Two Approaches to Poland and Hungary’s Breach of the Rule of Law
– A Comparative Study on the Rule of Law Response Mechanisms in the European Union

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Abstract

The Rule of Law is one of the European Union’s founding values and is not only a Treaty obligation under Article 2 Treaty on European Union but also a part of the accession criteria for potential Member States of the Union. Therefore, the Rule of Law is part of the foundation of the European Union’s institutional order, and fundamental to European integration. During the past several years concerns have been raised regarding the Rule of Law in the Union and especially regarding Poland and Hungary. The European Union has established a comprehensive response function to breaches of the Rule of Law which both Member States have been subject to. However, there are differences in the procedure and different mechanisms have been used in relation to the two Member States, and while neither the Rule of Law nor the response mechanisms available are unstudied subjects neither for social sciences nor the legal community there is a lack of research combining the two fields and comparing the Member States. This study has been conducted with the goal to fill this gap by conducting a comparative study on the Rule of Law responses at the European Union’s disposal and using Poland and Hungary as the cases addressed. The study attempts to find a correlation between the breaches within the Rule of Law committed by the Member States and the responses used by the European Union to find motivations for why it is justified to approach the Member States differently. To accomplish this the study compares first the breaches found by the European Commission in the respective Member States and then the response mechanisms used to address the concerns. By conducting this comparative analysis, the study has found significant motivations behind the different approaches used by the European Union which shows a correlation between the concerns raised and the European Union’s approach to address the concerns. The result of the study shows that it is motivated to use different approaches despite the two Member States breaching the same value.
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<td>Charter of Fundamental Rights of the European Union</td>
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1. Introduction

The process of European integration has been a long project and is still ongoing today. The Union project started after the second world war attempting to stabilise Europe and began with the European Coal and Steel Community. The project then grew and over time more European States joined and today there are 27 Member States (MSs) in the European Union (EU).

Looking at more recent history one of the biggest changes in the EU took place in the years between 2000 and 2009 where 12 new States became members of the EU.

The process of becoming a member of the EU is a long and complicated process and can take years to complete. To even be considered for membership a State must fulfil the conditions for membership known as the ‘Copenhagen criteria’. These criteria include a stable democracy, a functioning market economy, acceptance of all EU legislation and the Rule of Law (RoL). The admission criteria are based on the Treaty on the European Union (TEU) Articles 49 and 2. Article 49 TEU states that ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union […]’4, this Article refers to Article 2 TEU which contains the founding values of the EU.5 The values referred to in the accession Article are a) respect for human dignity, b) freedom, c) democracy d) equality, e) the rule of law and, f) respect for human rights including the rights of persons belonging to minorities.6 The combination of these two Articles create the basis of the accession criteria and the way to integrate into the EU.

This entails that all the twelve new MSs should have respected and promoted the values listed in Article 2 TEU at the time of accession. For the last 5-10 years there has been some serious concerns raised within the EU related to one of the values and two of the MSs which joined during the big expansion between 2000 and 2009. The value which has been of concern is the RoL and the MSs which are of concern are Poland and Hungary. The RoL is a wide and complicated value and contains several aspects and the EU describes the RoL as the following

3 European Union ‘Joining the EU’ European Union <https://european-union.europa.eu/principles-countries-history/joining-eu_en#:~:text=Joining%20the%20EU,Becoming%20a%20member&text=These%20conditions%20are%20known%20as,legislation%2C%20including%20the%20euro> accessed 22 March 2023.
5 ibid Article 2.
6 ibid.
‘all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.’ What can be determined from the description is that the RoL is closely connected to public powers, promoting a society free from corruption and an impartial justice system. Both Poland and Hungary face similar issues which are directly connected to the RoL. What has been seen is a regression since the point of entry of the RoL system in both MSs. The EU is not blind to the problem and has launched several response mechanisms of both preventive and sanctioning nature, including the so called ‘nuclear option’ under Article 7 TEU. The Article is a sanctioning mechanism for breaches of Article 2 TEU. The reason for the Article being called the ‘nuclear option’ is that at the end of the process a MS can be subject to serious sanctions, including the possibility of losing voting rights.

The Commission has as a reaction to the concerning RoL situation in the Union adopted the Rule of Law Framework. The aim of the RoL Framework is preventative, and the goal is to prevent emerging threats to the RoL and keep them from escalating to the point where the Commission is forced to initiate Article 7 TEU. The Framework is based on dialogue with the MS of concern, starting with a Commission assessment of the situation, then a recommendation, and lastly follow-up on the progress related to the recommendations. A tool which is used in the sphere of the Framework is the Rule of Law Report. The Report is an annual assessment of all 27 MSs with individual country chapters. The Report includes both positive and negative developments, in four principal areas for the RoL, these areas are 1. The justice system, 2. The anti-corruption framework, 3. Media pluralism, and 4. Other institutional issues related to

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9 TEU (n 4) Article 7.
10 Ibid Article 7.
11 Ibid Article 7.
checks and balances. The Report also contains recommendations and is used as a preventive measure to protect the RoL in the Union.

Two more response mechanisms are to be highlighted and they are cases in the Court of Justice of the European Union (CJEU) and the Conditionality Mechanism. In recent years there has been a significant increase of cases regarding the RoL in the CJEU, which shows the CJEU’s response to RoL concerns in the Union. In the case known as Portuguese Judges the CJEU established a general obligation for MSs to respect and guarantee that the national courts remained independent, based on a combined reading of Article 19(1) TEU, 2 TEU, and 4(3) TEU. This judgement opened the door for national courts to ensure judicial independence based on EU law, and the possibility for the CJEU to rule on the subject. Lastly, there is the Conditionality Mechanism, this mechanism came into force in 2021 as an additional layer of protection of the EU budget. The mechanism is based on protecting the budget in cases where breaches of the RoL risks affecting the EU’s financial interests. This mechanism is based on Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. Different from the RoL Framework is that the Conditionality Mechanism can result in sanctions on the concerned MS. The measures include suspension of payments and a prohibition of entering new legal commitments.

These responses all have different purposes with the RoL Framework including the RoL Report establishing preventive measures, and Article 7 TEU, cases in the CJEU and the Conditionality Mechanism are responses which can come with consequences for the MS. As of today, there are two MSs which are of serious concern regarding the RoL and which all or some of these

14 ibid.
15 Case C-64/16 Associação Sindical dos Juízes Portugueses, EU:C:2018:117.
16 Article 19(1) TEU: ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.’
17 Article 4(3) TEU: ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.’
18 Laurent Pech and Dimitry Kochenov, Respect for the rule of law in the case law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case (SIEPS, 2021) 15.
21 ibid article 5.
measures have been taken to combat the problems and they are Poland and Hungary. Both MSs are currently subject to measures and procedures to respond to RoL concerns in the MSs. However, even though the problems are similar, the MSs have not been subject to the same responses on all levels. This leads to the subject of this study, which is how has the EU responded to the two MSs, and how are they similar and different, and lastly what may the motivations behind this be? This paper will conduct a comparative study to attempt to answer these questions and use the perspective of European Integration Theory (EIT) combined with the RoL to answer why the EU has chosen this course of action regarding both MSs.

1.1 Aim and Research Question

As has been stated above Poland and Hungary have raised concerns within the EU regarding the RoL and the objective of this study is to analyse what the EU has done to respond to these concerns and why they have used these methods. At the start of the study there is a need to analyse the breaches committed by the MSs and which responses have been used to address the concerns. This is necessary to analyse the aim of the study which is to attempt to find motivations behind using different mechanisms. To reach this aim an analysis of the connection between the breaches committed by the MSs and the responses used to address the breaches will be conducted to attempt to find the EU institutions motivations for using different approaches to address breaches of the same principle. This leads to the following research questions:

- From the perspective of the EU, what is the current Rule of Law situation in Poland and Hungary and how are they similar and how do they differ?

- Which response mechanisms do Poland and Hungary have in common and which mechanisms have been applied individually?

- Is there a motivation behind the EU institutions using different response mechanisms against Poland and Hungary to address the concerns regarding the Rule of Law?
1.2 Method
The choice of method for this study is a comparative method and the comparison will be made between Poland and Hungary regarding the RoL response in the MSs. The aim of using the comparative method is to identify similarities and differences in the RoL procedures in the respective MSs and attempt to answer why the EU has chosen to take different approaches towards the MSs.

Comparison serves several purposes and can provide valuable results. Identifying the different ways political problems are addressed in different contexts provides opportunities to learn more about policy and exposes new ideas and perspectives. Analysing different cases and comparing them provides the opportunity to assess if a political phenomenon is a local issue or a broader trend. However, what can be described as the principal purpose of comparison related to political science is to develop, test and refine theories about casual relationships.  

By using comparison “natural experiments” can be used by lifting different combinations of political phenomena which can be observed in different places and times, through this the variations can be observed and an analysis of the differences between the variables (in this case the differences in the RoL procedure) in the comparison can offer results which show what effect this has on the political situation.

To try to describe comparison in more exact terms, it can be explained as systematically investigating two or more entities and comparing their respective differences and similarities, and as a result land on and understanding, explanation and further conclusions. Furthermore, an important starting point in the comparison is to establish what is being compared and why and why the specific components are the subject of the comparison, and always relate to the aim of the research.

Since the nature of the research conducted for this paper is strongly connected to EU law, an important point of departure for the comparative analysis is the legal perspective of the comparative method. The starting point in most comparative legal studies is functional comparison. Functionalism is based on that only law which has the same function can be compared. The main idea of this is that legal systems in detail will never have specifically the

23 ibid 286.
25 ibid 10.
same components in two different cases, and therefore the functionalism is compared. Hence, two (or more) legal phenomena which has the same function can be compared even though they do not have the same components.\textsuperscript{26} Thereafter, the solutions which are found can be placed next to each other, and the differences and similarities can be analysed, this should be done with a functional aim, which means it should be focused on concrete factual problems without reference to the national doctrinal systems.\textsuperscript{27}

To apply the methodological approach to this study, the entities which are studied are Poland and Hungary and their respective RoL procedures. The reasons for the choice of these entities are that they are the only MSs in the EU which are under the Article 7 TEU procedure which entails that the problems in the MSs are severe. The two cases are also where the EU has taken the most action to combat the situation with RoL in the MSs. The aim of this study is to try to establish the differences in the procedures and understand why the EU has taken different approaches regarding the MSs. Therefore, what is being examined is the procedures and the reason for the comparison is to establish the differences between the procedures and why they are different.

Regarding the legal perspective on the comparative method, the functionalistic approach fits well for this study. Both MSs are under a procedure which has the same purpose, which is to address a concerning RoL situation in the MSs. Therefore, an examination of the procedures against the MSs will provide an examination of a functionally identical procedure, containing differences in the approach from the EU which will be analysed. This will be done by comparing the cases from the EUs point of view and the national composition and norms will not be the subject of analysis. Rather the procedure will be the focus of the study, and analysing the steps taken and response mechanisms activated and how they are similar and different will be of importance.

By combining the political and legal perspective on the method the study aims to understand the procedure as well as why it may differentiate between MSs. Through the combination, an understanding can be reached both regarding the political issues regarding the RoL as well as the legal problems facing the RoL within the EU.

\textsuperscript{26} Uwe Kischel ‘The Comparative Method’ in Andrew Hammel (ed) \textit{Comparative Law} (1st edn, OUP 2019), 88-89.
\textsuperscript{27} ibid 89.
1.3 Material
The material which will be used for the study is primarily previously conducted research and official EU documents, as well as legal sources such as the Treaties and judgements from the CJEU. There is a vast amount of valuable research done about the RoL within the EU. The previous research is of different subject matters and covers both theoretical and legal perspectives of the RoL and this will be used to analyse how the principle is being breached. It is also valuable for the analysis of why the EU may act differently regarding the two MSs.

Official EU documents will be used to describe the mechanisms and their purposes. Furthermore, the documents will also serve to provide what mechanisms the EU has to this point has activated. Legal material is necessary both to establish the breaches of EU law and the scope of the CJEU’s authority. Furthermore, the CJEU cases serve as important sources of description of what the EU and the Court emphasises when delivering judgements. The Treaties serve as the foundation of the obligations on the MSs and reveal the authority of the EU institutions to uphold and respond to the breaches of the MSs. Furthermore, as for legal documents regulations will also be used, where for example the Conditionality Mechanism can be found. All the above will build the study and provide the necessary foundation for the comparison.

1.4 Literature Review
The subject of this paper has not been ignored by neither the political sciences nor the legal community of academics before. The RoL is a widely studied subject on national, European, and international level and so is the situations in both Poland and Hungary. The Article 7 TEU procedure has also been widely studied before. However, there is a lack of comparison between the procedures. Daniel Kelemen has written about the RoL situation in Hungary and Poland and given a possible reason for the concerning situation in The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland. The article explains why autocratic States favour constitutional pluralism and constitutional identity, and why they are prone to abuse. The article uses Hungary and Poland to explain why these concepts undermine the RoL and the understanding of the primacy of EU law. The article offers a valuable explanation of why Hungary and Poland use these concepts to undermine the RoL and the primacy of EU law.

Studies have also been published on the response mechanisms for the RoL backsliding in EU MSs. An example of this is Introduction: The Great Rule of Law Debate in the EU this article offers an overview of the existing mechanisms (as of 2016) and new mechanisms and their problems.\textsuperscript{29} While most of the papers written about the RoL and the response mechanisms are of legal nature, and has introduced valuable insights and legal innovations there is also papers focused on the political setting and an example of this is Daniel Hegedus paper What Role for EU Institutions In Confronting Europe’s Democracy and Rule of law Crisis? This paper focuses on the political setting that hinder EU MSs and institutions from fulfilling their obligations stemming from the Treaties, including the RoL. The paper argues that it is not deficiencies in the legal framework rather it is political settings which has contributed to the growing democracy and RoL crisis in the EU.\textsuperscript{30} Furthermore, Gábor Halmai has published a paper focusing on the conditionality mechanism and argues that the RoL Framework and Article 7 TEU mechanism is not sufficient to enforce compliance with the EU’s fundamental values. The paper uses the responses used against Poland and Hungary to show that earlier procedures and mechanisms used have not been successful to enforce the values and that political pressure is needed for a successful response to the RoL backsliding in the MSs.\textsuperscript{31}

As shown above the RoL in connection with Poland and Hungary is not an unstudied subject. However, several aspects make this subject valuable to study further and elaborating on what earlier researchers have already found. Firstly, the procedures against both MSs are still ongoing and new developments are made continuously therefore it is necessary to continuously monitor and analyse the developments as they come. Secondly, while there are mostly legal papers on the subject the political science perspective is not as developed, and even less the combination of the legal and political perspective. Lastly, as stated before the process is ongoing but there are not many (if any) studies carried out comparing the procedures to date and analysing why the EU acts differently towards the two MSs currently facing the same problem. Therefore, this study aims to fill this gap. This study will attempt to study the new developments which has been made up until the end of 2022, create a perspective on the subject using both the legal and political sciences, and lastly compare the procedures and analyse why the EU has acted in the manner which has been seen to this point.


1.5 Limitations
This study has been subject to several limitations both due to time and space but also for the focus of the study. To begin with the selection of countries for the case studies. The countries selected are Poland and Hungary, and while other MSs have RoL related issues it is only Poland and Hungary which have been subject to the Article 7 TEU procedure which highlights the weight the EU institutions have placed on trying to resolve the concerns in these MSs. This is a clear indication of the concerns raised regarding these two MSs and makes them appropriate for comparison since the MSs have this procedure in common and therefore the study has limited the research to these MSs.

Four response mechanisms have been selected for the study. While other mechanisms have been used these four are the most directed at the issue at hand. The four mechanisms are, the RoL Framework, the Article 7 TEU procedure, infringement procedures, and the Conditionality Mechanism. Due to the space and timeframe of the study other less official responses have not been examined. Furthermore, while the CJEU is subject for examination the study has been limited to an examination of infringement procedures and excluded requests for preliminary ruling. Requests for preliminary ruling is mentioned, however since this function’s main purpose is to ask the CJEU EU law related questions regarding national cases this procedure is not used directly by the EU institutions as a response to breaches of the RoL, rather it is a way for the national judges to question national legislation in relation to EU legislation. For this reason, the study focuses on infringement proceedings which are brought by the EU institutions.

One source which has been used extensively is the 2022 RoL Report. The study has limited the research to the 2022 RoL Report because of the time frame. The 2023 RoL Report was published during the composing of this study however since it was published at approximately after half of the time which this study is limited to, the study limited the research to the 2022 RoL Report and has limited the information gathered to sources published before the 2023 RoL Report was published. The study has also limited the research on the breaches of the RoL to the 2022 RoL Report. While other sources could be used to find breaches of the RoL by the MSs the 2022 RoL Report provides a comprehensive examination of the breaches which the Commission finds of importance and since the main objective of the study is to examine the responses by the EU institutions to the breaches, examining other sources becomes excessive and would not provide further knowledge of the EU’s reasoning for the choice of responses to address the breaches. To conclude the limitations of this study, the focus has been on which responses have been used and why. To examine this there is a need to examine the breaches committed by the
MSs however, the breaches in themselves have not been subject to analysis, rather the analysis have focused on the breaches in combination with the responses used and if the breaches motivate different approaches to the MSs.

1.6 Disposition
The thesis starts with an explanation of the theories used which are EIT and the RoL, after this a report of the RoL situation in both MSs from the perspective of the Commission by using the RoL Report is presented. This chapter analyses all the key areas of assessment in the MSs to build the foundation of the later analysis of the response mechanisms which have been used. The thesis then goes on to describe the different response mechanisms which have been selected for the thesis and used against the MSs. After this a final comparison will be made. This has the purpose of finding the answer to the question regarding if there is a motivation behind using different mechanisms against the MSs. Lastly, the thesis ends with conclusions on the results of the analysis.
2. Theory

To achieve the aims of this study two theoretical approaches have been applied, firstly European Integration Theory (EIT) and secondly the RoL. EIT will be used to analyse the process and theoretical reasons behind the EU’s actions against the MSs breaching the funding values of the EU. It will also be used to understand what outcomes may come from the actions and why the EU has different approaches towards the MSs.

The RoL is a wide and complex concept, which contains both legal and political aspects. The RoL is involved in every part of government and the public authorities of States, it is a form of guideline or goals for the function of the State. When breaches occur it is of importance to analyse which parts of the concept that are being breached and why these parts are to a larger extent subject to abuse than others. Furthermore, the study is concerned with the procedure which the EU applies when breaches of the RoL occur within the Union therefore a deep knowledge of what the RoL entails in the EU context is necessary. Furthermore, EIT and the RoL are closely connected and constantly interacting and dependent on each other.

2.1 European Integration Theory

While EIT has been defined in different ways throughout history there are two aspects of EIT which cannot be ignored and need an explanation and they are integration and theory.

Integration has also been defined differently and in some instances including both a social and a political process, and while this is a well-reasoned way of considering the aspect of integration, it is too demanding for the limited scope of this paper. Instead, a narrower view of integration will be used, and this view is focused on the creation of political institutions. 32 Even with the narrower view of integration the function is, which is true for both definitions, that it is a process. This process entails that integration is a process which leads to a political system. The EU is however to some extent unique in this process and special attention is needed for the understanding in the EU context, and within the work of EU integration, the EU has been accepted as a polity which needs further understanding. 33

Secondly, there is theory and approaching the meaning of theory is difficult since there are great variations in the understanding of theory. There is a narrow understanding of theory which is the causal argument of universal, transhistorical validity and nomothetic quality, and this can

33 ibid 3-4.
be tested through falsification of several hypotheses. However, different from integration the nature of this definition is too narrow and therefore a wider definition of theory will be used. The wider definition of theory uses a looser sense of abstract reflection, which, despite the abstract nature, can be context specific. This can be done by for example taking its departure from a specific policy field.34

To then combine the concepts the definition provided by Thomas Diez and Antje Winer will be borrowed,

‘European integration theory is thus the field of systematic reflection on the process of intensifying political cooperation in Europe and the development of common political institutions, as well as on its outcome. It also includes the theorization of changing constructions of identities and interests of social actors in the context of this process.’35

2.2 The Rule of Law

The RoL is a concept which encapsulates the justice system and has a fundamental importance for the foundation of the EU. The RoL is also included in the EU founding values in Article 2 TEU.36 However, a closer description of what the value entails is not provided, therefore a closer look at literature is needed for the understanding of the concept.

Since the study has the EU as its viewpoint, it is of importance to investigate how the EU defines and encapsulates the concept. To establish how the EU views the RoL insight can be gained from the 2022 Rule of Law Report (RoL Report). The RoL Report is a part of a wider effort by the EU to promote and defend the RoL.37 The RoL Report examines four key areas for the assessment and recommendations, and they are, (1) The justice system, (2) The anti-corruption framework, (3) Media pluralism, and (4) Other institutional issues related to checks and balances.38 These areas will be examined in closer detail next.

34 Diez (n 32) 4.
35 ibid 7.
36 TEU (n 4) Article 2.
38 ibid.
Justice system

In the assessment of the justice systems the Commission highlights three aspects of an effective justice system, and they are, independence, quality, and efficiency. Independence of the justice systems plays an important role in the assessment in the RoL Report because it has strong support in both the Charter of Fundamental Rights of the EU (EU charter) through Article 47 which ensures the right to an effective remedy before a court or tribunal and through Article 19 TEU which ensures the principle of effective judicial protection. The RoL Report goes on to highlight that independent judges and courts guarantee that rights of individuals and the EU’s values are protected. When a MS reforms their justice systems they are obliged to respect EU law and the case law from the CJEU.39

Anti-corruption framework

The next key area is anti-corruption framework. In this area the RoL Report describes that MSs should have a comprehensive approach to fighting corruption, and this approach must rely on both preventive and repressive measures. For this the MSs must have a stable legal and institutional framework, sufficient administrative and judicial capacity, combined with a political will to enforce the measures. Furthermore, the RoL Report lists some measures that should be in place for the preventive measures. The measures include reliable and effective integrity measures, ensuring transparency of lobbying, asset and interest disclosure systems, effective protection of whistle-blowers, and transparency of political party financing.40

Media Pluralism and Media Freedom

An independent and free media is a key pillar in a democratic society and the Commission highlights this in the RoL Report as one of the key areas of the assessment of the RoL. The RoL Report lifts that a free and pluralistic media is instrumental for the rule of law as the watchdogs of democracy. It goes on to describe that political pressure or control over the media undermines the freedom of speech and expression by undermining the right to seek, receive and impart information. Furthermore, the RoL Report underlines that conflicts of interest and a concentrated market which is dominated by few players may also negatively affect the freedom

40 ibid 10.
of the media. MSs have an obligation to promote a free and pluralistic media, and through this ensure an enabling environment for journalists and protect their safety.\(^{41}\)

Other Institutional Issues Linked to Checks and Balances

The fourth and last criterion of measurement in the RoL Report is checks and balances. The RoL Report describes checks and balances as an integral part of the RoL in a democracy. Checks and balances provide a system of mutual control where power is exercised with a system where every authority is subject to the scrutiny of others. The RoL Report recognises that the system of checks and balances may vary between MSs depending on their legal and institutional system, however it states that a system must be in place to uphold the RoL and democratic norms. Furthermore, the RoL Report stresses that Civil Society Organisations (CSOs), national human rights institutions, independent authorities such as equality bodies, and the Ombudsperson is an indispensable element in a healthy democracy and for checks and balances.\(^{42}\)

Combined Meaning of the Rule of Law in the European Union

From the four criteria of assessment a conclusion can be made on what the RoL entails within the EU. All the key areas are included in the concept, and they all contain their own elements. However, what can be established is that for a MS to uphold the RoL they must have an independent, high quality and efficient justice system, a comprehensive approach to fighting corruption and a political will to do it, an independent and free media with protection of journalists, and a well-functioning system of checks and balances. Even though the RoL Report is preventative\(^{43}\) it gives an established overview of the Commissions priorities and how the EU defines the RoL. The different key areas show both legal and political implications. This goes to show that even though the RoL is a legal concept the political nature of the principle cannot be forgotten.

2.3 The Connection Between European Integration Theory and the Rule of Law

Even though EIT and RoL may seem like two distinct concepts they are connected. It has been argued that the core of the RoL applied to foreign policy forms the cornerstones of European integration.\(^{44}\) An important starting point for the connection is to establish what

\(^{41}\) COM(2022) 500 final (n 39) 17.
\(^{42}\) ibid 22.
\(^{43}\) ibid 32.
\(^{44}\) Geert De Baere 'European Integration and the Rule of Law in Foreign Policy' in Julie Dickson and Pavlos Eleftheriadis (eds) Philosophical Foundations of European Union Law (OUP 2012) 354.
law theoretically entails. The concept of the RoL cannot be separated from the concept of law as of itself. The aim of the RoL is to correct abuses of power which are observed when political power is conducted through insisting on a particular mode of exercise of that power, i.e., governance through law. 45 The core concept of the RoL is based on the belief that moving State affairs from being governed by power to be governed by law is the foundational basis of the RoL and of European integration. The purpose of the RoL is made for individuals, even though it may seem to function primarily for the efficient realisation of governmental objectives. The RoL is also fundamental for a stable constitutional framework for the interaction between citizens and the State as well as the interaction between citizens. 46 International law and thereby EU law aims to constrain State power by subjecting them to certain rules. This creates an environment where the States behaviour is compatible with the similar behaviour of other States and actors in international law and furthermore, makes it predictable which in turn creates opportunities for individuals to act autonomously and freely. 47

The design of European integration was made to solve the international RoL conundrum in a specific region, and it was done by using a specific method, and this method is the ‘ordinary Union method’. This method is categorised by four elements a) the role of the Commission in formulating proposals, b) qualified majority voting in the Council, c) the involvement on different levels by the Parliament (depending on the decision-making procedure), and d) the CJEU’s role of ensuring judicial accountability. This method is also categorised by principles such as the primacy of EU law and direct effect. The method and the policy areas which it is applied to is often seen as the cornerstones of European integration. 48

Beyond methods and principles of EU law the connection between the RoL and European integration can be seen through the Treaties and especially the accession rules and Article 2 TEU. As earlier stated, the RoL is part of the EU founding values enriched in Article 2 TEU. 49 Furthermore, it can also be seen in the accession Article in the TEU. Article 49 TEU states that ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.’ 50 This shows

45 De Baere (n 44) 356–357.
46 ibid 358.
47 ibid.
48 ibid 361.
49 TEU (n 4) Article 2
50 ibid Article 49.
that if EIT entails the systematic reflection on the process of increased political cooperation in Europe and the development of common political institutions\textsuperscript{51} then the accession criteria which means the possibility of intensifying the political cooperation and creating the institutions responsible for the ‘ordinary method’ and its principles are fundamental, and within the accession criteria is Article 2 TEU and therewithin the RoL. EIT and RoL is therefore closely connected and needs a common understanding if a study is to be conducted on the breaches of the RoL and what response mechanisms are in place to combat this problem. This process of responding to a concerning RoL system in a MS involves the entire EU political and legal system and a breaching MS is not just breaching EU law it is also breaching the foundations of the EU and its institutional order.

\textsuperscript{51} See chapter ‘2.1 European Integration Theory’.
3. The Rule of Law Situation in Poland and Hungary

This chapter will examine the RoL situation in Poland and Hungary. The RoL has been of concern in both MSs for several years and to examine the response mechanisms the EU has used against both MSs it is important to first know in what areas the two MSs face the most problems and how the Commission has assessed the issues. The Chapter will use the RoL Report with its individual country chapters on the two MSs to examine what the Commission has highlighted as problems and what their assessment is. This creates a fair way of comparing the two MSs RoL situation, since the RoL Report uses the same criteria of assessment.

3.1 The Rule of Law Situation in Poland

The RoL has been of concern in Poland for several years with a range of issues, however the main issue remains which is the independence of the judiciary, however, Poland also faces other issues. While improvements are being made the process against Poland has been active since 2016 and serious concerns remain, and the Article 7 TEU procedure is still active. Since the procedure has been ongoing for several years a detailed review of the EU’s view of the issues are of interest.

3.1.1 Justice system

The justice system in Poland is separated into two main branches, the ordinary and the administrative judiciary. The administrative judiciary consist of the Supreme Administrative Court and 16 administrative courts, and they exercise control over public administration, this includes the legality of the measures taken by local government bodies and territorial organs. The ordinary judiciary is supervised by the Supreme Court and is constructed with three levels, a, 11 appeal courts, b, 47 regional courts, and c, 318 district courts. The judges are appointed by the President of the Republic at the request of the National Council for the Judiciary. Next is the Constitutional Tribunal, which main task is to deliver decisions on the constitutionality of national legislation. The Tribunal consists of 15 judges which are chosen by the Sejm (lower chamber of parliament), and they are appointed for a term of 9 years. Lastly there is the National Council for the Judiciary which is tasked by the Constitution to ensure judicial independence. Two characteristics of the Polish justice system which are outliers compared to

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52 SWD (2022) 521 final, (n 8) 1.
53 ibid 3.
54 ibid.
other MSs is that the Prosecutor General and the Minister of Justice is the same person, and the Constitution provides that advocates and legal counsellors can self-regulate their practice.\(^{55}\)

### 3.1.1.1 Assessment by the Commission

**Independence**

The independence of the judiciary in Poland is the biggest issue regarding the RoL. Starting with the perceived judicial independence which is very low among the general population and companies. The main reason for this is the perception from the public and companies that there is interference or pressure by the Government and politicians on the courts and judges. Then there are serious concerns about the independence of the National Council for the Judiciary, the CJEU delivered a judgment confirming the questionable independence of the National Council for the Judiciary. Furthermore, the European Court of Human Rights (ECtHR) has also addressed this issue and no steps by Poland have been taken to address the issue.\(^{56}\)

Issues have been identified with new reforms of the justice system. Reforms include a change of the judicial map and some of these reforms have already been put forward in draft legislation. While reforms aimed at increasing the efficiency of the judiciary are welcomed, the proposed method of selecting judges are subject to concerns. Furthermore, the Polish Government has prepared a comprehensive reform of the judiciary, which would entail forced transfers or retirement of ordinary court judges and changes to the system of promoting judges.\(^{57}\) Several rulings from the CJEU have established issues regarding the judiciary and one judgement even imposed interim measures, which have yet to be fulfilled.\(^{58}\)

Poland has adopted a Recovery and Resilience Plan to combat several problems which has been raised from the EU related to the independence of the judiciary. The Plan contains several milestones which Poland has committed to reach. However, the Plan still lifts important issues which needs to be solved and the plan was adopted in June 2022 which leads to the conclusion that the problems have yet not been solved. Included in the Plan is to firstly, reform the system of cases against judges, including disciplinary cases, on the lifting of judicial immunity, to ensure that it is decided by a court which fulfils the requirements in Article 19(1) TEU which requires the court to be independent, impartial, and established by law. Secondly, ensure that submitting a request for a preliminary ruling to the CJEU is not an action which can lead to

\(^{55}\) SWD (2022) 521 final, (n 8) 3.  
\(^{56}\) ibid 3-4.  
\(^{57}\) ibid 5.  
\(^{58}\) ibid 6.
disciplinary liability for judges. Thirdly, ensure that during disciplinary proceedings that the rights of the parties are strengthened. Lastly, a procedure for allowing all judges which have been subject to rulings from the current Disciplinary Chamber to have the rulings reviewed without delay by a Court which complies with the requirements in Article 19(1) TEU.59 While these are actions that Poland has committed to fulfil, issues can still be read through the actions. Firstly, there is not a Court which upholds the requirements in Article 19(1) TEU to decide on cases against judges on when judicial immunity should be lifted. Secondly, submitting a case for preliminary ruling to the CJEU can lead to disciplinary consequences. Thirdly, during these disciplinary proceedings the rights of the parties are not as strong as they are required to be. Lastly, there is not a satisfactory appeals court which upholds the requirements in Article 19(1) TEU.

The Commission has further raised concerns about the rulings from the Polish Constitutional Tribunal which directly challenges the primacy of EU law, and the ECHR. This has been done even though the independence and legitimacy of the Constitutional Tribunal still faces concerns.60 The primacy of EU law has been established by case law from the CJEU through case 26/62 Van Gen den Loos v Nederlandse Administratie der Belastingen and case 6/64 Costa v ENEL. The principle of primacy of EU law is based on that when there is a conflict between national law and EU law, EU law will prevail. The reason behind the principle is for direct effect of EU law to be applicable and if EU law would be subordinate to national laws the purpose of EU law would be undermined.61

The appointments in the Supreme Court have been a further concern which has been raised by the Commission. The Supreme Court has been subject to rulings from both the CJEU as well as the ECtHR. The concerns have been raised in connection to Article 19(1) TEU. The appointment of a new President of the Civil Chamber by the President of the Republic has been cause for concern due to a questionable procedure. The new President of the Civil Chamber changed the composition of the referring court responsible for implementing preliminary rulings from the CJEU. Furthermore, the new President publicly stated that implementing preliminary rulings from the CJEU goes against the Polish law, the new President also publicly

59 SWD (2022) 521 final, (n 8) 6-7.
60 ibid 8.
criticised decisions from the Supreme Court, as well as requests for disciplinary proceedings against judges on the Supreme Court.\textsuperscript{52}

Lastly, regarding the independence of the judiciary there have been concerns raised about the functioning of the prosecution service. There are several issues regarding functioning of the prosecution service including, the offices of the Minister of Justice and the Prosecutor general are occupied by the same person, the practice of seconding the prosecutors even though it is discriminatory continues to be used. Furthermore, there have been numerous instances of challenging CJEU and ECtHR decisions which have been used by the prosecution.\textsuperscript{63}

As seen above the Commission has identified several issues regarding the independence of the judiciary in Poland, ranging from the independence of the judges to the pressure put on prosecutors. What can be concluded from these issues is that they are largely related to higher instances challenging EU law and EU rules on the judiciary. Next on the criteria for the justice system in the RoL Report is quality and efficiency.

\textit{Quality and Efficiency}

In the field of quality and efficiency Poland measures quite well with some improvements which can be made. Regarding quality, for the administrative cases there is a comprehensive set of IT tools which is positive, however this could be implemented as an improvement for civil cases. Furthermore, improvement could be made by introducing electronic case files in ordinary courts and the Supreme Court. The main point of concern regarding quality is that no steps have been taken to revise the system of case allocation that was earlier found to be prone to abuse.\textsuperscript{64}

Regarding efficiency the overall performance of ordinary and administrative courts is stable. The ordinary courts remain at an average level on the performance, and administrative courts are above average. Poland, however, remains under enhanced supervision of the Committee of Ministers of the Council of Europe regarding the length of civil and criminal proceedings.\textsuperscript{65}

\textbf{3.1.2 Anti-Corruption Framework}

In Poland several authorities are responsible for the anti-corruption framework. This includes the Prosecutor General, which is also the Minister of Justice, and the Minister of Internal Affairs and Administration who is responsible for prevention aspects. Poland also has the Central Anti-
Corruption Bureau, and this authority is the specialised law enforcement body responsible for combating corruption, together with the Central Police Investigation Bureau, the Internal Security Agency, the Prosecution Service, and the regular police. The Central Anti-Corruption Bureau can trigger both administrative and criminal proceedings by combining intelligence and police functions, furthermore the Bureau is also tasked with policy coordination and corruption prevention. This includes educational awareness-raising and an e-learning platform for preventing corruption. Lastly, there is the Supreme Audit Office, and this authority is tasked with monitoring the public spending of the government administration bodies, which includes the National Bank of Poland and state legal persons.66

3.1.2.1 Assessment by the Commission

The perception among business executives and experts is that the level of corruption in the public sector is relatively high. In the 2021 Corruption Perception Index done by Transparency International, Poland scored 56/100 and is ranked on 13th place in the EU and 42nd place globally, this is a deterioration during the past five years.67 Furthermore, the audit of the Government Anti-Corruption Programme 2018-2020 showed that the programme was only partly implemented. The Polish government finalised the implementation of the programme, and then reported that about 57.5% of the planned actions had been taken in diverse circumstances. The program’s aim was to raise awareness about and reduce corruption with a set of specific goals. The success of this programme was audited by the Supreme Audit Office, and while most of the objectives related to providing educational material and training have been met, implementation of legislative initiatives has not been met. These legislative initiatives include the bill on Liability of Collective Entities, the reform of the asset declaration system, and the revision of lobbying legislation, and no announcement has been made of an adoption of a new anti-corruption strategy for the period after 2020.68

The legal framework on corruption in Poland has been reinforced, however, there are still gaps. The Criminal Code broadly criminalises corruption, and amendments to the Code has been made and entered into force in January 2022 aimed at countering corruption and increase transparency. Several other steps have also been taken to counter and prevent corruption within the legal framework. However, some gaps remain which include the ban on secondary activities does not apply on current deputies and senators or municipality-owned enterprises.

66 SWD (2022) 521 final, (n 8), 12.
67 ibid 13.
68 ibid 13-14.
Furthermore, there are also questions regarding proportionality regarding the corruption measures, the criminal sanctions for corruption range from 15 years and include life sentences for repeat offences.  

Concerns have been raised regarding the effectiveness of fighting foreign bribery. The effectiveness is concerning due to the lack of effective sanctions on foreign bribery, and the Commission has stated that the level of the sanctions is too low and are not effective, proportionate, or dissuasive.  Concerns have also been raised regarding obstacles to the effective repression of corruption which includes high-level corruption. There are several reasons for this, starting with a lack of resources which cause corruption investigations and prosecutions to be lengthy. In high-level corruption cases concerns are raised due to risks of institutionalised corruption and risks of impunity caused by differences of treatment in corruption cases for political purposes. This raises a risk for breaches of the principle of equality before the law. The reason behind these concerns is the increased influence of the executive over the judiciary, the prosecution, and the police. The Commission lifts that this exposes the entire chain of criminal proceedings for risks of political interference, which leads to undermining the effectiveness of anti-corruption efforts in respect to persons exercising top executive functions. This concern is strengthened by the fact that the Prosecutor General is also the Minister of Justice and puts into question the independence of the Central Anti-Corruption Bureau from the executive powers.  

Several other issues have also been raised including, the Polish Government has analysed the effectiveness of the lobbying rules but not made the findings public. There are different systems for asset declaration and controls but no pursuit of standardising. There are concerns about the election campaigns, and “impunity clauses” in public procurement rules, which were introduced during COVID-19 and continue to raise concern.  

3.1.3 Media Freedom and Media Pluralism  
The Polish Constitution provides that the public interest regarding radio broadcasting and television is safeguarded by the National Broadcasting Council. The members of the National Broadcasting Council are appointed by the Sejm, the Senate and the President of the Republic, and the freedom of press is constitutionally protected. The Law on Broadcasting and the Press
Law provide a legal framework for the media regulator and safeguards for journalistic independence.\textsuperscript{73}

3.1.3.1 Assessment by the Commission
The media freedom and media pluralism face less concerns than the Justice system and the anti-corruption framework by the Commission however, some concerns have still been raised. The concerns include recent developments about operating licensing, this concern has been raised due to modifications of the requirements for obtaining a media licence.\textsuperscript{74} There are concerns regarding the independence public service, the concerns are raised due to risks to the independence public service in relation to governance and funding.\textsuperscript{75} Introducing the state of emergency negatively affected the right to access to information, especially for humanitarian organisations and journalists. This concern was raised due to the state of emergency introduced in September 2021 at the Polish-Belarussian border, the area was excluded from any media scrutiny and there was no access for journalists, and the journalists were threatened with criminal charges for reporting on events in the emergency zone.\textsuperscript{76}

Lastly, the professional environment for journalists continues to deteriorate. The Law on Broadcasting and the Press Law protects journalistic independence, however self-regulatory mechanisms have not been developed within the journalistic community which has been shown to worsen the working environment. Instances of physical and verbal abuse of journalists have decreased, however the 2022 World Press Freedom Index reported that the journalist’s rights during protests are insufficient. Furthermore, the news media continues to be subject to threats of strategic lawsuits against public participation. The media in Poland is also threatened by a legislative act from the Ministry of Justice which risks affecting the freedom of speech on the Internet, the law would \textit{inter alia} establish a public authority which would function as an appeal body for moderation decisions by online platforms. The 2022 Media Pluralism Monitor has made the assessment that the risks related to the journalistic profession in Poland is at the medium level.\textsuperscript{77}

3.1.4 Other Institutional Issues related to Checks and Balances
Poland is governed by a representative democratic republic and has a directly elected President, a bicameral Parliament (Sejm and Senate) and a Constitutional Tribunal which is responsible

\textsuperscript{73} SWD (2022) 521 final, (n 8) 20.
\textsuperscript{74} ibid 21.
\textsuperscript{75} ibid 22.
\textsuperscript{76} ibid 22-23.
\textsuperscript{77} ibid 23-24.
for constitutional review. The President of the Republic, the Senate, a group of 15 deputies, the Council of Ministers, and a group of at least 100,000 citizens can propose new legislation. However, the Sejm has the final decision-making power regarding the adoption of new laws. There is also the Independent Ombudsperson who is tasked with protecting the rights and freedoms of persons and citizens, which is specified in the Constitution and other normative acts. Lastly, there is the Supreme Audit Office and this Office is the chief organ of state audit, it is subordinate to the Sejm, and it acts in accordance with the principles of collegiality.78

3.1.4.1 Assessment by the Commission
The Commission has identified several issues regarding checks and balances in Poland, starting with that there are significant reforms being adopted though a process of by-passing. The governmental legislative track, which entails an obligation for public consultations, is often ignored, and laws are often tabled by groups of Members of Parliament. This results in several laws not being subject to adequate public consultations, this is an issue since this prevents stakeholders from submitting their opinions on proposed legislation. This also results in the quality of the legislation being affected.79

Furthermore, in January 2022 Poland had 38 leading judgements from the ECtHR pending implementation. The new Ombudsperson continues to have an important role in safekeeping the RoL however, is constrained by limited resources.80 There have been allegations of the use of Pegasus and other spyware surveillance software, however there has been no investigation by the prosecution service.81 There have been concerns regarding the Poland-Belorussian border state of emergency regarding the constitutionality and restrictions on fundamental rights. The Supreme Audit Office is victim of adverse conditions, among other concerns the Prosecutor General has made a request to remove the immunity of the President of the Office.82

Lastly, the civic space has further deteriorated. Poland has a broad and vibrant civic society, which consists of more than 120,000 different non-governmental organizations (NGOs). However, the Commission has found that due to the lack of action regarding the continued deterioration of civic freedoms, the civic space in Poland is now characterized as “obstructed”. One group which has been significantly targeted by this is the LGBTIQ+ community and the connected NGOs, they are being targeted by draft legislative initiatives, and no measures have

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78 SWD (2022) 521 final, (n 8) 24.
79 ibid 24.
80 ibid 25.
81 ibid 26.
82 ibid 27.
been taken regarding the concerns raised by the NGOs regarding their access to public funding. There have been several so-called LGBTIQ+-ideology free zones, some have been annulled by courts, however three regional and several local governments made decisions repealing the declarations. Furthermore, in March 2022 a draft law was proposed regarding NGOs, this law gave rise to concerns especially from stakeholders because the law would entail a national registry of the NGOs finances from abroad, this list would in some circumstances obligate the NGOs to disclose the list of donors and show the origin of their funding for promotional materials. Other stakeholders have also raised concerns regarding a new draft law on the offence of religious beliefs. This law would extend the criminal liability of any act which publicly offends the Church or other religious association. Lastly, a law has been introduced which would increase the control over schools functioning by central government representatives. These representatives would then be able to significantly affect the access by individual NGOs to extracurricular activities of schools.  

3.1.5 Analysis of the Commission’s Assessment of Poland

As has been shown above the independence of the justice system remains the most significant concern raised by the Commission. However, the entire RoL function is concerning with all categories having significant problems. Notable is also that all the categories are connected and a problem with one often entails a problem with the others. For example, when there are issues with media freedom and media pluralism it opens the possibility for corruption to increase since the public is not made aware of the institutional problems which occur. If there is a problem with the checks and balances system and the executive and the judicial is not properly separated it opens the way for the independence of the justice system being threatened.

What can be seen from the Commissions assessment is an increase of influence by the executive branch of government over the other parts of the system of the RoL. Draft laws being adopted to hinder the independence of the different branches and placement of government officials in strategic places such as the Prosecutor General also being the Minister of Justice consistently increase the executive’s power over the other parts of governance. The EU has not stood by, and the RoL Report is not the only action which has been taken to try to address this problem. There have been several responses to the situation in Poland, among them several cases in the CJEU, recommendations, and most notably an activation of Article 7 TEU.

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83 SWD (2022) 521 final, (n 8) 29.
3.2 The Rule of Law Situation in Hungary

Hungary is in a similar position as Poland and has extensive concerns directed at the MS regarding the RoL and the Article 7 TEU procedure has been invoked. Till difference from Poland however, the problems are wider. The Commission has raised serious concerns regarding all criteria in the RoL Report. Judicial independence is what initiated the Article 7 TEU procedure, however the anti-corruption framework, independence of the media and checks and balances are of almost equal concern in Hungary.\textsuperscript{84} Below is a summary of the concerns raised by the Commission in the 2022 RoL Report.

3.2.1 Justice system

Hungary’s justice system is a four-tier court system, with 113 district courts which operate the first instance, then there are 20 regional courts which are responsible for appeals from the district courts. Next there are 5 regional appeal courts, and then the Supreme Court (Kúria), the Supreme Court’s main task is to oversee and guarantee the uniform application of the law. The legal ground is made up from the Fundamental Law which tasks the President of the National Office for the Judiciary, who is elected by the Parliament, with the central administration of the courts. The National Judicial Council is an independent body which supervises the President of the National Office for the Judiciary. In Hungary judges are appointed by the President of the Republic after a recommendation by the President of the National Office for the Judiciary. There is also the Constitutional Court which is not part of the ordinary court system and is tasked with overseeing the constitutionality of judgements and laws. Lastly, there is the prosecution service, the Hungarian Bar Association, and the regional bar associations. The prosecution service is an independent body with the power to investigate and prosecute crimes and the bar associations are autonomous self-governing public bodies.\textsuperscript{85}

3.2.1.1 Assessment by the Commission

\textit{Independence}

Several concerns have been raised by the Commission regarding the independence of the judiciary. However there has also been some improvements to previously raised concerns, while none of the concerns have fully been amended it is still worth noting that improvements are being made. Examples of this is that the perceived judicial independence, while remaining on average, has increased by three percentage points\textsuperscript{86}, and a uniformity procedure has been

\textsuperscript{84} SWD (2022) 517 (n 9) 1.
\textsuperscript{85} ibid 3.
\textsuperscript{86} ibid.
amended which the Venice Commission raised concerns about. \(^ {87}\) Lastly, the rules on how to remove the Prosecutor General have been amended, however some other recommendations on the subject have not been fully addressed. \(^ {88}\)

To begin there have been concerns raised regarding the lack of checks and balances in the administration of courts. The Commission raised in this concern regarding the National Judicial Council which has difficulties counter-balancing the powers of the President of the National office of the Judiciary. \(^ {89}\) This concerns is further increased by the absence of effective control over the President, which increases the risk of arbitrary decisions regarding the careers of judges. \(^ {90}\)

Continuing with the conditions for the judges, the Commission has concerns regarding a reorganisation of the administrative courts and a possibility for discretionary termination of judges. In the Supreme Court, the judges responsible for hearing administrative cases are appointed by the Supreme Court President and in other courts the judges are assigned by the President of the National Office for the Judiciary on proposal from the President of that court. However, neither the criteria nor the terms of assignment or the termination of the assignments are set out by law. \(^ {91}\) Furthermore, there have been concerns about the case allocation and appointments in the Supreme Court. According to European standards, to ensure an impartial and independent judge, it is required that allocations of cases within a court are set by and follow objective, and pre-established criteria. In this regard there have been issues raised regarding that the Supreme Court’s case allocation which does not make it possible for the parties to verify on which criteria the composition of the bench has been determined. \(^ {92}\) Furthermore, concerns have been raised regarding a bonus system for judges. There is no statutory definition or list of criteria for when a judge can receive the bonus, and there was a refusal to provide anonymised data on the awarding of bonuses. The lack of transparency regarding the bonus system leads to concerns about the independence of the judges and creates a risk of self-censoring by the judges. \(^ {93}\)

Lastly, regarding the independence of the justice systems in Hungary, the Supreme Court decided that a request for a preliminary ruling to the CJEU from a lower instance court was

\(^ {87}\) SWD (2022) 517 (n 9) 8.
\(^ {88}\) ibid 9.
\(^ {89}\) ibid 3-4.
\(^ {90}\) ibid 4-5.
\(^ {91}\) ibid 5-6.
\(^ {92}\) ibid 6-7.
\(^ {93}\) ibid 8-9.
unlawful. The CJEU then issued a ruling stating that EU law precludes a national Supreme Court from declaring a request for a preliminary ruling to be unlawful. Despite the ruling from the CJEU the Supreme Court published a statement confirming its decision to declare the request unlawful. This raises concerns since if the national courts can be challenged when referring questions to the CJEU, this could weaken the authority of the answers the CJEU gives and affect the implementation of the answers. This is also a problem because of the principle of primacy of EU law.94

Quality and Efficiency

Regarding quality and efficiency Hungary scores high. As for quality they have had successful digitalisation of the justice system and shown very good results regarding the promotion of and incentives for using alternative dispute resolution.95 Regarding efficiency, the efficiency of civil and administrative cases is high. Hungary scores high on the time needed to resolve cases and in January 2022 Hungary passed a law on compensation for delays in civil proceedings. The new law ensures compensation in case of violation of the right to have civil proceedings concluded within a reasonable time.96

3.2.2 Anti-Corruption Framework

In Hungary the Ministry of Interior oversees the overall coordination of the anti-corruption policy and oversight of the National Protection Service. The National Protection Service is a form of law enforcement agency, and is responsible for crime detection within the police, law enforcement, and other government agencies, this includes integrity tests of public officials. A division of the National Protection Service is also responsible for preventive action against corruption. The police can investigate corruption related to the private sector and corruption-related economic crimes; however, the Investigation Division of the Central Chief Prosecution Office has exclusive competence over investigation and prosecution of the public sector.97

3.2.2.1 Assessment by the Commission

Corruption is a considerable concern in Hungary with several issues raised by the Commission. To begin the perception of corruption in the public sector is high, this is supported by the 2021

94 SWD (2022) 517 (n 9) 7-8.
95 ibid 10.
96 ibid.
97 ibid.
Corruption Perception Index by Transparency International. According to the Index Hungary has a score of 43/100 and ranks 26\textsuperscript{th} in the EU and 73\textsuperscript{rd} globally.\textsuperscript{98}

Hungary has adopted an anti-corruption strategy which was to take place from 2020 to 2022 however the strategy and the connected action plan has been extended. The strategy has been mainly delegated to the National Protection Service, but there is a lack of transparency which leads to a lack of information regarding the success of implementing the strategy. What has been shown is that several measures in the strategy have not been implemented.\textsuperscript{99}

There have been some amendments to the Hungarian Criminal Code to address foreign bribery, however there is a lack of enforcement. Despite reports of foreign bribery there has been no new investigations, which leads to the conclusion that even though the amendments are a positive development there is a lack of enforcement. Furthermore, as for detection of foreign bribery Hungary has not implemented a dedicated strategy.\textsuperscript{100} The main tools for detecting and deterring corruption in the public sector is integrity tests and ‘lifestyle monitoring’, however there is a lack of independence regarding these tools.\textsuperscript{101}

Hungary has adequate resources and inter-institutional cooperation, despite this there are concerns regarding establishing a track-record of investigations, prosecutions, and final judgements when it relates to high-level corruption cases. This poses a risk of low accountability since there is a lack of judicial review, furthermore there are risks of clientelism, favouritism, and nepotism regarding high-level corruption cases. These are concerns which has been raised before and have yet to be addressed.\textsuperscript{102} The integrity rules regarding asset declarations and conflicts of interest are also of concerns. There is an extensive system in place to address this, however as for several other issues raised on this topic, there is a lack of transparency, oversight, and enforcement.\textsuperscript{103}

Above is some of the more comprehensive corruption issues, however there are several more which have been raised in the report. Firstly, lobbying rules remain incomplete and there is no follow-up when there are cases of non-compliance of the rules.\textsuperscript{104} Secondly, rules on post-employment and cooling-off periods are fragmented and applies only to a minor group of public

\textsuperscript{98} SWD (2022) 517 (n 9) 11.
\textsuperscript{99} ibid 11-12.
\textsuperscript{100} ibid 12-13.
\textsuperscript{101} ibid 13-14.
\textsuperscript{102} ibid 14-16.
\textsuperscript{103} ibid 16-17.
\textsuperscript{104} ibid 17.
officials.\textsuperscript{105} Thirdly, the framework related to whistle-blowers need further work to ensure their protection service.\textsuperscript{106} Fourthly, concerns have been raised regarding political party and campaign financing.\textsuperscript{107} Lastly, a COVID-19 trend of heightened corruption risks remains.\textsuperscript{108}

The corruption related problems in Hungary lead the Commission to send a written notification to Hungary regarding the Conditionality Regulation. This was used after the Commission raised serious concerns about the use of the EU budget, and the concerns are related to breaches of the RoL in combination of the use of public procurement and the functioning of the authorities which implement the budget.\textsuperscript{109}

3.2.3 Media Pluralism and Media Freedom

In Hungary protection of the right to access information and media freedom and pluralism is provided by the Fundamental Law and sectoral legislation. There is also the Media Act which provides the legislative frameworks for both public service and the Hungarian media regulator.\textsuperscript{110} The Commission has identified several issues related to media freedom and pluralism in Hungary.

3.2.3.1 Assessment by the Commission

The first issue the Commission has raised regarding media freedom and pluralism is related to the functional independence of the Hungarian media regulator. The Media Act establishes legal requirements and a framework for the operation of the Media Authority, and the Authority has been given sufficient resources to accomplish their task. However, concerns have been raised over the authority’s independence. The decision-making body of the authority is composed of members directly nominated by the ruling party. There have also been cases of refusal to renew broadcasting licences to independent radio stations, due to both failures to comply with certain administrative obligations and the use of inappropriate language. Due to these cases and other actions taken by the Media Authority concerns have been raised regarding the independence and effectiveness of the authority.\textsuperscript{111} Furthermore, there are concerns regarding an uneven distribution of State resources to different media outlets where pro-government media creates an unlevel playing field.\textsuperscript{112}

\textsuperscript{105} SWD (2022) 517 (n 9) 17-18.
\textsuperscript{106} ibid 18.
\textsuperscript{107} ibid 18-19.
\textsuperscript{108} ibid 19-20.
\textsuperscript{109} ibid 20.
\textsuperscript{110} ibid 20.
\textsuperscript{111} ibid 21.
\textsuperscript{112} ibid 21-22.
Continuing with the Commission’s assessment there have been concerns raised regarding the transparency of media ownership, however there are no plans to introduce legal obligations to enhance the transparency of media ownership.113 Continuing with the issue of transparency, public service in Hungary operates within an institutional system which is complex, and concerns have been raised regarding its financial and editorial independence. Public service in Hungary receives substantial funding and the budget is subject to parliamentary approval, however there are concerns for the lack of oversight over its spending. The RoL Report highlights on this point that there is a lack of transparency, civil control, and oversight over the budget and where the funding comes from. In combination with this, concerns have been raised regarding the editorial independence of public service, and stakeholders have pointed out that public service has had a role in amplifying disinformation by third actors.114

Lastly, on media freedom and pluralism journalists and media outlets have faced and continue to face challenges in Hungary, and access to public information continues to be hindered. The journalists have faced difficulties when attempting to access members of the Government and are barred from certain events. There is also an infringement case in the CJEU, Tilos Rádió, regarding a disproportionate refusal to renew a broadcasting licence and secret surveillance of journalists has been uncovered.115 The challenges to access to public information have been increased since the ‘state of emergency’ was declared due to COVID-19, and stakeholders have reported that the transparency of public-interest funds is inadequate.116

3.2.4 Other Institutional Issues related to Check and Balances

Hungary’s institutional system is a parliamentary republic with a unicameral Parliament. The Parliament is tasked with, among other functions, adopting and amending the Fundamental Law in Hungary, legislates, elects the Prime Minister, and elects the top rank officials, and the Republics President is elected by Parliament. The Constitutional Court, the State Audit Office and the Ombudsperson (Commissioner for Fundamental Rights) are tasked with counterbalancing the powers of the executive and the legislative and guaranteeing the respect for the constitutional order. Furthermore, the Government, the President of the Republic, every parliamentary committee, or parliamentary member may present a bill.117

113 SWD (2022) 517 (n 9) 22.
114 ibid 22-23.
115 ibid 23.
116 ibid.
117 ibid 23-24.
3.2.4.1 Assessment by the Commission

The Commission has raised serious concerns related to Checks and Balances, and the concerns raised are wide and cover most of the institutional system. To begin, the lack of public consultation in relation to accelerated legislative processes has weakened the quality of the regulatory environment. The Government has organised ‘national consultations’ on selected topics, however there is an absence of public consultations which are effective when it relates to draft laws, this raises questions about legal certainty and the quality of the legislation. Furthermore, CSOs have reported that decisions are made without the consultation of the relevant stakeholders. The Government has been using a method of circumventing consultation mechanisms by submitting bills through individual members of Parliament or by using urgent or extraordinary procedures.118

The Commission has found that the Government has used their emergency powers extensively. In June 2022 the ‘state of danger’ due to COVID-19 was terminated. However, the Parliament continued the emergency measures and issued emergency measures which were not related to COVID-19, among the measures taken the Parliament used their powers to overrule judicial decisions, and thereby limiting the right to strike and media freedom. In May 2022 the Parliament adopted a new law which would allow the Government to declare a state of danger in case of an armed conflict, war, or humanitarian crisis in a neighbouring State. This was also done the day after the law came into force due to the conflict in Ukraine.119

There have been allegations of the use of spyware to surveillance lawyers and journalists, which has been followed by investigations, however there are concerns regarding the absence of effective judicial supervision. It was found that at least ten lawyers had been targeted by spyware, and the report published found that the Hungarian authorities had carried out information gathering through the software both on lawyers and journalists. However, the report also found that the surveillance was carried out in accordance with the law. In relation to this, stakeholders have reported that the rules on secret surveillance are significantly loose, which leads to lawyers, as well as any citizen, can legally become targeted by secret surveillance with the ground of national security but without any significant oversight or control over the decision. The ECtHR delivered a judgment on the matter and found that the authorisation of application of surveillance lacked judicial supervision. The surveillance of lawyers without

118 SWD (2022) 517 (n 9) 24.
119 ibid 25.
sufficient guarantees and judicial oversight, has raised serious concerns for the independence of the lawyers and undermines the confidentiality of client-lawyer relations.120

There have also been concerns raised in relation to human rights and specifically the independence of the Commissioner for Fundamental Rights after a takeover of the responsibilities of the Equal Treatment Authority by the Commissioner. In the RoL Report it has been found that the Commissioner has not effectively engaged in all human rights issues, including, ethnic minorities, the LGBTIQ+ community, refugees and migrants, constitutional court cases of politically and institutionally sensitive nature, media pluralism, civic space, and judicial independence. The Commissioner has taken over the responsibilities of the Equal Treatment Authority, and the decision has been criticised for being adopted under a state of emergency, in a rushed manner and without consulting civil society.121

The Constitutional Court is of further concern. The Court has been given a new possibility to review final judicial decisions on request from public authorities. This raises questions about legal certainty, according to stakeholders the Court continued to overrule Supreme Court decisions, the Constitutional Court is made up of judges elected by Parliament, and their role in overruling judgements from ordinary courts raises concerns.122 In December 2020 CJEU ruled that Hungary had failed to uphold its obligations under EU law regarding the procedures for granting international protection and returning illegally staying third-country nationals. However, in February 2021 the Government in Hungary submitted to the Constitutional Court a request to interpret the judgements constitutionality. The Court ruled that if the EU institutions do not take measures to ensure the necessary effectiveness of joint exercise of competences Hungary would not be obliged to adhere to the judgement.123 This raises serious concerns due to the principle of primacy of EU law. Further, on the non-implementation of international judgements, in January 2022 Hungary had 47 leading judgements from the ECtHR pending implementation.124

Lastly, regarding the concerns, is related to civil society. Independent civil society remains under pressure, the legislation on civil society in Hungary meets international standards, however the civic space continues to be rated as ‘obstructed’. In November 2021 the CJEU held that it was a breach of EU law when Hungary criminalised organisation of assisting the

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120 SWD (2022) 517 (n 9) 26-27.
121 ibid 27.
122 ibid 27-28.
123 ibid 28.
124 ibid 28-29.
initiation process of applying for international protection when the situation at hand did not meet national standards. Hungary has failed to implement this judgement and thereby the pressure on civil society remains, especially regarding those active in the field of asylum. Other fields are also under pressure, independent CSOs are often labelled as ‘political’ which leads to them not being civic, and as ‘agents’ who are not serving the ‘national interest’. One group of civil society which has serious obstacles is organisations representing the LGBTIQ+ community, they have complained about being the target of smear campaigns by the Government. Furthermore, CSOs have also reported obstacles regarding access to justice, specifically significant has been regarding challenging environmental permitting processes.\textsuperscript{125}

Continuing related to civil society, the funding has raised questions. According to stakeholders the Governments has centralised the distribution of funding, and all funding now goes through the National Cooperation Fund. Nearly 40\% of civil society’s resources come from public funding and it has been reported that the funding is uneven, lacks transparency, and is politically biased.\textsuperscript{126}

3.2.5 Analysis of the Commission’s Assessment of Hungary

Following the Commissions assessment of the problems related to Hungary, what can be seen is a widespread and systematic backsliding RoL system. Hungary has serious issues raised in all areas of assessment. The only category which may not be as severe as the others is media freedom. As for the other categories the justice system lacks independence, Hungary scores 26\textsuperscript{th} out of 27 in the EU on the corruption scale, and the system of checks and balances is severely threatened with a Constitutional Court overruling the ordinary courts judgements. One issue which was mentioned several times is the unwillingness to implement judgements from the CJEU and the ECtHR. While the ECtHR is not part of the EU it is still an integral part of European integration, serving as the final place to ensure fundamental rights when the national system fails. As for the judgements from the CJEU this becomes concern when the refusal to implement judgements from the CJEU undermines principles such as primacy of EU law.

This study however is less concerned with what the two MSs are doing to take steps away from the RoL and more concerned with what the EU does to address the problem. Next the study will make a comparative analysis of the concerns raised by the Commission to establish where

\textsuperscript{125} SWD (2022) 517 (n 9) 29-30.
\textsuperscript{126} ibid 30-31.
the two MSs have similar and different issues which raise concern from the perspective of the RoL.

3.3 Comparison of the Concerns raised by the Commission

Above is the Commissions assessment of the two MSs RoL situation, and it shows several similarities between the two MSs but also some differences. Both MSs have issues in most the areas which can be considered severe however, the degree differs between the MSs.

Justice System

Comparatively the independence of the justice system differs on the perceived independence levels, with average levels in Hungary\(^{127}\) and very low in Poland\(^ {128}\). However, both MSs have some similar problems, one example of this is that both are imposing reforms and reorganisations of the justice system which negatively impact the judges\(^ {129}\). Furthermore, both MSs are challenging the principle of primacy of EU law, Poland through the Constitutional Court declaring EU decisions unconstitutional, and Hungary’s Supreme Court declared a request for a preliminary ruling unlawful\(^ {130}\).

The two MSs also differ on several points where a bonus system for the judges in Hungary has raised concerns, due to a system of unclear criteria for when the bonuses are received by the judges and a lack of transparency in the process. In Poland the prosecution service has raised concerns with the Minister of Justice and the Prosecutor General being the same person, which raises concerns about the independence of both offices. The two MSs also differ when it comes to Quality and Efficiency where Poland in this aspect scores average with the only concern raised being the length of criminal and civil proceedings. While Hungary scores high in this regard with effective implementation of procedures to ensure the quality and efficiency and no serious concerns raised by the Commission\(^ {131}\).

Anti-Corruption Framework

Regarding corruption, the two MSs differ on several points where Hungary faces the most issues. However, Poland is not without concerns, Poland’s corruption perception index is relatively high and scores 13\(^{th}\) in the EU and 42\(^{nd}\) globally regarding corruption. While Hungary

\(^{127}\) See ‘3.2.1 Justice System’.

\(^{128}\) See ‘3.1.1 Justice System’.

\(^{129}\) See ‘3.2.1 Justice System’ and ‘3.1.1 Justice System’.

\(^{130}\) ibid.

\(^{131}\) See ‘3.2.1 Justice System’ and ‘3.1.1 Justice System’.
scores high on the index and scores 26th in the EU and 73rd globally. This trend can be seen throughout the chapter on anti-corruption while the two MSs have similar problems the problems are more concerning in Hungary. Both MSs have concerns raised about the effective measures taken to fight foreign bribery, however Hungary does not have an effective strategy in place for the detection of foreign bribery. Both MSs have a problem with effective enforcement of high-level corruption, where there is a risk of political involvement however, in Poland this is more connected to the lack of independence of the judiciary and lack of resources, while Hungary has enough resources but a transparency problem which leads to difficulty establishing a track-record of investigations and final judgements. This in turn leads to lack of accountability, and there is a risk of clientelism, favouritism, and nepotism. Furthermore, both MSs have a transparency issue, in Hungary the issue is widespread and can be seen throughout the RoL Report, but it is especially prominent in the corruption area. An example of the lack of transparency in Poland is that the Polish Government has analysed the effectiveness of the lobbying rules, however, has not made the findings public.132

One significant difference between Poland and Hungary is that due to the Commissions concerns about the spending of the EU budget, which was directly connected to the corruption in the MS, they launched the Conditionality Mechanism regarding Hungary. This was done due to a combination of RoL breaches and the use of public procurement and the functioning of the authorities implementing the budget.133

*Media Pluralism and Media Freedom*

This is another area where Hungary faces more concerns than Poland. Both MSs have some shared problems, examples of this are difficulties with broadcasting licenses. However, the problems in Poland are related to modifications to the requirements for obtaining a licence, while in Hungary there have been refusals to renew licenses due to failure to comply with administrative obligations and one instance of refusal due to the inappropriate use of language. Both MSs have concerns raised about public service where both have issues related to independence and funding. Both MSs also introduced a less favourable situation for the media in connection with the introduction of a state of emergency where access to members of government and information was restricted.134 The two MSs also differ on several points and some of the most significant differences in the two MS are that in Hungary independence is a

132 See ‘3.1.1 Anti-Corruption Framework’ and ‘3.2.2 Anti-Corruption Framework’.
133 ibid.
134 See ‘3.1.3 Media Freedom and Media Pluralism’ and ‘3.2.3 Media Freedom and Media Pluralism’.
bigger issue than in Poland and in Poland there have been reports of threats of strategic lawsuits against news media journalists.\textsuperscript{135}

\textit{Other Institutional issues related to Checks and Balances}

As has been seen above both MSs have significant issues related to checks and balances. However, once again, Hungary faces more concerns than Poland, but they do have several issues in common. Both are using fast track legislative procedures and bypassing civil society and stakeholders. Significant issues related to civil society continues in both MSs and both have significant problems related to fundamental rights and freedoms, including the rights of, minorities, the LGBTIQ+ community, refugees and migrants and religion. The civic space in both MS is categorised as obstructed and face several concerns.\textsuperscript{136} In both MSs there have been allegations of the use of spyware and the Commission has found that the use of emergency powers is extensive. In Poland there is a state of emergency on the Poland-Belarusian border where the constitutionality and state of human rights have raised concerns. In Hungary after the state of emergency ended due to a less serious situation with COVID-19 the Hungarian authorities adopted a law which enabled them to use emergency powers if a neighbouring State was subject to war, armed conflict, or humanitarian crisis which was enforced due to the Russian invasion of Ukraine. Lastly, on the similarities both MSs have a significant number of leading judgements from the ECtHR pending implementation, with Poland having 38 and Hungary 47.\textsuperscript{137}

The two MSs also differ on several points. Starting with Poland, a draft law is threatening the integrity of NGOs. The law is aimed at transparency however, the law would entail a national registry of the NGO’s finances from abroad. Another difference is that Poland has introduced a law which increases the control over schools by central government, this entails that the representatives are able to affect the access of NGO’s to extracurricular activities in schools. In Hungary there is a significant difference in the influence over civil society, this has led to a judgement by the CJEU, and there have been reports of lack of access to justice and funding.\textsuperscript{138}

\textsuperscript{135} See ‘3.1.3 Media Freedom and Media Pluralism’ and ‘3.2.3 Media Freedom and Media Pluralism’.
\textsuperscript{136} For more detail on this see ‘3.1.4 Other Institutional issues related to Checks and Balances’ and ‘3.2.4 Other Institutional issues related to Checks and Balances’.
\textsuperscript{137} ibid.
\textsuperscript{138} ibid.
3.3.1 Results of Comparison

What has been described above is how Poland and Hungary are similar and different regarding the concerns the Commission has found in relation to the RoL. What can be established is that the two MSs have more in common than different which supports the fact that these two MSs are currently the most concerning in the EU. However, the RoL Report also shows that while Poland has many similar problems in all areas as Hungary the main and most significant issue in Poland is the independence of the justice system. Comparatively Poland has significantly less issues than Hungary in all other areas of assessment in the RoL Report. These problems should still not be ignored they are listed in the Report for a reason and therefore plays a role in the overall assessment of the RoL in Poland. However, with the main issue being the justice system directed efforts are justified and a significant improvement to the RoL situation would be a solution to the problems regarding the justice system.

Hungary on the other hand has a more far-reaching map of problems. In all areas of assessment Hungary has significant problems, which may show that the issues are connected. While having similar problems to Poland the list is longer in all areas except regarding the justice system where it is about the same number of concerns. Considering the range of issues in both MSs it is of importance to examine the possible responses the EU has at its disposal to combat this situation. While much effort has been placed on analysing the concerns in the MSs the importance of this analysis is not on what the MSs are doing in relation to moving further away from the RoL and more concerned with what the EU does to improve the situation. The importance of the above examination is to establish if the responses can justifiably be used differently or if the same process should be used on both MSs. Therefore, the study will continue with an examination of the different response mechanisms at the EU’s disposal to address the issue.
4. Response Mechanisms to a Backsliding Rule of Law System

The EU has several different response mechanisms to a backsliding RoL system in a MS, and the mechanisms vary in severity. This study will focus on three of the response mechanisms. These three are the main responses to a systematic problem in a MS, while the RoL Report serves as a foundation for the problems it is more of a preventive measure and will therefore not be included in the response mechanisms analysed here. The response mechanisms which will be analysed are the RoL Framework including the Article 7 TEU procedure, infringement proceedings, and the Conditionality Mechanism.

4.1 The Rule of Law Framework

Due to the confrontation of a RoL crisis in the Union the Commission adopted the RoL Framework. The objective of the Framework is to prevent emerging threats to the RoL and ensure the problems do not deepen or escalate further. At the point where the problems escalate it may entail a need to activate the Article 7 TEU procedure which is at the end of the Framework. The Framework is built on dialogue with the concerned MS, and the process starts with an assessment by the Commission then recommendations and lastly monitoring the follow-up of the recommendations.139 If there is no solution under the Framework, then Article 7 TEU is the last resort to respond and ensure the MS in question complies with the RoL. Article 7 TEU is the last resort since it contains far-reaching sanctions, which is a drastic response only reserved to the most severe cases.140

The RoL Framework is activated in situations where measures are being performed by or tolerated by authorities in a MS, which are likely to systematically and adversely affect the integrity, stability, or proper functioning of the institutions and the safeguard mechanisms which are in place at national level to protect the RoL. The Framework is not triggered by individual breaches of either fundamental rights or miscarriages of justice, rather it is designed to be triggered by systematic threats to the RoL.141

The RoL Framework is a three step process and is based on four principles, a) focusing on a solution through dialogue, b) ensuring an objective and thorough assessment of the situation, c) respecting the principle of equal treatment, and d) indicating a swift and concrete actions

140 ibid.
which could be taken to address the systematic threat and avoid the use of Article 7 TEU, and the three steps are 1) Commission’s assessment, 2) a Commission recommendation and 3) follow-up on the recommendation. Following will be a summary of the three steps of the procedure.

The Commission’s Assessment

The Commission’s assessment is based on relevant information from indications received from available sources and recognised institutions. In the assessment information from bodies like the Council of Europe and European Union Agency for Fundamental Rights play a significant role. If the result of this assessment shows that there is a systematic threat to the RoL then the Commission will send a RoL opinion describing its concerns and giving the MS an opportunity to respond.\textsuperscript{142} There is an expectation of sincere cooperation throughout the process in line with EU law, and if the concerned MS fails to cooperate it will be taken into consideration in the assessment of the seriousness of the threat.\textsuperscript{143}

The Commission Recommendation

In the second stage of the process the Commission will (if the problem has not already been solved) issue a recommendation. The recommendation will be issued if there is a systematic threat to the RoL and the authorities are not taking the appropriate steps to address the problem. In the recommendation the Commission will clearly indicate the reasons behind the concerns and set a time limit for the MS to resolve the issue, and when appropriate the Commission will also indicate possible measures to resolve the problems. The Commissions assessment and recommendation is based on dialogue with the concerned MS and any evidence the MS provides in advance.\textsuperscript{144}

Follow-up on the Commission’s Recommendation

In the third and last stage of the Framework the Commission will monitor the concerned MS and the actions taken to remedy the situation. The monitoring is based on further dialogue with the MS and can be based on if certain practices which raised concerns continue to occur or on how the MS implements the recommendations. However, if there is no solution to the problem

\textsuperscript{142} COM(2014) 158 final (n 141) 7.
\textsuperscript{143} ibid 8.
\textsuperscript{144} ibid.
after the three steps and the monitoring of the Commission within the time-limit which was set, the Commission will assess the possibility to activate the mechanism in Article 7 TEU.\(^{145}\)

**Activation of The Rule of Law Framework**

The RoL Framework has been activated once and that was against Poland in 2016.\(^{146}\) The Commission had before the activation closely monitored Poland and its RoL situation and after the activation of the Framework spent two years of dialogue with Poland under the Framework and adopted several recommendations.\(^{147}\) In 2017 the Commission sent a reasoned proposal to the Council to determine that there is a clear risk of a serious breach of the RoL by Poland and thereby activated Article 7(1) TEU.\(^{148}\)

4.1.1 **The Article 7 TEU Response**

The response mechanism under Article 7 TEU is the response with the potential to have the most severe consequences for the breaching MS. The Article has been activated twice first against Poland and then against Hungary. The Commission initiated the process against Poland in December 2017 after two years of dialogue under the RoL Framework. Regarding Hungary it was the Parliament which activated the Article 7 TEU response in September 2018.\(^{149}\)

The Article is often called the ‘nuclear option’; however, this may be misleading, the procedure has been activated twice, however it has never gone beyond the first step of the Article. The reason the term ‘nuclear option’ may be misleading is due to the failure to take account of the ‘suspensive arm’ of Article 7(1) TEU and the term has led to the belief that the Article can be used to exclude a MS from the decision making process in the EU, however this may not be accurate.\(^{150}\) For this reason there is ground to take a closer look at Article 7 TEU and see exactly what it entails.

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\(^{145}\) [COM(2014) 158 final (n 141)].


\(^{147}\) Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, [COM(2017) 835], paras 6-8.

\(^{148}\) Ibid para 4.


As described in the RoL Framework the goal is always to avoid Article 7 TEU\textsuperscript{151} since it could be a drastic measure and resolution through dialogue is preferred. However, Article 7 TEU also contains some dialogue. In Article 7(1) TEU the start of the procedure is described, and it is at this point that there is a determination of a \textit{clear risk of a serious breach} by a MS. Before the determination is made the concerned MS must be heard and may be given recommendations, and lastly for this first step the Council shall regularly verify that the grounds on which the determination has been made continue to apply.\textsuperscript{152}

After this first step comes the part which could potentially lead to some serious consequences for the concerned MS. Article 7(2) TEU is where there can be a determination of the existence of a \textit{serious} and \textit{persistent breach} of the founding values.\textsuperscript{153} This determination is necessary to be able to advance to the next step in Article 7(3) TEU which contains the measures which can be taken to respond to the breach. The Article describes the consequences as the following ‘[…] may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.’\textsuperscript{154} This may seem serious and it potentially could be however, Article 7(2) TEU where the determination of a serious and persistent breach contains an aspect which hinders the effective application of these consequences. The Article states ‘The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament […]’\textsuperscript{155} the \textit{unanimity} in this Article causes a problem. The Council is made up out of leaders of the MSs with political interests and getting a unanimous decision in the Council in an ordinary situation is difficult, but adding the fact that there is two MSs which are under the same procedure adds another level. This creates a situation where the two MS, if a vote were to happen, can protect each other by putting in their veto. The remaining part of the Article contains the provisions on how to revoke potential sanctions on the MS and the voting arrangements.\textsuperscript{156}

It may not be surprising that the procedure has yet to get further than Article 7(1) TEU and therefore never reached the sanctioning part. It is also unlikely that the procedure will ever get to the point where the sanctions are activated. Furthermore, even if the sanction part of the Article where to be activated there is no guarantee that any sanctions will be imposed on the

\textsuperscript{151}See ’4.1 The Rule of Law framework’.
\textsuperscript{152}TEU (n 4) Article 7(1).
\textsuperscript{153}ibid Article 7(2).
\textsuperscript{154}ibid Article 7(3).
\textsuperscript{155}ibid Article 7(2).
\textsuperscript{156}ibid Article 7(4-5).
MS, the Article clearly states that the Council may impose sanctions. Considering the ineffective nature of the Article it is misleading calling it the ‘nuclear option’.\textsuperscript{157}

This has caused the EU and most significantly the Commission to take other actions to try to protect the RoL, among these actions are cases in the CJEU. The next chapter will attempt to describe what the CJEU has the authority to do and has done with regards to breaches of the RoL.

4.2 Cases in the Court of Justice of the European Union

Another way the Commission as well as national judges have attempted to combat the issues related to the RoL is through the CJEU. While this may not be presented as a direct RoL response it has been one which has shown some of the most effective results from the perspective of consequences for the MS. The fist judgement to this effect was the case informally known as Portuguese Judges and this started the Courts case law on the protection of the RoL.\textsuperscript{158} This chapter will attempt to describe some of the most influential judgements from the CJEU on this subject and explain why this may be one of the most effective tools at the EU’s disposal. What has made this development possible is partly due to the use of Article 19 TEU and specifically the second subparagraph of Article 19(1) TEU, which states ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’\textsuperscript{159} and thereby making the enforcement of Article 2 TEU possible by the CJEU.

4.2.1 Portuguese Judges C-64/16 ASJP

The case Portuguese Judges has been described as one of the most influential cases regarding the RoL and has marked a beginning to the response of the Court regarding the RoL. The Judgement has had significant value for the interpretation and scope of the principle of the RoL. The significance of the case is the Court’s interpretation of the second subparagraph of Article 19(1) TEU from this part of the Article the Court interpreted an obligation on MSs which is general and justiciable to both guarantee and maintain the independence of the national courts.\textsuperscript{160} This judgement was a so called grande décision (grouped with judgements like Van Gend en Loos and Costa), which not only established the scope of Article 19(1) TEU but also showed the important part national courts play in European integration. The President of the CJEU also highlighted this aspect and stated that the national courts are called upon to play a

\textsuperscript{157} Pech (n 150) 159.
\textsuperscript{158} Pech (n 18) 8.
\textsuperscript{159} TEU (n 4) Article 19(1).
\textsuperscript{160} Pech (n 18) 22.
fundamental role in European integration and that the CJEU is committed to upholding the RoL within the Union. The interplay between EU law, national courts and integration shines through this judgement, while it is the CJEU’s outmost responsibility to interpret EU law the national courts also play a vital role in this relationship and a MS not ensuring the independence of its justice system are directly hindering this integration and undermining their obligations under EU law. This judgement was the start of further case law related to the RoL, this was far from the first ever judgement to this effect, however, it still marked a beginning to the case law to come, especially regarding Poland.

4.2.2 Poland’s History in the CJEU

Poland has been the subject of several judgements related to the RoL, both infringement procedures and preliminary rulings. The Commission has the role of the Guardian of the Treaties and is entrusted with the task of promoting the general interests of the Union and take the appropriate actions to ensure the application of the Treaties. Furthermore, the Commission is tasked with overseeing the application of EU law in cooperation with the CJEU. This leads to the Commission being the responsible party to ensure that EU law and thereby the RoL is protected in the MSs. The Commission has brought several infringement actions against Poland in relation to the RoL, and especially the independence of the Courts. Three cases will be highlighted to show this development. In all these cases Poland have been found to have breached Article 19(1) TEU on several grounds. These three judgements serve as an illustration into the Commissions work with the RoL in the CJEU.

Case C-619/18, Commission v. Poland (Independence of the Supreme Court)

This case is related to Polish legislation lowering the age of retirement of judges in the Supreme Court, such legislation is incompatible with principles of judicial independence and irremovability of judges. This case was of such serious nature that the Court grated the Commission interim measures. Interim measures are urgent measures which Courts can grant when there is an imminent risk of irreversible harm and are only granted on an exceptional basis. This speaks to the serious nature of the case and that the actions taken regarding the retirement ages of the judges being a serious risk to the judges. The CJEU highlighted in their

161 Pech (n 18) 32.
162 TEU (n 4) Article 17(1).
163 Pech (n 18) 33.
164 ibid 34.
165 European Court of Human Rights ‘Interim measures’ (Factsheet – Interim measures, European Court of Human Rights, 2023).
decision that the independence of the Supreme Court was directly and actively threatened, and the independence of the Supreme Court may not be guaranteed during the time of the proceedings. This caused the CJEU to argue that not granting the interim measures may cause serious damage to the EU legal order. This among other reasons due to the national Supreme Courts crucial role in implementing EU law in the national legal order and that the retirement age legislation may threaten the entirety of the MS’s judicial system.\footnote{166} This case speaks to the important role of the national courts and why the RoL is instrumental in European integration. As stated, the CJEU granted the interim measures and ordered Poland to immediately restore the Supreme Court to its situation before the new laws where implemented.\footnote{167} This shows a possibility for the CJEU to implement direct consequences for violating MS in a direct manner in contrast to the RoL Framework which works with recommendations and dialogue and Article 7 TEU which has failed to proceed to the stage where sanctions are possible. Later in the CJEU’s judgement it found Poland to have failed to fulfil its obligations under Article 19(1) TEU, and thereby declaring the new retirement regime in breach of EU law.\footnote{168}

Case C-192/18, Commission v. Poland (Independence of the Ordinary Courts)

This case is also related to the Polish legislation on the retirement of judges and the principles of irremovability and independence of judges, however not only limited to the Supreme Court.\footnote{169} In this case the Court also held that the Polish rules on the retirement of judges and prosecutors of the ordinary courts, together with rules on the possible extension of retirement of the judges was not compatible with requirements regarding the independence of judges.\footnote{170} The discretionary extension of the judicial mandate was conditional upon the decision of the Minister of Justice in Poland, and therefore making it a political decision and undermining the independence of the justice system.\footnote{171}

Case C-791/19 Commission v. Poland (Disciplinary Regime for Judges).

This case is related to the Disciplinary Chamber established in Poland.\footnote{172} The Disciplinary Chamber in Poland has caused serious concerns and led not only to the case in the CJEU, but was also one of the reasons for the Commission to activate Article 7 TEU, and five other MSs

\footnote{167}Pech (n 18) 47.
\footnote{169}Pech (n 18) 34.
\footnote{170}ibid 75.
\footnote{171}ibid 78.
\footnote{172}ibid 34.
to intervene on the side of the Commission in the case in the CJEU.\textsuperscript{173} The Commission raised five main arguments against the Disciplinary Chamber and thereby Poland, and it is worth in short summarising the arguments to give context to the nature of these new laws.

1) Allowing content of judicial decisions to be classified as a disciplinary offence is incompatible with the second subparagraph of Article 19(1) TEU.

2) The Disciplinary Chamber does not fulfil the required guarantees of impartiality and independence, and thereby violates the second subparagraph of Article 19(1) TEU.

3) The new regime of the Disciplinary Chamber is not compatible with the second subparagraph of Article 19(1) TEU because it fails to guarantee that disciplinary cases are examined by a court or tribunal established by law.

4) The next violation of the Article is failure to guarantee that disciplinary cases against judges are examined within a reasonable time and respect the rights of defence.

5) Lastly, judges can be subject to disciplinary actions if they refer a case for preliminary ruling by the CJEU which causes concerns about judicial independence and a violation of Article 267 TFEU\textsuperscript{174}.\textsuperscript{175}

The CJEU later sided with the Commission on all points. This situation even led to further consequences for Poland. Considering the earlier judgements delivered (which has been discussed above) and a failure to comply with the judgements and the interim measures, the Commission asked the CJEU to order Poland to pay a daily penalty payment in an amount which would encourage Poland to comply with the orders and judgements of the CJEU. In October 2021 the CJEU granted the request by the Commission and ordered Poland to pay £1 000 000 a day until Poland either complies with the earlier orders or until the date of delivery of a final judgement\textsuperscript{176}.\textsuperscript{177} This further goes to show that the CJEU has the authority to sanction MSs for breaches of the RoL and have the means to do so with both interim measures and penalty payments. However, it is also possible to argue that the CJEU are doing some of the most work for the European integration of the breaching MSs. While the CJEU has the authority to impose serious sanctions and orders on MSs the goal of the sanctions and orders are that they will be imposed until a time where the concerned MS agrees to follow and implement the orders

\textsuperscript{173} Pech (n 18) 87.

\textsuperscript{174} The article describes the jurisdiction of the CJEU concerning preliminary rulings.

\textsuperscript{175} C-791/19 European Commission v Republic of Poland [2021], ECLI:EU:C:2021:596, para 1.

\textsuperscript{176} This judgement has as of 7 April 2023 not been delivered.

\textsuperscript{177} Court of Justice of the European Union ‘Order of the Vice-President of the Court in Case-204/21 R Commission v Poland’ (CURIA, Press and Information, 27 October 2021).
of the Court. This is rather an including attempt than an excluding attempt. Trying to make the violating MSs once again uphold EU law and the principles of the Union.

4.2.3 Requests for Preliminary Rulings

Another way which the CJEU is involved with the RoL is when a MS makes a request for a preliminary ruling. The procedure is built up by a national court or tribunal having a dispute in their court regarding EU law. The national court is responsible for determining the need and relevance of a preliminary ruling. What is important to note about preliminary rulings is four points 1) the questions referred to the CJEU must concern interpretation of EU law, 2) the CJEU may only give recommendations if the case concerns EU law in the main proceedings, 3) the CJEU will not itself apply EU law to the dispute in the national court, rather it is up to the national court to draw conclusions from the CJEU’s ruling, and 4) preliminary rulings are binding on both the referring court and on all courts in all MS.178

Preliminary rulings are useful for MSs when there is a question of EU law which caselaw does not sufficiently answer. Within the Union the CJEU has seen a new trend where the national courts are using preliminary rulings to protect their own independence. Especially Poland has used this measure with over 35 preliminary rulings to date, however Poland is not alone, MSs like Malta, Romania, and Hungary has also made use of this procedure to try to protect their own justice systems and ask for help in resisting national measures which are attempting to undermine their independence.179

While this is a very helpful tool for the national courts to try to protect the RoL, this study seeks to understand the tools at hand by the EU rather than the MS being subject to RoL undermining measures. Therefore, preliminary rulings will not be examined closer. However, for the interested reader some significant rulings to this effect are; Joined Cases C-585/18, C-624/18 and C-625/18, A.K. e.a. Independence of the disciplinary chamber of the Supreme Court and Joined Cases C-558/18 and C-563/18 Miasto Łowicz and Prokurator Generalny.

4.2.4 Hungary’s History in the CJEU

Hungary’s history in the CJEU is significantly shorter than Poland’s. There have been no infringement proceedings against Hungary on the grounds of judicial independence launched by the Commission since the activation of Article 7 TEU. Even though as seen above there are

179 Pech (n 18) 95.
serious issues related to the independence of the judiciary. The same grounds the Commission has used against Poland regarding disciplinary regimes against judges and violations of Article 19(1) TEU can apply to Hungary, however the Commission has not applied the same method on Hungary. The history is not empty and while this study is not focused on actions taken by the national courts to defend their judicial independence in this case where there are no infringement cases on the specific subject, therefore one case from before the activation of the Article 7 TEU procedure and one preliminary ruling will be included.

*Infringement Procedure from 2012*

*Case C-286/12 Commission v. Hungary (Judicial Retirement Age)*

The case concerns a law which was adopted in 2012 regarding the retirement age of judges, prosecutors, and notaries. The law set up a compulsory retirement age of the civil servants and was also used retroactively, this was done by implementing compulsory retirement of judges, prosecutors, and notaries between the ages of 62 (which was the new retirement age) and 70. While in the cases concerning Poland after the Portuguese Judges case the Commission used mainly Article 19(1) TEU as legal ground, that judgment had not yet been delivered at the time of this case and the Commission used age discrimination as legal ground. The CJEU sided with the Commission in the case and found the new laws on the retirement age to be in breach of EU law.

*Preliminary Ruling*

*C-564/19 IS*

This case in the first-hand concerns a dispute in the national court regarding a Swedish national’s right to interpretation and translation in criminal proceedings and the right to information in relation to such proceedings. The referring judge sent this case to the CJEU for a preliminary ruling to determine whether the Hungarian law on the right to translation and interpretation was compatible with EU law. However, the case came to concern the right of judges to submit cases for preliminary ruling to the CJEU. After the judge had sent the case for preliminary ruling the Supreme Court in Hungary decided that the request was unlawful. The reason behind this opinion of the Supreme Court was that the request was neither relevant nor necessary for the resolution of the dispute. After this decision the judge made an additional...

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180 See ‘3.2 The Rule of Law Situation in Hungary’.
181 Pech (n 18) 65.
request to the CJEU to provide a preliminary ruling on if that judgement was compatible with EU law. After the Supreme Court’s decision, the referring judge was also subject to disciplinary action.\textsuperscript{183}

The CJEU found in this case that in the system of cooperation between the CJEU and the national courts precludes a national supreme court from finding a request for a preliminary ruling unlawful. Furthermore, the CJEU found that the Supreme Court’s reasoning that the request was not relevant or necessary is a question of admissibility of the case and in this respect the CJEU has exclusive jurisdiction. The CJEU went on to highlight that the finding of the Supreme Court of the unlawfulness of the request, can weaken the authority of the answers given by the CJEU, limit the exercise of requests for a preliminary ruling to the CJEU, and consequently restrict the effective judicial protection of individuals rights which derive from EU law. By this reasoning the CJEU held that in such circumstances the lower court is required to disregard the decision by the Supreme Court according to the principle of primacy of EU law.\textsuperscript{184}

Regarding the disciplinary proceedings leading from the request for a preliminary ruling, the CJEU held that EU law precludes disciplinary proceedings from being brought against a national judge on the grounds that the judge has made a reference for a preliminary ruling. The CJEU argued that the prospect of disciplinary action due to a referral for a preliminary ruling can undermine the mechanism provided for in the procedure and judicial independence which is essential for the functioning of the mechanism. Furthermore, disciplinary action can deter all national courts from making a reference for a preliminary ruling, and thereby undermine the uniform application of EU law.\textsuperscript{185}

This judgement started out as a request for a preliminary ruling to the CJEU regarding the EU laws on interpretation and translation and turned to address judicial independence and the integrity of the EU legal system. This judgement brings up several important points regarding the RoL and the integration of the EU legal order. The CJEU found that any decision to the power that a request for a preliminary ruling is unlawful is not compatible with EU law, and that any disciplinary action taken against a judge due to them requesting a preliminary ruling is a violation of EU law. When looking at the reasoning behind the CJEU’s decision it is connected not only to the RoL with judicial independence being in the centre but also integration. The EU

\textsuperscript{183}C-564/19 IS [2021] ECLI:EU:C:2021:949.
\textsuperscript{184}ibid.
\textsuperscript{185}ibid.
system is made on the ground of sincere cooperation which requires an integrated legal system where the national courts cooperate with the CJEU and the EU institutions. It could be argued that the principle of sincere cooperation is one of the biggest tests for European integration, since it leaves trust to the MSs to cooperate between each other as well as with the EU institutions.

4.3 The Conditionality Mechanism

The RoL also plays a role in the EU’s budget, in 2021 the EU added another layer of protection of the EU’s budget through the Conditionality Regulation.\textsuperscript{186} The new layer of protection has been adopted for cases when violations of the RoL risk affecting the EU’s budget. The Conditionality Regulation allows the EU to take certain measures to protect the budget when it is threatened by breaches of the RoL.\textsuperscript{187,188} The Regulation sets up several measures which can be taken in case the budget is threatened by breaches of the RoL, the list is long but in summary the measures are related to economic sanctions by either suspending payments or a prohibition of entering new agreements on different levels.\textsuperscript{189} The Conditionality Regulation is a mechanism which is targeted at protecting the EU budget rather than an instrument to oblige MSs to fulfil their obligations regarding the RoL, the CJEU has also confirmed that the Regulation is a separate measure from the Article 7 TEU procedure.\textsuperscript{190}

In April 2022 the Commission activated the Conditionality Regulation by sending a notification to Hungary, this started a process of assessment and exchange of information which continued until mid-September. During this time Hungary did not meet the required goals for the Conditionality Mechanism not to go further. After this process the Commission adopted a proposal for the protection of the Union budget in relation to the breaches of the RoL by Hungary, and the proposal was sent to the Council.\textsuperscript{191} The Council after the proposal decided

\textsuperscript{186} Conditionality Regulation (n 20).
\textsuperscript{188} Conditionality Regulation (n 20) Article 1.
\textsuperscript{189} ibid Article 5(1).
\textsuperscript{191} ibid.
to freeze £6.3 billion which was equal to 55% of the commitment programmes. The funds can later be received if Hungary implements the remedial measures.192

The Conditionality Mechanism has shown another response which has direct consequences. This mechanism provides a possibility for sanctions on MSs not respecting the RoL which could increase the pressure to remedy the problems. While this mechanism is not part of the RoL Framework or the Article 7 TEU procedure it still has practical consequences for MSs breaching the principles of the RoL. The mechanism was adopted to protect the Union budget from violations of the RoL and after the decision by the Council it has shown more potential than the Article 7 TEU procedure has been able to provide.

4.4 The Effectiveness of the Rule of Law Response Mechanisms

As seen above the EU has several methods and procedures to apply when a MS breaches the RoL. However, what is supposed to be the most dramatic measure has yet to yield the results a ‘nuclear option’ implies. The Article 7 TEU procedure is in a political standstill with an unanimity requirement for sanctions to be imposed on a breaching MS. The RoL Framework can be described as the ‘pre-article 7 procedure’, since this is the first step and establishes a warning system for the MS and attempts to find a solution to the problem before the need to activate Article 7 TEU.193 While the ambitions of the Framework are good it has shown little effect. It may be that when drafting Article 7 TEU it was not expected to ever be activated, and when drafting the RoL Framework that it would be enough to warn the concerned MS that it has a problem which needs a resolution. However, this has not been the case and the procedure under Article 7 TEU has now been activated twice.194 However, even though it has been activated and it has been several years since the activation the so called ‘nuclear option’ nature of the Article is nowhere to be seen. The unanimity requirement in the Article poses a serious problem for the future of the sanctioning arm of the Article, especially since there are currently two MSs under the procedure. Since there is a lack of effective implementation and consequences for a breaching MS the RoL Framework and the Article 7 TEU procedure may not be the best option to combat the problems in the two MSs and the measures which can be taken outside the Framework in the form of infringement procedures and the Conditionality Mechanism may show better results.

193 Halmai (n 31) 176.
194 Pech (n 150) 167.
As has been seen above, the two procedures that have yielded consequences of breaches of the RoL are infringement procedures which have ordered Poland to comply with interim measures and pay a fine of £1,000,000 a day until compliance with the CJEU’s judgements, and the Conditionality Mechanism which has frozen funds to Hungary to an amount of £6.3 billion. While these two measures are outside the RoL Framework and the Article 7 TEU procedure, they have shown that the EU will work towards a closer union when given the tools which make it possible to convince MSs breaching the founding values to discontinue the practices. This shows a willingness from the EU institutions not to exclude or isolate the breaching MSs, rather to convince them to comply with the values and to cease the concerning behaviour and protect the EU system which integrated the national courts and authorities into the system. However, what can also be seen is different approaches towards the two MSs. Poland has been subject to several infringement proceedings and has suffered the most severe consequences from the CJEU, while Hungary has been subject to the Conditionality Mechanism and has suffered the most severe consequences from the Council decision to freeze some of the funds to the MS.
5. Results

As established above EIT is a theory which focuses on political cooperation and the development of common political institutions as well as on its outcomes. Furthermore, it also includes the theorizing of changing constructions of identities and interests of social actors during this process.\textsuperscript{195} When combining this with the principles within the RoL there are several common aspects, where the RoL contains a combination of legal and political obligations.\textsuperscript{196} Furthermore, the RoL is one of the EU’s founding values and an obligation for the accession into the EU which means that it plays an important role in the process of European integration. As seen by the definition used by this study it is not only the development of common political institutions which is of importance but also the outcomes, and the changing constructions of identities and interests of social actors.\textsuperscript{197} This builds the foundation of the combined meaning of the RoL and EIT, which is used though out the analysis to build further understanding of the integration problem at hand; being the two MSs breaching the RoL and the institutions attempting to resolve the concerns.

When looking into what the study has found beginning with the breaches of Poland and Hungary, what can be seen is a change of interests of both the institutions (the Commission, Council, CJEU and Parliament) and of the MSs. These institutions were agreed upon when entering the Union and the Commission serving as the Guardian of the Treaties\textsuperscript{198} has played the biggest role in the protection of the RoL. Considering the political institutions an increasing number of actions have been taken since the emergence of the RoL concerns in the Union. The Commission adopted the RoL Framework, activated the Article 7 TEU procedure and launched several infringement procedures.\textsuperscript{199} However, the Commission is not alone the Parliament launched the Article 7 TEU procedure against Hungary and the Council adopted the decision which consequently led to the Conditionality Mechanism being activated.\textsuperscript{200}

The interests of the MSs have also changed, both Poland and Hungary have several breaches of the RoL, with Poland having the biggest concerns about the justice system and Hungary wider overarching RoL concerns. The reason for the argument that the interests have changed is supported by the accession conditions. For accession into the Union the fundamental values of

\textsuperscript{195} See ’2.1 European Integration Theory’.
\textsuperscript{196} See ’2.2 The Rule of Law’.
\textsuperscript{197} See ’2. Theory’.
\textsuperscript{198} TEU (n 4) Article 17.
\textsuperscript{199} See ’4. Response Mechanisms to a Backsliding Rule of Law System’.
\textsuperscript{200} ibid.
the EU must be fulfilled and as seen by the RoL Report this is no longer the case. Both MSs have a concerning development of risking the independence of their justice systems, relatively or high levels of corruption, media pluralism and freedom is being threatened, and the system of checks and balances is being undermined.\textsuperscript{201} This shows a change in priorities for the MSs since the time of accession where there was an ambition to join the Union and integrate into the system, accepting all the values and EU law.

However, EIT also focuses on the outcomes of the institutions and this in combination with the principles of the RoL is what this study is focused on. How has the process progressed and what has the institutions done to combat the problems in the concerning MSs? Considering that the same procedures have not consistently been used against both MS, why are there different approaches? And how does this reflect on the intensifying political cooperation when faced with an integration problem with two MSs sliding further away from the founding values of the EU? And lastly what are the possible justifications for the use of different procedures to address the problem? The combination of EIT and the RoL as a theoretical perspective has been used in the analysis below to attempt to answer the above-mentioned questions and motivate why the institutions have used different approaches towards Poland and Hungary.

5.1 The Motivations for the Different Approaches towards Poland and Hungary

As has been described above it has been a long process with several different elements in the EU’s process of addressing the MSs breaching the RoL. This study has started the process from the activation of the RoL Framework regarding Poland since it was the first direct enforcement of the RoL against the MS, and the activation of Article 7 TEU against Hungary since it was the most significant starting point for Hungary. Since these events the EU has adopted several measures to address the problem in both MS and an interesting outcome from the analysis of the different approaches against the two MSs is that the one procedure where the two have the most in common is the Article 7 TEU procedure. It is the only response which has been activated to the same degree against both MSs, while the detail in the procedure differs both are subject to the first part of the Article which is the preventive step in Article 7(1) TEU which entails a determination of the \textit{clear risk of a serious breach}.\textsuperscript{202}

However, even regarding this procedure the activation proceeded differently, the Commission activated the Article against Poland after several years of dialogue under the RoL Framework

\textsuperscript{201} See ‘3. The Rule of Law Situation in Poland and Hungary’.
\textsuperscript{202} TEU (n 4) Article 7(1).
and the Parliament activated the Article against Hungary without the RoL Framework being applied first. Why the Commission did not activate the Framework against Hungary has not surfaced during this study, however, the fact that the Parliament was able to activate Article 7 TEU without the so called ‘pre-article 7 procedure’ may show some efficiency in the response. The reason for this argument is that the Article clearly states that, one third of the MSs, the Parliament, or the Commission may activate the Article. This means that if either of these institutions feel that the others are neglecting their responsibilities of protecting the founding values the other can act and activate the Article. This may be the reason the Parliament activated the Article instead of the Commission, hence that the Parliament felt that the lack of action by the Commission put them in a situation where action had to be taken and therefore the Parliament used the response at their disposal to force attention to the concerning situation.

Moving on to the procedures where the two MSs differ which is the three other responses which have been discussed in the study. Starting with the RoL Framework, the Commission initiated the Framework against Poland in 2016 with the hopes of a resolution through dialogue. The Framework sets up a noble goal of addressing the problem before it escalates and through dialogue and recommendations make the MS concerned realise and resolve the problem. Considering the lack of sanctions in these mechanisms this mechanism realises the EIT perspective of increasing political cooperation with the goal of a common solution to the problem without the implementation of sanctions. As stated earlier the goal of the Framework is noble and works on the presumption of compliance with the principle of sincere cooperation. Article 13 TEU establishes this principle into law and obligates the MSs and the institutions to apply the principle. Considering the principle is a Treaty obligation it should be enforceable. However, as seen throughout the process of the RoL procedures and especially the Framework the goal of establishing sincere cooperation and a solution through the Framework failed. The recommendations were not implemented, and the process continued and eventually the Commission activated Article 7 TEU after 2 years of work under the Framework. However, this did show the start of the Commissions increasing focus on the RoL. Therefore, this mechanism is valuable, even though the Commission did not reach the intended results within the Framework a new framework was established with the sole purpose of protecting the RoL. Furthermore, the mechanism was built on political cooperation and dialogue rather than more

203 See ‘4.1 The Rule of Law Framework’.
204 TEU (n 4) Article 7(1).
205 See ‘4.1 The Rule of Law Framework’.
206 TEU (n 4) Article 13.
207 See ‘4.1 The Rule of Law Framework’.
drastic measures. This shows that there is a trust in the institutions and a will from the MSs to cooperate and work towards a successful outcome from the established mechanisms and institutions.

Moving on with the different procedures one response which has shown some consequences is infringement procedures. The Commission has launched several infringement procedures against Poland, these cases have shown that the CJEU has the authority to and is willing to enforce the RoL. After the Portuguese Judges case the CJEU created a president that the RoL is enforceable in the Court and that it is possible to seek remedies to specific problems where the RoL is concerned. This case marked the beginning of the enforcement of Article 19(1) TEU and Article 2 TEU. This case led to the possibility for the Commission to launch several infringement cases against Poland. These cases made the use of interim measures and penalty payments possible, which was imposing consequences on the MS for breaching the RoL. These cases not only showed the Commission’s commitment to the fight against breaches of the RoL system but also the CJEU’s willingness to join the fight. The CJEU granted the interim measures and ordered Poland to immediately restore the Supreme Court and due to the failure to comply with the measures and the judgments the CJEU also granted the Commission’s request that Poland should pay a daily penalty payment until the orders and judgements were implemented. While these measures are drastic and the consequences harsh the goal was to implement the interim measures and the penalty payment until Poland fulfilled their obligations under EU law. This shows the ambition of the Commission as well as the CJEU to restore the state of the RoL in Poland and cease the implemented measures. This reflects on the use of the RoL Framework with the goal of resolution through dialogue and sincere cooperation, while the Commission and the CJEU was forced to take more drastic measures to encourage Poland to comply with the judgements and cease the breaching behaviour, the institutional will to both protect the founding values, and the integrated functioning of the Union shines through. As stated by the CJEU in their judgements the national courts in the MSs paly fundamental role in the EU legal order and the cooperation between the EU institutions and the national courts build the foundation of the application of EU law. This highlights the intense cooperation between the EU institutions and the MSs which is necessary for the resolution of the concerns within the MSs. Infringement procedures are outside the RoL Framework; however, the procedures have

208 See ’4.2.1 Portuguese Judges C-64/16 ASJP’.
209 See ’4.2.2 Poland’s History in the CJEU’.
210 ibid.
211 See ’4.2 Cases in the Court of Justice of the European Union’.
proven successful in establishing guidelines for the RoL within MSs and establishing obligations in the RoL sphere which may not have been clear before the judgments.

Hungary has not been subject to infringement procedures since the activation of Article 7 TEU however, the Commission did launch an infringement procedure in 2012 related to a new regime for retirement of judges. This was before the Portuguese Judges case and therefore the use of Article 19(1) TEU was not yet utilised. This case shows a beginning of the Commissions concerns regarding Hungary.212 Another judgement which more directly addresses the RoL is the request for preliminary ruling from a Hungarian judge, this instance of a request for a preliminary ruling especially on this subject was a clear standpoint from the requesting judge. After the Supreme Court in Hungary decided that the request was unlawful the judge sent an additional request for the CJEU to rule on if it was lawful for the Supreme Court to make this decision.213 This is significant because this is not as common in Hungary as it is in Poland. Polish judges have sent over 35 requests for preliminary ruling while the case load from Hungary is significantly smaller. If this is due to the Supreme Court’s decision on the unlawfulness of the request which could lead to disciplinary action or if the will within the Polish justice system is greater to address the problem is unclear, however, it may be a combination of the two. What consequently can be concluded from the use of the CJEU regarding the RoL is that is has proven effective to both establish the obligations on MSs in this regard and to realise practical consequences of breaching MSs.

Lastly there is the Conditionality Mechanism which only Hungary has been subject to. This mechanism is also outside the RoL Framework and addresses when violations of the RoL risks affecting the EU’s budget. The mechanism was activated against Hungary in 2022 with the effect being the suspension of Union funding of £6.3 billion.214 This is, like the infringement proceedings against Poland, the most drastic measure taken with consequences for the MS. This mechanism while being directed at the EU budget still possesses real power to encourage MSs to comply with their obligations under the RoL. One big difference between the consequence faced by Poland compared to Hungary is that Poland has always been either ordered to stop an active behaviour or to pay a penalty payment which entails some level of compliance with the judgements and orders. However, this mechanism made sure the consequence was felt directly by freezing assets which Hungary would have received which means that Hungary has felt the

212 See ’4.2.4 Hungary’s History in the CJEU’.
213 ibid.
214 See ’4.3 The Conditionality Mechanism’.
consequence of their actions in a more direct manner than Poland which was obligated to implement the consequence themselves. However, not unlike the Article 7 TEU procedure, the Framework and infringement proceedings this mechanism also encourages political cooperation. The funding has been frozen pending implementation of measures to address the RoL risks to the EU budget and can then be received after successful implementation.

As seen above the differences between the two concerning MSs greatly outweigh the similarities even though the two MSs have a lot in common when it comes to the breaches of the RoL. Considering that they are both subject to the Article 7 TEU procedure an easy misunderstanding would be that the MSs should be subject to the same procedures. However, the different procedures have different goals and severity levels, and when analysing the RoL Report closer the two MSs differ in several substantial ways which may motivate the different approaches towards them.

Trying to understand the EU’s reasoning behind the different approaches towards the MSs is not a completely clear path. However, there are connections to be found between the responses used and the RoL Report where the concerns of the Commission are found.

A good starting point is the Commission’s comprehensive work with infringement procedures regarding Poland. Poland’s main issue regarding the RoL is the independence of the judiciary, and this can be seen throughout the Report. This is further highlighted through the cases in the CJEU, two out of the three cases addressed in this study directly concern the independence of the courts in Poland and the last case regards the disciplinary regime for judges which can also be directly connected to the independence of the judiciary. However, despite the independence of the judiciary being the biggest problem in Poland the Polish judges have shown some resistance. Polish judges have made use of the preliminary ruling procedure on over 35 occasions in relation to the RoL this shows that the Polish judges value the CJEU’s opinion and recognise their authority. Therefore, it may be the best option to fight fire with fire in the case of Poland and making use of the CJEU to address the concerns with the judiciary in Poland. Comparatively with Hungary which has almost no requests for preliminary rulings and almost 10 more judgements pending implementation from the ECtHR, Poland seems to respect the authority of international courts more than Hungary. This may also be the reason the

215 See ‘3.1 The Rule of Law in Poland’.
216 See ‘4.2.2 Poland’s History in the CJEU’.
217 See ‘4.2.3 Requests for Preliminary Rulings’.
218 See ‘3.3 Comparison of the Concerns Raised by the Commission’.
Commission has chosen not to use this approach regarding Hungary. Hungary has continuously
distanced themselves from international courts both by declaring a request for preliminary
ruling unlawful and through not implementing judgements from the ECtHR. It is also worth
noting that Poland’s disciplinary chamber attempted to make requests for a preliminary ruling
subject to potential disciplinary action,\(^{219}\) however the Polish judges have shown resilience and
have, despite this, requested preliminary rulings which is different from Hungary where there
is significantly less. For these reasons it may be a tactical decision by the Commission to make
use of the CJEU in the case of Poland where there is respect for the institution within the system
and not use this approach regarding Hungary considering the significantly shorter history in the
CJEU and the number of judgements pending implementation.

The RoL Report can also shed some light on why the Conditionality Mechanisms has been used
against Hungary but not Poland. The Conditionality Mechanism was created to protect the EU
budget from RoL related threats.\(^{220}\) An example of such a threat could be corruption. As seen
in the RoL Report corruption is a significant concern in Hungary, the Report shows a
concerning picture where Hungary scores 26\(^{th}\) in the Union and 73\(^{rd}\) globally. When examining
the concerns raised by the Commission several more largescale economic areas face serious
corns regarding corruption, such as lack of a detection strategy and enforcement of foreign
bribery and concerns regarding asset declarations. Furthermore, there is a lack of transparency
and judicial review in high-level corruption cases.\(^{221}\) This can understandably lead to questions
as to how the EU budget is implemented. The Commission has stated that a reason for activating
the Mechanism is that the authorities which implement the budget are of concern. Considering
the assessment of the Commission in the Report this is not unjustified, the widespread lack of
transparency and lack of enforcement of corruption, justifies the activation of the
Mechanism.\(^{222}\) There is however another aspect to this as well which may explain why the
Commission choose to send the proposal to the Council and choose the way of the
Conditionality Mechanism to enforce the RoL in Hungary.\(^{223}\) As described above Hungary has
an implementation problem. There is a significant number of judgements pending
implementation, and when a Hungarian judge choose to request a preliminary ruling the
Supreme Court in Hungary ruled that the request was unlawful, furthermore there has also been
significantly less requests for a preliminary ruling from Hungary. This shows that measures

\(^{219}\) See ’4.2.2 Poland’s History in the CJEU’.
\(^{220}\) See ’4.3 Conditionality Mechanism’.
\(^{221}\) See ’3.2.2 Anti-Corruption Framework’.
\(^{222}\) ibid.
\(^{223}\) See ’4.3 The Conditionality Mechanism’.
which entail commitment by Hungary may not be effective, therefore an action which does not require any compliance from Hungary like freezing funding may be more effective for the goal which is to encourage Hungary to comply with the obligations under the RoL. By using the Conditionality Mechanism, the EU withholds payments pending implementation of the requirements set up by the Mechanisms and thereby Hungary instantly feels the effects, rather than trying to convince them to implement judgements. The Conditionality Mechanisms is a drastic measure and while Poland also faces corruption issues it is not to the same extent as Hungary. Comparatively Poland scores 13th in the Union and 42nd globally\textsuperscript{224} which is a significant difference from Hungary. This shows that there are motivations for the different approaches and that the EU institutions may have chosen a tactical approach towards the MSs and are attempting to address the problem in the most tactical approach regarding each MS.

\textsuperscript{224} See ‘3.1.2 Anti-Corruption Framework’.
6. Conclusion

Returning to the research questions the breaches and the responses and how they are different and similar has been analysed in depth above and while why the differences exist has also been addressed it is worth going back to the last question. This assessment can be seen when combining the assessment in the RoL Report with the actions taken by the EU in response to the RoL backsliding in the MSs. This assessment shows that there is a clear correlation between the actions taken and the violations in the Report. Furthermore, there is also a connection between the level of cooperation and the actions taken. While Poland also has an implementation problem the judges in Poland have shown resilience and are attempting to use the CJEU to protect their judicial independence, which can motivate the use of the CJEU rather than an instrument like the Conditionality Mechanism. The opposite goes for Hungary, the resilience has not been seen in the same way in Hungary which indicates that other actions with a stronger encouraging power is needed, and hence the Conditionality Mechanism may be more appropriate than infringement procedures. Another conclusion which can be made is that the so called ‘nuclear option’ is not so much nuclear however, it does have political value. The Article 7 TEU procedure has the reputation of being the ‘nuclear option’ and while it may not practically have that power it does raise awareness of the problem since the Article would not have been activated unless the problems in the MSs was serious. Lastly, the one trend which is consistent with all the responses addressed in this study is that they are all temporary until the necessary changes have been made for the MSs to comply with their obligations. All measures are formed to encourage the MSs to implement the necessary actions to remedy the concerning RoL situations in the MSs. This also speaks to the political cooperation which is the final goal of these measures to reintegrate the MSs. Furthermore, as has been stated throughout the study the national courts and authorities play an important role in the EU system and they are all part of the checks and balances of the EU institutional system which means that a threat to the RoL in one MS is a threat to the RoL in the Union. Therefore, it is in the EU’s interest to encourage these MSs to comply with the obligations and restore the EU institutional system.

After looking at the results from the study and the connection between the breaches by the MSs and the responses used by the EU institutions, it further highlights the interlaced connection between the RoL and EIT. The RoL is one of the founding values of the EU and ever since the European project was started it has played a significant role in European integration and recent
years have continued to show its importance. The EU has established a comprehensive system of promoting the RoL and responding to RoL breaches within the Union. Even though Poland and Hungary have shown a development which illustrates a step back from the institutional system though the breaches of the RoL, the EU has responded with several mechanisms to address the issues facing the institutional system of the EU. The institutions have attempted to find a solution where the two MSs once again can cooperate fully with the institutional system of the EU. While the concerns may not be solved yet all mechanisms utilised have shown the will to restore and promote the system of governance through law which the RoL is built on and ensure the RoL throughout the Union.

To conclude what has been shown above is a motivation of why the EU has chosen different approaches towards the MSs even though the MSs are breaching the same principle. The RoL is a wide and comprehensive principle and covers the entire political system in a MS as well as within the EU and when the MSs have different concerns within the RoL it is necessary to find the most effective resolution to the problems in that MS, and therefore it may differ. While Poland and Hungary are similar in several breaches they differ in the severity and therefore different mechanisms may be more or less effective. If these approaches have been the right decisions is not yet possible to see since the concerns remain, however it does show a tailored approach towards the MSs and only time will tell if this was the right way to handle the problem.

As a last result of this study what has been found is an intricate and specified way of handling the breaching MSs based on the breaches committed and an increase in severity of the consequences for both MS. If this will prove effective or not is subject to further research as for now the EU is doing comprehensive work to address the problems and a need from the MSs to comply with the decisions, judgements, and recommendations from the EU institutions is necessary to find a solution to the RoL related problems within both the MSs and the EU.
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