues, the decision on when Hungary could have assumed the Council Presidency by 2030 if it had been prevented from presiding would have been a matter for the Council to decide and not the CJEU, as a decision of the CJEU on this issue would have impeded with the Council's authority to decide the order⁵¹⁷. The CJEU may, of course, examine pertinent Council decisions, it should, however, refrain from interfering with them unless the Council has unlawfully exercised its discretion, as would be the case if it had violated the equal rotation principle⁵¹⁸.

The proper course of action, according to Van den Brink, would have been to use Article 7 TEU procedure which could have suspended Hungary's rights, including the withdrawal of the right to preside over the Council, if it had been established that the Member State had committed a serious and persistent breach of the rule of law⁵¹⁹. Although he acknowledges the procedure's shortcomings and believes that changes should be made to improve its efficacy, he argues that it remains the appropriate legal mechanism for suspending a Member State's rights⁵²⁰. Lastly, he warns against manipulating constitutional procedures to achieve desired results and emphasises the importance of adhering to the existing legal framework⁵²¹.

Petra Bárd, on the other hand, supports the Meijers Committee recommendation, asserting that preventing Hungary from assuming the Presidency would not have been a sanction

⁵¹⁴ *Idem*, p. 16.

⁵¹⁵ *Ibidem*.

⁵¹⁶ *Idem*, p. 17.

⁵¹⁷ *Ibidem*.

⁵¹⁸ *Ibidem*.

⁵¹⁹ *Ibidem*.

⁵²⁰ *Idem*, p. 18.

⁵²¹ *Ibidem*.

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but a direct legal consequence of its systemic, repeated, and grave violation of common European values⁵²². In her analysis, she underscores the broad consensus that Hungary is no longer a democracy, citing assessments by the European Parliament, V-Dem Institute, and Freedom House.

The author's central argument is that the significant deviation from democratic norms has made Hungary unfit to assume the Presidency. In this respect, Petra Bárd argues that Hungary, which has acted as a bad "bad citizen" for more than a decade cannot be a "good host"⁵²³, referring to the analogy found on the Council's website. Bárd argues that Hungary's inability to act as an impartial mediator has already been demonstrated by its persistent efforts to "sabotage" the ordinary work of the Council. For example, Hungary has used its veto to influence decisions on other issues, such as blocking the EU budget to weaken the Conditionality Regulation or blocking Ukraine's aid package to release its frozen funds.

Bárd argues that the Council Presidency should rotate only among Member States that respect and protect the values contained in Article 2 TEU, maintain representative democracies as per Article 10 TEU, and have not regressed in their adherence to Article 49 TEU since accession. In addition, Bárd argues that respecting the principle of equal rotation does not necessitate following a strict order, as long as fundamental principles are upheld.

Bárd emphasises that postponing Hungary's Presidency would not have been a punitive measure but a protective one. Drawing on the CJEU's judgments on the Conditionality Regulation, she argued that such postponement should have been considered a self-defence mechanism for the EU, akin to measures taken to safeguard the budget from misuse. The postponement was thus presented as a necessary action to protect the EU's integrity and ensure that its values are not compromised by a Member State that has persistently violated them.

The debate on whether Hungary should have been prevented from assuming the EU Council Presidency underscores the practical complexity of wanting to protect the EU

⁵²² BÁRD, Petra - Can the Hungarian Council Presidency be Postponed- Legally?

⁵²³ *Ibidem*.

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from the harmful influence of Member States that violate its fundamental values whilst also respecting its own rule of law. This is no easy task. While Martijn van den Brink puts emphasis on the necessity of adhering to the principle of equal rotation and utilising established legal mechanisms- particularly Article 7 TEU- to address such issues, Petra Bárd supports the postponement of Hungary's Presidency as a protective measure for the EU, drawing on principles of militant democracy and legal flexibility within the Treaties. In the next- and final- subsection, the implications of either permitting or preventing Hungary's Presidency are explored. The aim is to understand the political and practical impact of both possibilities in order to understand if the EU's non proactive stance regarding this matter was wise.

4. Potential Consequences of Either Permitting or Preventing Hungary's Presidency

The potential impact of a Hungarian Presidency on the EU legal order is subject to differing opinions, leaving the best course of action up for debate.

Thu Nguyen, for instance, argues that the prospect of a Hungarian Presidency is not as bad as it is made out to be. To back up this claim, Nguyen argues that the Presidency does not have a right of initiative and that it is ultimately up to the European Council and the European Commission to make the decisions. Furthermore, she argues that the time of the Hungarian Presidency- soon after the European Parliament elections- limits its ability to cause harm, as the EU institutions will be preoccupied with post allocation and, most importantly, with the appointment of the new European Commission⁵²⁴. Consequently, she believes that not much legislative work can be accomplished during this time.

Supporting the claim that the Council Presidency following the European Parliament elections generally doesn't achieve much, Nguyen shows historical evidence that "The legislative files moving forward under the Finnish Presidency in the second half of the year were significantly fewer than normal: agreements were reached on 18 texts during its term. For comparison, the Estonian Presidency brokered 76 agreements in the second half of 2017, the Austrian one reached agreements on 128 documents in the second half

⁵²⁴ NGUYEN, Thu - The European Union's Hungary Problem.

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of 2018, and the French Presidency even managed to foster agreement on 130 texts last year”⁵²⁵.

However, dismissing the question at hand solely because of its convenient timing seems rather reckless. The bottom line is that Member States that have systematically violated the EU's fundamental values should not be allowed to be in a position where it could further undermine the democratic nature of the Union, irrespectively of its timing.

Although the Hungarian Presidency might be limited in its immediate legislative impact, it could nevertheless have a significant influence on the institution's functioning, as it is able to shape agendas, organise meetings and steer negotiations⁵²⁶, putting at risk the protection of the freedoms and fundamental rights enshrined in the Treaties that form the core of EU law.

Indeed, Hungary could set the Council's agenda in such a way that its own interests take precedence over those of the EU. This could result in delays or weakening of laws designed to strengthen democracy and human rights within the EU. Hungary's leadership could also exacerbate existing tensions between Member States, particularly between those that strongly support democratic principles, which could increase polarization and reduce cooperation within the EU.

On the international scene, the EU's reputation as a defender of democracy and human rights could be damaged, which would affect its diplomatic relations and influence. Hungary's closer ties with non-democratic countries like Russia and China could lead to decisions that are not in line with the broader EU foreign policy.

Having permitted Hungary's Presidency may, therefore, have symbolic and practical consequences that extend beyond immediate legislative actions. As Petra Bárd argues⁵²⁷, allowing an illiberal regime to hold such a prominent position within the EU could normalize the presence of governments that do not fully adhere to democratic principles and the rule of law. She argues that remaining silent about the absurdity of such

⁵²⁵ NGUYEN, Thu - Institutional Corsets and the Question of Timing.

⁵²⁶ JONES, Mared Gwyn; ZSIROS, Sandor - Charles Michel's election bid sparks race to stop Orbán from taking European Council reins.

⁵²⁷ BARD, Petra - Can the Hungarian Council Presidency be Postponed- Legally?

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representation goes against the principles of the rule of law. The prevention of the Hungarian Presidency could have been seen as the EU reinforcing its commitment to the rule of law and could have sent a strong and clear message that the EU does not tolerate illiberal regimes in key leadership positions, thereby supporting the integrity of its democratic principles⁵²⁸. This action could have helped strengthened internal cohesion among Member States that are committed to upholding democracy and human rights. Moreover, it could have maintained the EU's image as a community dedicated to these values, which is crucial for its legitimacy and influence in international affairs.

Preventing the Hungarian Presidency could also have had, however, considerable disadvantages. It could have deepened existing divisions within the EU and provoked a backlash from Member States who see such a move as an overstepping of EU authority. This could have fueled Euroscepticism and strengthened anti-EU sentiment in Hungary and other countries with a similar political landscape. Such a development could also have led to further polarisation within the Union and made cooperation and consensus-building more difficult. Moreover, it could have encouraged illiberal regimes to resist EU oversight and initiatives even more fiercely, which could have destabilised the internal dynamics of the Union.

Furthermore, preventing the Hungarian Presidency could have set a controversial precedent and raised questions about the criteria and procedures for such decisions. A solid legal and political justification would have been needed to avoid the impression of arbitrariness and ensure that the move was seen as a defence of the EU's fundamental values and not a political manoeuvre.

Furthermore, as Kolja Raube and Francisca Costa Reis argue⁵²⁹, the EU as an “order” is called into question in three different ways, which is only exacerbated by this issue regarding the Hungarian Presidency. The authors argue that the rule of law crisis has led to a crisis of identity, compliance, implementation, and perception. First, the EU is being transformed from within in the direction of values that run counter to its identity⁵³⁰.

⁵²⁸ *Idem*.

⁵²⁹ RAUBE, Kolja; COSTA REIS, Francisca - The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis, p. 628.

⁵³⁰ *Ibidem*.

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Second, the EU has been unable to prevent this development, which has undermined its ability to ensure the implementation of secondary EU law and to maintain the primacy and direct effect of EU law at Member State level⁵³¹. Third, this has compromised the way the EU is perceived in its efforts to present itself as a community of values rather than just an economic union⁵³².

One must not forget that the EU's integration process has created a regulatory and judicial interconnectedness founded on mutual trust. Consequently, any disregard for fundamental values such as democracy and the rule of law in one Member State can undermine the Union's worldwide legitimacy and credibility. This internal struggle over values within the EU can be seen as a setback for the European project, jeopardizing its united front and potentially weakening the Union as a whole⁵³³.

In summary, deciding whether Hungary should have been prevented from holding the EU Presidency is no easy task, as both permitting and preventing carry their own complexities. While denying Hungary from taking over could have signaled the EU's unwavering commitment to safeguarding its core values, doing so within the confines of the Union's own rule of law, although not impossible, presents difficulties. Having allowed Hungary's Presidency, on the other hand, also comes with its own dangers, risking legitimising illiberal regimes and undermining fundamental EU principles of democracy, the rule of law, and human rights. Despite the European Parliament's calls to address this matter, the EU took little to no action regarding this matter. The true and full impact of such a decision on the EU legal order remains to be understood until December 2024, when Hungary's rotational Presidency ends. Following the Hungarian Presidency and its outcomes, the EU may be more inclined to actively seek solutions for similar scenarios that could arise, particularly given the rapid ascent of extreme-right movements witnessed across the EU in recent years.

⁵³¹ *Ibidem.*

⁵³² *Ibidem.*

⁵³³ PECH, Laurent - Systemic Threats to the Rule of Law in Poland: Between Action and Procrastination, p. 2.

Concluding Notes

The EU finds itself in a very delicate situation, in which the progress of the integration project is now, more than ever, being jeopardised by its own Member States. From constitutional amendments to the erosion of judicial independence, media censorship and the curtailment of the rights of vulnerable groups, Prime Minister Viktor Orbán, has, during his fourteen years of consecutive power, transformed a legal system once tied by democracy and rule of law into one that undermines the EU as an order.

The process of democratic backsliding in Hungary is not an isolated event, but rather a systematic threat that has put EU's legitimacy at risk. Indeed, Hungary's self-proclaimed illiberal democracy inspired by oligarchies such as Russia and China, undermines the EU both internally and externally, particularly in the context of the Russia's war of aggression against Ukraine, which Hungary's closer relations to Russia and their open declarations of political alignment exacerbating this threat.

While the EU has taken action to contradict this illiberal turn, the mechanisms deployed have showed limitations. Despite extensive documentation and condemnation by the European courts (CJEU and ECtHR) of the violation of EU's values, the Article 7 procedure- triggered in 2018 by the European Parliament- has come to a standstill, being very unlikely that the European Council will ever achieve the unanimous vote to declare "the existence of a serious and persistent breach", nor will there ever be a vote in the Council of Ministers determining "a clear risk of a serious breach". Furthermore, the European Commission's infringement procedures have also proven ineffective, as Hungary continues to refuse to comply with the CJEU's judgements.

This inability of the EU institutions to effectively address the rule of law concerns took a decisive and surprising turn in 2022 when the European Commission and the Council implemented the most significant measures ever taken against rogue Member States. However, the effectiveness of the Conditionality Mechanism, the Common Provisions Regulation and the milestones in the Recovery and Resilience Plans can only be guaranteed if the European Commission takes a clear and firm stand in their application and does not give in to Hungarian pressure and blackmail, as was the case when €10.2

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billion of frozen funds were released in the face of Hungary's veto on monetary aid to Ukraine.

Although Hungary has, as of July 1st, taken over the EU Presidency, it does not mean that it is right. The EU's compliant attitude towards the Fidesz government has gone on for far too long, forcing the EU to compromise its standards in its capacity as a global leader.

Addressing the questions proposed at the beginning of this study: Should Hungary have been prevented from presiding over the EU Council? The answer is yes. Could Hungary have been legally prevented? Also, yes. However, a lack of willingness from the EU itself prevented this from happening, despite various calls from the European Parliament questioning Hungary's ability to act as an honest broker and the Meijer's Committee proposals of using existing legal and policy frameworks to prevent this worrying event for the EU.

The EU institutions have a duty to exhaust all legal means to neutralise the threat of illiberalism and maximise the protection of democracy. This is what the EU should have done with regard to the Presidency of such an important institution for the proper functioning of the European project. The placement of a Member State with a decade of undermining democratic values in a role expected to uphold those very values should have served as a critical wake-up call for the EU. Nevertheless, this is a risk the EU seems willing to take. Only time will reveal the practical impact of the Hungarian Presidency on the EU. Moving forward, the EU may be more inclined to take more proactive measures in similar situations to prevent a recurrence of such issues.

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