

Rule of Law infringements in Hungary and Poland and the  
EU institutions safeguarding processes

Between years 2017-2022

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Bachelors level thesis

## **Abstract**

What have the EU institutions done to safeguard rule of law values in Poland and Hungary? The goal of this thesis is to examine how Hungary and Poland have acted in ways that contradict EU values of rule of law, as well as what the EU institutions have done to safeguard these principles legislated in the Union's rule of law principle. Using a modified theory of external governance to explain incentives and motivations underpinning the EU institutions strategy to protect rule of law values. Based on a cost-benefit analysis of the consequences of political actions - or motivation to support common values - making it appropriate to protect these through temporarily suspending of certain rights of non-compliant member states. A process-tracing method using first-hand material was used to map EU institutions' political and legal processes aimed at discouraging and impeding rule-of-law violations by the Hungarian and Polish governments from 2017 to 2022. The findings indicate that EU institutions gradually enforced stricter procedures as a result of Hungary and Poland's failure to fully implement the necessary changes to support the rule of law. Making access to EU funding conditional on rule of law implementation. Lending support to both branches of the theory.

Key words: EU institutions, Rule of law, Hungary and Poland, Defending EU Values, EU Conditionality

**Word count: 9996**

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## **1. Introduction**

Hungary and Poland are two EU member states that have received a lot of media attention as well as criticism for failing to uphold the Union's democratic values. All member states that seek to join the Union must implement and adhere to EU legislation and values. If these values are violated, the EU institutions have several political tools at their disposal to put pressure on member states to align their policies and infractions with EU-legislated values. All EU member states must adhere to the union's rule-of-law principles and safeguard human rights, civil liberties, and democratic freedoms. All of these are protected and recognized as core EU values under Article 2 of the Treaty of the European Union. This is a requirement for all countries that have been granted accession to the union through membership. When member states violate these values, the EU has the legal authority to act based on the severity and consistency of the transgressions. Upon which the Council may act by a qualified majority of the other member states to revoke certain rights granted by admission to the Union.

The Union's procedures for protecting EU Rule of Law values have been in place for many years, which can be interpreted as a general lack of activity and lengthy processes. This is the foundation of my research question, which is to trace the EU institutions' actions in safeguarding the EU Rule of Law values and gain insight into the procedures and active initiatives to curb Hungary's and Poland's violations of these values. To protect and encourage compliance with the Rule of Law and the EU treaties that declare these, the union's institutions established conditionality requirements that protect EU values from infringements by member states. These conditionality requirements protect values stipulated in Article 2 TEU as well as provide additional protection under Article 7 TEU. According to these Articles, the EU Institutions have the authority to suspend certain member states' rights and obligations that adversely impact the Rule of Law and all that it entails. This can be accomplished through a Conditionality requirement, which suspends member states' rights, such as access to the EU budget through various funds, pending compliance with EU Rule of Law principles.

The theoretical framework of this thesis defines two perspectives that can be used to describe how member states and EU institutions deliberate and weigh the decision to implement these measures. To fully comply with and protect the Union's principles to ensure the Rule of Law. Perhaps the subsequent actions of the EU institutions are supported by a conditionality logic and a cost-benefit analysis, weighing possible losses and costs against potential gains and opportunities. A logic of appropriateness, on the other hand, describes whether EU institutions

choose to implement demands based on perceived congruence and benefit to collective identity and values.

## 1.1 Research question

*How have Hungary and Poland acted in conflict with the EU rule of law values and why has the safeguarding process from the EU institutions not happened earlier?*

Between the years 2017-2022.

## 1.2 Background

The EU has the ability to exert pressure on countries seeking to join the union through formal accession requirements that EU candidate countries must meet in order to gain membership. The Copenhagen Criteria define these (1993) The candidate states must also adopt the EU Acquis Communautaire which states that the entire body of EU law, norms, and values must be integrated in order to gain accession (Article 2 TEU; EUR-Lex, 2022). This begs the question of what tools the union has to control and enforce EU norms and values once the state becomes an official EU member state. This question has become increasingly important in the debate over EU rule of law, as two of the union's member states have seen an increase in authoritarian political trends and have been accused of violating EU laws and values. Anti-democratic movements and violations of EU values to uphold the union's democratic practice have increased in both Poland and Hungary. The European Parliament voted earlier this year (10 March 2022) to impose financial penalties on Hungary and Poland. Following trends of infringements of the Union's Rule of Law values, such as restricting court freedom, impeding judicial autonomy, and undermining the separation of powers, and thus risk weakening EU legislated rights and freedoms.

Hungary and Poland have both faced criticism for their protection of and adherence to the Union's Rule of Law (Carnegie Europe 2017). However, due to the Union's voting rules requiring unanimity, the two countries have often been able to shield one another from harsh consequences. This may appear to be a delay or inaction on the part of EU institutions. This is the context for my research, which seeks to understand what the EU has done to protect the Union's Rule of Law values and to determine whether there has been inactivity and excessively drawn-out procedures in securing EU values in these two member states.

## **2. Relevant EU legal framework**

### 2.1 Article 2 TEU

Article 2 of the current Treaty of the European Union (TEU) 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, including the rights of persons belonging to minorities[...] in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” (TEU, Article 2). This article states values, rights, freedoms and obligations that all EU member states must comply with and protect following accession to the Union.

### 2.2 Article 7 TEU

Article 7 is put in place to ensure that all EU member states comply with Article 2 which clarifies that all member states need to respect human dignity, human rights, democracy, freedom, equality, the rule of law including the protection of rights for minorities. The European Parliament, Commission and Council may determine that a member state is of risk of breaching values in Article 2 and subsequently suspend certain rights and obligations of these states. The EU institutions may also revoke these suspensions following changes of the situation under which they were initially imposed (TEU, Article 7).

### 2.3 Rule of law

The protection of the rule of law is a fundamental value stated in Article 2 of the TEU. “ The rule of law ensures that decisions by political actors are binding” (Hix & Høyland 2011, p.75). Holding member states accountable for guaranteeing and protecting the rights and values stated by EU law. Ensuring conformity for the rule of law is a prerequisite for the function of the union as it applies to the application of EU law, the function of the internal market, and mutual trust. Grounded in effective judicial protection, by securing the independence and quality of national justice systems and courts (European Commission, Rule of law p.5). The rule of law means that the unions member states are bound by law, and that citizens should be able to challenge and oppose the government’s action in independent courts. This includes that governments should fight corruption, and safeguard the freedom and independence of the

media. Ensuring that certain actors not be given unfair favor above others and that the inner workings of the government reported to the public, to ensure political transparency (Ibid).

## 2.4 EU Charter of Fundamental Rights

The Charter of Fundamental Rights (CFR) includes political, economic and social rights in the European Union for its citizens, protected by EU law. The rights include freedoms and principles of dignity, equality, solidarity, citizens' rights and justice general provisions of governing etcetera. Recognized and officiated through the Charters 54 articles. These rights became legally binding along with the Lisbon treaty 2009 and every year the Commission publishes a report of the application of fundamental rights within the member states (Official Journal of the European Union, 2012/C 326/02).

## 2.5 EU Regulation of conditionality for the protections of the Union budget

On the 16<sup>th</sup> of December 2020 the EU Parliament and Council adopted Regulation 2020/2092 that establishes a “conditionality mechanism” for the protection of the EU budget. If a member state should violate the principles of the rule of law the Regulation allows the European Council, acting on the Commission's recommendation, to impose safeguards such as withholding payments from the EU budget or suspension from previous approvals of union-funded programs (ECJ press release No 28/22; EUR-Lex 2020). The rule of law refers to the Unions values protected by Article 2 in the TEU which includes a transparent and accountable democratic law-making process, independent and impartial courts, separation of powers, effective judicial protection etc. Breaches of this principle are defined in Article 3 of the regulation 2020/2092:

“(a). endangering the independence of the judiciary:

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

(c). limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.” (Regulation 2020/2092, Article 3).

The ECJ may initiate this Regulation only if there are reasonable grounds to believe that a member state has violated the principles of the rule of law and that these violations have an impact on or seriously jeopardize the EU budget's sound financial management (Ibid, Article 4). The Union has several tools at its disposal to promote the rule of law and respond to violations of it, one of which is infringement proceedings initiated by Union institutions. However, the procedure outlined in Article 7 TEU is also applicable. This conditionality regulation is intended to supplement the other processes in place to protect the Union's budget from violations of the rule of law that jeopardize sound financial management and the Union's financial interests. The legal procedure outlined in Article 7 of the Treaty of the European Union allows the Council to reprimand member states that violate the common values that underpin the EU and its identity on a regular and serious basis.

As a result, a constitutionally legitimate space for legal action against a member state where there is a significant risk of or current violation of the Unions values is created. The legal ramifications of Article 7 TEU are compatible with and legitimize the regulation (OJ 2020 L 433I, p. 1-3). The purpose of the Regulations conditionality mechanism of suspending budget payments to EU member states that violate the rule of law is to persuade the member states in question to stop these actions and stop violating official and legislated values.



### **3. Eu institutions- EU Commission, Parliament, Council and Court.**

The Commission has the union's sole legislative initiative power, which means it proposes rules and laws. The Commission also has policymaking authority and oversees the Economic and Monetary Union (EMU) The Commission develops initiatives based on assessments, which are then sent to the EU parliament for scrutiny and approval by European MEPs, or members of the European Parliament as well as the EU Council (Fact Sheets on the European Union 2022, The European Commission; TEU, Article 17). According to the Unions good governance principles, the Commission must be transparent and accountable (TEU, Article 11). As a result, all official documents are more easily accessible. The actions of these EU institutions as well as their official declarations, documents, and initiatives will constitute the foundation of my research.

The EU Parliament is directly elected by voters in their home nations, as representatives of the EU citizens. The Parliament is the EUs law-making body, responsible for passing laws side by side with the EU Council based on the initiatives and proposals of the Commission. The Parliament, together with the Council is also responsible for establishing the EU budget. All EU institutions must follow Articles 10 and 11 in the TEU, stipulating that transparent and open decision-making is to be carried out close to the citizen as possible (TEU, Article 10). As well as Article 15 in the treaty of the functioning of the European Union, which states that all official documents must be publicly accessible (TFEU, Article 15).

In dealing with legal issues, the Court of Justice of the European Union (CJEU) is in charge of interpreting EU law and ensuring that it is equally applied, abided by, and safeguarded in all EU countries. The court is also in charge of resolving legal disputes between national governments and EU institutions. The court has the authority to annul EU legal acts that violate EU treaties, as well as to ensure that the EU parliament, Council, and Commission take legal action when necessary. Failure to act by these institutions can result in legal issues and official complaints to the Court from EU governments and other institutions (European Union, CJEU).

#### 4. Theory

The External Incentives Model is an explanatory model originally used to describe EU external governance (Schimmelfennig et al. 2004, p. 663-664). This theoretical framework was originally used to study the variables of effective EU rule transfer to non-EU states. I will be using the same theoretical framework to study two states that are within the EU but relevant still, to study the effective rule transfer of EU values and rules to these member states. By “rule transfer” the authors Schimmelfennig and Sedelmeier focus on the adoption of EU rules, meaning their institutionalization of EU legislation into domestic law. This includes domestic policy changes and re-designing domestic institutions to comply with EU rules and standards (Ibid, p. 662-663). They find that the variation of effectiveness in the transfer of domestic rule to EU rule is best described by the external incentives model, and with slight modification I believe this is a solid theoretical framework for the forthcoming analysis. In this thesis, the theory will be applied to current EU member states rather than the original models' non-member state focus. Despite this slight modification, I believe the theory offers valuable insight into the adaptative incentives for the current governments of Hungary and Poland.

The model of external governance in EU-rule adoption includes two slightly different approaches, the *external incentives model* based on conditionality and a rational evaluation of cost-benefit and *the social learning model* based on the logic of appropriateness. The external incentives model is essentially a rationalist bargaining model where the actors bargain to maximize their own utility. The EU using conditionality and reinforcement by rewarding or issuing credible threats as the main strategy to protect its interests. The outcome of this bargain is determined by four main factors that all affect the member states cost-benefit analysis of their perceived political benefits of the EU rule adoption. These factors include the calculation of conclusive EU conditions, the magnitude and speed with which rewards are distributed, the credibility of threats and promises and lastly the magnitude of the associated adoption costs (Sedelmier and Schimmelfening 2004, p.663-664). This model depicts states as actors who consider fulfilling EU conditions in order to receive EU rewards, which in this case could mean continuous receiving of EU funds. Or states make comply with EU demands to avoid or minimize potential costs and losses. The social learning model based on the logic of appropriateness on the other hand assumes that state actors are motivated by "internalized identities, values, and norms" (Ibid, p. 667-668). These states choose the best course of action to support their national identity and only adopt EU rules that they believe are appropriate in

light of this collective identity, values, and norms. According to this theory, Hungary and Poland's actions in contravention of EU rules may indicate that their national governments do not consider EU rules to be appropriate or persuasive enough to support their identities, values, and norms. Or that the EU's legislation on Rule of Law does not support the rights and freedoms that the respective national governments deem appropriate for their countries.

Sedelmier and Schimmelfening's (2004; 2020) model of external governance and its description of incentives looks at the states cost-benefit analysis regarding EU rule adoption. And argue that states establish democratic practices and regimes when the benefit of adopting liberal reforms or complying with EU values outweigh the costs of compliance. Alternatively that member states find the transition to EU values and practices more appropriate to further strengthen national identity. By adopting or changing domestic governing bodies and institutions to better align with EU rule of law. To gain benefits and rewards associated with EU compliance, meaning that the higher the benefit and the lower the cost from the member states perspective, the more likely the compliance becomes (Sedelmier and Schimmelfening 2004, p. 674-676; 2020, p.815-816).

These two approaches to external governance grants this thesis a thoroughly researched theoretical framework to explain the incentives for EU rule adoption and safeguarding. Which is what this thesis aims to do, to examine actions of the EU toward member states acting in non-compliance with EU legislation and what possible incentives and motivations lay behind these actions. The thesis aims to describe what actions have been taken by the EU to counteract the political shifts and choices by the local governments in Hungary and Poland that are in direct violation with EU legislation and values. And to use a theoretical framework that grants insight into possible reasons to why the member states in question as well as the EU have acted the way they have. In order to further both parties' interests, the EU and both respective member states (Sedelmier and Schimmelfening 2020, p.814-815). Previous studies using this model suggest that EU conditionality played an important role in the initial Europeanization of public policies in these post-communist member states. And suggest that the external incentives model explains the broad patterns of effective and successful transfer and adoption of rules from the EU to its member states. The model explains when EU conditionality results in national policy change in the member states, in alignment with Europeanization. The effectiveness is largely dependent on the context of conditionality influencing the condition of national public policies (Vachudova 2005, p.110-111).

## 5. Hypothesis

This section builds on the previously mentioned theoretical framework of two EU external governance logics applied to Hungary and Poland. I will present a hypothesis that follows the model of external governance, determining the political process of action-taking in EU institutions to curb Hungary and Poland's transgressions. Based on Articles 2 and 7 in the TEU, as well as the rule of law values, rights, and liberties they declare and protect. I wonder if the EU institutions' political actions are more in line with the logic of consequences or appropriateness. Furthermore, to investigate how this affects political initiatives in terms of lengthy processes, slow and gradual implementations. The institutions could have initially approached the infringements by notifying the respective member states of weaknesses in their EU rule of law compliance and the risk of their prospected consequences. As well as the social learning model that prescribes governance to the process as strengthening and protecting national identity and values. In the EUs case, protecting the Unions values from those who infringe upon it, even from within the Unions borders. Through a functioning rule of law, many of the the Unions values, identity and norms are protected and upheld. Therefore the consequences of rule of law infringements subsequently lead to breaching these protected value principles. Which is a grave contravention to the Unions legislation, treaties, rules, values, identity, freedoms and rights. All of which requires safeguarding by the EU institutions, a complex process that requires negotiation and clear directives between the member states and the EU institutions. Therefore, my hypothesis is:

*H: The process of safeguarding the Unions rule of law values is complex and requires multiple processes and clear directives between the EU institutions and Hungary and Poland. These processes might be lengthy and increasingly strict penalties following the level of compliance from the respective member states.*

## 6. Method

For this thesis, I will use a process-tracing method. In the theory section, I present a hypothesis that outlines possible EU action plans based on two models of external governance. Specifically, social learning based on appropriateness logic and lesson drawing based on consequence logic. The theory will be applied to the analysis of the thesis, along with the findings that trace the process of the Union's initiatives and responsiveness in dealing with violations of the rule of law in Hungary and Poland.

### 6.1 Process tracing

The process tracing method is a descriptive qualitative analysis method that can help to describe social and political developments as well as assess causal hypotheses. Process tracing is the methodical evaluation of diagnostic data chosen and examined in light of the researcher's study questions and assumptions. Process tracing, according to Mahoney (2010) focuses on description and temporal sequence identification (Mahoney 2010, p.125-131). This contributes to my research question by allowing me to trace the series of events that comprised the "delay" of the EU's lack of follow-through in ensuring the horizontal support of its treaties within member states. Process tracing examines the trajectories of change and causation. The analysis, however, fails if the phenomena observed at each step of this trajectory are not adequately described. The relationship between independent, dependent, and intervening variables is the focus of process tracing. A clear process timeline is required for assessing EU responsiveness or lack thereof (Ibid, p. 128-129).

The analysis of changes and sequence will be enabled by determining the unfolding of events over time by characterizing key steps in the process. This will be accomplished by charting process snapshots, such as relevant events in Hungary and Poland, as well as votes and actions taken by the Union between 2017 and 2022. The time frame for this thesis was chosen to coincide with the launch of the European Commission's first legal action against Poland and Hungary under Article 7 of the Treaty of the European Union in 2017 (Rule of Law Report Poland 2020, p.12). Furthermore, increased levels of corruption in Hungary were measured following the adoption of civil society legislation in 2017, which the Court of Justice ruled was incompatible with the Charter of Fundamental Rights (Rule of Law Report Hungary 2020, p.14). In terms of the analysis' conclusion, findings will be included until December 31, 2022.

This is due to the Commissions vote on suspending funds from the Unions Recovery and Resilience Fund (RRF) to Hungary on December 19, 2022. I will do my best to incorporate these results into my analysis but given the close-following publication date, it is unclear how thoroughly this new development will be investigated.

In political science, events are frequently studied in retrospect and my research will do the same. These are known as *ex post facto* studies and require my research to demonstrate a causal relationship (Teorell & Svensson 2007, p.59 & 80). One advantage of using a process-tracing method is this. Because of its adaptability and ability to "paint a picture" of a situation by sequencing events. This is relevant to my research question because it identifies and describes political and social phenomena in a systematic manner. By allowing me to sketch out causal mechanisms and causal inference in this qualitative process.

This method can assist me in describing political and social development, evaluating causal claims as well as processing time-stamped events and procedures (Collier 2011, p.823-824). More so than using a different method based on statistical measurements, such as quantitative regression analysis and inference. Particularly when it comes to issues such as reciprocal causation, spuriousness, and selection bias (Mahoney 2010, p.114-116; Teorell & Svensson 2007, p.69-71). The analysis must meet certain criteria in order to establish a true causal relationship. Temporal order, mechanism isolation, and identification (Ibid, p.64-65). Through process tracing the temporal order will be met, by identifying and isolating EU legal and political action-taking the two remaining criteria will be realized.

Potential weaknesses in the Process tracing method is assumptions and weak hypothesis, similar to other qualitative methods the researcher plays a large role in analyzing and delimitating which material to use in the research, so-called selection bias (Collier 2011, p.825-827, Teorell & Svensson 2007, p.222-223). Most events are omitted due to an overwhelming amount of EU institutional acts, which allows the researcher to design the necessary criteria for the event to be included. This phenomenon is present in this article, but by having a clear hypothesis and focusing the material to reliable and official first-hand sources, the potential weaknesses of this method can be minimized. According to Teorell & Svensson identifying external influences will help to improve the reliability of the measurement method because the limitations and specifications of the method allow different researchers at different times to repeat the research and get the same results. This eliminates the possibility of unsystematic errors and adds to the

validity of the research by establishing a clear link between theoretical conceptualization and operationalization of what is to be measured (Teorell & Svensson 2007, p. 58-59).

## 6.2 Operationalization

### Rule of law:

To analyze the level of rule of law congruence and discrepancies within Hungary and Poland I will mainly use the EU Commissions own country reports. According to the official country reports issued by the Commission there are four main areas of research when examining rule of law within EU member states. These country reports are meant to measure and interpret key areas that constitute a functioning and effective rule of law. Examining the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances. This will be further examined in the findings of this thesis (Rule of Law Report 2022, p. 2-3).

### EU Charter of Fundamental Rights:

The Charter is based on the Unions principles of democracy and rule of law. And serves to create a clear charter of fundamental rights, freedoms and principles to be protected and respected by all governing bodies, member states and courts of the Union. These rights, freedoms and principles include: dignity, freedoms, equality, solidarity, citizens rights, justice, and general provisions for interpreting and applying the Charters values (Charter of Fundamental Rights of the European Union 2012, p.1-2).

## 6.3 Collection of empirical material

I will gather material from EU Commission, Parliament, and Court publications to gain firsthand knowledge of how the union has handled Hungary and Poland's weak or selective compliance with EU rule of law values. This includes official press releases, motions, votes, and other forms of published communication between the two member states and the Union. As first-hand material provides relevant and direct insight into the Union's deliberative and action-taking process, the thesis reliability and source relevance will increase. Other materials and observations will be gathered from peer-reviewed publications on the subject, as well as articles from policy experts from publications such as Carnegie Europe. The material is first-hand from the relevant source, well-documented material published by EU institutions that

adhere to strict legal guidelines and are legally bound to adhere to the publicity principle. These texts that are easily accessible to the public and based on thoroughly scrutinized information following the unions' transparency policy. This adds to the quality and reliability of the collected material, and to the thesis reproducibility (Teorell & Svensson 2007, p. 58-59).

#### 6.4 Research design

The purpose of this thesis is to examine how Hungary and Poland have acted in ways that contradict EU values of rule of law. And why the EU's safeguarding process has taken so long through its action-taking institutions, namely the Commission, Parliament, and Council. This process consists of the EU's efforts to protect democratic civil liberties and punish violations of national rule of law among member countries, specifically Hungary and Poland. As previously stated, I will primarily rely on firsthand sources and official statements from the Union's press, as well as votes and motions results, to give the findings more substance and reliability.

The findings of the thesis will trace the EU's process of intercepting infractions and ensuring functioning rule of law practices in Hungary and Poland between 2017 and 2022. This will be accomplished by tracing the Union's action-taking process, such as Motions and votes in the Parliament, Council, and Commission that advance the EU's safeguarding initiatives. This is to look into what has been done to put a stop to the Polish and Hungarian violations of EU Rule of Law implementation. Following that, the analysis will investigate and answer the research question, as well as investigate which theory best explains the EU's action-taking strategy. Thus, the analysis will build on the findings to determine which hypothesis, based on the two theories, best describes the actions taken against Hungary and Poland for violations of EU rule of law. Based on the criteria of both theories, as well as determining whether and why the EU's process of acting in response to infractions from these two member states has been protracted and belated.

Finally, a brief conclusion will examine the EU action-taking process and initiatives to determine whether there was a delay or whether the EU took timely and continuous steps to protect and enforce EU rule of law values.



## 7. Findings

On September 30, 2020, the EU Commission issued its first "rule of law report" combining assessments of each member state's rule of law situation as well as the union's overall rule of law status. Hungary and Poland were chastised for failing to comply with and protect the EU's rule of law value. This country report was initiated as a legal foundation for the union to begin official assessment and action-taking consequences to member states regarding breaches in the protection of the rule of law. After initiating an official and cross-national assessment of all EU member states, the Commission, as the union's executive arm, can use the results as legitimate legal grounds for upholding EU values, including disciplining transgressing member states. The report reviews four main areas within rule of law “[...]the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances.” (Rule of law report 2022, p.1).

### 7.1 Infringements in Poland

Since 2015 Poland has made justice reforms that have been in disaccord with EU legislation values and norms. These reforms have increased the executive's influence over the judiciary, eroding judicial independence. In 2017, the Commission took legal action to combat this by launching the Article 7 TEU protective procedure, which allows the Commission to act in protecting the values stated in Article 2 TEU. This marked the start of the EU's legal action procedure in Poland to protect the rule of law. To protect judicial independence, the Commission launched two new infringement procedures in 2019 and 2020. In correctional cases involving judges, the EU Court of Justice granted temporary actions to suspend the powers of the Supreme Court's Disciplinary Chamber (Rule of law report Poland 2020, p.8-9).

Poland was chastised for structural flaws in their government's anti-corruption program; the relevant institutional framework exists but has been deemed inefficiently applied and followed. This creates difficulty in supporting transparency and the function of corruption-preventive institutions (Rule of law report Poland 2020, p.2). Furthermore that the Minister of Justice is also the general prosecutor, which raises serious issues about the institution's leadership in upholding the separation of power between the legislative and disciplinary powers. The Commission therefore launched a disciplinary order to the Court of Justice, which contested the Polish justice official arrangement and acted by sending in a law proposition to the

Constitutional Tribunal (European Commission Press Release 2021, p.3). This law was passed on December 20, 2019 and obliges all Polish judges to disclose personal information that could impede judicial independence or bias. Such as memberships, affiliations, positions in political parties etc, this was also meant to ensure quality, fairness and impartiality in the judiciary (Rule of law report Poland 2020, p. 5-6).

Several incidents occurred prior to the passage of this law that raised concerns about the Polish judiciary. Despite having one of the highest general government expenditures for the justice system in terms of percentage of GDP in the EU, the Minister of Justice has made several transgressions in important state affairs. Such as repeatedly delaying the publication of vacant judiciary positions in 2018, an issue that was subsequently raised by the Ombudsman. This can result in one of two issues: a highly inefficient judiciary or corruption. The Ombudsman's complaint about the Ministers' discrepancies was submitted to the Ministry of Justice, raising concerns about the separation of powers and a conflict of interest in the matter (Ibid, p.7). Between years 2018 and 2020 the Polish government implemented an anti-corruption programme based on a resolution (No.207 of 19 December 2017) of the Council of Ministers. This programme aimed to strengthen anti-corruption legislation (Rule of law report Poland 2022, p.13). Despite numerous improvements, key legislative initiatives were not met during the program's allocation. Bills, reforms, and revisions to legislation governing asset declaration and corporate affiliations of public office holders and ministers, as well as lobbying systems, are examples. All of this to increase transparency in political party finance, address conflicts of interest and strengthen criminal penalties for corruption. Following the program's completion in 2020, no subsequent anti-corruption strategies were announced or implemented in Poland to complete the resolution. Concerns regarding the government's anti-corruption institutions still remain an issue (Rule of Law Report Poland 2022, p.5).

Poland has been chastised for its selective and insufficient adherence to EU legislation on judicial independence and compliance to EU as of July 2021. As well as the Polish Constitutional Tribunal rulings on July 14 and October 7, 2021. Undermining EU law by deeming it incompatible with the Polish Constitution. And declaring Polish constitutions supremacy over EU law. Raising concerns about the independence and impartiality of Polish Constitutional Tribunal. With the July ruling Polish constitutional tribunal denied the binding effects of the CJEU issued under Article 279 Treaty on the Functioning of the European Union (TFEU) that guarantees effective judicial review by an independent and impartial tribunal. With

the October ruling the Polish Constitutional Tribunal disregarded Article 19(1) TEU, which guarantees the rights to effective judicial protection, thereby depriving citizens in Polish courts from the protection of the Article covered by EU law (European Commission Press release 2021, IP/21/7070). This is the third time the Commission has triggered infringement procedures against Poland, with the purpose of guaranteeing rule of law and protecting EU law, values and principles. On December 20, 2017, the Commission triggered Article 7(1) TEU following threats to the rule of law. The first infringement procedure was launched on April 3, 2019, following a newly legislated disciplinary regime for Polish judges. The Commission finds that the new regime is incompatible with EU law as it violates the independence of Polish judges from political control (European Commission press release, 3 April 2019). The second infringement procedure was launched on April 29, 2020, on a law passed in Poland in December of 2019 that was deemed to undermine judicial independence and prevents Polish courts to fulfill their obligation to directly apply EU law or request preliminary rulings from the ECJ (European Commission press release, 29 April 2020).

The Court of Justice of the European Union (CJEU) ordered Poland to comply with the rulings of the two infringement procedures, and correct specific laws that were incompatible with EU law. After months of inactivity from the Polish government to comply with the CJEU's rulings, the Commission requested that the CJEU impose financial penalties on Poland. In October of 2021 the CJEU enforced a daily fine of €1 million, until Poland complies with the court orders (CJEU press release No 192/21). Poland daily fine is conditional on their compliance of the CJEU order to dissolve their legislated disciplinary chamber for judges. This fine is still in effect as of the end of 2022, with a total sum of more than €400 million (Stars and Stripes, 2022). In regards to Poland's benefit from EU funds, it is due to receive a total amount of €1 578,9 million in 2021 from the EU. The vast majority of this funding is due to come from the EU's Recovery and Resilience Plan (RRP) (European Commission Directorate-General for Budget, 2021). Being granted access to this recovery fund in 2022 when the Commission planned to distribute it is conditional to Poland's commitment and implementation of several improvements to its rule of law. Poland has not yet fulfilled these requirements (Rule of law report Poland 2021, p. 5-6 & 17). But the incentive is there, as the fund could boost Poland's GDP by 1.1 to 1.8% by 2026, proving the gravity and significance of this Fund for Poland's economy (European Commission, 2022).

Since Poland's PiS (Law and Justice Party) came to power in 2015, there have been numerous accounts of appointing political allies in the judiciary, and effecting publicly funded media to report pro-government news as well as threaten the opposition with legal offenses. And the Polish media is through recent legislation regulated by a state-owned council, which brings both the issue of independence and corruptive influence to discussion (Carnegie Europe, 2017). Furthermore, Polish legislation regarding broad immunity for top government officials, as well as clear impunity clauses for crimes of abuse of office, has been criticized. These issues were raised by the Commission and throughout the remaining year several rulings were delivered by the ECJ and the European Court of Human Rights, under Article 7(1) in the TEU, confirming many Polish violations of EU law. As a result, the Commission launched its third infringement procedure against the Polish Constitutional Tribunal on December 22 in 2021.

## 7.2 Infringements in Hungary

Many EU institutions have expressed concern about Hungary's weak civil society and lack of judicial independence. Concerns have been raised about the power balance between the president of the national office and the managing judiciary of courts. As a result, the independence of the national judicial council is called into question. Concerning developments in the Hungarian supreme court occurred when a request for a preliminary ruling to the European Court of Justice was declared illegal. In Hungary, new legislation allows members of the constitutional court (directly elected by Parliament) to be appointed to the Supreme Court. This, like the developments in Poland, can be concerning in terms of independence and the separation of legislative and prosecutorial powers. As well as the lacking independence of media in both countries. The Hungarian media continues to be largely pro-government, ineffective, untransparent, and ineffective, heavily influenced and obstructed by political influence (Rule of law report Hungary, 2020).

Close ties between national businesses and politics, as well as a lack of investigation and prosecution following allegations of corrupt behavior in high-level politician circles. Restricting media freedom, minimizing civil oversights, and failing to regulate lobbying forces, as well as lacking transparency and access to public government information. Amongst Hungarian members of parliament, there have been reports of favoritism, nepotism, lacking disclosure on lobbyism, ineffective supervision and enforcement of rules of conduct to ensure integrity. Despite signals from several EU safeguard institutions very little has been done to

improve the integrity and anti-corruption practices amongst high-ranked public officials, in politics and the judiciary. GRECO, the Council of Europe's "states against corruption" group has issued recommendations and notes on how the Hungarian members of parliament can be more transparent. With their ties to high-ranked prosecutors as well as large corporations. By adopting codes of conduct, making public party financing for elections, implementing practices to verify public officials, legislating regulation of lobbying and overall public disclosure. (Rule of law report Hungary 2020, p.2; GRECO, 2020).

According to legislation passed in June 2017 the public authorities in Hungary are able to dispute final decisions of the constitutional court. There have also been diminishing opportunities for public consultations due to high legal aid fees, leading to a crowding out of inclusive public access to legal assistance for citizens. As well as lacking impact assessment of new procedural laws. This raises concern regarding the transparency and quality of the Hungarian legislative process, due to the lacking reliability in checks and balances. The legal certainty and reliability of checks and balances was investigated by the Commission, concerned that the new legislation in Hungary was inconsistent with EU values and protected rights. EU rights are protected by the Charter of Fundamental Rights (CFR) and suspecting Hungarian legislation to be infringing on these rights, the Commission referred Hungary to the Court of Justice (CJEU) in November 2019. The EU Court of Justice found that Hungary's transparency of foreign funding for civil society organizations as well as transparency of associations was incompatible with the rights and freedoms protected under the Charter of Fundamental Rights (CFR) in June 2020 (CJEU Case C-78/18). Concerns regarding judicial independence through Article 7 TEU in Hungary were addressed by the EU Commission and Court, but remain unchanged. Hungary received official criticism in the first rule of law report 2020 and in the most recent 2022 report the Commission finds that Hungary has done very little to correct the criticized areas of concern (Rule of law report Hungary 2022, p.3).

In Hungary, criticism about lacking judicial independence was given after elected leader Victor Orban in 2019 abandoned efforts to create a new administrative court system. When the Covid-19 pandemic hit in early 2020, Orban ended up giving enormous "political emergency power" to the Hungarian parliament. Once again, acting in controversy to EU rule of law values. Following that, discussions in the EU took place about whether access to EU funds should be linked to adherence to EU rule of law. The EU's options for dealing with authoritarian leaders like Orban, who openly boast about running a "illiberal state based on national foundations,"

are limited (The Washington Post, 2018). Former Hungarian diplomat Peter Balazs who was engaged in the Hungarian accession process speaks of the Union being a “fantastic constellation” that both Hungary and west Europe wanted. It was widely viewed that national differences would fade over time as new members grew to accept the old members' values, rules and institutions. But this may have been overly optimistic and naïve in regards to the post-accession follow up (The Washington Post, 2020).

In regards to Hungary's benefit from EU funds, it has been one of the greatest net beneficiaries. Due to receive a total of €657,78 Million in 2021 from the EU. This is equivalent to around 5% of the country's GDP. The vast majority of this funding is due to come from the EU's Recovery and Resilience Plan (RRP) (European Commission Directorate-General for Budget, 2021). Hungary's RRP includes the 17 corrective measures, as well as other rule-of-law reforms pertaining to judicial independence. Hungary has committed to 27 "super milestones" that must be completed before RRF payments can be made. Following the findings of Hungary's inadequate reform implementation, the Commission decided to keep the 18/09/2022 proposal to suspend 65% of the Recovery and Resilience funds totaling €7.5 billion. Until Hungary's Rule of Law protection is completed and re-established, as well as all other 17 conditionality milestones.

On December 19, 2022, the Commission will vote on suspending RRF to Hungary. With the general conditionality of strengthening the rule of law, combating corruption, ensuring judicial independence, implementing standard audits and control measures, plans to invest in green energy and thus reduce reliance on Russian fossil fuels, and improving digitalization in education and public administration are among the 27 "Super Milestones" (European Commission, 2022a). The European Parliament plenary sitting on November 21, 2022 assesses Hungary's compliance with the Rule of law conditions, triggered by the Commission. And welcomes the decision to trigger the Conditionality Regulation toward Hungary's RRP funding, that the Commission put forward following the 17 remedial measures negotiated by the Commission to the Hungarian Government. And calls on the Commission and Council to take immediate action in implementing this Regulation (European Parliament, 2022). On November 30, 2022, the Commission sent out this official resolution stating that Hungary has not made sufficient progress in implementing the 17 remedial measures agreed to under the general conditionality mechanism. Hungary's deadline for meeting these agreed-upon conditions through reform passed on November 19, 2022, and the Commission concludes that Hungary

failed to adequately implement all necessary reforms. Reforms that the Commission believes are necessary to implement in order to eliminate risks to the EU budget in Hungary. These 17 measures primarily concern Hungary's rule of law, as evidenced by the effectiveness of the Integrity Authority and judicial review of prosecutorial decisions (European Commission, 2022a).

Further funding from the Union consists of The Cohesion fund, which provides financial support for the bottom ten percent of EU member states GNI (Gross National Income). per capita. It is meant to strengthen the economic, social and territorial cohesion of the EU. By funding the countries improved administrative capacity, corruption prevention and state transparency. These goals require the country to have implemented EU rules and values to be effectively met. Both Hungary and Poland are eligible for this fund as they have an average GNI per capita below 90% of the EU-27 average (EUR-Lex, 2021). On December 22, 2022 the Commission froze approximately € 22 billion of Hungary's 2021-2027 Cohesion Fund. Due to Hungary's failure to comply with the Unions protected values stated in the Charter of Fundamental rights. The Union has also blocked € 5.8 billion from Hungary's Covid-19 recovery fund. This decision is conditional to Hungary's compliance with the Unions demands on improvements to judicial independence (Jurist, 2022). Poland has not received any funding from the allocated €35.4 billion Covid-19 recovery fund, nor from the Unions allocated € 75 billion in Cohesion funds. Poland's access to its Cohesion fund is dependent on compliance with the EU Charter of Fundamental Rights (Jurist, 2022a). Both member states have been conditionally barred access to the EU recovery and Cohesion funds. This raises numerous issues within both countries and the question remains if these recent budget restrictions will have the desired effect. These considerable and serious advancements were intended to encourage significant legislative reforms and political change. Furthermore, the post-pandemic economic strains as well as the ongoing war between Ukraine and Russia are also contributing factors to why Hungary and Poland are currently heavily reliant on continuous EU funds. Hungary has taken in thousands of war refugees from Ukraine and has therefore taken on substantial costs in supporting these refugees' well-being (The National Interest, 2022).

## 8. Analysis

The longer Hungary and Poland lack in compliance with the rule of law values and the procedures taken to secure it, the more costly and strict penalties the EU institutions implement. Such as withholding EU funds to create a large enough cost to both Hungary and Poland to make the necessary changes in order to start receiving the funds again. This can pose an issue as the necessary changes that both countries need to make are likely costly and long-term processes. Some of which might not be possible without the support of EU funds. These are examples of why the decision of withholding EU funds is multifaceted and complex, as the consideration for protecting the citizens and minimizing backlash on the public needs to be taken into consideration if the regulation should be implemented.

According to the logic of appropriateness, the EU acts in primary concern with the collective identity of the Union, seeing the breach of compliance to EU rule of law principles as a breach of trust and cooperation among the member states. Putting the common identity and respect for the citizens' rights and freedoms at risk. Therefore the EU may take a stricter and less lenient approach to the issue and implement costly protective consequences for these non-conforming member states, such as economic penalties or political exclusion. Alternatively, acting in accordance with the logic of consequences the EU may choose a more rationalistic approach and design its course of action and legal implementations based on the expected consequences. This may result in more lenient and softer actions from the EU due to a certain fear of the consequences and counter-action by Hungary and Poland. Softer instruments may be giving the two respective governments more time to implement the necessary remedial measures in line with the Unions values. Strategically choosing the action plan that is expected to yield a higher likelihood of progressive reform. This would be a strictly logical deliberation of actions, taking into consideration a cost-benefit balance in favor of the Unions interests.

Aside from the legal demands on the EU institutions and Court to follow up make sure that all member states follow agreed-upon laws, norms and values of the Union. The EU must have considered whether withholding EU funds will aid in rectifying the violations of EU rule of law done in Hungary and Poland. Or if these restrictive measures would risk leading to polarization, economic hurt and further weakened administrative institutions and democratic policies. The issue is twofold, the Union suspends a large portion of the Cohesion Fund as well as the RRF, using its leverage of controlling the allocation of the EU budget. The Unions institutions need



to act in accordance with the Treaties and Articles put in place, just as the member states. Therefore all actions need be in accordance with the Unions values, norms and policies, acting within their jurisdiction with the power they've been given to protect political rights and civil liberties. As is legislated in Article 2 and 7 of the TEU. The possible damage and negative consequences following any decision must be critically examined, so EU action-taking to protect the rule of law doesn't lead to collateral damage in other freedoms and liberties.

Hungary and Poland have been suspended from EU Cohesion Funds following a failure to meet the rule of law requirements, make complete changes in line with the infringement procedures and subsequently not fulfilling the conditionality criteria. The economies are forced to deal with the trying and costly times to come without the substantial economic support they rely so heavily on to support the country's administration and overall function. Hungary and Poland, like many other European countries, are dealing with increased costs following the pandemic, but more pressingly, with the large number of Ukrainian refugees seeking a temporary home away from Russia's war on Ukraine. This has put economic and political pressure on Hungary and Poland, which are geographically close to Ukraine and thus among neighboring states for refugees to flee to. To cover these increased costs, both Hungary and Poland stand to benefit from EU funds, increasing the incentives to follow rule of law principles. Making EU funds contingent on member states' compliance with the rule of law is thus an effective tool for leveraging compliance in member states with weak rule of law implementation, increasing the severity of the consequences associated with noncompliance with EU values.

According to the logic of consequences, Hungary and Poland face significant costs if they continue to violate the EU's rule of law conditionality. Hungary and Poland, according to the theory of external incentives, are actors seeking to maximize their own utility. Bargaining with the Union to promote their best interests based on four main factors. *The magnitude and speed with which rewards are distributed, the credibility of threats and promises and lastly the magnitude of the associated adoption costs.* The credibility of the threats and the now-expired deadlines have proven to be real, so the majority of the determinants of the bargain between the EU and the two member states, as well as within national government administration, are known. The magnitude and speed of the rewards, or in this case the penalty, are harmful to both countries' economies. Threats and promises to lift the penalties upon full implementation are well known and secure because they have been declared in official Court rulings. Finally, the magnitude of associated costs and benefits of implementing and adopting demands. These full

associated costs for the governments of Hungary and Poland are unknown to me and thus cannot be calculated.

Through various infringement procedures, court rulings, and country investigations, the EU institutions have initiated continuous and gradual procedures to safeguard the Union's rule of law principles and values. These processes may appear to be lengthy, but by tracing the Union's process of action-taking to protect the rule of law in both member states, the many protective measures become clear. The Union has indeed made continuous and deliberate acts stop infringements on the Unions rule of law values.

Finally, it is critical to consider the thesis's relevance as well as its contribution to science and beyond. Because of the ongoing procedures and current implementations of EU safeguards in both Hungary and Poland, this thesis is highly relevant and can contribute to a deeper understanding of collective action-taking procedures among interested parties. As a result, this thesis also benefits parties other than the scientific community. In addition, the established theoretical framework provides insight into the incentives of EU member states to comply with supranational pressure to adapt necessary corrective changes in order to follow the Union's collective values and legislation. The incentives resulting from a cost-benefit analysis or an estimate of member states' compliance with national values. This provides interesting perspectives on the accounts of opportunity costs and national identity and sovereignty as parameters in the rule-compliance deliberations of EU member states.

## **9. Conclusion, discussion and future research**

The EU chose a softer initial strategy, informing both states of deficiencies in rule implementation in country reports and initiating national assessments of governing body integrity and judicial independence. Following that, formal recommendations for changes were made to strengthen local authorities in combating rule of law violations from within. After multiple softer attempts to promote reform and safeguard the rule of law values, both member states' measures were found to be unsatisfactory by Union standards. As a result, stricter and more "costly" actions were taken, implementing strict conditionality measures to protect the Union's budget. Resulting in the risk of losing access to EU funds, pending the full and correct implementation of agreed-upon milestones, reforms and requirements of all areas of functioning rule of law. These procedures amount to a gradual but continuous process from the EU institutions to safeguard the Unions values, becoming stricter with the insufficient adherence by Hungary and Poland. This supports and consolidates the claims in my hypothesis.

The conditionality implementation regarding the suspension of EU funding, is highly efficient in shifting the cost-benefit analysis of Hungary and Polands future course of action. Both member states are eligible and highly effected by the EU funds. Making the choice to continue infringing on rule of law values by not making the necessary policy changes more costly. But the spillover effects of these stricter actions result in a catch-22 conundrum. Promoting action-taking within the member states by increasing the cost of non-cooperation and on the other hand withholding funds that are integral for both countries to be able to finance the necessary reforms. The Union has not completely cut off funding from the Union but the recently suspended funding will undoubtedly affect both countries' economies and incentives to comply with the rule of law requirements. All political decisions have consequences, and the EU has and continues to stand before difficult and multifaceted cost-benefit considerations where every action must be weighed and criticized against potential risks and repercussions.

In response to member states consistently violating rule of law legislation, the EU's actions were gradual and started by implementing changes to protect the Unions values and identity. As a Union that secures rights protected under the TEU and requires all member states to equally contribute and respect these values. Therefore a logic of appropriateness could describe the initial actions of the EU institutions. But this may be concurrent with considerations to the logic of consequences, as the infringed upon EU values are in place to protect rights, freedoms

and civil liberties. Therefore the consequences of a weak rule of law are detrimental to the basic principles and legislated values of the Union, not to mention going against the Unions legislation and recognized treaties. These consequences, including the inappropriateness of infringing on the Unions common identity an protection of rights; could describe the stricter and more costly penalties for Hungary and Poland. Resorting to financially penalizing instruments conditional to the implementation of rule of law agreements.

Aside from the legal claims that EU institutions have as a supranational power, both branches of the theory may describe the design and timing of the EU institutions action-taking. Based on the expected outcome and the effectiveness of each potential action in achieving the desired outcome. Attempting to reduce the potential backlash from member states' governments, as well as the collateral damage from political decisions on civilians in the countries. Thus the EU may have initially struggled to justify tougher action by withholding EU funds, wanting to give both countries ample opportunity to right their wrongs. This tolerance and leniency may have shifted over time as both countries were given multiple opportunities and time to implement corrective measures without making sufficient progress. As a result, the conditionality regulation for gaining access to the Union's budget via the RRF and Cohesion Fund was implemented, pending full alignment to functioning rule of law practices - thereby protecting EU rights, freedoms, and liberties. Following repeated violations of the rule of law, EU institutions imposed harsher penalties to increase the costs for Hungary and Poland to continue acting in violation of the Union's common identity of shared values. This reinforces both the external incentives of a cost-benefit analysis and the social learning model of appropriateness to protect Union values.

## 9.1. Discussion

The theory was modified to describe the actions and hypothesize why Hungary and Poland are making the current political decisions; even so, I believe this theory has merit in analyzing current EU member states. However, it is important to remain open to possible self-serving interpretations. I am also aware that relying on country reports as a primary means of direct EU communication about rule of law protection may be overly optimistic. These country reports are highly processed and official diplomatic documents that the EU publishes as a result of the research conducted in each member country. Therefore, these documents can be diplomatically formulated political tools that may leave out many of the most pointed pieces of

information and criticism in order to maintain friendly communication and not jeopardize each member state's dignity and integrity. Because these documents are highly processed, critical details and harsh criticism can be consciously mitigated in order to maintain a positive outlook on cross-national cooperation. To counter this, official motions were included in the findings and through this- direct statements from the EU Parliament, Council, and Commission. Due to their similar nature of promoting good communication and avoiding offense and dishonor of the criticized member states, these documents may not fully circumvent the issue of tempered criticism. To promote diplomatic integrity and friendly objectivity. Direct material and transcripts from meetings, negotiations, and deliberations between the governments of Hungary and Poland, as well as EU bodies, would have been interesting to examine. To gain insight into information that has not been diplomatically tempered and filtered. This may be a weakness in the thesis's sources, but due to time-, length- and budget constraints, obtaining unofficial or unpublished EU documents proved difficult.

## 9.2 Future research

With this thesis and many others before it, the matter of how the Polish and Hungarian governments have acted in opposition to the EU rule of law legislation has been analyzed. But this was largely done from the EUs perspective, as many of the sources are first-hand communications from the Union. It could be interesting to look at the rule of law enforcement and subsequent economic conditionality of EU funds from the perspective of Hungarian and Polish governments. To research what their stances are regarding their actions and the EUs counter-actions on the matter of rule of law. Further interesting research could be to follow the development in Hungary and Poland to see if the economic conditionality indeed has the intended effects on the adoption and complete enforcement of the EU rule of law requirements.

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