

DEFENDING DEMOCRACY: WHAT EXPLAINS THE EU'S RESPONSE TO BACKSLIDING MEMBER STATES?

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Loren Vermeire

ABSTRACT

Over the course of the past decade, western democracy has started to gradually regress. This regression is usually a consequence of deliberate actions taken by authoritarian politicians. This process is often referred to as democratic backsliding. The European Union was founded on basic principles of democracy, the rule of law and human rights, enshrined in the founding treaties. Aspiring member states need to adhere to these values to be considered for accession. The EU's foundation did not foresee that member states could start undoing democratic checks and balances after accession, however. But autocratic governments like Fidesz in Hungary and Law and Justice in Poland have proven the existence of democratic backsliding within the European Union over the past decade. Consequently, the EU has been developing responses to these issues, but the incremental nature of processes of democratic backsliding has not made this easy. The EU institutions have slowly become more aware of existing threats to democratic institutions in member states and thus slowly developed the way democratic backsliding is addressed. These developments are also reflected in a growing body of literature on democratic backsliding in the European Union. This literature has suggested recent policy shifts in the EU's approach to backsliding member states. This research attempts to add to the literature by focusing on the research question: 'What explains the European Union's response to backsliding member states?'. With this research aim in mind, this thesis applies a theoretical framework to the logic guiding the EU's actions and qualitative research methods including a multiple-case study analysis of the EU's response to democratic backsliding in Hungary and Poland. The reasoning behind the EU's approach is further explored through interviews with EU officials and members of civil society. Four explanatory factors guiding the EU's response to democratic backsliding in member states are identified: (1) legal and procedural mechanisms; (2) (inter)institutional dynamics within the EU; (3) political considerations; and (4) the influence of the member states.

The analysis of the response to Hungary and Poland shows how the EU steps up its approach if the issues related to democratic backsliding worsen. The theoretical framework is used to explain how the EU is both bound and constrained by its own regulation, how compliance is incentivised through financial and legal consequences and how the EU approaches different member states according to the same principles. The analysis shows that the EU has no unified approach to democratic backsliding, but a fragmented one across the European Commission, the European Parliament and the Council of the European Union. The political nature of these institutions brings politics into the approach. Lastly, the member states, including the ones that are backsliding, are often represented in these institutions and can weigh in on the decisions made against backsliding member states. This policy issue is high on the EU's agenda as it pertains to its core values, but its nature is very complex. Therefore, an integrated and unified approach seems hard to attain.

Key words: Democracy; Democratic backsliding; European Union; rule of law; institutionalism; Hungary; Poland

SAMENVATTING IN HET NEDERLANDS (SUMMARY IN DUTCH)

Enkele westerse democratieën ondergingen het voorbije decennium een graduele achteruitgang. Deze achteruitgang is doorgaans een gevolg van doelbewuste acties van autoritaire politici. Dit proces wordt vaak benoemd met de term *democratic backsliding*. De Europese Unie is gesticht op basis van de principes van democratie, de rechtstaat en mensenrechten, vastgelegd in de fundamentele verdragen. Aspirant-lidstaten moeten deze principes eren alvorens EU-lidmaatschap mogelijk is. De stichting van de EU voorzag echter niet dat lidstaten de democratische *checks* en *balances* ongedaan zouden maken na toetreding. Maar autocratische regimes zoals Fidesz in Hongarije en Recht en Rechtvaardigheid in Polen hebben het bestaan van *democratic backsliding* in de Europese Unie bewezen gedurende het laatste decennium. De EU heeft bij gevolg reacties ontwikkeld op deze problemen, maar de incrementele aard van *democratic backsliding* maakt dit complex. De EU werd langzaamaan beter bewust van de bestaande dreigingen voor de democratische instituties van haar lidstaten en ontwikkelde stap voor stap de manier waarop *democratic backsliding* wordt aangepakt. Deze ontwikkelingen zijn ook gereflecteerd in de groeiende hoeveelheid literatuur over *democratic backsliding* in de Europese Unie, waarin een recente verandering in de EU's aanpak van *backsliding* in lidstaten wordt gesuggereerd. Dit onderzoek poogt om bij te dragen aan de literatuur door te focussen op de onderzoeksvraag: 'Wat verklaart de reactie van de Europese Unie op *backsliding* in lidstaten?'. Voor dit onderzoeksdoel hanteert deze thesis een theoretisch kader om de logica die de acties van de EU aanstuurt te verklaren en kwalitatieve onderzoeksmethoden zoals een *multiple-case-studie*analyse van de reactie van de EU op *democratic backsliding* in Hongarije en Polen. De redenen achter de aanpak van de EU wordt verder onderzocht aan de hand van interviews met EU-functionarissen en leden van het maatschappelijk middenveld. Vier verklarende factoren die aansturend zijn voor de reactie op *democratic backsliding* in lidstaten worden geïdentificeerd: (1) wettelijke en procedurele mechanismen; (2) (inter)institutionele dynamieken binnen de EU; (3) politieke overwegingen; en (4) de invloed van de lidstaten.

De analyse van de reactie tegenover Hongarije en Polen toont aan hoe de EU haar aanpak intensiveert als de problemen gerelateerd aan *democratic backsliding* escaleren. Het theoretisch kader wordt gebruikt om te verklaren hoe de EU zowel gebonden als gelimiteerd is door haar eigen regulatie, hoe de EU naleving stimuleert door middel van financiële en juridische gevolgen en hoe de EU verschillende lidstaten behandelt op basis van dezelfde principes. De analyse legt bloot dat de EU geen uniforme aanpak heeft voor *democratic backsliding*, maar eerder een gefragmenteerde aanpak gespreid over de Europese Commissie, het Europees Parlement en de Raad van de Europese Unie. De politieke aard van deze instituties brengen politieke overwegingen in het spel. Tot slot zijn de lidstaten, inclusief degene in een proces van *democratic backsliding*, vaak gerepresenteerd in deze instituties en kunnen ze dus wegen op beslissingen die gemaakt worden tegenover de lidstaten. *Democratic backsliding* staat hoog op de beleidsagenda van de Europese

Unie aangezien het met fundamentele waarden te maken heeft, maar is ook zeer complex. Dat blijkt een geïntegreerde en uniforme aanpak te bemoeilijken.

Kernwoorden: Democratie; *Democratic backsliding*; Europese Unie; rechtstaat; institutionalisme; Hongarije; Polen

PREFACE

This Master's dissertation focuses on the European Union's response to democratic backsliding in EU member states. It was written over the 2023-2024 academic year and serves as the conclusion to my Master of Science in Public Administration and Management at Ghent University.

Some expressions of gratitude are in order:

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- *Loren Vermeire (June 2024)*

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LIST OF USED ABBREVIATIONS

Art.	Article
CEE	Central and Eastern European
CEU	Central European University
CERV	Citizens, Equality, Rights and Values Programme
CJEU	Court of Justice of the European Union
CPR	Common Provisions Regulation
CSO	Civil Society Organisation
CSR	Country Specific Recommendation
CVM	Cooperation and Verification Mechanism
DG	Directorate-General
ECR	European Conservatives and Reformists
EPP	European People's Party
EU	European Union
EUCO	European Council
FRA	European Union Agency for Fundamental Rights
JURI Committee	European Parliament's Committee on Legal Affairs
LIBE Committee	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
NGO	Non-Governmental Organisation
OLAF	European Anti-Fraud Office (<i>Office Européen de Lutte Antifraude</i>)
Perm reps	Permanent Representatives
PiS	Law and Justice (Party) (<i>Prawo i Sprawiedliwość</i>)
QMV	Qualified Majority Voting
RRF	Recovery and Resilience Facility
RRP	Recovery and Resilience Plan
S&D	Progressive Alliance of Socialists and Democrats
Sec-Gen	Secretariat-General
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
V-Dem	Varieties of Democracy

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1 INTRODUCTION

This research will aim to explain the EU's response to backsliding member states and the logic behind this response. This introduction will explain the practical and theoretical relevance of this research aim. Additionally, it will outline the main research question and the overall structure of this research in trying to answer this question.

1.1 Problem definition

1.1.1 Practical relevance

The gradual erosion of democratic institutions and norms, has emerged as a significant global issue, affecting countries of various economic statuses across various regions. Over the last decade, the liberal democracies of many western states, which were once thought to be immune to decline, have faced increased challenges and attacks by politicians blatantly denouncing institutional and democratic safeguards (Mounk, 2018). Such politicians are often seen as populists. Leaders disregarding democratic institutions have seen increased success in elections with numerous examples from Donald Trump in the United States to Narendra Modi in India. In the European Union Hungary's Viktor Orbán and Poland's Jarosław Kaczyński are seen as prime examples of democratically elected leaders undermining democracy and the rule of law (Mounk, 2018).

The preservation of democracy and the principles of the rule of law is as relevant as ever in the European Union. The EU was founded on principles rooted in democracy, the rule of law and human rights for all its citizens. EU member states openly opposing these principles threatens the legitimacy, integrity and cohesion of the European Union as whole (Sitter & Bakke, 2021). Euroscepticism and the success of politicians openly opposing the EU has created discourses suggesting that the EU needs to take measures to preserve itself as these are direct threats to its very existence (Kaeding et al., 2020). Political instability can also undermine the EU's ability to act in other policy domains. For example, the rise of populist leaders threatens economic integration and cooperation within the EU, essential for sustained growth. Therefore addressing these issues is also crucial for maintaining economic stability and growth across the Union (Mosley, 2023).

This is reflected in the EU's policy, and it has active plans to preserve European democracy. On December 12th, 2023, the European Commission presented its 'Defence of Democracy Package'. This action plan positions the preservation of democratic values and institutions as a political priority and aims to strengthen democratic resilience by "promoting free and fair elections", "strengthening media freedom" and "countering disinformation" (European Commission, n.d.-d, para. 6). The Defence of Democracy Package

also puts citizen and civil society participations at the forefront and addresses the EU citizens' growing disillusionment with the EU's role as protector of democracy. This shows that the issues discussed in this research are high on the EU's policy agenda (European Commission, 2023b). However, the European Commission and the European Parliament have not seen eye to eye in the approach to countering democratic regressions, and the European Parliament filed a court case in March 2024 over a Commission decision to unfreeze funds for Hungary, a prime backsliding member state (Vela & Chiappa, 2024). The 2024 European elections will be key in the EU's discourse on these issues for the coming years. But with the success of right-wing and anti-democratic politicians at the national level, there has arguably never been more uncertainty about the possible outcome of these elections.

By examining how the EU responds to democratic backsliding in its member states, this research could provide valuable insights into safeguarding democracy within the Union. Understanding the underlying factors that influence the EU's responses can inform the EU's policy development and implementation in its aim of being a resilient European Union that remains true to its core values and principles (European Commission, n.d.-d).

1.1.2 Theoretical relevance

Research on democratic backsliding has been developing over the past decade and is continuing to do so. The term democratic backsliding is often used without being properly conceptualised according to Wolkenstein (2023), who wanted to fill this gap by conceptualising democratic backsliding as the regression of democratic institutions, norms, and practices within a political system. Though, as will be discussed in the conceptual framework, conceptualisations of democratic backsliding are contested at times (Wolkenstein, 2023).

According to Kreuder-Sonnen (2018, p. 452) the EU "has taken an authoritarian turn in the past crisis decade, which needs to be systematically addressed in EU studies". The existing literature on democratic backsliding in the European Union covers various aspects. Some literature focuses on occurrences of democratic backsliding within the European Union (for example Bakke & Sitter, 2022; Bernhard, 2021; Kelemen, 2017; Lindberg, 2018; Mechkova et al., 2017; Nakai, 2023; Sitter & Bakke, 2021). Other literature focuses on democratic backsliding in specific member states, such as the study by Bernhard (2021) on Hungary and Poland, the study by Iusmen (2015) on Romania or the study by Hanley & Vachudova (2018) on the Czech Republic. Other scholars such as Castaldo & Memoli (2024), Meyerrose (2023) and Sedelmeier (2024) focus on the causes of democratic backsliding and the reasons for differences between EU member states. Studies like the one by Winzen (2023) focus on consequences of democratic backsliding within the EU. Much of this literature is very recent and the body of literature still growing.

This research will focus on the side of the EU's response to backsliding in member states, so it is important to acknowledge the existing literature on the EU's response to backsliding member states. This body of literature is also still growing and is less developed compared to other aspects of backsliding in the European Union. Holesch & Kyriazi (2022) focus the role of member states in the EU's ability to respond to democratic backsliding. Other literature focuses on explaining and evaluating what the EU has done so far in response to backsliding member states without going into the reasoning behind policy choices, such as Durakçay (2023) on the response to Hungary, Pech et al. (2021) on the response to Poland and Raube & Costa Reis (2021) on the EU's response to backsliding in the context of turbulent times plagued by different crises. Blauburger & Kelemen (2017) and Sedelmeier (2017) focus on the existing judicial and political safeguards against democratic backsliding respectively, but their research is dated by now. Theuns (2020) outlined the differences between possible political and economic responses that the EU could use to address backsliding. Other scholars focus on what they the EU should do (differently), such as Olsen (2023b) who outlines all the possible avenues the EU can take in this response and Theuns (2022) who calls for an expulsion mechanism against backsliding member states.

There is some literature attempting to explain the reasoning and logic behind the EU's response to democratic backsliding, but most studies focus on specific factors that play a part in shaping the EU's response. Wunsch et al. (2023) discuss the role of different understandings of democratic backsliding in the EU's political choices. Wunsch & Chiru (2024) focus on the role of polarisation in the European Parliament, Schlipphak et al. (2023) focus on blaming strategies and their effectiveness, Priebus (2022) and Oleart & Theuns (2023) focus on the role of the European Commission, and Meijers & van der Veer (2019) and Herman et al. (2021) focus on the role of the Members of the European Parliament.

Recently, there have been some studies explaining the EU's (general) approach to backsliding member states. Kelemen (2024) suggests that while the EU has taken a more assertive approach to backsliding member states recently, its reluctance and failure to act sooner has made it increasingly difficult to contain backsliding in member states such as Hungary. Blauburger & Sedelmeier (2024) analysed the EU's sanctioning of democratic backsliding in Hungary and Poland and focused on the policy change in this approach, suggesting that the EU has been sanctioning democratic backsliding more often in recent years. This change was also acknowledged by Kelemen (2024). Blauburger & Sedelmeier (2024) use their finding to suggest that this policy shift should be attributed to electoral regression of democratic institutions, norms, and practices within a political system. Hernández & Closa (2024) also analysed the shift into the EU's policy approach, but they attribute it to the different stances Hungary and Poland have taken after Russia's invasion of Ukraine. According to Hernández & Closa (2024), this reflects that the EU has prioritised the response to the war in Ukraine over responding to democratic backsliding within the EU.

The studies into the EU's response to democratic backsliding are all very new and their number is limited compared to other aspects of democratic backsliding. The literature often covers different aspects of the EU's response separately or covers the response to Hungary and Poland specifically. Sitter & Bakke (2021) highlight that there is no clear conceptualisation of the EU's response to backsliding member states and the logic that guides this because it is a new phenomenon that involves deliberate steps member states and their governments take, which were not foreseen when the EU was founded. Essentially, Sitter & Bakke (2021) argue that until not so long ago, the idea that member states would regress from their democracies after they had become democratic enough to join the EU seemed highly unlikely at best and was not foreseen in the academic literature either. The existing literature will be discussed in more detail in the conceptual framework (section 2).

The situation concerning democratic backsliding in the European Union is constantly developing, as is the literature. I use the arguments presented in this section to argue that there exists a lack of a clear conceptual framework and a lack of research explaining the factors and logic that explain the EU's response to backsliding member states. Section 1.2 will expand on this by outlining the main research aim, the central research question, and how answering this research question will be approached in this thesis.

1.2 Research aim and outline

Following the practical and theoretical relevance, the aim of this research is to analyse how the European Union responds to democratic backsliding in EU member states and the logic and factors that guide this response. Specifically, this research aims to answer the following research question:

What explains the European Union's response to backsliding member states?

This thesis will be structured into different parts in its aim to answer this research question.

1. **Conceptual framework:** Chapter two of this thesis will perform a literature review and desk research to (a) establish a conceptual framework of democracy and democratic backsliding, (b) establish how these concepts can be applied to the EU context, (c) map out the EU's available tools to address democratic backsliding, and (d) give an overview of the existing academic literature on the EU's response to democratic backsliding to further reinforce the identified research gap.
2. **Theoretical framework:** Chapter three of this thesis will establish a theoretical framework to help answer the research question.
3. **Methodology:** Chapter four of this thesis will explain the methodology that is used to answer the research question in chapter five and the possible implications of this methodology.

4. **Case studies of the EU's response to backsliding in Hungary and Poland:** The first part of chapter five will perform a multiple-case-study analysis to map out the EU's response to backsliding in Hungary and Poland. The aim of this is to compare these cases and establish patterns in the EU's response.
5. **Content analysis of interviews:** In the second part of chapter five, this research employs interviews to gain a deeper understanding of the logic behind the EU's decisions. The content of these interviews is analysed to establish further themes in the EU's response to backsliding member states.
6. **Discussion:** The discussion section in chapter six will outline the implications of the findings and how these relate to the established conceptual and theoretical frameworks.
7. **Conclusion:** The final conclusion in chapter seven will answer the research question, give an overview of how this thesis established the answer(s), outline possible limitations of this research and give some recommendations for further research.

2 CONCEPTUAL FRAMEWORK

2.1 Conceptualising democracy

Before being able to conceptualise the term democratic backsliding, it is important to have a conceptual understanding of democracy. A country cannot be considered a democratic backslider if it hasn't achieved a certain level of democracy first (Carothers & Press, 2022). European Union countries are typically described as having liberal democracies (Rittberger, 2010) or liberal constitutional democracies (Law, 2017; Negretto & Sánchez-Talanquer, 2021).

The European Union uses a form of political conditionality to promote liberal democracy to aspiring member states. This means that countries have to conform to the EU's idea of liberal democracy if they want to be part of the European Union (Schimmelfennig, 2005). Liberal democracies emerged in Europe (and other parts of the world) through a process of constitutional reforms (Negretto & Sánchez-Talanquer, 2021). To start, a definition of democracy itself can give a better understanding for the concepts that will follow. Dahl (1971, p. 2) sees democracy as a polyarchy and famously describes it as a political system which is “completely or almost completely responsive to all its citizens”. More recently, Merkel & Lührmann (2021, p. 870) define democracies as “as political regimes that were established in free and fair multi-party elections taking place in a context where freedom of speech, association, and universal suffrage were guaranteed”. Liberal democracies come with the addition of “institutionalized checks and balances that check the power of those who govern” (Merkel & Lührmann, 2021, p. 870).

According to Hayek (1982, p. 1), the main aim of liberal constitutionalism is to “provide institutional safeguards of individual freedom”. Constitutionalism attempts to secure individual liberty by limiting the government (Hayek, 1982). Vanberg (2011) adds that liberal constitutionalism is complementary to democracy, because democracy can be seen as a cooperative of sovereign citizens, while liberal constitutionalism focuses on these sovereign citizens' individual liberty. According to Corradetti (2022), liberal constitutional democracies have fundamental rights, freedoms and values embedded in the constitution. Liberal constitutional democracies are consolidated “on the basis of three criteria: elections, freedom of speech, and freedom of association” (Corradetti, 2022, p. 2). However, these criteria seem limited. Monciunskaitė (2023) adds respect for minorities as another important criterium of a liberal constitutional democracy. These criteria lead to a healthy civil society and a stable political system which facilitates fair democratic elections (Monciunskaitė, 2023). Judicial independence is also crucial in the defence of rule of law and democracy (Bárd, 2021). Next, media freedom is an important aspect of consolidating an anti-corrupt democracy (Bhattacharyya & Hodler, 2015), especially as populists seek to attack media freedom and exploit the use of online misinformation for political gain (Vachudova, 2020). Lastly, Ramanujam & Wijenayake (2022) argue that upholding democracy goes hand in hand with

protecting academic freedom because rule of law principles are necessary to ensure university autonomy, while this autonomy in turn can support the rule of law. This can be seen as a “mutually reinforcing relationship between upholding the rule of law and protecting the autonomy of universities” (Ramanujam & Wijenayake, 2022, p. 28).

In recent years, scholars such as Loughlin (2019) and Ragazzoni (2022) have discussed the challenges faced by liberal constitutional democracies. The decline of liberal constitutional democracies globally, is exacerbated by socioeconomic inequalities and the rise of populist movements. The Covid-19 pandemic has further exposed vulnerabilities within democratic systems (Ragazzoni, 2022). Loughlin (2019) argues that constitutional democracy is experiencing a decline due to various interconnected factors. Globalisation has led to the rise of transnational regulatory institutions, diminishing the ability of nation-states to regulate their own economies and undermining national self-determination. This has eroded constitutional democracy by insulating officials from traditional forms of accountability and designing rules to protect market arrangements from political interference. Additionally, trends such as the weakening of legislatures, political parties, and electoral participation rates contribute to the erosion of representative democracy. Economic inequality, demographic changes, and the rise of populist movements further exacerbate these challenges (Loughlin, 2019). Corradetti (2022) agrees that turbulent times plagued by different crises add to this decline because they lead to loss of trust, political polarisation, economic inequality, and governing failures.

2.1.1 Democracy and democratic values in the EU context

In the previous section we identified (1) a healthy civil society; (2) stable political parties facilitating democratic elections; (3) judicial independence; (4) media and academic freedom; and (5) respect for minority rights as the components of a liberal constitutional democracy (Bárd, 2021; Bhattacharyya & Hodler, 2015; Corradetti, 2022; Monciunskaitė, 2023; Ramanujam & Wijenayake, 2022). According to Monciunskaitė, (2023, p. 14): “the fundamental values the EU is founded on directly corresponds to the essence of liberal constitutional democracy”. The EU member states’ commitment to liberal democracy is embedded in the Treaty on European Union (TEU). The fundamental values of the EU can be found in Article 2 TEU, which reads:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” (Treaty on European Union, 1992, p. 19).

So the values explicitly mentioned in this article are: (1) respect for human dignity; (2) freedom; (3) democracy; (4) equality; (5) the rule of law; and (6) respect for human rights, including the rights of minorities. These values are explicitly promoted by the EU institutions along with the promotion of a European identity (Oshri et al., 2016). Additionally, according to the Copenhagen Criteria, an aspiring member state or a potential candidate country must attain stability in institutions ensuring democratic governance, adherence to the rule of law, respect for human rights, and the safeguarding of minorities. This means that in order to be able to backslide, an EU member state must be a liberal democracy first (Sitter & Bakke, 2021).

2.2 What is democratic backsliding?

Before being able to assess the European Union's response to democratic backsliding in EU member states, it is important to have a clear understanding of what democratic backsliding is.

The term 'democratic backsliding' has been widespread in the literature in the last decade (for example Bruszt, 2015; Kreuder-Sonnen, 2018; Mechkova et al., 2017; Riedel, 2017; Sedelmeier, 2014). But some scholars argue that the term lacks a clear conceptualisation (Gora & de Wilde, 2022; Waldner & Lust, 2018; Wolkenstein, 2023). As Bermeo (2016, p. 5) states, "The term *democratic backsliding* is frequently used but rarely analyzed. (...) Part of the problem is the term's extraordinary breadth". There seems to be no clear consensus on the definition of democratic backsliding (Sitter & Bakke, 2021). Wolkenstein (2023) expanded on this, attempting to conceptualise a general understanding of democratic backsliding that is applicable in the different institutional and academic contexts in which the term is used. The term democratic backsliding itself implies a regression moving backwards. Becoming more democratic is seen as moving forward and becoming less democratic is seen as moving backwards (Wolkenstein, 2023). It should be noted that this is a typical Western or Eurocentric view, as democracy is not a priority in every country across the globe. This 'eurocentrism' is sometimes criticised (Sundberg, 2009). For example, Isakhan (2016, p. 67) views contemporary political science and history as having "exclusively Western roots" and calls for the broadening of the narrative of democracy and its history.

In their analysis of the literature on democratic backsliding, Gora & de Wilde (2022) identified three different strands of democratic backsliding literature. They called these three strands (1) "rule of law backsliding", (2) "a deterioration of political discourse", and (3) "a decline in participation" (Gora & de Wilde, 2022, p. 346). 'Rule of law backsliding' a term that is often used as a synonym for democratic backsliding (Daly, 2019) and it will be treated as such in this thesis to avoid confusion. So, the conceptualisation of democratic backsliding in this section also applies to the term rule of law backsliding.

Wolkenstein (2023, p. 268) defines democratic backsliding as involving “either the suspension of some or all of those fundamental constitutional rights that correspond to the basic rights categories (i–iv), or that the exercise of those rights is obstructed without them being suspended”. The basic rights categories Wolkenstein refers to are the four categories of basic rights by Habermas (2001):

- “(i) basic rights that result from the autonomous elaboration of the right to the greatest possible measure of equal individual freedom of action for each person;
- (ii) basic rights that result from the autonomous elaboration of the status of a member in a voluntary association of legal consociates;
- (iii) basic rights that result from the autonomous elaboration of each individual’s right to equal protection under the law, that is, that result from the actionability of individual rights
- (iv) basic rights (whatever their concrete content) that emerge from the autonomous elaboration of the right to an equal opportunity to participate in political law-giving” (Habermas, 2001, p. 777).

Wolkenstein (2023) used this definition to identify two types of democratic backsliding. These two types are rights-suspending and rights-obstructing democratic backsliding. **Rights-suspending democratic backsliding** refers to a situation where some or all fundamental constitutional rights are suspended, typically by political actors, in response to perceived pressing social or political issues. This suspension is often justified by portraying the situation as an emergency requiring exceptional and drastic measures (Wolkenstein, 2023). These measures are usually framed within the concept of ‘emergency politics’, where temporary suspension of rights is seen as necessary to address a crisis (Schmidt, 2022). The critical test for determining whether rights suspensions constitute democratic backsliding lies in whether they are truly temporary and justified by the severity of the situation, or if they represent a more permanent erosion of rights and an abuse of executive authority (Wolkenstein, 2023). **Rights-obstructing democratic backsliding** occurs when political changes, often introduced incrementally, make it harder or even impossible for certain groups or individuals to exercise their constitutional rights, without directly suspending those rights. This form of backsliding is characterised by the successive introduction of new constitutional norms that, when combined, significantly restrict the exercise of fundamental rights (Wolkenstein, 2023).

Gora & de Wilde (2022), Waldner & Lust (2018) and Wolkenstein (2023) all conceptualise democratic backsliding as a slow and gradual process that happens over time. During this process, democratic checks are eroded over time through almost insignificant steps. The idea is that these steps, by themselves, can go unnoticed, but over time they lead to more authoritarian and less democratic regimes through the empowerment of the executive body of government. This seems to be a largely accepted conceptualisation of democratic backsliding in the academic literature (Cianetti & Hanley, 2021; Gora & de Wilde, 2022; Haggard & Kaufman, 2021; Jee et al., 2022; Karolewski et al., 2023; Nakai, 2023; Sebők et al., 2023;

Waldner & Lust, 2018). This conceptualisation of democratic backsliding implies that democratic backsliding is an intended consequence of deliberate measures, such as the centralisation of political power or influencing the electoral process, as opposed to being an unintended consequence of other policy measures. Democratic backsliding happens through the deliberate undermining of liberal democracy (Sitter & Bakke, 2019). Sitter & Bakke's (2019, p. 5) definition of democratic backsliding as "*a process of deliberate, intended actions on the part of a democratically elected government, designed to gradually undermine the fundamental rules of the game in an existing democracy*" is therefore appropriate for this research.

It is important to note that a country cannot be considered a democratic backslider if it hasn't achieved a certain level of democracy first. There needs to be a certain level of democracy before a process of democratic backsliding can take place (Carothers & Press, 2022). Wolkenstein (2023) warns that attempts to measure democratic backsliding contain the risk over overgeneralisation of what can be seen as democratic backsliding. For example, democratic backsliding differs from what Greskovits (2015, p. 28) calls "hollowing of democracy". The main difference lies in the fact that the hollowing of democracy is the decline in the functioning and legitimacy of democratic institutions that can happen for a variety of different reasons such as growing disillusionment and disengagement of citizens. Democratic backsliding on the other hand involves a deliberate and systematic erosion of democratic norms and practices. So the fact that democratic backsliding happens deliberately is the key difference (Greskovits, 2015).

In practice democratic backsliding can manifest itself in different ways. Bermeo (2016) identifies 6 varieties of democratic backsliding. (1) A classic coup d'état is an illegal attempt to overthrow a sitting (executive) government, usually through military force. (2) An executive coup occurs when a freely elected chief executive head of state suspends the constitution and establishes a dictatorship for themselves. (3) Open electoral or vote fraud is the rigging or manipulation of votes on election day. (4) A promissory coup is when the coup is presented as a temporary intervention coupled with the promise to hold elections. But these coups are rarely followed by swift and fair elections. (5) Executive aggrandisement occurs when elected government officials try to change, and essentially remove institutional checks and balances and weaken the political opposition through a slow and incremental process. (6) The strategic manipulation of elections, through a slow process that can involve disguised violations of the law and occurs long before the actual election day. This is similar to the five strategies to turn bureaucracies into populist regimes identified by Bauer & Becker (2020). These strategies are (1) centralisation of structure, (2) centralisation of resources, (3) politisation of personnel, (4) politisation of norms, and (5) reduction of accountability. These strategies are mainly linked to Bermeo's idea of executive aggrandisement as they are ways to change institutional checks and balanced incrementally (Bauer & Becker, 2020).

This suggests a link between populism and democratic backsliding (Bauer & Becker, 2020; Bermeo, 2016). According to Karolewski et al. (2023, pp. 425–426) populism “contributes to democratic erosion on the institutional level by undermining electoral competition, judicial independence, and legislative oversight”. Other scholars agree that democratic backsliding is linked to (rising) populism (Muno & Pfeiffer, 2022; Popp-Madsen, 2020). Huber & Pisciotta (2023) suggest a causal relationship with the rise of populism leading to democratic backsliding. According to Vachudova (2021) populism is strongly linked to democratic backsliding and populist parties use democratic backsliding, through attacks on democratic institutions, to expand their power. Though Mounk (2018) argues that this relationship is more nuanced and adds that economic and cultural pressure and anxieties are also part of the equation. For the sake of not expanding the scope of this research too much, the relationship between populism and democratic backsliding will not be explored further.

As mentioned before, a country needs have achieved a certain level of democracy, before being able to backslide from said democracy (Carothers & Press, 2022). Globally, a lot of countries can still not be considered proper democracies. But at the end of the twentieth century and during the beginning of the twenty-first century, a lot of countries became democratic for the first time (Diamond, 2021). Though a lot of countries also ended up undergoing democratic regressions or trends that can be seen as early forms of democratic backsliding (Diamond, 2021; Foa & Mounk, 2017). So before moving on to democratic backsliding in EU member states specifically, it is worth stressing that democratic backsliding is not limited to EU or European countries. For example, there is scholarly literature on democratic backsliding in India (Maiorano, 2022), North Macedonia (Gafuri & Muftuler-Bac, 2021; Popetrevski, 2017), Serbia (Castaldo, 2020; Gafuri & Muftuler-Bac, 2021; Nakai, 2023; Vascotto, 2024), South Korea (Eom & Kwon, 2023), Tunisia (Huber & Pisciotta, 2023), Turkey (Kollias, 2023; Nakai, 2023; Reiners & Turhan, 2021; Ugur-Cinar, 2023), and in various Latin-American countries (Leon, 2022; Pérez-Liñán et al., 2019).

Diamond (2021) compared trends of democratic backsliding globally and, while there is certainly not a single cause, one of the factors leading to democratic backsliding is the rise of authoritarian politicians who exploit polarisation for their own benefit. These politicians, often described as populists, deliberately harbour divisions within society to consolidate power. They portray themselves as champions of the people against corrupt elites and use rhetoric that scapegoats minorities and external threats. This polarisation undermines democratic norms and institutions, eroding the foundation of democracy (Diamond, 2021). This relates back to the link between democratic backsliding and the rise of populism. Diamond (2021) cites leaders like Chavez and Maduro in Venezuela, Erdoğan in Turkey, Orbán in Hungary, Kaczyński in Poland, Duterte in the Philippines, Narendra Modi in India, and Jair Bolsonaro in Brazil as modern or recent examples of populist politicians that contribute to democratic backsliding in their respective countries. Non-EU countries will not be discussed further as they lie outside of the scope of this research.

2.2.1 Democratic backsliding in the European Union

Now that a clear conceptualisation and definition of democratic backsliding have been established, its occurrence in the European Union can be analysed. Democratic backsliding is of course not limited to the European Union, yet this section is limited to the discussion of democratic backsliding in EU member states.

According to Sitter & Bakke (2021, p. 5): “in the EU context, the first key point is that the study of democratic backsliding is the study of why and how governments put in place reforms that weaken existing democratic institutions”. This includes the separation of political power, the role and scope of independent institutions, freedom of the press and of organisation and assembly, and free, legitimate elections. As mentioned in section 2.1.1, EU member states’ commitments to liberal democracy, and the values they have to breach in order to be considered as democratically backsliding, are embedded in the Treaty on European Union. Gora & de Wilde (2022, p. 357) highlight the deterioration of the rule of law and the independence of the judiciary as “the heart of the problem” in the EU. This is because it is seen as a fundamental threat to democracy within the European Union. The rule of law and judicial independence are essential components of a democratic system as they ensure that laws are applied fairly and impartially, and that the judiciary acts as a check on the power of the executive and legislative branches of government. When the rule of law and judicial independence are undermined, it can lead to a concentration of power, erosion of civil liberties, and a lack of accountability. This can result in a decline in democratic governance and the protection of individual rights and freedoms. This is seen as a threat to the functioning of the EU as a political system and the ability of member states to uphold the democratic standards expected of them (Gora & de Wilde, 2022).

Although democratic backsliding can happen through electoral manipulation, and often does so, this is less prevalent in Europe. European democratic backsliding tends to start through individual rights infringements and limits to the freedom of expression (Lindberg, 2018). Sitter & Bakke (2021) identify the first three clear cases of democratic backsliding in EU member states. The first clear case of an EU member backsliding began in 2010, in Hungary, with Orbán’s right-wing populist party Fidesz gaining a two-thirds majority (see section 2.2.2.1 for more details). The second crisis happened in Romania in 2012, when Romanian president Traian Băsescu was accused of abuse of power. The third crisis began in 2015 in Poland, after the right-wing populist Law and Justice party (PiS) won the elections (see section 2.2.2.2 for more details) (Sitter & Bakke, 2021). According to Gora & de Wilde (2022, p. 345) Poland and Hungary remain “the two poster cases of democratic backsliding in the EU”. There seems to be consensus that Poland and Hungary are the two main cases of democratic backsliding in the European Union among scholars (Bakke & Sitter, 2022; Bernhard, 2021; Bugaric & Kuhelj, 2018; Kelemen, 2017; Pech & Scheppele, 2017; Sata & Karolewski, 2023; Smolka, 2021). This does not mean that democratic backsliding is limited to these two EU member states. Other member states in which the quality of democracy and the occurrence

of democratic backsliding has been questioned in the academic literature are Romania (Adamski, 2019; Iusmen, 2015; Sedelmeier, 2014; Sitter & Bakke, 2021), Bulgaria (Dawson & Hanley, 2019; Gherghina & Bankov, 2023), the Czech Republic (Bakke & Sitter, 2022; Dawson & Hanley, 2019; Guasti, 2021; Hanley & Vachudova, 2018; Kotarski & Petak, 2021; Labanino & Dobbins, 2023a, 2023b; Vachudova, 2019), Croatia (Čepo, 2020; Kotarski & Petak, 2021), Slovenia (Labanino & Dobbins, 2023a, 2023b), Slovakia (Bakke & Sitter, 2022; Guasti, 2021), Latvia (Greskovits, 2015; Monciunskaitė, 2022, 2023), Lithuania (Monciunskaitė, 2023), and Malta (Lobina, 2023). It can be noted that these are mostly Central and Eastern European countries. This suggests a divide between these countries and Western-European countries (Sedelmeier, 2024).

Greskovits (2015) notes that Central and Eastern European (CEE) countries are typically younger democracies compared to Western European democracies and identifies declining involvement in democracy and democratic backsliding as the two main threats to Central and Eastern European's democracies. Though the situation is nuanced and various across different countries. This can be a consequence of different countries having different paths to their democracy (Stanley, 2019). It is worth noting that the situation has developed in some of these countries. Further rule of law regressions have caused a growing body of literature rule of law issues in Poland and Hungary and on the EU's capacity to deal with Hungary and Poland (Bernhard, 2021; Oleart & Theuns, 2023; Sitter & Bakke, 2021; Wonka et al., 2023). Therefore, these two countries will be discussed in more detail in section 2.2.2.

Auerbach & Petrova (2022) explain that there is a certain level of scepticism among citizens in post-communist countries, which they attribute to flawed implementation of democratic ideas and institutions in these countries and the expectations of citizens following the introduction of more democratic governments not being met. The rise of populist parties in CEE countries has also been cited as a reason for democratic backsliding in CEE countries, with Fidesz in Hungary and PiS in Poland being prime examples of populist parties in recent years (Vachudova, 2019). Vachudova (2020) explains that populist parties in CEE countries engage in democratic backsliding by attacking democratic institutions, delegitimising opposition, consolidating power, and exploiting state resources for personal gain. In relation to this, Castaldo & Memoli (2024) found that more political support and more trust in these populist parties contributed to democratic backsliding. This suggests that more authoritarian and populist governments that enjoy greater support can be more successful in undermining democratic institutions and taking more illiberal approaches.

Populism and euroscepticism isn't limited to CEE countries however, and the rise of populism and euroscepticism in Western European countries, mainly among radical left-wing and radical right-wing parties, has been documented extensively in academic literature (Berman, 2019; Carrieri & Vittori, 2021; Pintsch et al., 2022; Rooduijn & Akkerman, 2017). Discussing the causes of the rise of populism in the EU would expand the scope of this thesis too much, but this nuance is important to discern whether there is an

East-West divide on democratic backsliding in Europe. There exists a narrative that western member states are more democratic and more receptive to rule of law interventions by the European Union compared to eastern member states (Sedelmeier, 2024; Volintiru et al., 2024). Sedelmeier (2024) analysed the quality of democracy and the attitude towards EU rule of law interventions in a comparative assessment across all EU member states and found that there is no straightforward or clearly identifiable regional divide among EU member states. While there are certainly differences in the quality of democracy and attitudes towards EU rule of law interventions within the EU, these differences are complex and do not conform to a simple East-West divide. There are differences between subgroups in the EU as both eastern and western member states can be found on different sides depending on the specific criteria used (Sedelmeier, 2024).

Meyerrose (2023) argues that European integration also contributes to democratic backsliding by increasing executive power, limiting domestic policy space, and impacting new democracies. Cianetti et al. (2018) argue that the role of existing illiberal socio-economic, oligarchical and corrupt structures and networks in the post-Soviet CEE countries also needs to be considered in this discussion. The EU's emphasis on state-building and economic transformation leads to strong executives and weak institutions, allowing for the manipulation of power (Meyerrose, 2023). The EU's focus on state-building and economic transformation in its democracy promotion efforts could inadvertently strengthen the executive branch, leading to an imbalance of power. This emphasis on executive control, coupled with the neglect of other critical democratic institutions like legislatures and independent judiciaries, creates opportunities for executives to undermine democratic norms and consolidate their power, resulting in democratic backsliding (Meyerrose, 2023).

2.2.2 Examples of backsliding EU member states

The next paragraphs will zoom in on democratic backsliding in Hungary and Poland as two major examples of backsliding EU member states and also briefly cover democratic backsliding in Slovakia and Greece as these are more recent examples of backsliding EU member states. There seems to be consensus among scholars that Poland and Hungary are the two main cases of democratic backsliding in EU member states (Bakke & Sitter, 2022; Bugaric & Kuhelj, 2018; Gora & de Wilde, 2022; Kelemen, 2017; Pech & Scheppele, 2017; Sata & Karolewski, 2023; Smolka, 2021). The main reason for discussing these cases in detail is because they will each be used as the subjects for a case study analysis in the analytical part of the thesis in section 5.1.

According to Lindberg (2018), both Hungary and Poland regressed from being considered as liberal democracies to electoral democracies. This is based on the democracy indices of the Varieties of Democracy (V-Dem), in which electoral democracy is conceptualised as “a political system in which political leaders are elected under comprehensive voting rights in free and fair elections, and freedoms of

association and expression are guaranteed” (Herre, 2022, para. 3). According to the V-Dem codebook, electoral democracy “seeks to embody the core value of making rulers responsive to citizens” (Coppedge et al., 2021, p. 43). This requires that political organisations and civil society organisations can operate freely, and that elections are free from fraud or systematic irregularities and they influence the selection of the chief executive. Additionally, there must be freedom of expression and independent media (Coppedge et al., 2021).

2.2.2.1 Democratic backsliding in Hungary

According to Sitter & Bakke (2021, p. 2) “the EU’s first real backsliding crisis” began in Hungary in 2010. This is when Hungarian Prime Minister Viktor Orbán and his Fidesz party secured fifty-three percent of the popular vote and gained a two-thirds majority after the elections, thanks to Hungary’s disproportional electoral system (Sitter & Bakke, 2021). Essentially, this was a form of state capture (Anghel & Jones, 2024). This majority enabled Orbán’s new government to change the constitution and other laws and strengthen its own power. This new government weakened the constitutional court, took control of important public institutions through long mandates for party loyalists, and changed the electoral law so that its policies require a two-thirds majority to be amended (Sedelmeier, 2014). In section 2.1, we identified (1) a healthy civil society; (2) stable political parties facilitating democratic elections; (3) judicial independence; (4) media and academic freedom; and (5) respect for minority rights as the components of a liberal constitutional democracy. Hungary’s democratic backsliding mainly manifested itself through the government’s changes of electoral laws, attacks on judicial independence, limitations of media freedom, civil society and academic freedom and crackdowns on minority rights (Monciunskaitė, 2023). These changes contributing to Hungary’s democratic backsliding are discussed in this section.

Hungary became ‘free’ based on the classification by Freedom House in 1990, which suggests it was democratic enough to be able to backslide from that democracy (Freedom House, 2019). However, in 2019 Hungary became the first ever EU member state to lose this ‘free’ status, after Freedom House changed Hungary’s status back to ‘partially free’ (Freedom House, 2019; Sitter & Bakke, 2021). Though it is sometimes contested whether Hungary can be considered as having been truly democratic before Fidesz took over, and according to Anghel & Jones, p. (2024, p. 61) “civil society’s communist-era habits of complaisance, its openness to party capture, and the additional patronage resources sluiced to Budapest by the EU, explain why Hungary was so vulnerable to state capture by Fidesz”. The 2010 election occurred amidst a severe economic crisis, leading to anticipated losses for incumbent parties. Unlike other post-communist countries, Hungary struggled to complete its democratic transition, failing to agree on a new constitution. Political polarisation hindered consensus-building, with competing visions of democracy deepening divisions. By 2010 there was growing disagreement in Hungary. Viktor Orbán saw that many Hungarians weren’t necessarily fervent defenders of democracy and took this opportunity to seize power.

Civil society in Hungary, while present, tended to adapt to rather than oppose the government and was influenced by political parties. Despite EU membership, mechanisms to enforce democratic norms proved ineffective (Anghel & Jones, 2024).

After a year in office, the Orbán government completely replaced the existing constitution, without giving opposing parties the chance to give any input. This constitutional change was combined with the introduction of the so called ‘cardinal laws’. These changes systematically concentrated power within the government, dismantling previous checks and balances on executive authority (Kelemen, 2017). Orbán's consolidation of power in Hungary involved systematically concentrating power within the government, dismantling previous checks and balances on executive authority, and subverting institutional independence, stifling press freedom and inducing self-censorship to silence dissenting voices (Kelemen, 2017). Over the years, Hungary became more and more authoritarian. According to Lindberg (2018) these changes picked up speed between 2015 and 2017.

Fidesz changed electoral laws to strengthen its own position. Opposition factions faced significant disadvantages, enabling Fidesz to secure its second two-thirds majority. Initially, the alteration of Hungarian constituency boundaries before the 2014 elections favoured the ruling coalition, sparking allegations of gerrymandering (Scheppele, 2022). Gerrymandering is “the practice of deliberately and unfairly manipulating district lines to favor one party over others” (McGhee, 2020, p. 172). Additionally, new electoral legislation led to the proliferation of “fake parties” (Monciunskaitė, 2023, p. 48), confusing voters with numerous parties bearing similar names on ballots. This surge in parties was facilitated by reduced requirements to make the national party list, with lower signature thresholds. Secondly, the electoral system underwent crucial alterations favouring the ruling coalition, condensing the mixed-member majoritarian system into a simpler two-tier structure. Thirdly, the introduction of a dual voting system worked in favour of the incumbent government, making it easier for ethnic Hungarians residing outside Hungary's borders to vote compared to native Hungarians living abroad. This system notably boosted the ruling coalition's voter base in the 2014 elections (Monciunskaitė, 2023).

Not long after securing power, the Fidesz government also started dismantling judicial independence in Hungary, limiting the possibility of judicial checks on its power and allowing the party to put party loyalists in important long-term positions of power, with possible veto rights over potential future governments (Bánkuti et al., 2012). The government introduced a series of laws that changed the shape of political institutions and made the guarantee of constitutional rights less secure. These laws affected various areas such as freedom of information, prosecutions, nationalities, family protections, independence of the judiciary, status of churches, and elections to Parliament (Halmai, 2019). This restriction of ex-post control caused controversy and concern among the EU Commission at the time (Venice Commission, 2011). The composition of the Constitutional Court was changed to further impede its ability to fulfil its function as a

protector of fundamental rights. The number of judges was increased, allowing for the selection of new judges who would serve for a longer term. The president of the Constitutional Court, who was previously elected by the judges, was now selected by the Parliament. Subsequently, the law mandating a retirement age for Constitutional Court justices was abolished, allowing Fidesz-appointed justices to serve indefinitely. These politically aligned judges were observed to consistently rule in favour of the government in cases (Monciunskaitė, 2023).

Fidesz has also sought to limit media freedom, civil society and academic freedom. In 2010, two pivotal laws were enacted, granting the governing Fidesz party extensive control over Hungary's mass media landscape. These laws revamped the Hungarian Media Authority, installing Fidesz-aligned individuals in key positions, and established the Media Council, entirely comprised of Fidesz loyalists. This consolidation of power extended to public media outlets, effectively turning them into tools for promoting Fidesz propaganda. Orbán justified these changes as necessary to counter perceived left and liberal bias in the media, as is often done by populists (Monciunskaitė, 2023). Fidesz also sought control over private media, allowing for the concentration of media ownership among their allies, further cementing the party's influence over the media landscape. Legislation regulating the use of drones was enacted to suppress investigative journalism, and public funds were directed to media outlets aligned with Fidesz ideology. Additionally, Fidesz imposed strict rules on journalists' activities within the Hungarian Parliament (International Press Institute, 2022).

Alongside these measures, Fidesz launched a systematic attack on Hungarian civil society, particularly targeting NGOs receiving foreign funding. NGOs were publicly discredited and subjected to illegal audits, criminal charges, and raids. The passage of the 'Lex NGO' law in 2017 mandated registration and labelling requirements for organisations receiving foreign funds, effectively stigmatising them (Bárd, 2020a; Monciunskaitė, 2023).

Fidesz implemented limits on academic freedom in Hungary. In April 2017, the Hungarian Parliament targeted academic freedom by adopting a modification to the Act on National Higher Education (Bárd, 2020b). This modification, known as 'Lex CEU', aimed to force the Central European University (CEU) out of the country, according to Bárd (2020b), a CEU professor. The Act on National Higher Education introduced several requirements that make it difficult for foreign-funded universities to operate in Hungary. (Bárd, 2020b).

The Hungarian government also limited minority rights. The government targeted reproductive rights, the rights of sexual minorities, and marginalised various ethnic minorities, particularly immigrants. Hungarian women are primarily viewed as reproductive citizens, emphasising their role as wives and mothers above all else (Vida, 2019). The government also pursued policies informed by traditional values and aimed at

addressing demographic decline. They have provided economic incentives for larger families, restricted abortion rights, banned the medical abortion pill, and excluded gender studies from the school curriculum. This conservative stance includes rejecting immigrants (Monciunskaitė, 2023). Orbán positions himself as a defender of “Christian Europe”, suggesting that Muslim refugees want to impose their beliefs onto European Christians (Martin & Gallaher, 2020, para. 2). These anti-immigrant sentiments have become central to Fidesz's political identity, leading to measures such as building fences to keep migrants out and engaging in controversial pushbacks (Monciunskaitė, 2023).

According to the analysis of Sitter & Bakke (2021), Fidesz mainly ensured executive domination over the legislature by manipulating legislative procedures to curtail consultation and debate, submitting significant constitutional amendments as private member's bills. These actions triggered international controversy and led to diplomatic tensions and suspension of funding from international partners like Norway. Hungary's case highlights a form of democratic backsliding that maintains some elements of liberal democracy, such as competitive elections, while gradually eroding democratic institutions and norms, signalling the slow but deliberate process that was part of the conceptualisation of democratic backsliding earlier in this conceptual framework (Sitter & Bakke, 2021).

According to Bernhard (2021), Hungary's backsliding can also be attributed to the existence of a discursive space on the right, structural changes, protests and civil disobedience, manipulation of the media and institutions, and the manipulation of nationalist and xenophobic narratives. Hungary's case can be seen as a clear example of democratic backsliding that is still ongoing. Sata (2023, p. 1) states that “Hungary has become the leader of anti-democratic and anti-European developments within the European Union”. According to Suyunova (2020), Hungary is in clear breach of the EU's values as established in Article 2 TEU and lacks respect for human rights. To summarise, Hungary violates these values through limiting the independence of the judiciary, restricting the rights of NGOs, undermining the rights of minorities, restricting academic freedom, limiting freedom of religion, violating the principles of democracy (Suyunova, 2020).

Fidesz continues to remain in power in Hungary, but in 2024, tens of thousands of Hungarians took to the streets of Budapest to protest against the government. Viktor Orbán's government is also being challenged by opposition politician Péter Magyar, who has expressed a desire to overthrow Orbán and his political system (Bayer, 2024).

2.2.2.2 Democratic backsliding in Poland

In the October 2015 parliamentary elections in Poland, the Law and Justice Party (PiS), characterised as ultraconservative and nationalist-populist, secured a plurality of the vote, translating into an absolute

majority of seats in the Sejm (Kelemen, 2017). The Sejm is the highest governing body in Poland and part of the Polish bicameral parliament (Sejm of the Republic of Poland, n.d.). According to Sitter & Bakke (2021) this can be seen as the start of democratic backsliding and the rule of law crisis in Poland. Despite Beata Szydło's appointment as prime minister, the party remained firmly under the influence of its co-founder, Jarosław Kaczyński. Kaczyński openly admired Viktor Orbán's governance style and pledged to emulate it, indicating a desire for centralised power akin to Orbán's model in Hungary (Kelemen, 2017). (Though it must be noted that Kaczyński's stance on Orbán has since radically changed due to Orbán's stance on Russia and his refusal to condemn mass civilian killings in Ukraine (Jack, 2022)). Upon assuming office, the PiS government swiftly launched assaults on the independence of Poland's high court, the Constitutional Tribunal, and public media, mirroring tactics employed by Orbán's Fidesz in Hungary. The government's actions provoked a constitutional crisis, with President Duda and the parliament challenging the authority of the Constitutional Tribunal by attempting to stack it with loyalist judges and passing legislation to weaken it. Similarly to Fidesz in Hungary, PiS quickly sought to exert political control over public media by stripping the independent Public Broadcasting Council of its authority and granting the treasury minister power to appoint and dismiss management (Kelemen, 2017).

Just like with the case of Hungary, this section will outline Poland's democratic backsliding by looking at Poland's changes in electoral laws, limits to judicial independence, limits to media freedom, civil society and academic freedom and limits to minority rights (Monciunskaitė, 2023).

The Law and Justice party changed some electoral laws to increase their chances of re-election, similar to what Fidesz did in Hungary. In 2017, PiS altered the National Electoral Commission's composition to favour PiS, reducing independent judges' presence and appointing members aligned with the government. These changes granted the Commission extensive authority over the elections. Changes in ballot admissibility allowed for potential manipulation in favour of specific parties (Monciunskaitė, 2023). In 2019, when PiS won the 2019 parliamentary elections again. The party's consolidation of power in key institutions like the Constitutional Tribunal and public media broadcasters cast doubt on the fairness of the election, despite its technical legitimacy (Markowski, 2020).

PiS limited the independence of the judiciary. According to Sadurski (2019), this government dismantled checks and balances through changing the Constitutional Tribunal and changing what Sadurski (2019, p. 96) calls "the 'regular' judiciary". The Polish Constitutional Tribunal is the highest judicial authority tasked with interpreting the constitution, ensuring the legality of legislation, and safeguarding fundamental rights and freedoms in Poland. Before 2015, this Tribunal was seen as an independent protector of democracy and of the limits to the legislative and executive powers in Poland (Sadurski, 2019). PiS' assault on the Constitutional Tribunal started almost immediately after they gained power. After one year of appointing judges, PiS "effectively paralysed" the Constitutional Tribunal (Sadurski, 2019, p. 62). The seizure and

manipulation of the Tribunal was not immediate but involved a coordinated effort by PiS officials over several years. This is consistent with the definition of democratic backsliding as an incremental but deliberate process. The manipulation of the Tribunal commenced with the PiS government's rejection of five new judges appointed by the previous administration, followed by the Civic Platform party's last-minute appointment of five judges just before the 2015 parliamentary elections. President Duda's refusal to swear in the Civic Platform-appointed judges led to the urgent appointment of PiS-aligned judges. The Tribunal's defence of its independence was further undermined by the creation of an extra-constitutional role, filled by a PiS loyalist (Sadurski, 2019).

In October 2017, the Tribunal issued a decision that effectively validated the positions of the PiS-appointed judges who were initially elected unconstitutionally. The Tribunal justified its new stance by arguing that judges were considered legitimate if they were sworn in by the Polish President and elected by the Sejm (Sadurski, 2019). These reasons contradict the principles of the rule of law because they give the president and the Parliament power over the judiciary, which contradicts the separation of powers (Monciunskaitė, 2023). Monciunskaitė (2023, p. 59) summarises that “once the Tribunal was stripped of its powers to check the executive, PiS could implement their policies without objection from the Tribunal”. The Constitutional Tribunal was not considered to be independent anymore and this was (famously) exemplified in 2021, when this Tribunal issued a judgment declaring Polish institutional law superior to EU law. In this way the Polish Constitutional Tribunal, and by extension the sitting Polish government, directly denounced the supremacy of EU law, which at the time sparked debates of a possible ‘Polexit’ (Gliszczyńska-Grabias & Sadurski, 2023).

After essentially capturing the Constitutional Tribunal, PiS turned their attention to the ‘regular’ judiciary. This constitutes the ordinary courts, the Supreme Court, and the National Council of the Judiciary. While this may sound like an easier task on face-value as it pertains to lower-level courts, this is not necessarily the case. As Sadurski (2019) notes, the Constitutional Tribunal was a fifteen-person body, while there are around ten thousand ‘regular’ judges in Poland. He goes on to say that “the elimination of the [Constitutional Tribunal] as a device of constitutional review triggered a debate about dispersed, or decentralised, constitutional review performed by all courts” (Sadurski, 2019, pp. 96–97). Though despite this notion, the PiS-led government in Poland swiftly moved to extend its influence over the ordinary courts, the Supreme Court, and the National Council of the Judiciary. This was driven by PiS's narrative that Poland's transition to democracy was incomplete due to a corrupt legal system (Sadurski, 2019). Additionally, the retirement age of Supreme Court judges was reduced, leading to the forced retirement of experienced judges and enabling the government to appoint new judges more aligned with its interests. Furthermore, the Minister for Justice and Prosecutor General were granted increased powers over the courts, including the authority to dismiss court presidents without providing reasons. This consolidation of

power allowed the government to remove judges deemed unsupportive and exert control over the judiciary (Sadurski, 2019).

PiS marginalised and attempted to silence the opposition through legislative fast tracking and through proposing items of legislative changes as bills of private members, that were in reality put forward by the PiS government. Party loyalists were appointed to state-owned companies and were often favoured for lucrative contracts. PiS used the government to consolidate power, suppress dissent, and shape the economic landscape in line with its political objectives (Sadurski, 2019).

As was the case in Hungary, PiS limited media freedom, civil society and academic freedom in Poland (Monciunskaitė, 2023). According to Sadurski (2019), media freedom faced significant challenges. PiS introduced restrictive legislation that granted the government greater control over media regulation and content. For example, the government reformed the Polish Media Authority, appointing loyalists to key positions and allowing them to issue fines to journalists for content deemed unfavourable to the government. Moreover, PiS exerted influence over state-owned media outlets, using them as vehicles for propaganda and promoting pro-government narratives. The appointment of loyalists to leadership positions within public media organisations resulted in biased reporting and limited coverage of opposition viewpoints, undermining the role of the media as a watchdog and source of independent information (Sadurski, 2019). In addition to controlling public media, PiS sought to exert influence over private media outlets, particularly those critical of the government. PiS also used legal mechanisms to intimidate journalists and media organisations critical of the government. Lawsuits, regulatory fines, and other legal actions were employed to silence dissent and suppress investigative reporting (Sadurski, 2019).

The PiS government actively limited civil society by instituting measures to centralise the distribution of funds to NGOs (Sadurski, 2019). They established two new entities to oversee this process. However, these entities are predominantly composed of government officials, raising concerns about their impartiality and independence. NGOs represented in these entities had limited influence, and there was a clear bias towards conservative Christian organisations aligned with PiS's ideology. This centralised model adversely affected NGOs advocating for women's rights, asylum seekers, and refugees, with funding often withheld from those critical of the government's policies (Monciunskaitė, 2023).

Academic freedom was also limited, particularly with the enactment of reforms aimed at restricting the freedom of expression of Polish academics and promoting the conservative ideology of the ruling party. A prominent example of these restrictions was seen in cases brought against Professor Wojciech Sadurski (whose work has incidentally been cited for a large part of this section on Poland) by the ruling party and its affiliates, stemming from his critical comments about the government (Monciunskaitė, 2023). Despite the eventual dismissal or resolution of these cases in Professor Sadurski's favour (Mikowski, 2022), the

ongoing pressure on a vocal critic of the regime was cause for concern within academic circles (Monciunskaitė, 2023).

There was also “an assault on individual rights” in Poland (Sadurski, 2019, p. 150). PiS implemented laws and regulations that restrict the organisation and conduct of public gatherings, impeding citizens' ability to exercise their right to peaceful assembly. Amendments to laws imposed strict requirements for obtaining permission from local authorities for demonstrations, granting officials broad discretion in determining the conditions of protests. These measures have led to a restrictive environment for freedom of assembly, raising concerns about democratic rights and freedoms (Sadurski, 2019). The aforementioned limits to media freedom also limited freedom of speech. Additionally, PiS used defamation laws to silence critics, essentially leading to censorship of journalists and activists. Finally, PiS amended the statute of June 2016 on counter-terrorist activities and the statute of 15 January 2016 on the police, allowing the government “to control citizens and collect personal data without following normal statutory procedure” (Sadurski, 2019, p. 157).

In the 2019 elections, PiS targeted sexual minorities and gender ideology, aligning itself with traditional Catholic views and equating 'Polishness' with conservative Catholicism (Monciunskaitė, 2023). This led to rejection of LGBT+ rights, endorsement of ‘LGBT-Free Zones’, and dissemination of homophobic propaganda. PiS also restricted abortion rights, culminating in an almost absolute ban on abortion. Additionally, PiS moved to withdraw from the Istanbul Convention, refusing to fully protect women against violence. These actions reflect PiS's prioritisation of reproductive citizenship over women's autonomy and equality, though it can be argued that these amendments are democratic if they are supported by a majority of the Polish people. They remained worth mentioning as they do constitute restrictions to individual freedoms (Monciunskaitė, 2023). The same thing can be said for PiS's foreign policy, which can be described as populist according to Szeptycki (2022). This foreign policy is characterised by a focus on national identity, opposition to immigration, and a confrontational approach towards European partners. This has led to strained relations with the EU over issues related to the rule of law and democratic values (Szeptycki, 2022).

Following the parliamentary elections in October 2023, the Civic Coalition, led by Donald Tusk took office after securing just over thirty percent of the vote and forming a coalition government with two smaller parties. Polish president Andrzej Duda initially tried to use his constitutional powers to appoint another Morawiecki-led PiS government, but this lost a confidence vote, allowing the Polish Parliament to vote in the new government led by Tusk. This marked the end for the Law and Justice government's reign. But Duda, a PiS ally (though he is politically independent), continues to hold presidency since his 2020 re-election (Fella, 2024). Following his ascend to power, Tusk pledged to take the rule of law “very seriously” (Liboreiro, 2023, para. 1) and launched plans to reform the judiciary in such a way that judicial

independence is restored in Poland (Krzysztozek, 2024). The new government has also pledged to overturn the abortion ban, depoliticise the public media, make anti-LGBT hate speech a crime, and separate church and state (Ptak, 2023). This new government under Tusk is far more welcoming of EU regulation, but has faced difficulty in undoing the PiS-government infringements on the rule of law. This is because president Duda has a veto-right, which he vowed to use against the new government's spending bill, essentially announcing a clash with the new government and blocking their intentions (Faris, 2023). In January 2024, Duda did sign the budget bill into law but then immediately sent it to Poland's constitutional court for review, again delaying the new government's ability to take proper action (Minder & Erling, 2024).

2.2.2.3 Hungary and Poland's backsliding compared

Table 1: Democratic backsliding in Hungary and Poland compared

	Hungary under Fidesz	Poland under PiS
Electoral Laws	Amendments to electoral laws through gerrymandering, favouring sitting party's position	Amendments to the National Electoral Commission's composition to favour PiS through reduced independent judges' presence
	Creation of fake parties to confuse voters	Control over electoral districts shifted to commissioners appointed by the Minister of Interior
	New electoral system favoured ethnic Hungarians abroad	Changes in ballot admissibility allowed for potential manipulation in favour of PiS
Limits to Judicial Independence	Changed judicial appointment procedures, allowing the government to appoint party loyalists	Manipulation of the Constitutional Tribunal through rejected and replaced judges
	Constitutional Court's power curtailed through amendments and centralisation	Seized and manipulated the Constitutional Tribunal over several years, undermined its independence
	Changed the shape of judicial institutions and constitutional rights	Control over ordinary courts, Supreme Court, and National Council of the Judiciary
	- Increased the number of Constitutional Court	PiS-appointed judges through amended legislation
	Abolished mandatory retirement age for Constitutional Court justices	Forced retirement of judges, increased powers for the Minister for Justice and Prosecutor General

	Hungary under Fidesz	Poland under PiS
Limits to Media Freedom	Control over private media, suppression of investigative journalism	PiS implemented measures to tighten control over media, reformed Polish Media Authority
	Public funds directed to media outlets aligned with Fidesz	Influence over state-owned media, use of legal mechanisms to intimidate journalists
	Fidesz imposed strict rules on journalists' activities within the Hungarian Parliament	Restricted journalism, such as the use of drones to capture footage of government officials
		Legal actions against critical journalists and media organisations
Civil Society	NGOs targeted with the 'Lex NGO' law, subjected to illegal audits, criminal charges, and raids	Centralised distribution of funds to NGOs, bias toward conservative Christian organisations
Academic freedom	Academic freedom limited with 'Lex CEU', targeting Central European University	Reforms restricting academic freedom, cases against critical academics
	New requirements for foreign-funded universities making it difficult for CEU to operate	Government imposed regulations on universities, prosecuted critical academics
Limits to Minority Rights	Targeted reproductive rights, rights of sexual minorities and restricted abortion right	Targeted sexual minorities through endorsed 'LGBT-Free Zones', prioritising reproductive citizenship and restricted abortion rights
	Emphasised traditional values	Focus on national identity
	Rejected immigrants, built fences to keep migrants out	Opposition to immigration

Based on Bárd, 2020a, 2020b; Halmai, 2019; International Press Institute, 2022; Kelemen, 2017; Martin & Gallaher, 2020; Monciunskaitė, 2023; Sadurski, 2019; Scheppele, 2022; Szeptycki, 2022).

2.2.2.4 Hungary and Poland's coalition

For a while, Hungary and Poland were allies in the European political playfield. According to Holesch & Kyriazi (2022), this Hungarian-Polish coalition contributed to democratic backsliding in several ways. Firstly, the coalition has provided mutual protection within the European Union framework, which will be discussed in more detail in section 5. This mutual protection was particularly evident during negotiations over the EU's budget and the Covid recovery package in 2020 (Herszenhorn & Bayer, 2020). Secondly, while the Hungarian government initiated the backsliding process first, the Polish government seemingly learned from the Hungarian example and implemented similar measures. As was clear from the section on democratic backsliding in Poland, the Polish government looked to Hungary as a model for its own backsliding project, especially in areas such as judicial reforms, media control, electoral processes, and changes to the parliament and adapted them to its own context. And thirdly, the coalition has been used by both governments to legitimise their backsliding actions domestically. Political leaders from both countries praised and supported each other for some time, emphasising the strong friendship between Hungary and Poland. This endorsement from a key international ally helped to cast the governments' controversial actions as normal and justified at home (Holesch & Kyriazi, 2022).

Eventually this relation crumbled because of Orbán's pro-Russian stance during the ongoing Russian invasion of Ukraine, with Orbán vetoing an €18 billion EU aid package for Ukraine (Tamma, 2022) and refusing to condemn mass civilian killings in Ukraine (Jack, 2022). Though this notion is challenged by Holesch & Zagórski (2023) and their analysis of the voting patterns of Fidesz, Law and Justice and other populist and radical right-wing parties in the European Parliament, and their stances towards Russia and the rule of law issues before and after the invasion. Their findings show that "the invasion did not influence the dynamics of democratic backsliding. Despite the rhetoric, it actually brought Fidesz and Law and Justice closer together" (Holesch & Zagórski, 2023, p. 1178). In fact, in January 2024 former Polish and PiS Prime Minister Mateusz Morawiecki announced his openness to joining up with Fidesz in the EU Parliament (Wax, 2024).

2.2.2.5 Democratic backsliding in Slovakia

Recently there have also been concerns in the EU Parliament over the upholding of rule of law standards in Slovakia (European Commission, 2024b). According to Čuroš (2023), the Slovak judiciary has faced challenges related to judicial corruption, political interventions, and the lack of accountability. There was also a constitutional reform in Slovakia in 2020, which aimed to address suspicions surrounding the judiciary and improve its functioning. The reform included amendments to laws related to the functioning of the judiciary. However, while there have been challenges and controversies surrounding the Slovak judiciary, Čuroš (2023) does not suggest a complete breakdown of democratic principles or a systematic

attack on the judiciary. Though in April 2024 concerns were reinforced after Peter Pellegrini, a national-leftist and ally of populist Slovak prime minister Robert Fico, won the presidential elections. In the media, Pellegrini is seen as a populist with a Russia-friendly stance (Cameron, 2024; The Guardian, 2024).

According to Hlatky (2024), the rule of law in Slovakia faces significant threats, primarily driven by the pragmatic goals of political figures like Fico. Following the loss of power by the party Smer in 2020, the subsequent government led by party OĽaNO and Matovič initiated anti-corruption efforts, resulting in trials and investigations targeting officials associated with Smer rule, including Fico himself. However, Smer's conservative shift ahead of the 2023 election, fuelled by anti-Ukraine sentiment and socioeconomic concerns, facilitated their return to power. This resurgence allowed Smer and its coalition partners to undermine anti-corruption measures and shield themselves from potential prosecution. These concerns have become more relevant with Pellegrini taking the presidential office. While the presidency holds limited powers, it can impede government plans. These developments underscore threats to the independence of institutions safeguarding democracy, such as the courts, media, NGOs, and the Office of the President. Although the EU has expressed concerns about Slovakia's trajectory, its impact on the government's actions has been limited (Hlatky, 2024).

2.2.2.6 Democratic backsliding in Greece

The European Parliament has recently also raised concerns about democratic backsliding in Greece (European Parliament, 2024e; Rhawi, 2024). This process has been ongoing for a number of years, as is typical for democratic backsliding. In his study into democratic backsliding Sotiropoulos (2018) characterises democratic backsliding in Greece as being a consequence of various factors. These include political clientelism, patronage-based political identities, clientelism practices, the hiring of political appointees, the massive hiring of non-permanent public employees, a lack of depoliticisation efforts, ad hoc policy measures, the politicisation of state institutions, an unequal balance of power among democratic institutions, prolonged political campaigning against the opposition, the discrediting and marginalising of the opposition, control of media, the undermining of democratic principles and institutions, the weakening of checks and balances, decreasing voter turnout, declining trust in political institutions, assaults on government buildings and politicians, attacks on journalists, long-standing political legacies, erosion of political trust, weaknesses in governance and the rule of law, corruption, weak accountability mechanisms, policy capture, limited media pluralism, populist tendencies, declining voter turnout and political conflicts, and curtailment of democratic legitimation. This is a long list of different factors possibly explaining democratic regressions in Greece, though further research seems limited (Sotiropoulos 2018).

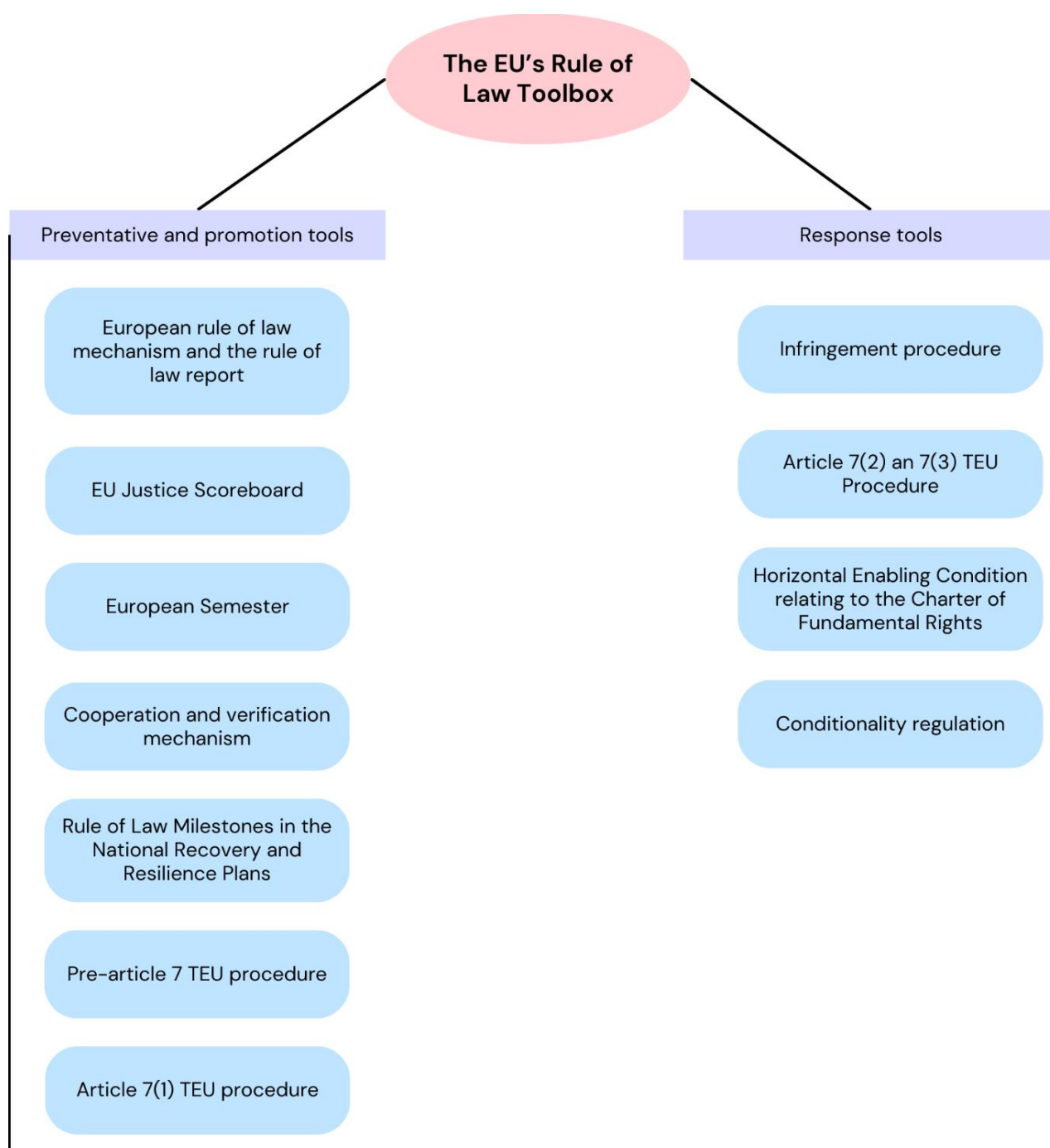
Recently, the Greek government has been criticised for undermining the independence of the judiciary, evidenced by issues with the quality and speed of the justice system, as well as the improper handling of

political interference cases. There have been numerous instances of government actions against journalists, including surveillance, legal intimidation, and restricted media ownership transparency (Brooks, 2024). Additionally, the government has been accused of misusing legislative processes, bypassing public consultations, and implementing laws with little to no input from civil society, leading to poorly crafted legislation and eroding public trust. Corruption remains a significant problem, with inadequate measures to ensure transparency and accountability in political financing and public procurement (Brooks & Day, 2024).

2.3 The EU's Rule of Law Toolbox

The EU has several tools to support the promotion and upholding of the rule of law in the EU. The totality of these tools together is often referred to as the 'rule of law toolbox' (European Commission, 2023e). According to the European Commission (2023e), the rule of law toolbox contains tools on the promotion of rule of law and the prevention of problems on the one hand and tools to respond to issues on the other hand. Prevention and promotion tools include the European rule of law mechanism which refers annual rule of law dialogue and the annual rule of law reports, the EU Justice Scoreboard, the European Semester, and the cooperation and verification mechanism. Response tools include the infringement procedure; the Article 7 TEU procedures, the rule of law conditionality mechanism; and the horizontal enabling condition relating to the Charter of Fundamental rights; and the rule of law framework (European Commission, 2023e). Pech et al., (2023, p. 22) refer to the rule of law framework as "the pre-Article 7 procedure" and classify it as a preventative and promotion tool instead of a response tool and add the rule of law milestones in national recovery and resilience plans as another preventative and promotion tool. Pech et al. (2023) also make the distinction between the Article 7(1) TEU procedure as a preventative and promotion tool and Article 7(2) and 7(3) procedures as response tools. This thesis will follow this classification of the rule of law toolbox and discuss the prevention and promotion tools and the response tools respectively in this section. An overview of the rule of law toolbox is given below in figure 1.

Figure 1: The EU's Rule of Law Toolbox



2.3.1 Preventative and promotion tools

The preventive and promotion tools within the EU's rule of law framework are mechanisms designed to proactively maintain and reinforce adherence to the rule of law across all member states. These tools encompass a range of measures aimed at identifying, addressing, and preventing potential threats to the rule of law. At their core, these tools aim to promote a transparent, accountable, and democratic legal framework within member states (Pech et al., 2023). Next, all preventative and promotion tools will be discussed briefly.

2.3.1.1 European rule of law mechanism and the rule of law report

The European rule of law mechanism is designed as a preventive tool to uphold the rule of law and deter any emerging challenges or deterioration within the European Union. It facilitates an annual dialogue involving the European Commission, the Council of the European Union, the European Parliament, member states, national parliaments, civil society, and potentially other stakeholders. The mechanism revolves around the rule of law report, which the EU started publishing annually in 2020 and which serves as the cornerstone of this dialogue. Its primary goal is to foster cooperation between the EU institutions, encouraging them to contribute within their respective roles. Additionally, the Commission urges national authorities to engage with the rule of law report and encourages involvement from stakeholders at both the national and EU levels. The rule of law report is published annually and comprises an overarching report on the rule of law in the EU and individual chapters for each of the 27 member states. It focuses on four key areas: justice systems, anti-corruption measures, media pluralism, and institutional checks and balances (European Commission, n.d.-f, 2023e). The national rule of law dialogues, developed by the Commission and the Fundamental Rights Agency and facilitated by national Commission representations, provide a platform for stakeholders and authorities to discuss national rule of law issues and devise follow-up actions based on the findings of the rule of law report (European Commission, n.d.-f, 2023e).

A noteworthy change to the rule of law reports is the inclusion of 'Country Specific Recommendations' for each member state from 2022. These recommendations assess progress made and, as the name suggests, can include specific recommendations (Pech et al., 2023).

2.3.1.2 EU Justice Scoreboard

The EU Justice Scoreboard is an annual publication that provides an overview of various indicators related to the efficiency, quality, and independence of justice systems across the European Union. It serves as an integral part of the EU's rule of law toolbox and is connected and contributes significantly to the European Semester. The primary objective of the EU Justice Scoreboard is to support member states in enhancing the

effectiveness of their national justice systems by offering objective, reliable, and comparable data. The findings of the EU Justice Scoreboard serve multiple purposes. They are utilised as a source of information for the rule of law report and inform country-specific evaluations within the European Semester, particularly in the context of the Recovery and Resilience Facility (European Commission, n.d.-b, 2023e). The EU Justice Scoreboard does not directly assess national safeguards on judicial independence or detect rule of law backsliding (Pech et al., 2023).

2.3.1.3 The European Semester

The European Semester is a yearly process that coordinates economic, fiscal, employment, and social policies among European Union member states. It is part of the EU's economic governance framework, where member states align their budgetary and economic policies with EU-agreed regulation. The European Semester aims to contribute to convergence and stability in the EU, ensure sound public finances, foster economic growth, prevent excessive macroeconomic imbalances, monitor the implementation of national recovery and resilience plans, and coordinate and monitor employment and social policies. The European Semester involves close monitoring and dialogue between member states and EU institutions, contributing to enhanced policy coordination and economic stability within the EU (Council of the EU and European Council, 2024a, 2024b; European Commission, n.d.-h). Notably, in 2018, the Council of the EU adopted a Country Specific Recommendation addressing judicial independence in Slovakia, marking the first acknowledgment of rule of law concerns within the European Semester. Since then, European Semester's country reports have regularly highlighted rule of law issues related to national judiciaries (Pech et al., 2023).

2.3.1.4 Cooperation and Verification Mechanism

The Cooperation and Verification Mechanism (CVM) was established by the European Commission to assess and support the progress of Bulgaria and Romania in specific areas related to judicial reform, corruption, and organised crime. This mechanism was put in place because when Bulgaria and Romania joined the EU in 2007, they still had deficiencies in these areas. The CVM is designed to help both countries address these shortcomings as a transitional measure and operates through a set of criteria. The Commission conducts regular assessments based on monitoring and dialogue with Bulgarian and Romanian authorities, and input from various stakeholders, including civil society, international organisations, and independent experts. This approach aims to assist Bulgaria and Romania in achieving the necessary reforms to fulfil their EU membership obligations and ensure the correct application of EU laws and policies. The CVM is only applied to these two member states and thus of little importance when it comes to other member states (European Commission, n.d.-a).

2.3.1.5 Rule of Law Milestones in the National Recovery and Resilience Plans

The Recovery and Resilience Facility (RRF) is a temporary EU instrument that finances reforms and investments in member states to enhance sustainability, resilience, and readiness for green and digital transitions. It is a consequence of Covid-19 as it was created as part of the EU's plan to help member states recover from the economic and social impacts of the pandemic, by financing reforms and investments from the start of the pandemic in February 2020 until the end of 2026 (European Commission, n.d.-i).

Although the RRF was not initially designed as a rule of law instrument, the Commission incorporated rule of law considerations into it (Pech et al., 2023). The rule of law milestones in the National Recovery and Resilience Plans (RRPs) are qualitative objectives included in these plans to ensure the proper use of EU recovery funds. This integration allows for funding of reforms linked to the effectiveness of justice systems. Specifically, countries receiving European Semester Country Specific Recommendations (CSRs) related to judicial independence, anti-corruption, or anti-money laundering must include rule of law milestones in their RRP before receiving EU recovery funds. The RRF Regulation connects RRP with the European Semester mechanism. It mandates reforms to improve judicial systems, fraud prevention, and anti-money laundering measures, as well as the establishment of internal control systems to detect and prevent fraud and corruption. However, if a member state experiences rule of law backsliding, the Commission lacks the authority to impose new milestones. Instead, it can suspend or recover funding if a member state fails to meet previously agreed milestones (Pech et al., 2023). For example, the rule of law milestones in the National Recovery and Resilience Plans of Hungary and Poland focus on different aspects. In Hungary, the milestones primarily cover rule of law issues, including remedial measures proposed by the government. While in Poland, the focus is on the country's courts and concerns related to the judiciary. The Hungarian plan has a larger number and more diverse range of milestones compared to the Polish plan, covering reforms in the judiciary, public administration, and legal system (Schwarcz, 2023).

2.3.1.6 The pre-Article 7 TEU procedure

The pre-Article 7 TEU procedure refers to a mechanism employed by the European Commission as a preventive measure to address potential systemic threats to the rule of law within EU member states. It operates before the formal use of Article 7 TEU (European Commission, 2014a, 2023e). The pre-Article 7 TEU procedure consists of a three-stage process. (1) The first stage involves a Commission assessment in which the Commission collects and examines relevant information to assess whether there are clear indications of a threat to the rule of law in a member state. If there is a threat, the Commission initiates dialogue with the member state by sending a 'rule of law opinion' and expressing its concerns, to which the member state has the opportunity to respond. (2) The second stage occurs if the Commission finds that there is objective evidence of a systemic threat and that the member state is not taking appropriate action

to address it. The Commission then issues a ‘rule of law recommendation’ to the member state, which specifies the steps the member state should take to resolve the situation within a fixed time limit. (3) The third possible stage involves a follow-up to the recommendation. The Commission monitors the follow-up given by the member state to the recommendation. If there is no satisfactory follow-up within the set time limit, the Commission assesses the possibility of activating the mechanisms set out in Article 7 TEU (European Commission, 2014a).

2.3.1.7 Article 7(1) TEU procedure

Article 7(1) reads:

“On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply” (Treaty on European Union, 1992, p. 19).

The Article 7(1) TEU procedure is a preventive measure to address a clear risk of a serious breach of the values stated in Article 2 TEU. The procedure involves several steps:

1. The Council of the European Union determines, by a majority of four fifths of member states (excluding the EU country concerned), that there is a clear risk of a serious breach of the values in Article 2 TEU.
2. Once the clear risk is determined, the Council can issue recommendations to the EU country concerned. These recommendations are adopted by a majority of four fifths of member states (excluding the EU country concerned).
3. The EU country concerned can present its case and provide explanations during a hearing in the Council.
4. A reasoned proposal can be made by either one third of the member states, the European Commission, or the European Parliament. This proposal requires a two thirds majority of the votes cast.
5. The European Parliament must give its consent to the reasoned proposal. This consent requires a two thirds majority of the votes cast (European Commission, 2023e).

2.3.2 Response Tools

The response tools within the EU's rule of law framework are mechanisms designed to address and react to rule of law breaches or threats after they have occurred. These tools allow the EU institutions to intervene when member states fail to uphold the rule of law or when there are significant risks to democratic principles within a member state (Pech et al., 2023). In this section, all of the EU's tools to respond to instances of rule of law backsliding are briefly outlined.

2.3.2.1 Infringement Procedure:

The infringement procedure is used by the EU when a member state fails to implement EU law. Through this procedure, member states can be compelled to properly and fully apply European regulations. The goal of the infringement procedure is to ensure that EU member states fully comply with European regulations (European Commission, n.d.-c). The infringement procedure is governed by the Treaty on the Functioning of the European Union (TFEU), which outlines the rules and provisions for filing complaints and conducting the procedure. Specifically, Article 258 TFEU is the legal basis for starting this procedure (EU Monitor, n.d.). This article reads:

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”
(Treaty on the Functioning of the European Union, 2007, p. 160).

The infringement procedure can unfold through several stages, which are detailed below (EU Monitor, n.d.; European Commission, n.d.-c):

1. The Commission identifies potential breaches of EU law through its own investigations or in response to complaints from citizens, businesses, or other stakeholders.
2. If an EU country fails to communicate measures that fully transpose EU directives or rectify suspected violations of EU law, the Commission may initiate a formal infringement procedure. This involves several steps (European Commission, n.d.-c):

- 2.1 The Commission starts the procedure by sending a letter of formal notice requesting further information to the member state concerned. This member state must then send a detailed reply within a specified period, typically two months.

- 2.2 If the Commission concludes that the member state is failing to fulfil its obligations under EU law, it may send a reasoned opinion. This is a formal request to comply with EU law and includes a section on why the Commission considers that the member state is breaching EU law. It also includes a request that the member state informs the Commission of the measures taken, within a specified period, again typically two months.
 - 2.3 If the member state still fails to comply, the Commission can decide to refer the matter to the Court of Justice. Though according to the European Commission (n.d.-c) most cases are settled before being referred to the court.
 - 2.4 If the member state fails to communicate measures that implement the provisions of a directive in time, the Commission can ask the Court of Justice to impose penalties.
 - 2.5 If the Court of Justice finds that a country has breached EU law, the national authorities must take action to comply with the Court judgment (European Commission, n.d.-c).
3. If, after a Court judgment has been issued, the member state still doesn't act to comply with EU law, the Commission can refer the case back to the Court.
 4. If a member state is taken to the Court for a second time, the Commission can propose financial penalties, such as lump sum payments or daily fines.
 5. The Commission publishes an annual report reviewing key aspects of EU law application and presenting infringement cases by policy area and country.
 6. Information about Commission decisions on infringements is made available online, allowing stakeholders to access details about infringement cases (EU Monitor, n.d.; European Commission, n.d.-c).

According to Pech et al. (2023, p. 24): “from a rule of law backsliding point of view, the main problem with the infringement procedure has been the Commission’s narrow understanding of its scope of application”. Traditionally, the Commission believed infringement actions could only address breaches of specific EU laws. A 2018 Court of Justice ruling challenged this view, ultimately broadening their scope to include matters beyond EU law, such as national measures undermining judicial independence. This decision clarified that member states have a general obligation to ensure and maintain the independence of national courts handling EU law matters (Pech et al., 2023).

2.3.2.2 Article 7(2) and 7(3) TEU Procedure

Article 7(2) and 7(3) read as follows:

“2. 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, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, 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. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State” (Treaty on European Union, 1992, p. 19).

The second paragraph, Article 7(2) TEU, establishes a mechanism for the European Council to determine the existence of a clear risk of a serious breach of EU values by a member state. If the European Council, by a four-fifths majority, determines that such a risk exists, it can issue recommendations to the member state in question (European Commission, 2023e).

The third paragraph, Article 7(3) TEU, is applicable when a member state has already committed a serious and persistent breach of EU values. If the European Council, acting unanimously (except for the member state in question), determines that such a breach has occurred, it can decide to suspend certain rights that the member state enjoys under the EU treaties, including its voting rights in the Council (European Commission, 2023e). However, the decision to suspend these rights must be approved by the European Parliament. This part of the Article 7 TEU is sometimes referred to as the "sanctioning arm" of the Article 7 procedure because it allows for measures to be taken against a member state after a breach has occurred (Pech et al., 2023, p. 25).

2.3.2.3 Horizontal Enabling Condition relating to the Charter of Fundamental Rights

The horizontal enabling condition relating to the Charter of Fundamental Rights “requires all Member States to put in place effective mechanisms to ensure that the programmes supported by the Common Provisions Regulation and their implementation complies with the Charter. This is a precondition for related expenditure to be reimbursed” (European Commission, 2023e, p. 2). So this condition mandates compliance before any related expenditure can be reimbursed (except for costs contributing to fulfilling the condition).

The Charter guarantees rights such as the right to an effective remedy and an independent tribunal. Non-compliance triggers financial consequences, including non-reimbursement of costs or program approval suspension. The Common Provisions Regulation (CPR) stipulates this requirement, emphasising respect for fundamental rights in fund implementation. member states must report non-compliance cases, facing financial penalties if the condition isn't met (European Commission, 2023e; Pech et al., 2023).

2.3.2.4 Rule of law Conditionality Regulation

Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union, more commonly referred to as the Rule of Law Conditionality Regulation, or simply the conditionality regulation, aims to ensure the protection of the EU budget when rule of law violations directly impact its financial interests (Regulation 2020/2092, 2020). This regulation provides a mechanism for the European Commission to propose appropriate measures to the Council if breaches of rule of law principles in a member state pose a threat to the EU's financial management. It was enacted in January 2021 and is the most recent addition to the EU's rule of law toolbox. Under the Conditionality Regulation, the European Commission can propose various measures to the Council if breaches of rule of law principles in a member state threaten the EU's financial interests. These measures include the suspension of payments and financial corrections through reducing or recovering payments made to the member state in question. Additionally, the regulation allows for the proposal of other measures to address the rule of law breaches effectively (European Commission, n.d.-e).

To ensure clarity and consistency in the application of the regulation, the Commission has developed comprehensive guidelines. These guidelines outline how the Commission will interpret and implement the regulation, including procedures for protecting the rights of recipients and beneficiaries of EU funding. Monitoring and enforcement of the regulation involve gathering information from various sources, including the Commission's annual rule of law report. Additionally, complaints play a role in providing insights into potential breaches and informing decisions on activating the regulation (European Commission, n.d.-e).

Article 3 and Article 4 of this Regulation add (indicative) breaches of the rule of law principles, which will not be listed as this is a long list of possible breaches. Article 5 establishes the types of measures that can be adopted if it is determined that rule of law breaches in a member state affect or risk affecting the sound financial management of the EU budget. These measures include suspending payments, terminating legal commitments, reducing economic advantages, and prohibiting new legal commitments. The regulation ensures that final recipients and beneficiaries of EU funds are still entitled to receive payments, even if measures are imposed on their member state. Article 6 details the procedure for adopting these measures. The European Commission first assesses whether breaches have occurred and their impact on the financial management of the EU budget. If necessary, the Commission proposes appropriate measures to the Council

of the European Union, which then decides whether to implement them. Article 6 mandates the proportionality of measures, taking into account the nature, duration, gravity, and scope of the breaches (Regulation 2020/2092, 2020).

2.3.3 Academic literature on the EU's tools against democratic backsliding

Kelemen & Blauberger (2017, p. 319) classify the EU's tools and mechanisms against democratic backsliding into "judicial and political safeguards". As the name implies, judicial safeguards refer to the mechanisms and procedures within the judicial system that are designed to protect and uphold the rule of law, democracy, and fundamental rights (Blauberger & Kelemen, 2017). Blauberger & Kelemen (2017) classify the infringement proceedings under this type of safeguard. However, they highlight that the Commission's use of infringement proceedings can be selective and limited by political considerations (Blauberger & Kelemen, 2017). Political safeguards are measures or mechanisms put in place to protect and uphold democratic principles and prevent democratic backsliding in a political system. They are designed to ensure that governments and political actors adhere to the rule of law, respect human rights, and maintain democratic institutions and processes (Sedelmeier, 2017). Sedelmeier (2017) classifies the rule of law framework and dialogue (as part of the rule of law mechanism), and the EU Justice Scoreboard as political safeguards. These safeguards have limits and challenges to them. Varying domestic conditions can make it challenging to apply political safeguards consistently and effectively. Lack of consistency in applying the safeguards can undermine the legitimacy and effectiveness of the safeguards. And illiberal governments and political actors may resist or oppose safeguards, creating challenges for their implementation (Sedelmeier, 2017).

Theuns (2020) criticised the current procedure outlined in Article 7 TEU, specifically for conflicting with the values it aims to defend, particularly democratic equality. Article 7(2) TEU is seen as problematic because it requires a high threshold for action, potentially allowing member states to protect each other from scrutiny and accountability. Article 7(3) TEU is criticised for relying on unanimity, which can be influenced by political considerations and power dynamics. This undermines the principle of democratic equality (Theuns, 2020).

2.4 Existing literature on the EU's response to backsliding member states

This section will perform a further literature review on the existing academic literature covering the EU's response to backsliding member states. This can provide evidence of the research gap which is to be filled by this research.

2.4.1 The response of the EU as a whole

Containing democratic and rule of law backsliding can be complicated, especially when voters elect openly anti-democratic politicians (Mounk, 2018). According to Wunsch et al. (2023) citizens in democracies fail to punish political candidates who openly violate democratic standards at the ballot box due to reasons such as partisanship, lack of awareness, issue prioritisation, identity politics, lack of viable alternatives, lack of trust in institutions, fear and intimidation, and lack of trust in the electoral process. These factors can vary across contexts and individuals, making it a complex phenomenon influenced by a combination of individual, social, and political factors (Wunsch et al., 2023).

Sitter & Bakke (2021) analysed the EU's capacity to respond to democratic backsliding in its member states. The authors propose 3 strategies that the EU can follow: (1) contain; (2) accept; or (3) fight democratic backsliding. Initially, the EU focused on containing democratic backsliding through measured action and normative signals. As seen in Poland and Hungary, the EU's ability to contain backsliding faced difficulty. So, the EU has to choose between accepting backsliding or fighting it according to Sitter & Bakke (2021). Accepting open defiance of EU law could lead to a differentiated EU where states do not recognise each other's legal systems. On the other hand, a strategy to reverse backsliding could potentially force backsliding states out of the EU (Sitter & Bakke, 2021).

According to Raube & Costa Reis (2021), the EU's response to democratic backsliding in its member states has been mixed. The European Commission and the European Parliament have shown potential to defend the EU's democratic order and have taken actions such as launching infringement procedures and activating Article 7 TEU. However, their responses have been criticised for being insufficient and lacking decisive action as they are said to have been slow and fragmented, with different actors exhibiting varying levels of commitment and effectiveness (Raube & Costa Reis, 2021).

According to Bakke & Sitter (2022), the EU's response to democratic backsliding has been limited and ineffective. The EU's policy tools are described as limited, and there is a lack of political will among member states to address the issue. The EU's ordinary mechanisms for dealing with states that break EU laws have proved inadequate. The EU's ultimate sanction of suspending important aspects of EU membership requires unanimity among member states (Article 7(2) TEU), and some member states have been sympathetic to the backsliding governments, making it difficult to take strong action. This relates to how Hungary and Poland blocked sanctions towards one another for a while (Holesch & Kyriazi, 2022). According to Feisel (2022), the EU faced several challenges and limitations in its response to backsliding member states, namely: political considerations, leading to delays and inaction; the EU's institutional dynamics, resulting in watered-down measures and compromises; reliance on technical and legalistic approaches, which may not address the broader challenges of democratic erosion; a lack of ultimate

coercive powers to enforce decisions and hold member states accountable; and reactive measures and a lack of a comprehensive strategy, which do not effectively address the root causes of democratic backsliding (Feisel, 2022).

According to Emmons & Pavone (2021), the EU has failed to effectively respond to democratic backsliding in member states, particularly in the case of the rule of law crisis in Hungary and Poland. They argue that EU institutions have repeatedly failed to act despite the constitutional breakdowns and threats to democratic values in these countries. According to Kelemen (2024), the EU initially failed to address the rise of autocratic member state governments in Hungary and Poland. The EU's failure to act is attributed to several factors, including party politics, intergovernmental norms and institutions, leniency in enforcement by the European Commission, and inaction. However, since 2021, there have been important changes in the EU's approach to the autocracy crisis. The EU has become more assertive in challenging autocratic governments (Kelemen, 2024). Despite these developments, Kelemen (2024) concludes that the EU is unlikely to escape democratic backsliding anytime soon. The fundamental features of the EU's institutional structure and political culture that facilitated democratic backsliding in the first place remain there and continue to discourage an effective EU response (Kelemen, 2024).

Hernández & Closa (2024) discuss the EU's response and capacity to respond to democratic backsliding in the context of the Russian invasion of Ukraine. The European Commission has often adopted a soft enforcement mechanism directed at countries like Poland. However, the outbreak of the war in Ukraine has led to a shift in the EU's approach to rule of law enforcement. The Commission has adopted a much tougher stance towards Hungary, which has a friendly attitude towards Russia and clashes with the position of most member states and the Commission itself. The change in the Commission's attitude is attributed to the different positions taken by the Polish and Hungarian governments regarding a unified EU response to Russia (Hernández & Closa, 2024). Poland strongly condemned the Russian aggression, while Hungary adopted a pro-Moscow and anti-sanctions position (Holesch & Zagórski, 2023). Hernández & Closa (2024) argue that forbearance in rule of law enforcement depends on the Commission's estimate of national government preferences. The Commission may enhance its enforcement activity when the priorities of national governments concerning other issues indicate that it can instrumentalise enforcement to gain support for the preferred option. In summary, this suggests that the EU's response to democratic backsliding, particularly in relation to the rule of law, is influenced by the priorities of member states and the Commission's calculation of political payoffs (Hernández & Closa, 2024).

Blauberger & Sedelmeier (2024) discuss the policy change of the EU in response to democratic backsliding in Hungary and Poland. The EU initially had a policy of inaction and low sanctioning, as had also been argued by Pech et al. (2021). But from late 2020 onwards, the EU shifted towards punishing democratic backsliding through material sanctions. Blauberger & Sedelmeier (2024) highlight two processes that

explain this policy change. First, the increasing public salience of backsliding across member states created domestic electoral incentives for mainstream parties to support sanctions against illiberal governments abroad. Once the issue of backsliding became more important and illiberal government representatives were viewed more negatively by domestic voters, mainstream parties faced electoral punishment if they maintained close relations with backsliding governments. Supporting EU sanctions became a way for these parties to distance themselves from backsliders and protect their electoral prospects. Additionally, sanctions could be used as signals to the domestic electorate, generating electoral benefits in the competition between mainstream parties. Second, backsliding governments disrupted intergovernmental policy cooperation and threatened core EU policies. This negative intergovernmental spillover increased the costs of inaction for other member states and EU institutions. When backsliding governments posed a threat to core EU policies, even previously reluctant actors at the EU level became willing to support the use of sanctions. The costs of allowing backsliding to undermine common policies outweighed the costs of imposing sanctions (Blauberger & Sedelmeier, 2024). It is suggested that the EU's response to democratic backsliding is influenced by both domestic electoral incentives and the threat posed to core EU policies. When backsliding disrupts international policy cooperation, there is a greater likelihood of the EU using sanctions to counter democratic backsliding (Blauberger & Sedelmeier, 2024).

2.4.2 How the EU's response to backsliding in Hungary is evaluated

Durakçay (2023) highlights that the EU has faced challenges in addressing the legal and constitutional changes under Viktor Orbán's government, which question the EU's capacity and political will to prevent violations of its rules and norms pertaining to democracy. The EU has implemented various mechanisms, such as infringement procedures and the activation of Article 7 TEU, to address the rule of law violations in Hungary. However, the EU's response has been limited by political barriers, including the reluctance of member states to take strong action against Hungary. Durakçay (2023) suggests that the EU needs to strengthen its political will and mechanisms to effectively address and prevent democratic backsliding in Hungary and other member states. The EU has also used soft mechanisms, such as dialogue and engagement, to address the rule of law issues. The response has faced challenges and limitations, such as the lack of unanimous agreement among member states and the limited effectiveness of existing mechanisms. With this in mind, Durakçay (2023) emphasises the need for a stronger and more coordinated response from the EU to effectively address democratic backsliding in Hungary.

Scheppele et al. (2022) suggest that the EU has not been willing enough to address the systemic rule of law problems in Hungary and call for a 100% suspension of Hungary's cohesion funds. Partial suspensions are said to be ineffective in serious situations like Hungary's because the violations of the rule of law principles, such as corruption, lack of independent prosecution, and non-impartial judges, are deeply ingrained in the

financial management system of Hungary and have a significant impact on the integrity of EU funds flowing into the country (Scheppele et al., 2022).

Petit (2022) suggests that the EU should take several actions to address Hungary's democratic backsliding.. A periodic review system must be established to ensure ongoing compliance. Financial pressure should be applied through the suspension of EU funds, harmonising across different funding schemes and considering regional allocations to bypass central governments, thus enhancing oversight and preventing misuse. Addressing Hungary's illiberalism on the international stage requires member states to reconsider unanimity in the Council, favouring qualified majority voting for more effective decision-making (Petit, 2022).

2.4.3 How the response to backsliding in Poland is evaluated

According to Dănilă et al. (2023), the EU has responded to Poland's democratic challenges through various mechanisms, including monitoring by international bodies and implementing conditionality measures to withhold EU funds. While these efforts have faced resistance from Polish authorities, they contribute to the legitimacy of EU intervention. Poland's future trajectory depends on factors such as EU actions, societal resistance, and electoral outcomes (Dănilă et al., 2023).

Pech et al. (2021) discuss and criticise the EU's response to democratic backsliding in Poland. The European Commission activated its rule of law framework for the first time with respect to Poland in January 2016. This step was taken due to concerns about the situation of the Polish Constitutional Tribunal and the violation of its judgments by the ruling majority (see section 2.2.2.2 for more details). Despite the activation of the rule of law framework and subsequent actions by the European Commission, virtually all of the problematic issues identified by the Commission were not addressed by Polish authorities (Pech et al., 2021). Pech et al. (2021, p. 21) argue that the European Commission has systematically acted "too little too late", while the Council of the EU has failed to act meaningfully. The inaction of these two EU institutions is seen as a dereliction of duties. On the other hand, the Court of Justice of the EU has defended judicial independence whenever an infringement case was lodged with it by the Commission. However, the Court's record in preliminary ruling cases is more mixed, as it has been apprehensive about undermining the principle of mutual trust (Pech et al., 2021). Pech et al. (2021) conclude that the EU's response to Poland's rule of law crisis has been inadequate and suggest that more statements, dialogue, and reports will not be sufficient to contain or solve the crisis. It is argued that the situation in Poland represents a "total breakdown in the rule of law" (Pech et al., 2021, p. 4), which poses a threat to the legal order that underpins the EU. Pech et al. (2023) argue that the EU should have used the conditionality regulation to block Poland's funds as it did with Hungary, citing multiple violations in Poland that fall within the scope of this regulation.

2.4.4 Literature comparing Hungary and Poland

After analysing the cases of Poland and Hungary, Kelemen (2017) suggested that the EU has been ineffective in responding to democratic backsliding in these member states. The EU's response to democratic deficits at the national level has been limited and the EU may be trapped in an "authoritarian equilibrium" where partisan politics at the EU level protect local autocrats (Kelemen, 2017, p. 231). Partisan politics are said to play a role in shaping the EU's response (Kelemen, 2017).

Kovács & Scheppele (2018) draw several lessons from the cases of Hungary and Poland. Firstly, these cases demonstrate that even consolidated democracies can experience a decline in the independence of their judiciary. This challenges the notion that once a democracy is consolidated, it will remain so indefinitely. Though here it can be noted again that it is contested whether Hungary ever had a consolidated democracy (Anghel & Jones, 2024). Secondly, in both Hungary and Poland, parties with autocratically inclined leaders came into power with significant majorities. These leaders, Viktor Orbán in Hungary and Jarosław Kaczyński in Poland, attacked key independent public institutions, including the constitutional judiciaries, in order to eliminate them as veto points. Thirdly, the deconsolidation of democratic governments poses a threat to the European Union. The judiciaries of the member states are responsible for enforcing EU law throughout the Union. If these judiciaries are disabled or compromised, the EU's ability to ensure uniform compliance with EU law is undermined. Fourthly, the attacks on the national judiciaries in Hungary and Poland have significant implications for fair treatment and the ability to counter autocratic states through legal means. If courts are not neutral in enforcing the law, it becomes impossible for individuals or opposition groups to challenge the government through legal channels nationally (Kovács & Scheppele, 2018). Lastly, Kovács & Scheppele (2018) going into the EU's lack of tools to address these issues in Poland and Hungary back in 2018, though the EU has developed (its use of) these tools. Bernhard (2021) agrees that the EU's response to democratic backsliding in Hungary and Poland has been limited in its effectiveness and argues that member states have greater leeway to diverge from EU norms once they become members because the EU's enforcement mechanisms for ensuring compliance with its fundamental norms are not decisive (Bernhard, 2021).

2.4.5 The role of the EU's institutions according to the literature

2.4.5.1 The European Commission

The European Commission's response to democratic backsliding in EU member states has been primarily anchored on technocratic appeals to the rule of law and judicial independence, according to Oleart & Theuns (2023). However, this approach is said to be limited and fails to adequately address the broader conception of democracy. The Commission's understanding of democracy is described as a form of "democracy without politics" (Oleart & Theuns, 2023, p. 883), which prioritises a technocratic and legalistic perspective over a democratic pluralist one. The Commission's policy choices in regard to democratic backsliding are

argued to reflect this depoliticised understanding of democracy. The Commission is criticised for having a narrow conception of democracy and should not just focus on legal bases in its response, but also consider a more politicised approach because preventing healthy debates and democratic disagreements can lead to more hostile conflicts, as demonstrated by populist rhetoric (Oleart & Theuns, 2023). According to Priebus (2022), the Commission's tools are characterised by a mismatch between the deliberate nature of non-compliance and the solutions chosen. The Commission's approach is primarily focused on prevention and dialogue, rather than enforcement through sanctions. Priebus (2022) argues that this approach is unable to deal with deliberate backsliding and calls for a combination of management and enforcement strategies, along with support for domestic democratic forces, to address the issue more effectively.

2.4.5.2 The European Parliament

According to Wolkenstein (2022), European political parties have been complicit in democratic backsliding by supporting illiberal governments in Hungary and Poland. Particularly the European People's Party (EPP) and the European Conservatives and Reformists (ECR) Party are said to have been complicit in democratic backsliding in Hungary and Poland. Wolkenstein (2022) argues that they have supported these countries and hindered efforts to address the erosion of democratic norms and the rule of law. This complicity is seen through their voting behaviour, because some MEPs have consistently voted against sanctions and resolutions aimed at addressing the democratic backsliding. Additionally, informal networks and affiliations between European parties and their national counterparts have been used to promote the agenda of illiberal governments (Wolkenstein, 2022).

According to Meijers & van der Veer (2019), MEPs from party groups affiliated with the ruling parties in Hungary and Poland are less likely to raise concern over democratic issues and more likely to vote against condemning resolutions. Similarly, Herman et al. (2021) analysed the EPP MEPs' voting behaviour between 2011 and 2019 and found that with MEPs from member states with lower democratic performance were less likely to vote for sanctions. This makes sense as MEPs from these member states may be concerned about becoming targets of resolutions in the future and may generally be less attached to fundamental values compared to other MEPs (Herman et al., 2021). Wunsch & Chiru (2024) highlight a growing polarisation in the European Parliament's debate on EU interventions in response to democratic backsliding. MEPs supporting intervention emphasise the importance of defending EU values and the rule of law, while those opposing intervention reject EU interference and emphasise national sovereignty. Ideological orientation and geographic origin play a significant role in shaping MEPs' positions. While the European Parliament has been criticised for its slow response, it is also where strong defences of EU values can be found (Wunsch & Chiru, 2024).

2.4.5.3 The Council of the European Union

Winzen (2023) argues that backsliding member states can benefit from the Council's consensus norm and selectively oppose decisions in certain areas while supporting decisions in others. This consensus norm is needed for the Article 7(3) TEU procedure for example, as explained in section 2.3.2.2. However, the success of member states' tactics depends on various conditions, such as not being isolated, whether or not the EU is facing time pressure, and the insulation of Council members from political accountability.

2.4.5.4 The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) plays a role in addressing democratic backsliding by establishing standards for assessing the independence of a member state's judiciary. Both the Commission and the national courts of Poland and Hungary have filed cases with the CJEU regarding judicial reforms and the principle of judicial independence. The CJEU's strong stance against backsliding governments has led to more compliance from Poland and Hungary (Scheppele & Kelemen, 2020). Another example is the 'Portuguese Judges case' from 2018, which involved a challenge by Portuguese judges regarding their retirement age. It was argued that the mandatory retirement age of 70 for judges violated EU law, particularly the principle of non-discrimination based on age (Ovádek, 2023). This case was a landmark ruling because it empowered the European Commission to bring infringement procedures against member states for violations of the obligation to ensure judicial independence. It also strengthened the role of national judges in challenging government interference through the preliminary reference system. The case highlighted the importance of judicial independence as a fundamental principle of the EU and the rule of law, triggering further developments in EU law and policy (Ovádek, 2023). Lenaerts (2023) and Komanovics (2022) highlight the importance of effective remedies and independent courts and argue that the Court of Justice plays a significant role in ensuring the independence of national judges within the EU. Raube & Costa Reis (2021) argue that the Court's effectiveness is limited by the political and legal constraints of the EU treaties.

2.4.6 Civil society's role in the EU's response to backsliding member states

Eisen et al. (2019) underscore an important role for civil society organisations (CSOs) and non-governmental organisations (NGOs) in the EU's response to democratic backsliding. They outline various ways in which CSOs and NGOs can contribute, such as capacity-building, donor coordination, empowering non-traditional actors, and securing local funding. Eisen et al. (2019) argue that civil society's partnership with political opposition and other actors is crucial in countering democratic erosion, and the EU should support and strengthen these organisations.

Christopoulou (2022) agrees that civil society plays a crucial role in responding to democratic and rule of law backsliding in the EU. It acts as a counterbalance to the state, holds political actors accountable, and participates in decision-making processes. The European institutions recognise the importance of civil society and have developed initiatives like the rule of law report to address the challenges faced by civil society. For example, in Hungary civil society organisations played a significant role in responding to backsliding by advocating for the protection of fundamental rights, promoting transparency, and holding the government accountable (Christopoulou, 2022). In Poland civil society organisations protected the rule of law by raising awareness and safeguarded judicial independence by defending the independence of the judiciary and challenging reforms that undermined it. They engaged in strategic litigation to challenge legislative changes, represented affected judges in domestic and international courts, sought international support and intervention, provided information to EU institutions, and utilised international mechanisms to address violations (Grabowska-Moroz & Śniadach, 2021).

2.4.7 How scholars think the EU should respond to democratic backsliding

According to Olsen (2023b, p. 77), the EU should defend its values by implementing a “concentric defence strategy” that combines various measures. These measures include political, cultural, socio-economic, and legal responses. Possible responses include naming and shaming, exclusion of non-liberal democratic parties, civic education, public expression of principles, EU regional development and cohesion funds, targeted economic sanctions, suspension of rights, diplomatic pressure, political dialogue, engagement, educational programs, public awareness campaigns, support for civil society organizations and independent journalism, economic development, reducing inequality, social cohesion, financial assistance, investment, support for social programs, activation of Article 7 TEU, strengthening rule of law oversight mechanisms, enhancing judiciary independence, and effective enforcement of EU law (Olsen, 2023b, pp. 81–83). These responses should be targeted towards the actual wrongdoers and should not rely on problematic notions of collective responsibility, according Olsen (2023b). Olsen (2023b) also suggests that the EU should also ensure that these responses respect the principle of the separation of powers, specify its fundamental values through legislation and establish clear and transparent evaluation criteria for breaches of these values. The responsibility for defending liberal democracy should primarily lie with the member states, but the EU has a role to play in protecting its values when they are violated in member states (Olsen, 2023b).

Beetz (2024) thinks the EU has a duty to protect its democratic peoples from democratic backsliding in member states for several reasons. These include the principles of shared popular sovereignty and European integration, the commitment to the rule of law and fundamental rights, the aim to maintain stability and security, and the need to uphold the EU's reputation and legitimacy as a democratic and values-based organisation. Beetz (2024) proposes several actions that the EU should take to protect its citizens from democratic backsliding. These actions include implementing discursive measures such as naming and

shaming backsliding governments, engaging in rule of law dialogues, expressing support for pro-democratic actors, economic measures like targeted sanctions and providing financial support to pro-democratic actors (Beetz, 2024).

Theuns (2022) proposes that the EU needs an expulsion mechanism. Such a mechanism would involve the possible removal of a member state from the EU due to serious and persistent breaches of EU fundamental values, such as democracy, equality, and the rule of law. The need for an expulsion mechanism is argued based on preserving the democratic character of the EU, the lack of effectiveness of other measures, the voluntary nature of EU membership, and consistency with the rule of law. Expulsion from the EU, if done within the appropriate legal framework, is seen as a more appropriate, coherent, and legitimate final political sanction for backsliding member states by Theuns (2022). Olsen (2023a) argues against the expulsion of EU member states that have turned autocratic, arguing that expulsion is unnecessary when a member state can voluntarily leave. This argument seems short-sighted however, as it completely disregards the benefits that member states enjoy by being part of the European Union. Olsen (2023a) also argues that the democratic rights of European citizens should take precedence over the rights of states. Expelling member states for democracy protection would result in citizens of that member state losing important EU rights by being expelled from the EU (Olsen, 2023a).

2.5 The research gap

Now that the existing literature on the EU's response to democratic backsliding has been discussed, it serves to repeat the research gap. The research gap was introduced in section 1.1.2.

As the previous section has shown, the existing literature discusses existing safeguards (Blauberger & Kelemen, 2017; Sedelmeier, 2017), the approach of individual EU institutions (Lenaerts, 2023; Oleart & Theuns, 2023; Priebus, 2022; Scheppele & Kelemen, 2020; Wolkenstein, 2022) and the role of civil society (Christopoulou, 2022; Eisen et al., 2019). The EU's approach to backsliding in general and its effectiveness is criticised (Bakke & Sitter, 2022; Raube & Costa Reis, 2021; Theuns, 2020). Additionally, some scholars evaluated the EU's approach to democratic backsliding in Hungary (Durakçay, 2023; Petit, 2022; Scheppele et al., 2022) and Poland (Dănilă et al., 2023; Pech et al., 2021, 2023).

The main findings across these studies focus on the EU's inconsistent application of tools (e.g. Theuns, 2020), the EU's inability to apply Article 7 TEU because of the high voting threshold in the Council (e.g. Theuns, 2022), the EU's fragmented response across different institutions (e.g. Raube & Costa Reis, 2021), the limits of individual institutions (e.g. Herman et al., 2021; Oleart & Theuns, 2023; Scheppele & Kelemen, 2020), case specific challenges in Hungary and Poland (e.g. Dănilă et al., 2023; Scheppele, 2022)

and the importance of civil society (e.g. Christopoulou, 2022). These findings underscore the need for a more comprehensive and coherent strategy to effectively address democratic backsliding, considering the political, institutional, and socio-economic factors influencing the EU's response. More recently, scholars such as Blauberger & Sedelmeier (2024) have focused on the shift in the EU's policies and approach to backsliding member states, arguing that the EU stepped up its approach over time with regard to Hungary and Poland.

The existing literature provides a solid foundation for understanding the EU's tools and mechanisms against democratic backsliding. However, significant gaps remain in explaining the complex interplay of political, institutional, socio-economic, and external factors that shape the EU's response. Addressing these gaps will contribute to a more comprehensive and nuanced understanding of the EU's approach to safeguarding democracy and the rule of law within its member states. This dissertation aims to fill this research gap by integrating these diverse factors and providing a holistic analysis of the EU's response to backsliding member states.

3 THEORETICAL FRAMEWORK

Scholars use different types of theoretical approaches when discussing the European Union policy. According to Hatton & Sonny (2015) the following theoretical approaches are the most dominant in EU literature: neofunctionalism, intergovernmentalism, liberal intergovernmentalism, (new) institutionalism and multi-level governance. I argue that adopting an institutionalist approach is the most fitting for this research because it employs a clear focus on legal and normative frameworks such as the EU's regulations and values, which section 2 has shown to be important aspects. In contrast, neo-functionalism focuses on spillover effects between member states, intergovernmentalism focuses on the preferences of member states and multi-level governance focuses on the interaction between national and international levels (Hatton & Sonny, 2015). However, the focus of this thesis is on the EU as an institution and how its behaviour in responding to democratic backsliding in member states is shaped. The other approaches mentioned fit less clearly within this perspective and take look at different levels on which the member states operate in a more individual context or seem more fitting for an approach from the member states perspective. In contrast, institutionalism can be used to look at the EU as institution on its own to explain its logic in responding to backsliding member states (Ansell, 2021). The next section will elaborate further on the specific strand of institutionalism which will be used, namely normative institutionalism, and on how and why this will be applied.

3.1 Normative institutionalism

Ansell (2021, p. 135) describes institutionalism as “a broad umbrella term used in the social sciences to describe the study of institutions and their importance in social, economic, and political life”. Overall, institutionalism provides a framework for understanding how institutions shape social, economic, and political processes, and how they can change over time. It offers different perspectives on the role of institutions and the mechanisms through which they influence actors' behaviour. So, institutionalism emphasises the role of formal structures, rules, and procedures in shaping behaviour (Peters, 2022). Applied to the subject of this thesis, institutionalism focuses on the formal and informal rules, norms, and procedures that shape political behaviour within the EU's institutions. And as has been discussed in the conceptual framework, the EU has treaties and regulations that establish its rules. Furthermore, the EU's rule of law toolbox provides specific frameworks for different legal instruments that the EU can use in its approach to democratic backsliding in member states. These often include frameworks that outline in which specific scenarios they can be used. Therefore, an institutionalist approach seems fitting in a broad sense (Ansell, 2021). However, as Peters (2022) points out, there are different types of institutionalism across the literature. That's why it might prove insightful to apply a specific strain of institutionalism.

A relevant, albeit a somewhat lesser-known type of institutionalism is called **normative institutionalism**. This type of institutionalism is sometimes used to explain behaviour of the EU's institutions (Thomas, 2009). For example, normative institutionalism is an established theory in the analysis of EU foreign policy (Schimmelfennig & Thomas, 2009). According to Thomas (2009, p. 343), “normative institutionalism emphasizes the behavioral impact of standards of appropriateness established by the community's normative and policy commitments”. When applied to the European Union, normative institutionalism posits that member states are dedicated to maintaining the political sustainability of the Union. They place importance on being perceived as adhering to its normative and policy commitments, despite having different preferences on specific policy matters. This theory suggests that EU decision-making is influenced by the normative and policy commitments established by member states during the formation of the EU's institutions, its expansion, and the creation of policies. Therefore, normative institutionalism focuses on the EU's established rules and regulations which often have the EU's values enshrined in them, as explained in section 2.1.1 (Thomas, 2009). As normative institutionalism emphasises values and norms in shaping responses within institutions, it seems applicable in the context of this thesis.

I argue that using Thomas' (2009) conceptualisation of normative institutionalism can help answer what explains the EU's response to backsliding member states. In the case of the EU, treaties and legislation establish normative frameworks that govern the behaviour of EU institutions and member states. These rules and regulations are based on specific values that the EU aims to respect. As explained in section 2.3, tools such as the Article 7 TEU procedure were established to protect the EU's values enshrined in Article 2 TEU. These legal documents articulate principles such as democracy, the rule of law and respect for human rights, which serve as the basis for the EU's response to challenges like backsliding. By applying the normative institutionalist approach, the EU institutions' adherence to treaties and legislation could reflect a commitment to upholding these norms and values. Additionally, this framework might give insight into how these norms and values are internalised by EU actors, shaping their identities and behaviour (Thomas, 2009).

3.2 Logic of consequences and logic of appropriateness

The EU's rules and regulations might not be the only factor explaining the EU's response to backsliding member states. To assess the logic that guides the EU institutions' decision-making, the theories of the logic of consequences and the logic of appropriateness can provide further insight. According to Schulz (2018, p. 914), “a logic of action is a characterization of a mode of action of an actor (individual and collective). It aims to capture the ‘reason to act’”. Schulz (2018, p. 914) clarifies that “action follows a logic of consequences when it is driven by subjective assessments of outcomes of alternative courses of action. Action follows a logic of appropriateness when it is shaped by rules relevant to the current situation”. This

section will explain how these two forms of logic can help explain the EU's approach to backsliding within member states.

3.2.1 Logic of consequences

Logic of consequences involves deliberate consideration of alternatives, assessment of their outcomes, and preference-driven choices. Actors driven by this logic engage in some form of analysis to evaluate future consequences of their decisions (Schulz, 2018). In the EU's rule of law toolbox (section 2.3), there are several tools that are tied to financial consequences. This indicates that the EU can incentivise certain behaviour through the use of these tools. The EU could use the threat of imposing financial consequences to incentivise backsliding member states to follow its norms and regulation.

3.2.2 Logic of appropriateness

Logic of appropriateness adheres to norms, rules, and identities as guiding behaviour. This means that rules can be tacit or explicit and include habits, skills, routines, conventions, policies, norms, laws, institutions, and technologies. Actors recognise a situation and match it to appropriate action consistent with relevant rules. The logic of appropriateness relies on matching situations to rules and involves less information processing compared to the logic of consequences (Schulz, 2018). This can be applied to the subject of this thesis. The tools in the EU's rule of law toolbox always, at least to some extent, specify when they can be used. For example, the Article 7(1) TEU procedure is used to establish a serious breach to the rule of law (see section 2.3.1.7). This seems somewhat open to interpretation, which can indicate that EU institutions have some discretion in applying this procedure. In these cases, an EU institution might follow the logic of appropriateness in deciding whether to use one of its tools. Therefore, the logic of appropriateness can be useful as a framework to determine how the EU decides when to use certain tools and when not to use them (Schulz, 2018).

In summary, the logic of consequences emphasises more rational decision-making based on anticipated or possible outcomes, while the logic of appropriateness emphasises adherence to norms, rules, and identities (Schulz, 2018). Both logics offer perspectives to help the EU's response to democratic backsliding, considering the strategic calculations of consequences as well as the use normative frameworks in proportion to a member states transgressions of EU norms.

4 METHODOLOGY

4.1 Research design

To analyse how the European Union responds to democratic backsliding in EU member states, different types of qualitative research are used. Qualitative research implies the collection of data in a natural setting and data analysis that can be both inductive and deductive (Creswell & Poth, 2018). In reporting on the data, a qualitative analysis includes “the voices of participants, reflexivity of the researcher, a complex description and interpretation of the problem and its contribution to the literature” (Creswell & Poth, 2018, p. 8). Qualitative research is used to understand reality, describe and explain the social world, and for developing explanatory models and theories (Morse & Field, 1996). This usually involves the perspectives and experiences of participants. This means that qualitative researchers focus on interpretative and subjective concepts. This research strategy is fitting for this thesis as the aim is to understand how and why the European Union responds to democratic backsliding in its member states. Focusing on how and why an actor acts in a certain way is often operationalised through qualitative matters (Austin & Sutton, 2014). The research analysis in section 5 is split into two parts.

The first part of the analysis uses a **multiple-case-study design**. According to Creswell & Poth (2018, p. 96): “Case study research involves the study of a case (or cases) within a real-life contemporary context or setting”. The cases in a case study can be concrete entities such as individuals, organisations or partnerships. But they can also be less concrete, such as communities, relationships, or decision-making processes (Creswell & Poth, 2018). The EU’s response to Hungary and Poland will be analysed as cases using this design. As explained in the conceptual framework, these countries are generally seen as the two most obvious examples of EU member states undergoing democratic backsliding (see for example Bakke & Sitter, 2022; Bugaric & Kuhelj, 2018; Gora & de Wilde, 2022; Kelemen, 2017; Pech & Scheppele, 2017; Sata & Karolewski, 2023; Smolka, 2021). This is why the responses to these countries were picked as fitting cases. As they are the only two major examples, they are probably also the only cases that are comparable withing the EU. This notion is seconded in the literature by Bernhard (2021) and Everett (2021). Importantly, it is not the democratic backsliding processes in Hungary and Poland which are identified as the cases, but rather the EU’s response to democratic backsliding in both countries is used as the cases. Because these are two cases, this research employs a multiple-case-study design. This is simply a research design employing a case study approach in which “the inquirer selects multiple cases to illustrate the issue” (Creswell & Poth, 2018, p. 99). These cases are analysed using process tracing, which will be explained further in section 4.3.

The second part of the analysis consists of a **qualitative content analysis**. The data used for this analysis consists of the interview transcriptions, which are added to the appendix of this thesis. More information

on the interviews is given in section 4.2. More information on the content analysis is given in section 4.3. In the upcoming paragraphs, the data collection and data analysis strategies and the quality of this research are discussed.

4.2 Data collection

The data collection for this research includes a literature review, desk research and field research through interviews. The use of these different forms of research means that there is data triangulation. The aim of combining different sources for data collection is to obtain a more detailed documentation and comprehensive understanding of that which is being researched (Creswell & Poth, 2018). The data collection process can be divided into three parts.

Firstly, data was collected through a **literature review** to develop the conceptual and theoretical frameworks for the research topics. Specifically, the literature review aimed to develop a detailed understanding of democratic backsliding, how this can be applied to the context of the European Union and of the existing literature of the EU's response. The literature review was facilitated through consulting several online databases such as Web of Science, Google Scholar and databases from various EU websites. In addition, a form of snowball sampling was used by using the reference list of collected scientific articles to find more relevant academic literature (Creswell & Poth, 2018).

Secondly, **desk research** was performed through a document analysis. This contributed to the conceptual framework and was used for the case studies. The documents are mainly relevant legal and policy documents, such as legal texts, resolutions and decisions reports. Additionally, media reports were used to add context, particularly to provide information on the most recent events in the case studies.

Thirdly, field research was performed through **semi-structured interviews**. This type of interview can be defined as an interview “where the questions are pre-planned prior to the interview but the interviewer gives the interviewee the chance to elaborate and explain particular issues through the use of open-ended questions” (Alsaawi, 2014, p. 151). This structure can facilitate added depth in the interviewee's response and allows the interviewer to ask follow-up questions. This type of interview is seen as the ideal data collection method for case studies and it is the most used type of interview in qualitative research (Adhabi & Anozie, 2017). The main aim of the interviews is to identify factors that help explain the EU's response to democratic backsliding and to gain insight into how decisions are being made at the EU level. Additionally, the focus of this thesis is not limited to the EU's response to Poland and Hungary. The interviews can help in answering the question of what the EU's response to backsliding member states is in a broader sense, beyond Hungary and Poland. Simply performing an empirical analysis of the response to these two member states might not reveal intricacies or reasoning behind the decisions of the EU

institutions. Interviewing people who closely work on topics related to democracy and the rule of law in the EU can reveal inside knowledge that is not publicly available. Additionally, in the conceptual framework, civil society was identified as an important actor in the response to democratic backsliding (see section 2.4.6). Therefore, some members of relevant civil society organisations were interviewed as well. Potential participants for the interviews were selected through purposeful sampling (mainly using EU websites). Purposeful sampling refers to the intentional selection of individuals driven by the specific purposes of the research (Creswell & Poth, 2018). For the sake of protecting the participants' anonymity, no further details on the selection process can be given. Snowball sampling was also used, as the first few interviewees recommended other potential candidates. Additionally, some contacted people declined to participate but referred me to a colleague who was willing to participate in their stead (Creswell & Poth, 2018).

In total twelve interviews were carried out with fourteen participants, as two interviews involved two participants at the same time. Throughout section five, the interviewees will be referenced as '(interviewee x)' or as '(interviewee x; interviewee y; interviewee z)' in case multiple interviewees are referenced for the same point or paragraph in section five. Because all these interviews took place around the same time and because the dates are available in table 2 below, it seemed unnecessary to mention the date every time. The transcriptions of the interviews are added to the appendix of this thesis. In order to participate, all participants were required to sign an informed consent. By signing this, they assured that they (1) had received sufficient information regarding the research, (2) were participating voluntarily, (3) gave permission for the researcher to save the generated data and report on it anonymously, (4) were able to step out of the research project at any time, (5) could receive the findings of this research and (6) knew that the data protection officer of Ghent University could be contacted for more information regarding the protection of personal information. Most of the interviews were recorded, with explicit permission to allow the making and inclusion of a transcription. However, interviews 6, 7 and 12 do not include a transcription as the participants did not allow one to be made and did therefore also not allow the interviews to be recorded. Moreover, interview 7 is not used for the analysis of this research, but it is still included in Table 2 below, as it did serve as a means to obtain background information to guide the course of this research. Interviews 6 and 12 are part of the analysis in section 5, but no transcription is included.

Nine of the twelve interviews were facilitated through Microsoft Teams, one interview was conducted telephone and two interviews were conducted in person. Of the fourteen participants, seven work for the Commission, three for the European Parliament (of which two are Members of the European Parliament, while the other has a different role), and three work for (different) civil society organisations. One interviewed EU official did not wish the institution for which they work to be revealed. An overview of the interviews is given below in Table 2.

Table 2: Overview of interviews

Interview number	Interviewees	Institution/organisation	Date	Medium
1	Interviewee 1	Polish Civil Society Organisation	21 March 2024	Online via Microsoft Teams
2	Interviewee 2	EU Parliament Official	22 March 2024	Online via Microsoft Teams
3	Interviewee 3	European Partnership for Democracy	29 March 2024	Online via Microsoft Teams
4	Interviewee 4	Member of European Parliament	2 April 2024	Telephone
5	Interviewee 5	EU Commission Official	5 April 2024	Online via Microsoft Teams
6	Interviewee 6	EU Official	8 April 2024	Online via Microsoft Teams
7	Interviewee 7 & Interviewee 8	EU Commission Officials	9 April 2024	In person
8	Interviewee 9	Hungarian civil society organisation	10 April 2024	Online via Microsoft Teams
9	Interviewee 10	EU Commission Official	11 April 2024	Online via Microsoft Teams
10	Interviewee 11 & Interviewee 12	EU Commission Officials	22 April 2024	Online via Microsoft Teams
11	Interviewee 13	Member of European Parliament	30 April 2024	Online via Microsoft Teams
12	Interviewee 14	EU Commission Official	15 May 2024	In person

4.3 Data analysis

The data analysis is split into two parts. The first part concerns the case studies of the EU's responses to democratic backsliding in Hungary and Poland respectively. The second part concerns the analysis of the interviews.

These cases will be analysed through **process tracing**. Adopting the definition by Collier (2011, p. 824), process tracing “is an analytical tool for drawing descriptive and causal inferences from diagnostic pieces of evidence often understood as part of a temporal sequence of events or phenomena”. So it is used to empirically analyse events that occurred over a time period. Process tracing is used in section 5 to map out the sequence of every major action that the EU institutions have taken to address democratic backsliding in Hungary and Poland. By adopting process tracing, patterns can be established among these two cases to identify potential “recurring empirical regularities” (Collier, 2011, p. 824). The goal of the case study is to

establish patterns in the EU's response to these backsliding countries. The theoretical framework (section 3) is used to try and explain the logic guiding these responses.

As explained, the interviews are transcribed. The transcriptions can be found in the appendix of this thesis. A qualitative **content analysis** was performed on these transcriptions. According to Kleinheksel et al. (2020) content analysis "is a method designed to identify and interpret meaning in recorded forms of communication by isolating small pieces of the data". This data is then organised in a way that can be used to describe or explain something. According to Renz et al. (2018, p. 824) this method "seeks to provide knowledge and understanding of the phenomena under study through systematic methods of coding and classifying text to reveal patterns and themes". Content analysis is a well-established research method to analyse data collected through interviews (Kleinheksel et al., 2020; Renz et al., 2018).

A content analysis was performed on the interview transcriptions to establish patterns in the EU's response that might not have been identifiable through the case studies. During this analysis, the data was inductively coded using the statistical data analysis software NVivo. Inductive coding means that the data, i.e. the transcriptions, were used as a base to develop the codes (Creswell & Poth, 2018). Three rounds of coding were used to develop a coding framework which classifies the transcription data into different themes. During the first round, all interviews were analysed to establish the themes of the framework. During the second round, the data was coded into this coding framework. The third round served as a means to revise and reorganise the data. The coding framework established through the inductive coding of the interview data can be found below in Table 3.

Table 3: Coding framework

Code number	Code name	Code info
1	Legal and Procedural Mechanisms	Code for discussions about specific legal or procedural mechanisms, obligations or restrictions used by the EU to address backsliding.
2	Institutional Dynamics	Code for mentions about the role of EU institutions in responding to backsliding, and their relationship and interactions with each other.
3	Political considerations	Code for mentions about political factors and their impact.
4	Member states' influence	Code for mentions of member state influences shaping the EU's response.
5	Role of Civil Society:	Code for mentions of civil society actors' involvement the EU's response.
6	Other	Code for any other potentially relevant factors that cannot be grouped in any of the previous codes.

4.4 Quality of the research

This section will discuss the reliability, validity and potential limitations to the reliability and validity of this research. These are important aspects to consider in qualitative research (Creswell & Poth, 2018).

4.4.1 Research reliability

Reliability in qualitative research refers to the consistency and dependability of the research process (Creswell & Poth, 2018). Creswell & Poth (2018) describe several methods that enhance research reliability that can be applied. Firstly, providing information on the selected codes and the transcriptions which were analysed, adds transparency and can help readers in understanding the research process. Secondly, using multiple rounds of coding (as explained in section 4.3) ensures some consistency into the coding analysis (Creswell & Poth, 2018).

There are some potential limitations to the reliability which need to be acknowledged. With regard to the case studies, the use of media reports can mean that biased information affects the analysis. It is up to any researcher to be mindful of this. With regard to the interviews, inconsistencies in how the questions are

asked can lead to inconsistencies in the data. Adding the transcriptions to the appendix can give readers insight into this process. With regard to the content analysis, maintaining consistency in how the data is coded and analysed over time can be challenging. This was mitigated by using multiple rounds of coding and by waiting until all of the interview transcriptions were completed before starting the coding process (Creswell & Poth, 2018).

4.4.2 Research validity

Validity in qualitative research involves establishing the credibility and trustworthiness of the study (Creswell & Poth, 2018). Validity is often split into internal and external validity. Internal validity focuses on whether the results accurately reflect the phenomena studied and whether the research methods and data collection processes were sound. External validity refers to the transferability of the findings to other contexts. This is also referred to as the generalisability of the research. With regards to this subject, it is about whether the findings of this thesis are representative of the EU's response to backsliding in all of its member states (Creswell & Poth, 2018). With regard to the internal validity, the use of data triangulation through using data from EU documents, media, and interviews (section 4.2), can be used to corroborate the findings. By selecting interviewees from multiple EU institutions and civil society organisations, a diverse range of perspectives is collected. Through the inclusion of transcriptions of (most of) the interviews, these perspectives are presented verbatim. Concerning the case studies, a detailed description of these cases can allow readers to gain a better understanding of how the findings were generated. Regarding the external validity, including the interview transcriptions and a detailed description and analysis of the case studies can help in determining whether the findings are applicable to the context of other EU member states, because it allows for the transcriptions to be reused (Creswell & Poth, 2018).

There are some potential limitations to the validity of this research which need to be acknowledged. Regarding the internal validity, researcher bias can mean that my own perspectives and biases may influence how data is interpreted and how questions are framed during the interviews. It is important to be mindful of this as a researcher to try and avoid this. There can be selection bias in both the selection of documents and sources for the desk research and the selection of the interview participants. This was mitigated by being thorough, focusing on including official EU documents in the case studies and by interviewing a range of different actors. Regarding the external validity, there is the risk that the findings from the case studies of Hungary and Poland are not representative of the EU's response to other member states. It is important to consider how the context influenced the situations in these cases (Creswell & Poth, 2018).

Broader limitations of this research are discussed in section 7.

5 **RESULTS**

5.1 Multiple-case analysis of the EU's response to Hungary and Poland

The first part of section five performs a multiple case analysis of the EU's response to democratic backsliding in Hungary and Poland respectively. These cases are mapped out, compared and the theoretical framework is applied to discern which logic might explain the EU's responses.

As explained in section 2.3.1.1, the EU started publishing annual rule of law reports in 2020, with a chapter for every member state. These report on the rule of law situation under the four pillars of justice systems, anti-corruption measures, media pluralism, and institutional checks and balances (European Commission, n.d.-f). However, the chapters of Hungary and Poland will not be discussed in the analysis of the EU's response to democratic backsliding in these countries below. This is because these reports largely report on the same issues that were discussed in sections 2.2.2.1 and 2.2.2.2, which detailed democratic backsliding in Hungary and Poland respectively.

5.1.1 The response to democratic backsliding in Hungary

As outlined in section 2.2.2.1. on democratic backsliding in Hungary, this process started around 2010. The first identifiable action at a European level came from the Venice Commission, which issued a formal opinion on Hungary's constitutional amendments in June 2011 (Venice Commission, 2011). The Venice Commission is advisory body of the Council of Europe, specifically on constitutional matters. But this cannot be classified as action by the EU because, despite what its name might suggest, the Council of Europe is distinct from the European Union (Venice Commission, 2014). However, it is worth mentioning as it was the first formal step taken against Hungary at a European level. The Venice Commission issued a formal report in which it acknowledged Hungary's move towards a new constitution as a positive step for democracy, emphasising values like separation of powers and protection of rights. It also raised several concerns over Hungary's judiciary and included some recommendations (Venice Commission, 2011).

It did not take that long for members of the European Parliament to start raising concerns about the series of controversial constitutional amendments introduced by Fidesz (see section 2.2.2.1). Eventually, this prompted the European Parliament to pass a resolution in February 2012 expressing its worries and calling for action to safeguard democratic principles in Hungary. The resolution highlighted several specific issues, including changes to Hungary's constitution, the independence of the judiciary, media freedom, and electoral laws. These changes raised concerns about the concentration of power in the hands of the ruling party and the potential erosion of checks and balances within the Hungarian political system. While this

resolution did not immediately lead to formal measures against Hungary, it marked the beginning of the EU's engagement in and scrutiny of the situation (European Parliament, 2012).

In January 2012, the European Commission had already initiated an infringement procedure against Hungary over legislation affecting the independence of its central bank, data protection authorities, and judiciary, which came into force under Hungary's new constitution. The Commission sent formal notices to Hungary, citing breaches of EU law, particularly concerning the independence of institutions and judiciary interference. The main concern was the compulsory retirement of 274 Hungarian judges, which contradicted EU law. Other concerns included government influence on the central bank, and the creation of a new data protection authority susceptible to political interference. The Commission requested Hungary's response within a month (European Commission, 2012b). In November 2012, the Court of Justice of the EU ruled that the retirement of judges, through lowered mandatory retirement ages, violated EU law (European Commission, 2012a). Hungary subsequently amended its law, gradually lowering the retirement age. The Commission monitored the implementation of these changes. In November 2013, the Commission closed the infringement procedure on the forced retirement of judges, but still had infringement proceedings running on the independence of the national data protection authority (European Commission, 2013). In April 2014, the European Court of Justice ruled in favour of the European Commission's case against Hungary, arguing that the premature termination of the Hungarian Data Protection Commissioner's term violated EU law and compromised the independence of the Hungarian Data Protection Authority. This forced Hungary to change its law in question again (European Commission, 2014b).

In July 2013, the European Parliament followed up on its initial resolution, passing another resolution on Hungary. The resolution addressed concerns about the state of democracy, the rule of law, and fundamental rights in Hungary, highlighting issues such as lack of transparency and inclusiveness and undermining of the independence of the judiciary, restrictions on media pluralism, and violation of the rights of minorities (European Parliament, 2013). In 2015, the European Parliament passed another resolution on the situation in Hungary, addressing further concerns. It called for the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights to address breaches at the member state level (European Parliament, 2015).

In 2017, the Commission launched another infringement procedure against Hungary for its new law on foreign-funded NGOs, sending a letter of formal notice. The law imposed registration and reporting requirements on NGOs receiving foreign funding, potentially violating fundamental rights and EU law (European Commission, 2017e). Following the European Commission's letter of formal notice, Hungary responded, but the Commission remained unsatisfied with the explanations provided. Subsequently, the Commission issued a reasoned opinion to Hungary, urging compliance with EU law (European

Commission, 2017d). Hungary failed to listen to the Commission, prompting the Commission to refer the matter to the Court of Justice (European Commission, 2017f). The Court ended up siding with the Commission in 2020, stating Hungary's laws on foreign-funded NGOs, violated EU rules on freedom of association and ordering Hungary to make amendments to the laws in question (Court of Justice of the European Union, 2020).

By 2018, concerns about Hungary's democratic backsliding had been mounting for several years. Fidesz party had implemented a series of constitutional changes and laws that critics argued undermined democratic principles, weakened checks and balances, and limited media freedom (section 2.2.2.1) (Monciunskaitė, 2023). This prompted the Parliament to adopt a resolution concerning the “existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded” (European Parliament, 2018b, p. 1). This means the EU Parliament took a significant step in response to concerns about democratic backsliding in Hungary, by voting to trigger Article 7(1) of the EU Treaty against Hungary (see section 2.3.1.7). While the vote to trigger Article 7(1) was a significant political statement, it did not immediately lead to concrete consequences for Hungary. The next steps in the Article 7 procedure involve the European Council, where member states must unanimously determine whether there is a clear risk of a serious breach of EU values. If so, Article 7(2) could be invoked, potentially leading to the suspension of Hungary's voting rights in the EU (see section 2.3.2.2) (European Parliament, 2018b). However, the Hungarian government and its allies within the EU, mainly Poland, strongly rejected the European Parliament's resolution, portraying it as politically motivated interference in Hungary's internal affairs. This marked a sort of coalition in the Council with Poland and Hungary protecting each other. This significantly hindered the use of the Article 7 procedure (Holesch & Kyriazi, 2022). Carrera & Bárd (2018) argue that the Article 7 procedure is inherently political in its nature because it needs to be voted on in by the EU member states in the Council.

In 2019, following a vote, the European People's Party suspended Fidesz's membership from the party. This meant that that Fidesz could no longer attend party meetings, have speaking time, voting rights, nor have the right to propose candidates for posts (European People's Party, 2019). In that same year, the European Parliament rejected the Hungarian Commission candidate, prompting the Hungarian government to propose a new candidate. The Hungarian Commissioner was to be responsible for enlargement in the EU, and the Parliament argued that there would have been a conflict of interest in the case of the original Hungarian candidate (Rios, 2019).

In 2020, the Commission introduced the Conditionality Regulation (see section 2.3.2.4), which was to take effect in January 2021. But Hungary, along with Poland threatened to veto the EU budget if it was linked to rule of law conditionality. Eventually, a compromise was agreed. The agreement maintained the link between accessing funds from the substantial fiscal package and upholding democratic and rule of law

principles. However, a significant change was that sanctions could not be enforced until the European Court of Justice decided on the legality of any new rules introduced by a member country, i.e. the conditionality regulation in this case. This essentially allowed Hungary and Poland to challenge this regulation in court, prolonging its proper implementation as court cases can take months, if not years (Banks, 2020). Following this, Hungary, with Poland's support, challenged the implementation of the new conditionality regulation in the Court of Justice. Hungary argued that there was no legal basis for the regulation and that it circumvented the procedure laid down in Article 7 of the Treaty on European Union and called for the annulment of multiple articles of the conditionality regulation. However the Court disagreed with Hungary's arguments and upheld the legality of the conditionality regulation (Court of Justice of the European Union, 2022).

In June 2021, the Hungarian parliament passed 'Act LXXIX', which banned educational material and content depicting LGBT people in schools and on TV, arguing that this was to protect children. This was heavily criticised in both the EU Parliament and the Commission. MEPs quickly called upon the Commission to launch an infringement procedure to challenge this law in the Court of Justice (European Parliament, 2021a). One week later, the Commission initiated the infringement proceedings against Hungary, sending a letter of formal notice to Hungary which cited violations of several EU rules. These actions were deemed to violate principles of freedom of expression, non-discrimination, and human dignity (European Commission, 2021a). One year later, the Commission initiated the next step of the infringement proceeding, taking Hungary to the Court of Justice over this matter (European Commission, 2022a). In 2023, the Parliament, along with the governments of 15 member states, joined the case as plaintiffs against Hungary (Fox, 2023). As of May 2024, the Court is yet to have issued a judgment in this case.

In May 2022, the European Parliament adopted a resolution to express its dissatisfaction with the ongoing Article 7 procedure against Hungary and the lack of progress in this procedure. This is because Hungary and Poland blocked the further use of this procedure for each other in the Council (European Parliament, 2022b). In September 2022, the European Parliament adopted another resolution, concerning the "existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded" (European Parliament, 2022c, p. 1), just like it did in 2018. Essentially, the Parliament triggered the Article 7(1) TEU procedure again. The resolution identified various issues that pose a threat to EU values, including the functioning of the constitutional and electoral system, the independence of the judiciary and other institutions, corruption, freedom of expression and media pluralism, academic freedom, and the rights of minorities and migrants. Apart from triggering the Art. 7 TEU procedure, the resolution called for the Council and the Commission to take decisive action, including issuing recommendations, applying the conditionality regulation, and excluding Hungary from the Recovery and Resilience Facility until compliance is achieved (European Parliament, 2022c). The Art. 7 procedure however did not make it

through the Council's vote again, with Hungary and Poland's coalition to block these votes for each other, and with other member states also showing reluctance (European Parliament, 2024a).

In April 2022, the Commission used the conditionality regulation for the first time since it went into force against Hungary. This represented the beginning of a process of assessment and exchange of information, which lasted several months and led to the submission of a proposal for a Council decision in September 2022, officially applying the conditionality regulation (Council of the European Union, 2022b). The conditionality regulation aims to protect the EU budget and prevent EU money from being used in ways that violate EU regulation (see section 2.3.2.4). It should be noted that the Commission waited until after the Court upheld the legality of this instrument. In applying this regulation, the Commission essentially decided cohesion funds for Hungary should be frozen until Hungary makes necessary changes. The Commission proposed two measures to the Council under this regulation. The first measure was to suspend 65% of Hungary's cohesion funds until Hungary made amendments to its laws to be in accordance with EU regulations. The second proposed measure was to prohibit Hungary from entering into legal commitments with public interest trusts for programmes implemented in direct and indirect management. These measures were to be approved in the Council by qualified majority (European Commission, 2022b). This decision was formally welcomed by the European Parliament (European Parliament, 2022a).

Shortly after, in November 2022, the Hungarian government promised to make necessary changes to its judiciary to unlock EU funds, which could be seen as an early indicator that this conditionality regulation might be effective. Because Hungary only partially implemented the proposed reforms, the Council gave the green light for the Commission's proposed measures to be implemented in December 2022, however the percentage of suspended funds was reduced from the proposed 65% to 55% (Council of the European Union, 2022a). According to the Council: "in light of the number and significance of remedial measures that have been satisfactorily implemented by Hungary" (Council of the European Union, 2022a, p. 107). The suspension still represented a significant portion of the budgetary commitments under specific operational programs in cohesion policy and represented approximately 6.3 billion in budgetary commitment funds (Council of the European Union, 2022b). Along with these two measures, the Council added that Hungary was required to inform the Commission of the implementation of the remedial measures it committed to, including any additional commitments, every three months starting from the adoption of the decision. This reporting ensures transparency and accountability in the implementation of the measures. Additionally, the Council added that The Commission would continue to monitor the situation in Hungary and assess the implementation of the remedial measures proposed by Hungary. The Commission was to provide periodic updates to the Council and submit necessary proposals for lifting the measures if the conditions for their adoption were no longer met. The measures under the conditionality regulation are all temporary measures until adequate action is taken. They act as a means to protect the EU's budget and

incentivise Hungary to improve its compliance with the principles of the rule of law (Council of the European Union, 2022a).

With 6.3 billion euros of Hungary's cohesion funds already blocked, the Commission decided in late December of 2022 to freeze all of Hungary's roughly 22 billion euros in cohesion funds. This money stems from EU cohesion funds that every member state can get from the EU's long-term budget between 2021 and 2027. 5.8 billion euros were frozen under rule of law related milestones under the Recovery and Resilience. The rest of the money was blocked under the horizontal enabling conditions. The Commission took this decision because the conditionality regulation decision only took into account issues related to the rule of law, the judiciary and corruption at the top political levels. However, Hungary also had issues related to academic freedoms, LGBTQI rights and the asylum system, which the Commission also wanted to be dealt with (Abnett & Strupczewski, 2022).

In January 2023 the European Commission decided to prohibit over 30 Fidesz-linked Hungarian universities over concerns over academic freedom. This means that these universities have no access to new Erasmus+ and Horizon Europe grants until an agreement is reached (Upton, 2023b). Six Hungarian universities hit with this ban, took this case to the Court of Justice of the European Union. As of May 2024, the case is still pending (Upton, 2023a). In November 2023, MEPs suggested lifting the EU ban on Hungarian universities receiving Horizon Europe and Erasmus+ funding and outsourcing the management of the funds to an independent body overseen by the European Commission (Brent, 2023).

In May 2023, the Hungarian government again vowed to reform its judiciary to unlock the frozen EU funds. These reforms were a result of negotiations with Commission officials, which led to an agreement of proposed reforms to which the Commission reportedly gave a preliminary accord (Tamma, 2023).

In June 2023, the European Parliament, with a clear majority, adopted another resolution addressing Hungary's rule of law and fundamental rights breaches and on the frozen funds situation. It expressed concerns about the deterioration of the rule of law and fundamental rights in Hungary. The resolution condemned the Hungarian government's efforts to undermine the values of the EU and its anti-EU communication campaigns, called on the Council to take action and urged the Commission to use all available tools to address the breaches and stressed the importance of defending EU values and principles. This echoes the Parliament's previous resolutions on Hungary. The resolution stressed the need for the Commission to closely monitor the fulfilment of milestones and targets linked to EU funds and to ensure that the funds reach the intended recipients. Lastly, the Parliament questioned the legitimacy of Hungary's upcoming presidency in the Council of the European Union in the second semester of 2024. In light of this, the Parliament asked to Council to find a solution as soon as possible (European Parliament, 2023a). As of

May 2024, it looks like Hungary will still become president of the Council of the European Union in the second semester of 2024.

In July 2023, the Hungarian government contacted the Commission to inform it that Hungary now fulfilled the enabling conditions on judicial independence, and thus the money should be unfrozen. After an assessment, the Commission took two decisions in December 2023. One decision pertains to judicial reform and the other to the budget conditionality. Regarding judicial reform, Hungary had fulfilled conditions related to judicial independence in the Commission's view, allowing access to around €10.2 billion in funds to be unfrozen. However, concerns remained regarding other areas like the child-protection law and academic freedom. Concerning the budget conditionality, Hungary's breaches in public procurement, prosecutorial action, conflict of interest, and corruption, which led to the suspension of around €6.3 billion in funds, remained unresolved according to the Commission. This meant that amendments were still required, and the Commission would only lift further measures once Hungary addresses the issues. Since Hungary hadn't notified any remedies, the risk to the budget remained unchanged. This means that these 6.3 billion euros remained frozen under the conditionality regulation, along with 10.4 billion under the Recovery and Resilience Fund (European Commission, 2023a).

The Commission's decision to unfreeze part of Hungary's funds was met with criticism from the European Parliament. The leaders of four parliamentary factions sent a joint letter to the Commission President. In this letter they expressed concerns about the Hungarian judicial reforms and their fulfilment of the four judicial milestones set out in the horizontal enabling condition under the Common Provisions Regulation. The letter stated that the horizontal enabling condition referring to the independence of the judiciary had not been fulfilled and that the Commission should properly assess whether the enabling conditions have been met before any relevant payments are made. The letter also highlighted concerns about the implementation requirement regarding the strengthening of the National Judicial Council, stating that there are signs that the decision-making is not independent of the government's interests. Additionally, the letter raised concerns about the fair allocation of EU funds in Hungary, as the current government refuses to process applications from government critics (The Greens/EFA, 2023). Around the same time, it was reported that Hungary was threatening to block EU funding towards Ukraine (Lukiv & Parker, 2023). This caused some MEPs to suggest that Hungary was blackmailing the EU and that the release of the funds came in exchange for a favourable vote on the funds for Ukraine by Hungary in the Council (The Greens/EFA, 2023). In response, in January 2024, MEP Petri Sarvamaa (EPP) initiated a letter to Roberta Metsola, the president of the European Parliament, stating that the Parliament should take action to call on the Commission or the member states to trigger Article 7 (2) TEU, which would then be followed up by the Article 7(3) procedure, which constitutes suspending Hungary's voting rights in the Council (EUobserver, 2024). In total, this letter was undersigned by 120 MEPs (Liboreiro, 2024a).

Shortly after, the Parliament adopted another resolution, addressing the situation in Hungary and the unfrozen EU funds. Just like the previous resolutions, it expressed concerns about the deterioration of the rule of law, democracy, and fundamental rights in Hungary, condemning the actions of the Hungarian government and calling on the Council to address the new developments affecting the rule of law. It also criticised Viktor Orbán specifically for blocking the decision on the Multiannual Financial Framework revision, which jeopardised financial aid to Ukraine. The resolution welcomed the Commission's decision to prolong the measures adopted under the conditionality regulation and called for the protection of EU funds. However, in this resolution, the Parliament expressed concerns about the Commission's decision that the horizontal enabling condition of the Charter had been fulfilled in relation to judicial independence, enabling Hungary to claim reimbursements of up to 10.2 billion euros. The resolution called on the Commission to take action to address the risk of a serious breach by Hungary of EU values (European Parliament, 2024b). Shortly after, MEPs questioned Commissioners Hahn (Budget and Administration), Reynders (Justice), and Schmit (Jobs and Social Rights) about the unfreezing of these funds and about the application of the conditionality regulation. This sparked discussions in the Parliament on whether legal action should be taken to try and overturn the Commission's decision in the Court of Justice (European Parliament, 2024a). In late January 2024, Justice Commissioner Reynders announced that the Commission would not push for the use of the Article 7 procedure unless there is a clear and strong majority among the member states (Liboreiro, 2024b).

Not long after, in February 2024, the Parliament adopted a resolution on the Commission's 2023 rule of law report. In this resolution, the Parliament reiterated its concerns regarding the rule of law and fundamental rights in Hungary and highlighted that these issues still need to be addressed further. The Parliament urged the Commission to meet its responsibility for the enforcement of EU human rights law and to act regarding failures to implement judgments and use the conditionality regulation in cases of non-compliance (European Parliament, 2024e). In March 2024, the members of the Legal Affairs Committee of the European Parliament voted in favour of taking the Commission to the Court of Justice over the release of 10.2 billion euros in Hungary's funds (The Greens/EFA, 2024). This was subsequently heavily reported in media outlets (see for example De La Feld, 2024; Liboreiro, 2024c; Malingre, 2024; Vela & Chiappa, 2024). However, there was not much active follow-up by the Parliament on this case (Interviewee 13). An official study for the Parliamentary research on the prospective budget for the European Union in 2024 does mention that the Parliament's Legal Affairs Committee "lodged its case against the Commission on 25 March 2024 under the case number C-225/24" (D'Alfonso et al., 2024, p. 67). The case number 'C-225/24' does yield a result on the website of the Court of Justice titled "Parliament v Commission". This indicates that the case has officially been filed (Court of Justice of the European Union, 2024). This was confirmed by an interviewed Commission official (Interviewee 14). It is notable that this case has since barely been mentioned.

In April 2024 the European Parliament filed another resolution “on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications” (European Parliament, 2024d, p. 1). Echoing all of its previously mentioned resolutions, the Parliament reiterated its concerns over the persistent breach of democracy, the rule of law, and fundamental rights in Hungary and highlighted deterioration of respect for the values enshrined in Article 2 TEU. The resolution also criticised the lack of progress in the ongoing Article 7(1) TEU procedure, calling for regular hearings, concrete recommendations, and the initiation of the Article 7(2) TEU procedure. It expressed concern over Hungary's upcoming presidency of the Council of the European Union. The resolution called on the Commission to take action using its available tools to address breaches of EU values (European Parliament, 2024d). The resolution also addressed concerns related to corruption, media freedom, civil society, and compliance with EU law, calling for support to independent civil society organisations and urging the Commission and the Council to negotiate “an EU mechanism on democracy, the rule of law, and fundamental rights in the form of an interinstitutional agreement” (European Parliament, 2024d, p. 12).

5.1.2 The response to democratic backsliding in Poland

Poland's backsliding issues started after the Law and Justice party (PiS) ascended to power in October 2015. Not long after, this government started a series of controversial reforms targeting the Constitutional Tribunal (see section 2.2.2.2 for more information). It did not take long before the EU institutions took notice and expressed concerns. In March 2016, the Venice Commission issued a formal opinion on the amendments made by the PiS government to the Polish Constitutional Tribunal. The Venice Commission criticised the procedural changes introduced by the amendments, such as the "sequence rule" (Venice Commission, 2016, p. 10) and the “attendance quorum” (Venice Commission, 2016, p. 12), which it believed to hamper the effectiveness of the Constitutional Tribunal and endanger the rule of law (Venice Commission, 2016).

Not long after, in April 2016, having taken the opinion into consideration, the European Parliament adopted its first resolution “on the situation in Poland” (European Parliament, 2016a, p. 1). In this resolution the Parliament expressed “serious concern” about the political and legal dispute concerning the Constitutional tribunal (European Parliament, 2016a, p. 3). The resolution emphasised the importance of upholding the rule of law, democracy, human rights, and fundamental freedoms in the European Union. It highlighted the role of an independent judicial system in protecting citizens' rights and expressed concerns over the actions taken by the Polish government. The resolution also emphasised the need for the European Commission to monitor all member states equally in terms of respect for democracy, the rule of law, and fundamental rights (European Parliament, 2016a).

In June 2016, the Commission adopted its own formal opinion on the situation in Poland, marking its first formal steps in addressing Poland's backsliding issues. Similarly to the Parliament's resolution, the Commission's opinion highlighted concerns about the Constitutional Tribunal, including the appointment of judges, the implementation of its judgments without proper publication and the impact of new legislation on the Tribunal's ability to independently review cases. The Commission outlined the steps Poland would need to take to address the concerns (European Commission, 2016a). The Polish government did not address these concerns. Therefore, the Commission issued a rule of law recommendation, expressing disappointment at the fact that the issues persisted despite ongoing dialogue with Polish government officials. To summarise, the Commission's recommendations covered four aspects of Poland's judiciary, namely for Poland to ensure lawful judge appointments, publish and fully implement the March 2016 judgment and subsequent judgments, with automatic future publication, respect the Constitutional Tribunal judgments and the Venice Commission's opinion in any law reforms, and allow Constitutional Tribunal review of new laws before enactment. The Commission also emphasised that failure to address concerns could lead to further steps, including potential activation of the Article 7 TEU procedure (European Commission, 2016b, 2016c).

As outlined in section 2.2.2.2, Poland's issues surrounding the judiciary did not get resolved, but worsened (from a rule of law point of view). This prompted the European Parliament to adopt its second resolution on Poland in September 2016. This resolution addressed developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union. The resolution expressed concern, particularly regarding the composition and functioning of the Constitutional Tribunal, the independence of the judiciary, media freedom and pluralism, the rights to liberty and security, and the right to a fair trial. It called on the Polish government to cooperate with the European Commission and find a compromise to solve the ongoing constitutional crisis. The resolution also urged the Commission to monitor the follow-up given by the Polish authorities to its recommendations and assess the compatibility of the legislation adopted in Poland with EU law and the values on which the Union is founded (European Parliament, 2016b).

Because the situation in Poland developed further, the European Commission followed up its first rule of law recommendation with a second one in December 2016. In its recommendation, the Commission stated that there was "a systemic threat to the rule of law in Poland" (European Commission, 2017a, p. 65). The recommendation highlighted further concerns regarding Poland's judiciary and called on the Polish authorities to take urgent action to address these concerns (European Commission, 2017a).

However, Poland did not take the required steps to reform its judiciary. The Polish government did reply to the Commission's recommendation within the two-month time limit. However, the reply disagreed with all the issues raised by the Commission and did not announce any new actions to address the concerns

outlined (European Commission, 2017b). This prompted the European Commission to reiterate its concerns in a new recommendation in July 2017. This recommendation urged the Polish government to take immediate action to address the systemic threat to the rule of law and emphasised the importance of loyal cooperation among state institutions. Importantly, it also directly mentioned that recommendations under the rule of law framework do not prevent Article 7 TEU from being activated. In this way the Commission suggested that the situation in Poland may be approaching a point where the Article 7 TEU procedure could be initiated if there was no immediate action undertaken by Poland (European Commission, 2017b). Shortly after, the Commission also initiated an infringement procedure against Poland due to concerns regarding the “Law on the Ordinary Courts Organisation” (European Commission, 2017c, para. 1). The Commission's key concerns included gender discrimination, the retirement age for judges and potential undermining of court independence by giving the Minister of Justice discretionary powers over judge mandates and court presidents (European Commission, 2017c).

The European Parliament officially weighed in on the conversation again in November 2017, by adopting another resolution. This resolution expressed concern over the rapid legislative developments in Poland that undermine fundamental human rights, democratic checks and balances, and the rule of law. It highlighted the issue of the proper functioning of the Constitutional Tribunal and the potential structural undermining of judicial independence and called on the Polish government to implement the recommendations of the Commission. It called for further dialogue between the Polish government and the Commission and emphasised the need for a regular process of monitoring and dialogue to safeguard the EU's fundamental values (European Parliament, 2017).

The European Commission followed up with another recommendation to Poland in December 2017. The recommendation expressed “serious concerns” about several new laws, including those on the Supreme Court, the National Council for the Judiciary, the Constitutional Tribunal (European Commission, 2018a, p. 62). The Commission recommended urgent action to protect the independence of the judiciary, separation of powers, and legal certainty (European Commission, 2018a).

Along with this recommendation to the Polish government, the Commission issued a proposal to the Council “on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law” (European Commission, 2017g, p. 1). This means that the Commission triggered Article 7(1) TEU. This, in December 2017, was the first ever time that this article was triggered. The proposal discussed the concerns previously raised by the European Commission regarding the rule of law in Poland. It highlighted issues related to the lack of an independent and legitimate constitutional review, the adoption of laws that threaten judicial independence and the separation of powers, and the failure of Poland to address these concerns despite recommendations from the Commission. The Commission also stated that it remained

ready to reconsider the proposal if Poland implemented the recommended actions (European Commission, 2017g).

The Parliament was not satisfied with the progress following the triggering of this Article 7(1) TEU procedure. Therefore, it adopted another resolution in March 2018. The resolution welcomed the Commission's decision to activate this article as regards the situation in Poland, but it called on the Council to take swift action and move forward in accordance with the provisions set out in this article (European Parliament, 2018a).

In September 2018, the European Commission referred Poland to the European Court of Justice for violating the principle of judicial independence with a new law on the Polish Supreme Court. This law lowered the retirement age of Supreme Court judges, risking the premature termination of mandates and lacking clear criteria and judicial review. Despite the Commission's warnings and concerns, Polish authorities did not address these issues. As the implementation of this law accelerated, the Commission escalated the matter to the Court of Justice of the EU, requesting interim measures to restore the Supreme Court's previous status and an expedited procedure for a final judgment (European Commission, 2018b).

The Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE) sent a delegation to assess the situation in Poland on the ground. This resulted in a mission report in December 2018. In this lengthy report, the LIBE Committee highlighted concerns raised by various stakeholders, including government officials, representatives of the judiciary, human rights organisations, opposition parties, civil society representatives, and journalists. The conclusions focused on the reforms to the judicial system, with some stakeholders defending the reforms as necessary and others expressing concerns about the impact on the independence of the judiciary and democratic principles. The report also highlighted challenges faced by the media in Poland, including government pressure and the spread of fake news. The report mainly reflected a deep divide between the government and its supporters, who argued that the reforms are necessary, and opposition parties and civil society organisations, who saw the reforms as a threat to the rule of law and democratic principles. The report concluded that there is a clear risk of a serious breach of the rule of law in Poland, referring to the Article 7(1) TEU procedure, and called for further dialogue and engagement to address these concerns (European Parliament Committee on Civil Liberties, Justice and Home Affairs, 2018).

In April 2019, the European Commission initiated an infringement procedure against Poland concerning the new disciplinary regime for judges. The Commission contended that this regime undermined judicial independence by lacking safeguards against political influence, violating EU law on effective remedies and court independence (European Commission, 2019a). Following an insufficient response from the Polish

government, the Commission referred the case to the European Court of Justice in October 2019 (European Commission, 2019b).

In April 2020, the European Commission initiated another infringement procedure against Poland concerning its new law on the judiciary, which the Commission believed undermined the independence of Polish judges and violated EU law, echoing much of its previous concerns. Key points of contention included the broadening of disciplinary offenses, granting exclusive competence to a specific chamber of the Supreme Court, and hindering Polish courts' ability to adjudicate cases and assess judicial powers (European Commission, 2020). In September 2020, the European Parliament passed another resolution addressing human rights and the rule of law in Poland, highlighting issues such as freedom of assembly, association, privacy, comprehensive sexuality education, hate speech, discrimination, and the independence of the judiciary. It called on the Polish government to protect these rights (European Parliament, 2020). The resolution expressed “deep concern” about justice system reforms (European Parliament, 2020, p. 5).

In July 2021, the European Commission expressed concerns about Poland's handling of resolutions adopted by several Polish municipalities and regions, which declared themselves "LGBT-ideology free zones" (European Commission, 2021a, para. 9). The Commission requested information from the Polish authorities, but found their responses inadequate, hindering the Commission's ability to assess the situation effectively. Consequently, the Commission issued a formal notice to Poland for its lack of cooperation (European Commission, 2021a).

In October 2021, the European Parliament adopted another resolution, addressing the rule of law crisis in Poland in relation to the primacy of EU law. Just like in all of its resolutions, it highlighted the importance of respect for human rights, democracy, and the rule of law as fundamental values of the European Union. The resolution condemned the actions of the Polish government, particularly the decision of the illegitimate Constitutional Tribunal to question the primacy of EU law and its impact on judicial independence. It called for urgent and coordinated action by the Commission and the Council, including launching further infringement procedures, triggering the new conditionality regulation, and refraining from approving the draft Recovery and Resilience Plan of Poland until the government implemented the judgments of the Court of Justice of the European Union (European Parliament, 2021b).

In December 2021, the European Commission launched another infringement procedure against Poland. Again, this related to concerns regarding recent rulings by the Polish Constitutional Tribunal. The Tribunal's rulings had been challenging the primacy of EU law, breaching principles of autonomy, primacy, effectiveness, and uniform application of Union law. The Commission contended that these rulings directly violate EU law. Furthermore, there were additional doubts about the independence and impartiality of the Constitutional Tribunal because of irregularities in the appointment of judges (European Commission,

2021b). In July 2022, the Commission took the next steps in this infringement procedure, issuing a reasoned opinion to Poland regarding the Polish Constitutional Tribunal and its recent case law. Poland's response did not address these concerns (European Commission, 2022c). Because Poland's response to this was unsatisfactory again, the Commission took the following step in the infringement procedure and referred Poland to the Court of Justice in February 2023 (European Commission, 2023d).

In May 2022, the European Parliament adopted a resolution to express its dissatisfaction with the ongoing Article 7 TEU procedure against Poland and lack of progress in this procedure. This is because Hungary and Poland blocked the further use of this procedure for each other in the Council and the reluctance of other member states to vote against Hungary and Poland (European Parliament, 2022b).

In June 2023, the European Commission initiated another infringement procedure against Poland following the assessment of Poland's new law concerning the “State Committee for the Examination of Russian Influence on Poland's internal security between 2007 and 2022” (European Commission, 2023c, para. 1). The Commission asserted that this law violated several EU principles and laws. The Commission criticised the law for unduly interfering with the democratic process, potentially damaging the reputations of election candidates, and imposing sanctions that may restrict the political rights of elected individuals (European Commission, 2023c).

Shortly after this, in July 2023, the European Parliament adopted a resolution “on the electoral law, the investigative committee and the rule of law in Poland” (European Parliament, 2023b, p. 1). This resolution expressed concerns about amendments to Polish electoral laws. The resolution called for the Polish authorities to bring their conduct of elections in line with international obligations and standards for democratic elections. It also welcomed the Commission's recent infringement procedure. The resolution reiterated the Parliament's position that Poland's Constitutional Tribunal was illegitimate and called on the Commission to progress with its litigation and launch another infringement procedure. The resolution called on the Commission to widen the scope of the Article 7(1) TEU procedure regarding Poland to include clear risks of serious breaches of other basic values enshrined in Article 2 TEU (European Parliament, 2023b).

In February 2024, the European Parliament used the issues of Poland's non-compliance with the EU's rule of law values as part of a resolution on the Commission's 2023 rule of law report, addressing rule of law issues in the European Union as a whole. The resolution emphasised the importance of the rule of law, democracy, and fundamental rights in the EU and called for the strengthening and streamlining of existing mechanisms to protect these values. It highlighted the need for an independent judiciary, transparency, access to information, media pluralism, and the protection of journalists and civil society (European Parliament, 2024e).

As outlined in section 2.2.2.2, a more democratic government took over in Poland after Donald Tusk and his party won the 2023 elections and took office, promising to overturn the previous government's unconstitutional and undemocratic amendments. Of course, this plan was welcomed by the European Commission (Włodarczak-Semczuk, 2024). Poland reformed its disciplinary regime for judges, including abolishing the Disciplinary Chamber of the Supreme Court and introducing safeguards against unjustified disciplinary proceedings. The Commission acknowledged Poland's commitment to addressing rule of law concerns beyond judicial reforms. As a result, the Commission adopted two legal acts that allowed Poland to access up to €137 billion in new EU funding, which it had not been able to access due to the antidemocratic policies of the previous governments. To clarify, this money was not blocked in entirely the same way that money was blocked in the case of Hungary, as the conditionality regulation was not used for Poland. Instead, all of this money was blocked under the Recovery and Resilience Facility (RRF) and under the horizontal enabling condition related to the EU Charter of Fundamental Rights. This money is only given out to member states that fulfil certain conditions, which Poland never fulfilled under the PiS government. In February 2024, the Commission found that Poland had fulfilled key milestones related to judicial independence under the RRF, allowing for the disbursement of €6.3 billion in RRF funds. Additionally, the Commission found that Poland met the horizontal enabling condition related to the EU Charter of Fundamental Rights, granting access to €76.5 billion for various EU funding programs (European Commission, 2024c).

The most recent development at the time of writing is the announcement issued by the Commission on May 6th, 2024, stating that it intends to close the Article 7(1) TEU procedure for Poland. After reviewing Poland's legislative and non-legislative measures addressing concerns about judicial independence and its commitment to the primacy of EU law, the Commission no longer perceives a clear risk of a serious breach of the rule of law. Poland's adoption of an 'Action Plan' in February 2024 and its initial implementation steps contributed to this assessment. As a result, the Commission intends to withdraw its proposal from 2017, effectively closing the Article 7(1) TEU procedure. Commission President Ursula von der Leyen commended Poland's efforts and the progress made, emphasising the significance of this development for both Poland and the European Union. The Commission will present its analysis to the Council, inviting any observations. Monitoring of the rule of law situation in Poland will of course continue as it does in any member state, particularly through the annual rule of law report process (European Commission, 2024a).

5.1.3 The EU's responses to backsliding in Hungary and Poland compared

Before analysing the EU's response to the Hungary and Poland using the theoretical framework, an analysis comparing the two cases might yield further insights. Table 4 below compares the response according to a timeline of events.

Table 4: Timeline of the EU's response to democratic backsliding in Hungary and Poland

Year	Hungary	Poland
2010	Fidesz gains power	
2011	Venice Commission issues formal opinion	
2012	• Commission initiates infringement procedure over independence of central bank, data protection, judiciary • Parliament adopts resolution • CJEU rules Hungary's retirement of judges violates EU law	
2013	Parliament adopts resolution	
2014	CJEU rules Data Protection Authority violates EU law	
2015	Parliament adopts resolution	Law and Justice Party (PiS) gains power
2016		• Venice Commission issues formal opinion. • Parliament adopts resolution • Commission adopts formal opinion • Commission issues rule of law recommendation • Parliament adopts resolution • Commission issues rule of law recommendation
2017	• Commission launched infringement procedure against law on foreign-funded NGOs • Commission issues formal opinion • Commission refers NGO funding case to CJEU	• Commission issues rule of law recommendation • Commission initiates infringement procedure over Constitutional Tribunal amendments • Parliament adopts resolution. • Commission issues rule of law recommendation • Commission triggers Article 7(1) TEU
2018	Parliament triggers Article 7(1) TEU	• Parliament adopts resolution expressing dissatisfaction with Article 7 TEU and its lack of progress in the Council • Commission refers judges mandatory retirement case to CJEU • Parliament's LIBE committee assess situation on the ground
2019	• European People's Party suspends Fidesz's membership • Parliament rejects Hungarian Commissioner candidate	• Commission initiates an infringement procedure against new disciplinary regime for judges • Commission refers disciplinary regime case to CJEU
2020	CJEU rules foreign-funded NGO law violates EU law	• Commission initiates infringement procedure against new law on the judiciary. • Parliament adopts resolution
2021	Hungary challenges the Conditionality Regulation in CJEU Commission initiates infringement procedure against ban on educational material and content depicting queer people	• Poland supports Hungary in case against conditionality regulation • Commission expresses concerns about 'LGBT-free zones' • Parliament adopts resolution • Commission launches infringement procedure against over rulings challenging the primacy of EU law.

2022	• CJEU upholds conditionality regulation • Commission refers case against ban on educational material and content depicting queer people to CJEU • Parliament adopts a resolution expressing dissatisfaction with Article 7 TEU and its lack of progress in the Council • European Parliament triggers Article 7(1) TEU again • Commission freezes €6.3 billion through conditionality regulation • Commission freezes all €22 billion in cohesion funds	• Commission issues formal opinion regarding Constitutional Tribunal • Parliament adopts resolution expressing dissatisfaction with Article 7 TEU and its lack of progress in the Council
2023	• Parliament and 15 member states join case against ban on educational material and content depicting queer people • Commission prohibits several Hungarian universities from accessing Erasmus+ and Horizon Europe grants • Parliament adopts resolution • Hungary informs Commission of fulfilling enabling conditions on judicial independence • Commission unfreezes €10.2 billion of frozen funds	• Commission refers Constitutional Tribunal and primacy of EU law case to CJEU • Commission initiates infringement procedure against new law on the State Committee for the Examination of Russian Influence on Poland's internal security • Parliament adopts resolution • Pro-EU Tusk government gains power • Commission allows access to €137 billion of previously inaccessible funds
2024	• MEPs sent joint letter to Commission president criticising unfreezing of funds • Parliament adopts resolution on unfrozen funds • Parliament adopts resolution • Parliament takes Commission to CJEU over unfrozen funds • Parliament adopts resolution	• Parliament adopts resolution • European Commission announced intention to close the Article 7(1) TEU procedure

There are some **similarities** apparent in the EU's response to Hungary and Poland. While there were differences in the issues of democratic backsliding in these countries, this did not seem to affect the way EU institutions approached these issues. In both cases, the Venice Commission, although it is not an EU body, served as an early detector of democratic backsliding. This was then followed up by actions by the EU institutions. The Parliament passed multiple resolutions in both cases. Each time it reiterated the need to address issues of democratic backsliding and repeated issues from previous resolutions if they persisted. In both cases, the Parliament often acted as an initial respondent by being the first to formally address issues of democratic backsliding through its resolutions. The infringement procedure (section 2.3.2.1) was used multiple times by the Commission in both cases. This usually happened after the EU entered into dialogue with the member state, showing that the Commission systematically makes use of its legal instruments to address persistent issues of democratic backsliding. In both cases the Article 7(1) TEU procedure (section 2.3.1.7) was used after the issues seemingly failed to be addressed. This tool was only used when the issues of democratic backsliding had come to a point that was considered more severe. In both cases the progression of this Article 7 TEU procedure was hindered because it could not be adopted in the Council.

As was discussed, Poland and Hungary supported each other strategically to prevent unanimous decisions in the Council, which are needed to impose sanctions under the Article 7(2) procedure. Holesch & Kyriazi (2022) used this as an example to show that the EU can be prevented in stepping up its action by member states using their position in the Council strategically. In general, the EU's response began with initial warnings and dialogue, progressing to resolutions, infringement procedures, and finally triggering Article 7 TEU. After which the procedure failed to progress further because it is the member states who have to step it up further in the Council.

There are **differences** apparent in the two cases. In the case of Poland, the shift of government helped the EU, because the new government wanted to work together to resolve its own issues of democratic backsliding. So, in Poland, a domestic political change had an influence, while this is not the case for Hungary. The Article 7 TEU procedure was used for the first time in Poland, two years after the Commission started addressing Poland's issues. For Hungary this procedure was triggered later, even though the Commission had been dealing with issues in Hungary for almost six years by that point. So, the Commission was quicker to adopt measures in Poland. Financial measures were used in both cases, but not exactly in the same way. In both Hungary and Poland financial measures were tied to the Recovery and Resilience Facility and horizontal enabling conditions, but in Hungary a portion of funds was also frozen under the conditionality regulation. This was not the case in Poland. Another difference is that for Poland all frozen funds were released with one decision, while in Hungary only part of the funds was unfrozen. However, it was the decision to unfreeze Hungary's funds that sparked major criticism within the European Parliament. This is probably because of the change of government in Poland and the new governments pro-EU stance.

5.1.4 The theoretical framework applied

This section will attempt to explain the European Union's approach to democratic backsliding in the cases of Hungary and Poland. In the theoretical framework normative institutionalism, the logic of consequences, and the logic of appropriateness, were identified as theories that can help explain the logic behind the EU's response to backsliding member states.

5.1.4.1 Normative institutionalism

Normative institutionalism focuses on how formal structures, rules, procedures, values, norms, and identities within institutions influence actions. This framework highlights the EU's emphasis on democratic principles and the rule of law in its dealings with member states (Thomas, 2009).

The EU's **structured legal actions and formal procedures** are evident in the EU's response to both Hungary and Poland. The EU institutions, and particularly the Commission, used structured legal actions from the rule of law toolbox (see section 2.3). The Commission used formal opinions and recommendations, infringement proceedings, referrals to the Court of Justice, and the conditionality regulation to address issues such as judicial independence, media laws, and NGO regulations and to enforce compliance. Both the EU and the Parliament triggered the Article 7(1) TEU procedure to try and address more severe and systemic forms of democratic backsliding. But they were ultimately limited by the EU's structure and rules in progressing with this procedure. Specifically, the Commission and Parliament have to rely on the member states, represented in the Council of the European Union, which have to adopt the further steps of the Article 7 TEU procedure. So far the member states have failed to reach the required four fifths majority (see section 2.3.2.2), which is why there have yet to be any sanctions for Hungary and Poland through the Article 7 TEU procedure. This shows that the EU's formal legal frameworks serve as a base for the way the EU addresses democratic backsliding in its member states.

The EU's **values**, particularly the ones enshrined in Article 2 TEU (see section 2.1.1), are the basis for the EU's legal frameworks and thus for the EU's response to backsliding member states. This is particularly apparent in the resolutions adopted by the Parliament, which often directly refer to the EU's values in the treaties, emphasising their importance. Similarly, the Commission's recommendations repeatedly reference the importance of judicial independence, the primacy of EU law, and democratic principles, illustrating the influence of these normative commitments. The Commission's identity as a promoter of democracy and rule of law is evident in its sustained pressure on Hungary and Poland to reform their judiciaries and uphold constitutional norms. This identity is always based on competences that are bestowed upon the Commission, which are referred to in the texts Commission's formal decisions (Thomas, 2009).

5.1.4.2 Logic of consequences

The logic of consequences suggests that actions are driven by rational calculations of costs and benefits (Schulz, 2018). This framework is reflected in the EU's strategic use of sanctions and legal threats to enforce compliance. The strategic use of financial sanctions, such as freezing EU funds through the conditionality regulation, reflects a calculated approach to create costs for non-compliance. The initiation of infringement proceedings can end with a referral to the Court of Justice in case of non-compliance by the member state, which the Commission applied on several occasions in the cases of Hungary and Poland. By imposing legal and financial consequences, the EU incentivises member states to comply with its regulations and values. To a lesser extent, the continuous escalation of measures, including the eventual use of Article 7 TEU, could reflect the EU's strategic efforts to increase the costs of non-compliance and push for reforms. But this is not really effective because member states have the final say in progressing with the Article 7 TEU procedure.

5.1.4.3 Logic of appropriateness

The logic of appropriateness posits that actions are guided by what is deemed suitable or appropriate within a given context, based on norms, roles, and identities (Schulz, 2018). The Article 7(1) procedure was only triggered once the issues of democratic backsliding in Poland and Hungary were deemed as serious breaches of EU values. When the EU takes action, decisions always include arguments as to why potential are deemed to be appropriate. And the EU always enters into dialogue with the member state in question to allow it to explain or argue against a decision.

5.2 Understanding the EU's response and its guiding factors

This section is (mostly) a manifestation of the interview results and will explain how the EU responds to backsliding in its member states by assessing what the roles of the EU institutions (5.2.1) and civil society (5.2.2) are in this response, and what factors and logic guide this response (5.2.3). Information based on interviewee response will use '(interviewee x)' as a reference, as explained in section 4.2.

5.2.1 Roles of the different EU institutions

5.2.1.1 The European Commission

The European Commission is composed of the Commission president and the commissioners (one from each member state), who are assigned a specific policy area. For the topic of democratic backsliding and the rule of law, the main commissioners are Reynders as Commissioner of Justice, Jourová as Commissioner of Values and Transparency and Hahn as Commissioner of Budget and Administration when the conditionality regulation is relevant (see section 2.3.2.4) (European Commission, n.d.-g). The Commission is organised into different departments based on specific policy areas. These departments are known as Directorate-Generals (DGs). These work together a lot to ensure a consistent approach (Interviewee 11). The Commission is the executive body of the European Union and the “guardian of the treaties” (Interviewee 6; Interviewee 10). So it is up to the Commission to take action when there is a violation of a treaty or when there is a potential violation of broader EU principles related to the treaties (Interviewee 12). This makes the Commission the institution that is responsible for enforcing the rule of law and means the Commission can take initiative within this rule of law enforcement (Interviewee 1; Interviewee 4). What makes the rule of law important, is that it is very much related to the proper functioning of the EU's democracy. In its role as guardian of the treaties and enforcer of the rule of law, the Commission monitors all member states (Interviewee 10). An example of the Commission's initiative in enforcing the rule of law is the fact that the Commission is responsible for starting the infringement procedures, as illustrated by the cases of Hungary and Poland. Importantly, the Commission has discretion in its decision-making as enforcer of the rule law (Interviewee 2).

The Commission also encourages member states to honour the treaties and international agreements and helps member states by coordinating them when, for example, a member state receives recommendations from an international standard setting body. The Commission also acts as the EU body that governments of member states can turn to when they need advice on how to regulate something or when they want something to be done at EU level. This can then act as a reason to allow the Commission to take the lead in the Council and legislate on specific issues (Interviewee 12).

5.2.1.2 The European Parliament

The European Parliament is the legislative body of the EU and consists of Members of European Parliament (MEPs) that are directly elected by EU citizens in their country. The Parliament is the legislative body of the EU and negotiates and adopts the EU's laws and budget, in cooperation with the Council of the European Union. The Parliament has 27 Committees, with the Committee on Civil Liberties, Justice and Home Affairs being the most actively involved in the issues related to this thesis. Within the Parliament, the MEPs organised themselves into 7 political groups (European Parliament, n.d.). So the Parliament's role lies in being the representative of the EU citizens. It fulfils this role by keeping up with what goes on in member states and tabling issues. To do this, MEPs listen to citizens, civil society, activists, journalists, judges, and any other potential stakeholder. In being the legislative body of the EU, the Parliament has no executive powers as those lie with the Commission. So in that way the Parliament is limited in what it can do (Interviewee 13). The Parliament has elective powers and can hold the Commission to account. However, these powers are rarely used and when they are, it usually takes a lot of time and can end in a court case, which can then take years. This is why the Parliament is reluctant to use its powers against the Commission (Interviewee 4). However recently, the Parliament did take matters into its hands by taking the Commission to Court over the decision to unfreeze funds for Hungary (Interviewee 14), as explained in section 5.1.1.

In reality, MEPs mainly put pressure on the Commission and on the Council to address rule of law and backsliding issues in the member states. The Parliament is the institution where MEPs can really talk about the issues and put them on agenda and also keep them on the agenda. It is usually the Parliament which brings attention to issues first. This was also evident in the cases of Hungary and Poland, where it often happened that the Parliament was the first EU institution to address an issue with a resolution. This pressure was evident in these cases and the Parliament has been very active on Poland and Hungary this past term. It is often the MEPs who ask the Commission to issue recommendations and organise hearings and who ask the Council to impose sanctions. MEPs have tried to convince the Council to act on the Article 7 TEU procedure with arguments and by meeting and talking with government officials represented in the Council. But so far these attempts at convincing the Council have failed to lead to any outcomes. This also means

that it depends on specific MEPs to address these matters and that the number of MEPs involved might not always be that large (Interviewee 2; Interviewee 4; Interviewee 13).

The Parliament's pressure cannot force the European Commission and the Council to do anything. So just because the Parliament is critical on rule of law issues, does not mean the other institutions will follow by addressing these issues (Interviewee 2). According to one MEP: "the European Parliament has become weaker vis-à-vis the Commission and the Council" (Interviewee 4). The Parliament does not really use its power to hold the Commission to account or to be a legislative counterweight to the European Council. The Council and the Commission have been making more decisions together while the Parliament's role as being the one to scrutinise this, has weakened because the Parliament is not really performing this scrutinising role. This has allowed national governments, who are represented in the Council, to gain greater decision-making power with less control by the Parliament (Interviewee 4).

5.2.1.3 The Council of the European Union

The Council of the European Union is the essential decision-making body of the European Union and consists of the ministers of the member states' national governments who are responsible for the topic in question. The Council negotiates and adopts the EU's laws and budget, in cooperation with the European Parliament. (It is not to be confused with the European Council, which consists of the heads of state of the EU member states, and the Council of Europe, which is a European human rights organisation, though these names are arguably very confusing) (Council of the European Union, n.d.).

The Council also has a rotating presidency over a six-month period, with Belgium being the current president. This president can hold hearings for individual member states to question them about rule of law issues (Council of the European Union, 2024), though not every president actually takes up this role. Belgium had taken up that duty this presidency, but they found no support from other member states and the hearing ended up being blocked by Justice Commissioner Reynders (Interviewee 2).

The Council holds the final say for a lot of decisions for activating the rule of law mechanisms, Article 7 TEU procedures and imposing and lifting sanctions on backsliding member states. It also makes the final decision in establishing the risk to the EU budget in the use of the conditionality regulation to freeze EU funds for backsliding member states (Interviewee 4; Interviewee 5; Interviewee 10). Additionally, the discussions as part of the rule of law dialogue between the EU and a member state are held in the Council (Interviewee 6).

5.2.1.4 The Court of Justice of the European Union

The Court of Justice of the European Union's main role is to ensure the equal application of EU law in every EU member state, and it does so by ruling on cases brought before it (European Union, n.d.). When it comes to rule of law related issues, the Court of Justice has provided clarification on these issues through developing its jurisprudence and giving interpretation in cases that deal with issues related to member states' rule of law and judiciaries. However, this role is limited by the fact that the Court can only give interpretation of EU law and not on national legislation. This is a relevant issue for example in cases where national governments pass legislation that contradicts EU law (Interviewee 1; Interviewee 9).

5.2.2 The role of civil society

Civil society organisations (CSOs) play a role in the EU's response to democratic backsliding in member states. The main contribution of CSOs consists of providing the EU with information of rule of law issues in member states. This happens both formally and informally. Formally, CSOs can provide input to the stakeholder consultations that are part of the annual rule of law report. This is not limited to CSOs, and anyone can provide input. Informal communication happens between civil society members and EU officials who know each other on a more personal level (Interviewee 3; Interviewee 9). Civil society organisations report on events of rule of law backsliding, legislative developments, et cetera, of their own accord and they can often provide reliable information on specific legal contexts of their respective countries. They usually produce independent research and sometimes CSOs release joint statements on rule of law and judiciary issues in member states. CSOs can observe overall rule of law trends in member states independently from the EU. Because of this, the Commission sometimes relies on information from the civil society and the Commission is certainly open to input (Interviewee 2; Interviewee 3; Interviewee 5; Interviewee 9; Interviewee 10). For example, Polish civil society organisations offered to help in the case of Poland by providing details on the legal steps to be taken by Poland to unblock EU funds (Interviewee 1). The help CSOs provides mainly involves the sharing of information. Sometimes CSOs will target specific stakeholders within the Commission. The information can relate to all aspects of democratic backsliding, though rule of law related issues can be tricky because there is a large rule of law toolbox, making the EU's decision-making process more difficult and issues often relate to multiple aspects of EU law. The sharing of information mostly happens through direct contact in a more informal setting and the relationship between the Commission and CSOs is described as quite open (Interviewee 3).

Civil society organisations mostly interact with the Commission because of its role in being the institution to really initiate the legal steps against member states who breach the rule of law. Interaction with the Commission mostly happens through the cabinets of relevant Commissioners (Interviewee 3). But the interaction between the Commission and civil society organisations can vary. It is up to the Secretariat-General to coordinate the relationship between civil society and the Commission, by guiding CSOs to the

right Directorate-General for example. A lot of the time, civil society organisations are the ones to contact relevant Commission cabinets and departments (Interviewee 3; Interviewee 5; Interviewee 11). In some cases, the Commission might also give information to CSO, but this is dependent on the decision and is rather rare. For big or ongoing decisions this will not happen. A lot also depends on the relationship a CSO representative might have with a Commission official. Often times communication becomes easier once CSO members develop their relationships with Commission officials. In some case the Commission will consult CSOs of its own accord. But this is dependent on which department and on which cabinet. It is mostly rare within Commissioner cabinets but seems to happen more often in the lower-level departments of the Commission's Directorate-Generals. For example, when legislation clearly impacts civil society, CSOs will be contacted to gather their perspectives. So, when the Commission initiates a consultation, it is usually targeted and is intended to gather specific information. In some cases, the Commission even funds CSOs to check the respect of the rule and implementation of measures in specific member states. There are also instances in which it is mandatory for the Commission to consult CSOs, but again, this depends on which department is involved (Interviewee 3; Interviewee 5; Interviewee 9; Interviewee 10; Interviewee 11; Interviewee 12).

The relationship between the Commission and CSOs is not flawless, however. The EU is a very complex public sector organisation, which can make it hard for CSOs to know where to go with their information. It can also be hard for CSOs to know what kind of information is useful to the Commission because it is very hard to see how information is used in the end (Interviewee 3; Interviewee 9; Interviewee 12). There are not many formalised entry points, which makes it harder for CSO to provide input (Interviewee 9). There are the stakeholder contributions attached to the rule of law report and the 'Have Your Say' platform, which are accessible to anyone. However, the latter is barely used by CSOs (Interviewee 10). The Commission does not really give much information back to civil society organisations for various reasons. Sometimes, when a decision is ongoing or because of the 'principle of sincere cooperation between member states', the Commission simply cannot give certain information. In cases where the Commission could involve CSOs, it does not always do so. This might be because the Commission has other stakeholders, such as national government officials, with which it enters into discussions. The Commission's response to CSOs' concerns can often take a lot of time and sometimes the Commission does not respond at all. This can cause issues as the situation in a member state can change a lot by the time the Commission responds (Interviewee 1; Interviewee 3; Interviewee 9; Interviewee 11). According to one interviewee, the Commission is also not always sincere in its communication with CSOs, but this probably concerns communication at the higher political levels of the EU's decision-making bodies (Interviewee 1).

Apart from the Commission, MEPs can also be in contact with CSOs. Of course, this depends on the MEP in question. Certain MEPs who are active on rule of law issues are also actively engaging with CSOs (Interviewee 13). Interaction varies between the different political groups in the Parliament, with some

being more open to CSOs than others. Representatives of backsliding governments sometimes try to discredit civil society through accusations of foreign interference, which can cause wrongful stigmatisation and discredit CSOs (Interviewee 3). This was the case in Hungary and Poland (see section 2.2.2.1 and 2.2.2.2).

5.2.3 Factors explaining the EU's response to backsliding member states

This section aims to determine the logic and guiding factors behind the decisions made by the different EU institutions when deciding on how to address a backsliding member state.

5.2.3.1 Legal and procedural mechanisms

The European Commission is the executive body and enforces EU regulation (see section 5.2.1.1). This role means that the Commission is supposed to base its decisions on what the treaties and other EU regulations provide. The Commission will essentially always argue that it is bound by the EU laws in its decision-making (Interviewee 2; Interviewee 10). As one Commission official put it: “we sort of, in a very boring, you know, and a very focused way, stay within our rules” (Interviewee 10). Because if the Commission exceeds the boundaries provided by the rules, a decision will be challenged before the Court of Justice and will lose the case. And by losing cases in the Court of Justice, the Commission could lose credibility, which could then end up leading to more of its decisions being challenged. So, it is not about linking issues of backsliding in member states to specific tools. For example, the conditionality regulation can only be used when there is a risk to the EU budget, i.e. when EU money is being spent in ways it should not be. The tools of the rule of law toolbox (section 2.3) can only be applied under specific conditions. This does not really leave any possibility for the Commission to be more punitive or more lenient by choice when deciding on whether to use its rule of law tools against member states. The Commission does have some discretion in interpreting the laws and treaties when there is room for interpretation. In such cases, the Commission can take a more informal approach. But the Court of Justice also plays a role here by clarifying how laws are to be interpreted through its judgments in cases. An example of this is a judgment made by the Court, clarifying that the Commission is obligated to deal with proportionality. So measures taken need to be reasonably proportionate compared to what a member state did, which reflects the logic of logic of appropriateness as outlined in the theoretical framework (section 3.2.2). All member states must be treated according to the same standards. Different outcomes can be attributed to differences of situation in the member states (e.g. see the comparison of the case of Hungary and Poland in section 5.1.3) (Interviewee 2; Interviewee 5; Interviewee 10; Interviewee 11; Interviewee 12; Interviewee 14).

The Commission can only act if the laws provide legislation on specific issues related to rule of law and democratic backsliding. It is thus easier to scrutinise member states when the EU's principles are codified. When the tools of the rule of law toolbox can be used, is explained in detail in section 2.3 and will not be

repeated here. However, it is worth noting that not all possible issues which could be classified under democratic backsliding are regulated. And the issues that are regulated have strict conditions outlining when they are violated. The tools often relate to specific issues and there are no EU laws dealing with larger systemic problems. This can help explain why the issues in Hungary are hard to deal with as they have slowly developed over many years and have permeated multiple aspects of Hungary's democratic system (Interviewee 1; Interviewee 2).

There are several consequences following from the fact that the Commission tries to strictly adhere to EU regulation. The Commission wants clear evidence to show that EU law is being violated and that it has the competence to act and will verify this first before acting. So when breaches are obvious and it is clear that a decision will stand, the Commission will act and will do so relatively quickly. This is simply because the Commission can be sure of its decision. However, when breaches are more complicated and more systemic, permeating more aspects of a member states' legal system and democracy, the response will take more time because of the complexity of the case. In these cases, legislation will not be applicable in an obvious way. So more complex issues are harder to deal with (Interviewee 1; Interviewee 9). Legal proceedings also take a lot of time, especially in more complicated cases. During this time, issues in member states can develop further, which in turn can cause the Commission to bring new charges, which then delays the case further. And by having issues develop further and possibly worsen in the meantime, it can become progressively harder to address them. In the case of Hungary for example, the issues progressed slowly, and even though the Commission used several of its tools, these always addressed specific components of backsliding in Hungary and failed to deal with the problem as a whole (see section 5.1.1) (Interviewee 1; Interviewee 3; Interviewee 9; Interviewee 13; Interviewee 14).

Another consequence of the logic of strictly following the legislation, is that the Commission mainly looks at legal changes and less at the proper implementation of these legal changes by the member states. If a rule simply requires that a law is adopted, then that is what the Commission will ask of a member state, regardless of whether that law is properly followed in reality. And if laws are not actually implemented, but merely formally adopted, then the Commission will not effectively deal with specific issues in member states. However, some tools and regulations do allow for further action if the Commission can prove that the rules are not implemented properly, such as the horizontal enabling condition and the budget conditionality regulation (Interviewee 1; Interviewee 5; Interviewee 9; Interviewee 13).

Economic sanctions and incentives are an important part of the EU's response to backsliding member states. For the horizontal enabling condition, it is not the Commission who does the assessment, but it is the member states themselves (section 2.3.2.3). And if this assessment is negative, the Commission automatically freezes money linked to this tool. The Commission's decisions in using economic incentives mainly came into question when the Commission decided to unfreeze funds for Hungary in December 2023.

This is explained in more detail in section 5.1.1. Again, the Commission argues that it simply followed the legislation and released these funds because Hungary made the requested changes to its laws. MEPs and civil society organisations have been very critical of this and are disappointed with the fact that simply making some changes leads to the sanctions being lifted without there being any real changes when it comes to implementation. So this is a contested topic. The Commission is also not keen to block money. In the Commission's eyes it is a good thing that money can be spent if it is spent in the right ways. This is preferable to money being frozen and not being used. There is a deadline for money to be claimed, which acts as another incentive for member states to have it be unfrozen (Interviewee 1; Interviewee 2; Interviewee 4; Interviewee 5; Interviewee 9; Interviewee 10; Interviewee 13).

Part of the money that got unfrozen for Hungary, was initially blocked under the conditionality regulation mechanism. Again, for this tool to be used, there needs to be a clear and obvious link between specific issues in a member state and the EU budget. MEPs wanted this tool to be used against Hungary's restriction on abortion laws. But the Commission did not find a link with the EU budget here, so this was not possible. It did find a link with Hungary's law on public procurement laws, which is why it still got activated. MEPs had already been calling for the Commission to use this tool which was new at the time. But because this was the first time this tool was going to be used, the Commission was very careful in how it was applied and made sure to stay within the framework of what the EU regulation provides. The tool was also challenged in Court of Justice of the European Union by Hungary and Poland, but ultimately was validated in the Court. And only after this, did the Commission gain the confidence to apply this tool. So the reason for being careful in the first use of this tool was to make sure it could not be challenged in Court again. The logic here is that by strictly staying within the legal frameworks, the Commission can make sure that a tool's legitimacy cannot be challenged. Because otherwise, this tool could lose its credibility after its first use. The Commission argues that it went as far as it could in the application of the conditionality regulation (Interviewee 2; Interviewee 5; Interviewee 9; Interviewee 10; Interviewee 13).

The legal frameworks behind the EU's rule of law toolbox play an important role. In a way, the Commission is limited in what it can do against backsliding member states by the frameworks of these tools. MEPs argue that the Commission is hesitant in using these tools and that the tools themselves do not work well together and thus should be improved (Interviewee 2; Interviewee 13). However, this is not easy because tools often have to get negotiated in the Parliament, and maybe more importantly, also in the Council of the European Union, in which the member states are represented. So, these tools often get "watered down" in the negotiations, before ultimately entering into force (Interviewee 1; Interviewee 13).

5.2.3.2 Institutional reasons and dynamics

The way the institutions are organised and how they interact with each other influences the way the EU responds to backsliding member states.

The EU is a very complex public sector organisation. The role of the different institutions involved is explained in section 5.2.1. This complexity can make it harder for the EU institutions to address issues in member states. This is partly because these same member states are represented in the institutions of the European Union. There is institutional rigidity. For example, the previous section discussed that the procedures can take a long time, which can deter institutions from using them (Interviewee 13). There are institutional rules which hamper the EU's response to backsliding member state. The most obvious example of this can be found in the Council. The Article 7 TEU procedures have thus far never been able to get through a Council vote, as was illustrated in the cases of Hungary and Poland. For both these countries, the Article 7(1) TEU procedure was triggered but ultimately failed to lead to any further action because it needs to be passed by a four out of five majority in a vote in the Council (see section 2.3.2.1). It is not just this coalition that means this procedure cannot get through the Council. The member states have a tradition of staying out of each other's way, which is why these procedures have yet to have been passed in the Council. Member States do not want to sanction each other because they fear that in the future, they might be sanctioned themselves for a different transgression. So in a way they treat each other as equals and are lenient in the hopes of having the favour returned. This can be put in a broader perspective because the EU is essentially a cooperation of 27 member states, and this cooperation would become more difficult if member states start sanctioning each other more often. For the Article 7(2) TEU procedure, it would be even more difficult and here the coalition really matters, because this procedure needs to be passed through a unanimous vote in the Council. Another important aspect is that Article 7(2) TEU can only be triggered by the Commission or by one third of the member states, unlike Article 7(1) TEU which can and has been triggered by the European Parliament. So far the Article 7(2) TEU procedure has not even found support among one third of the member states. So it seems the required unanimity remains unattainable for the time being (Interviewee 1; Interviewee 2; Interviewee 3; Interviewee 4; Interviewee 5; Interviewee 13). As one Parliament Official put it: "that unanimity is always prevented because Orbán usually has at least one friend" (Interviewee 2). Legally speaking, the Council itself does not have an official position on the situation in Hungary (Interviewee 6)

The EU institutions, particularly the Parliament and the Commission, do not always agree. This does not have to be a bad thing and different opinions are a staple of any democracy. The EU institutions operate at a high public level, and MEPs will always be entitled to express their opinion on the decisions of the Commission or Council. But differences between the institutions can have implications for the EU's general response to backsliding member states. The most relevant example is the Parliament expressing its

discontent over the Commission's decision to release frozen funds for Hungary, which ultimately led to the Parliament taking the Commission to the Court of Justice over its decision (see section 5.1.1). But the Commission argues that it followed the procedures and stayed within its competences and that the Parliament therefore should not have expected any other action from the Commission (Interviewee 2; Interviewee 5; Interviewee 10). According to one member of the European Parliament, this division leads to “weak leadership” (Interviewee 4).

The way the institutions work together also has an impact. In section 5.2.1.2, it was explained that the Parliament's role has decreased in significance compared to the Commission and the Council of the EU. The EU institutions sometimes tend to work separately and in a narrow way, without a broader interinstitutional perspective of systemic issues of democratic backsliding in the member states. This relates back to the Commission being more likely to take action when breaches are less complex and more obvious, as this might lead to the Commission dealing with issues separately instead of as a larger picture. For example, asking Hungary to change a law on public procurement without addressing the clearly existing systemic issues in Hungary. But this in turn ties back to the fact that the Commission is limited by what the treaties and EU regulations prescribe. The complexity of the EU causes hesitance because having a narrower view of issues causes the institutions to refrain from working together (Interviewee 2; Interviewee 9).

The Commission does not necessarily share its information with the Parliament either. The Commission informs the Parliament of measures taken in relation to the rule of law report, and the tools usually have rules that state in what capacity the Parliament is to be kept informed. But beyond the rules the Commission does not really provide further information unless it is deemed necessary. So again, it is about following the rules and regulations. Sometimes the Parliament does not have the right to receive certain information. For the Parliament it is difficult to understand the Commission's decision-making process because of this. The Commission does not provide information in cases where no formal decision is adopted. Or to put it differently, in cases where the Commission decides not to take action. In some areas of the rule of law, such as the links with the protection of the budget and the conditionality regulation, specific departments or Commissioners and their cabinets will discuss things with the Parliament before making a decision. But this is not a requirement. The MEPs ask the Commission a lot of questions on these issues, but these questions are not always answered. Commission departments tend to keep information within the Commission and share with each other, but sharing information with the Parliament tends to happen less if the Commission deems it unnecessary. This might be explained in part by the fact that the Commission might make its decisions more susceptible to being challenged in Court if it gives away a lot of information (Interviewee 2; Interviewee 5; Interviewee 10; Interviewee 11; Interviewee 14).

The relationship between the Commission and the Parliament also depends on the individual MEPs and how many of them actively advocate for addressing rule of law issues in member states. As became clear from the cases of Hungary and Poland, it is often the Parliament adopting the first resolutions on specific issues and it is MEPs who try to pressure the Commission and the Council to act. At the time of writing, the 2024 European elections are very close, and the course of the EU's response to backsliding member states will thus partly be defined by what the next Parliament looks like (Interviewee 3; Interviewee 4; Interviewee 13).

5.2.3.3 Political considerations within the EU institutions

The European Parliament is comprised of directly elected representatives of EU citizens, or put simply, it is comprised of politicians. The European Commission, as the executive body, is inherently a political body that takes political decisions with political consequences. The Council of the European Union brings together the ministers of specific policy areas depending on the topic at hand. So, it is composed by national politicians making decisions at the EU level (Interviewee 4). Therefore, it does not come as a surprise that a section on the influence of political factors and considerations is warranted. In the previous section on the influence of institutional dynamics, the example of the Article 7 TEU procedures not finding support in the Council of the European Union was used to illustrate that the way the Council is set up as an institution has an impact on the EU's ability to address democratic backsliding in member states. The decision by member states not to act upon this article in the Council is also an example of a politically motivated decision. As stated previously, the member states do not want to sanction each other because they fear the same might happen to them in the future (Interviewee 1). The Commission is usually also represented during political discussions in the Council. However, the role of politics in discussions is often dependent on the political sensitivity of a specific issue and it always remains hard to identify what can be seen as a purely political issue or decision (Interviewee 6).

The Commission's decision to release Hungary's fund has been used as an example several times by now. And again, it serves as a good example. Specifically, the timing of this decision is seen by some, mostly MEPs, as a clear example of a political decision. The argument is that this money was unblocked in exchange for the Hungarian government not blocking a Council decision on sending financial aid to Ukraine, as Orbán had been using his position on Ukraine strategically to try and shake some EU pressure off his back. The Commission had essentially asked Hungary to change a law, and immediately after this law was changed, this was followed by the decision to unblock part of Hungary's frozen funds. The Parliament's main argument for this timing being political is that this decision came instantly, while the Commission had around nine more days to carry out its assessment. The Commission's argument is that the law was changed and it thus had to fulfil its end by unfreezing the money that was frozen because of that law in the first place (Interviewee 2; Interviewee 3; Interviewee 4; Interviewee 5; Interviewee 10;

Interviewee 13). While it is true that the Commission followed procedure as it always does, it did not have to make the decision when it did, which could indicate that this decision was indeed political. This notion is contested among the Commission officials that were interviewed as part of this research. One Commission official stated:

“The decision to go for the decision just before the discussion on Ukraine was political. Also to activate or not the budget conditionality, eventually there's some political considerations which are taken into account. But that's normal, I would say. I mean, you don't treat the same a country which commits to the European values, and a country which over and over is criticising and blocking and slowing down the process of policymaking. Yeah, so there is a political element for sure” (Interviewee 5).

Another Commission official admitted that political considerations are a part of the Commission's decisions but emphasised that the procedure was still followed in this case (Interviewee 10). A third Commission official denied the notion that political considerations played a role in this case, stating that this timing was a coincidence and arguing that Hungary did not fully withdraw its veto against financial aid for Ukraine (Interviewee 14). In fact, at the time of writing Hungary is still using this veto strategically (Barigazzi, 2024). Conversely, the two interviewed MEPs and the Parliament official (non-MEP but working for a Parliamentary group) were all strongly convinced that the timing of this decision was politically motivated (Interviewee 2; Interviewee 4; Interviewee 13). It could however be argued that the Commission refusing to apply this law if Hungary fulfilled demands would also be a political decision (Interviewee 14).

“There are precious few angels in the EU”, one Commission official (Interviewee 10) said to explain that there are rule of law problems in every single member state. This can deter the Commission to act upon issues of democratic backsliding in member states, because in principle the Commission must treat all members states in the same way. So, if the Commission started cases for smaller issues in a specific member state, it would have to do this in every member state with similar issues. Otherwise, the Commission could be accused of applying double standards. But this does not seem to apply to cases where the Commission has acted on more obvious issues of democratic backsliding, such as in Poland and Hungary. This might be because these are the two most obvious cases of democratic backsliding in the EU, which could mean that there is more pressure to deal with them. This might indicate that the Commission feels compelled to act when the issues become more systemic and gain more public attention (Interviewee 1; Interviewee 10). One Commission official argued that acting against member states can also have a deterrent effect, by showing other member states what would happen if they engaged in similar practices (Interviewee 10). As stated in a previous section, the Commission will act more decisively when cases are less complex, and will be slower to react to more complex and systemic issues. When issues are more complex, the Commission is more likely to take a more diplomatic or political approach and will refrain from adopting real measures

(Interviewee 1). This extends to cases where the Commission decides not to act. According to one MEP, it is the decisions not to intervene that are politically motivated. Because, as explained in section 5.2.3.1, when the Commission decides to act, it tends to stay within the frameworks provided by EU regulation (Interviewee 4).

The Commission supports a national government's political decision if it aligns with the Commission's goals. This was illustrated in the case of Poland, where the new government pledged to reverse the previous government's democratic backsliding (see section 2.2.2.2). In this case, the Commission rewarded this more pro-democratic government by unblocking all frozen money for Poland with one decision and by ultimately putting an end to the Article 7 TEU procedure (see section 5.1.2). Though some argue that this decision has come prematurely, and that Commission decided to unfreeze these funds based on promises instead of on implementation (Interviewee 1; Interviewee 2; Interviewee 3; Interviewee 5; Interviewee 10; Interviewee 13; Interviewee 14).

Within the Parliament, politics also influenced the approach to backsliding member states. Particularly Greece was cited as an example by two MEPs. The Greek president Mitsotakis has a lot of allies in the European Parliament, especially in the European People's Party. This made it difficult for individual MEPs to raise concerns on democratic backsliding in Greece. In a similar vein, Hungary is sometimes portrayed as the black sheep in the EU when it comes to democratic backsliding. Though as has already been stated, issues of democratic backsliding are certainly not limited to Hungary. But this portrayal allows some MEPs and member states to ignore issues in other member states (Interviewee 4; Interviewee 13). The media also plays an important role in how issues of backsliding in member states in portrayed however (Interviewee 14). Additionally, two Commission officials implied that MEPs positioned themselves strategically on Hungary's democratic backsliding, with an eye on the upcoming elections of June 2024. So for their own political goals. Specifically, the Commission being taken to Court by the Parliament is used as an example, because this underlined the Parliament's action in the media, but since this announcement, the case has not really come up in any discussions anymore. It has however officially been handed in, as explained in section 5.1.1 (Interviewee 5; Interviewee 10; Interviewee 14).

5.2.3.4 Member states' influence

While this could certainly also be classed under political considerations, the influence member states have on the EU's seemed significant enough to warrant its own section.

As explained in section 5.2.3.2, the EU's member states have a tradition of staying out of each other's way. So, they do not want to pick fights by sanctioning each other at the EU level. This is mainly evident by the fact that the Council, which consist of members of the members states' national governments, is reluctant

to take real action against backsliding member states. The EU's member states are represented in every single institution. Particularly in the Council of the EU and in the European Council. Ministers and heads of the member states will serve their own states first. This is not abnormal as they are ultimately only elected by the citizens of their respective countries (Interviewee 13). This notion does not apply to all policy areas, for example on climate policy the EU has been able to expand its competence because the member states recognise the benefits of regulating climate policy at the EU level (Cifuentes-Faura, 2022). But this is not the case when it comes to enforcing the rule of law and dealing with democratic backsliding (Interviewee 13). Though member states might encourage each other to respect the rule of law in some cases (Interviewee 12), they refrain from enforcement through sanctions in the Council of the European Union. Governments of backsliding member states can proclaim that there are no issues in their countries in some cases, especially when the issues are less known or less obvious. These member states have no detailed knowledge of each other's legal systems, which makes it harder to detect democratic backsliding in member states. This rhetoric can also be true for other EU institutions, as national politicians can be skilled diplomats and successfully convince the EU institutions that they are well within the EU's regulation and respect the EU's values, when in reality this is not always true. National politicians assuring the Commission that 'everything was fine' happened in the cases of Hungary and Poland (Interviewee 1).

Powerful national government officials can also hinder the EU's response to democratic backsliding. The example of Orbán continuously using his position on Ukraine aid in the Council strategically is applicable to this notion (see for example Barigazzi, 2024). But another recent example is Poland's president Duda, who is linked to the previous Law and Justice government, using his veto powers to block the new Tusk government in undoing Law and Justice's democratic backsliding (see section 2.2.2.2). Even though both the EU and the new Polish government want to resolve Poland's democratic backsliding, they cannot because of one powerful Polish politician (Interviewee 1; Interviewee 9).

5.2.4 Applying the theoretical framework to the interview results

The theoretical framework was mainly designed to explain the logic that guides EU decisions in addressing backsliding based on the case studies (section 5.1). In contrast, the structure of the content analysis (this section 5.2) was based on the answers of the interviewees as it served to gain a deeper inside perspective on the logic behind the EU's decision-making in addressing backsliding in member states. It can still be interesting to analyse in what capacity the interview results from section 5.2 can be explained through the theoretical framework, which is what this section will explore.

5.2.4.1 Normative institutionalism

For a conceptualisation of normative institutionalism see section 3.1.

The Commission bases its decisions on the EU legislation and thus adheres to the EU's institutional setting and rules. Applying this framework reiterates the importance of the EU's formal structures, norms, roles, and the interactions of EU institutions in shaping the response to backsliding member states. The European Commission's role as 'guardian of the treaties' shows that its actions are guided by the foundational principles and values of the EU that are codified in the treaties. The European Parliament's efforts to represent EU citizens and uphold democratic values reflect normative institutionalism. MEPs bring issues of backsliding to the agenda based on normative commitments to democracy and human rights. To a lesser extent, it could be argued that civil society's engagement could be explained through this framework because CSOs advocate for the values that they deem important. Lastly, the complexity and rigidity of EU procedures can slow down responses to backsliding, revealing institutional limitations (Thomas, 2009).

5.2.4.2 Logic of consequences

For a conceptualisation of the logic of consequences, see section 3.2.

Similarly to the case study, the interview results reveal that the EU uses financial measures to incentivise compliance strategically, as it ties the availability of funds to criteria related to the rule of law. The member states' reluctance to sanction one another due to fear of future reprisals is a clear example of the logic of consequences. The member states fear that they might be sanctioned in the future if they sanction another member state and are more lenient to one another in hopes of that leniency being returned. The example of the Commission basing its timing of deciding on the unfreezing of Hungary's funds in return for a favourable vote by Hungary can also be explained by the logic of consequences, as it suggests decision-making based on anticipated outcomes (Schulz, 2018).

5.2.4.3 Logic of appropriateness

For a conceptualisation of the logic of consequences, see section 3.2.

The principle of proportionality, meaning that the Commission must act in proportion to a member state's action, clearly follows the logic of appropriateness. This is seen all throughout the Commission's actions which are often guided by strict adherence to laws and regulations. The different institutions act based upon what they deem is the right course of action appropriate for their institutional role. When engaging with CSOs, the Commission sometimes follows the Commission's interaction with CSOs follows established norms of stakeholder consultation and appropriate channels for input, which again reflects the logic of appropriateness (Schulz, 2018).

The importance of political considerations, differences leading to friction between the EU institutions and the member states' diplomatic influence seem to fall outside the scope of the established theoretical framework. The implications of this will be discussed in section 6.2.

6 DISCUSSION

This research has provided a comprehensive understanding of the EU's response to democratic backsliding in its member states, including the roles of various EU institutions and civil society, and the factors and logic guiding the EU and its institution's actions. This section will discuss and reflect on these insights and their theoretical implications.

6.1 Discussion of the findings

The European Commission, Parliament, and the Council of the European Union each play their own role in the response to backsliding member states. The European Commission acts as the guardian of the treaties, responsible for enforcing EU regulations through legal mechanisms such as infringement procedures, recommendations, and the conditionality regulation. Its actions are based on strict adherence to EU law, aligning with normative institutionalism and the logic of appropriateness. The Commission's reliance on legal instruments to address issues such as judicial independence, media laws, and NGO regulations underscores its commitment to formal structures and procedures, reflecting both normative institutionalism and the logic of appropriateness (Schulz, 2018; Thomas, 2009). The European Parliament often serves as the initial responder to democratic backsliding, bringing issues to the policy agenda through resolutions and pressuring the Commission and the Council to act. This reflects its role as the representative of EU citizens and its adherence to democratic principles. The Parliament's repeated calls for action and adoption of resolutions illustrate its commitment to upholding EU values, despite its limited executive powers. The Council of the European Union, composed of ministers of the national governments, often hesitates to take decisive action against backsliding member states due to political considerations and the tradition of member states to refrain from sanctioning each other. This reflects the logic of consequences (Schulz, 2018), because they do so with the aim of not being reprimanded by each other. The Court of Justice ensures the uniform application of EU law across member states. Its judgments provide clarity and set precedents that influence the actions of other EU institutions. However, the Court's ability to address national legislation is limited, impacting its role in dealing with democratic backsliding. Civil society organisations play a complementary role through advocacy, research and by providing valuable information to the EU institutions, particularly the Commission, helping to shed light on issues of democratic backsliding.

Various factors guiding the EU's response to democratic backsliding were identified. The first important factor consists of the EU's legal and procedural mechanisms. The EU's response is strongly influenced by its legal frameworks. Especially the Commission's actions are typically strongly based on the established rules and procedures. The Commission seeks clear evidence of breaches and ensures that measures are proportionate to the violations, reflecting the logic of appropriateness (Schulz, 2018). It might seem obvious that the Commission follows the established rules, but the findings have also shown that the rigidity of

these legal frameworks can slow down and limit responses to backsliding. The procedural requirements for initiating and progressing infringement procedures, as well as the Article 7 TEU process, exemplify this rigidity.

Secondly, institutional dynamics influence the EU's ability to address democratic backsliding among its member states. These dynamics include the relationships and interactions between the EU's various institutions, the complexity of their decision-making processes, and the impact of institutional rules and norms. This was evident through the interinstitutional relationships. The European Parliament often acts as a watchdog, urging the Commission to take action on democratic backsliding. However, the Commission's reliance on legal frameworks can lead to friction, particularly when the Parliament perceives the Commission's actions as insufficient. This dynamic was evident in the Parliament's criticism of the Commission's decision to unfreeze funds for Hungary. The Council of the European Union plays a crucial role in the decision-making process, particularly in triggering Article 7 TEU procedures. However, its requirement for unanimity or qualified majority voting has thus far always impeded decisive action. There is some institutional rigidity, which can make the decision-making processes slow and complex. This can hinder timely responses to democratic backsliding. The lack of a coordinated approach among the EU institutions can lead to fragmented actions. For instance, while the Commission may initiate legal proceedings, the Parliament may adopt resolutions, and the Council may hold hearings, these actions are not always synchronised, potentially reducing their overall impact.

Thirdly, political considerations influence the EU's response. This proves that the EU's legal frameworks are not the only factor guiding the EU's responses. Political considerations can be found in the EU institutions and among member states when they make decisions at EU level. The reluctance of member states to sanction each other and the strategic use of positions by national leaders, like Orbán in Hungary and Duda in Poland, illustrate this influence. EU institutions simply cannot ignore these political strategies and contexts and thus political consideration make it into decisions. As has been shown, decisions such as the timing of unfreezing funds can be influenced by broader political contexts, highlighting some interplay between legal frameworks and political considerations.

This notion extends to the fourth important factor influencing the EU's response, the influence of the member states. Member states' reluctance to sanction each other, driven by concerns over future reprisals and diplomatic relations can be seen as a political factor, but it also implies influence of national interests on the EU's collective response. Shifts in domestic politics, such as the change in government in Poland, can significantly impact the EU's approach as the EU is willing to help governments who want to realign their aims with the EU's goals and regulations.

Although it was not the main aim of the research (see section 1.2), the findings have exposed some challenges to the EU's response to backsliding member states. As mentioned, the EU's complex institutional structure and rigid procedural frameworks can slow down responses to democratic backsliding. This complexity can make it difficult to address systemic issues effectively. Limited coordination and information sharing between the EU institutions can impede a unified response to backsliding. Additionally, political considerations within the EU institutions and among member states can hinder decisive action.

6.2 Theoretical implications

The theoretical framework was based on the theories of normative institutionalism, the logic of consequences, and the logic of appropriateness (see section 3) (Schulz, 2018; Thomas, 2009). The application of this framework provides insights into the EU's response to democratic backsliding. However, the analysis also reveals limitations in these theories' ability to fully explain the influence of political considerations and the member states' influence.

The theoretical framework captures the importance of the EU's formal structures, norms, and values in shaping its response. **Normative institutionalism** explains the Commission's adherence to legal frameworks in which the EU's values and principles are embedded. And the Parliament's frequent emphasis on these democratic principles strengthens this notion (Thomas, 2009). **The logic of consequences** explains the strategic use of sanctions and the reluctance of member states to sanction each other. The example of the Commission's timing in unfreezing Hungary's funds also demonstrated this logic. The **logic of appropriateness** is evident in the proportionality principle guiding the Commission's actions and the established norms of stakeholder consultation with civil society. The EU institutions' decisions are often based on what is deemed suitable within their institutional roles. While normative institutionalism and the logic of appropriateness provide a foundation for understanding the EU's adherence to legal norms and values, the logic of consequences offers a more comprehensive explanation of the EU's strategic, but often hesitant actions (Schulz, 2018).

However, the significant role of political considerations and the influence of member states highlight areas where the established theoretical framework falls short. Applying insights from the existing literature on the EU's response to democratic backsliding discussed in the conceptual framework (section 2.4), can help account for the complex links between institutional rules, political dynamics, and member states' actions in explaining the EU's response to democratic backsliding.

Sitter & Bakke (2021) analysed the EU's capacity to respond to democratic backsliding in its member states. The authors propose 3 strategies that the EU can follow: (1) contain; (2) accept; or (3) fight democratic backsliding. The EU is quicker to respond to easier issues, while systemic issues are harder to

deal with. This arguably reflects that the EU chooses to contain the issues rather than fight them at their root causes. Furthermore, Sitter and Bakke (2021) emphasise the EU's struggle with containment strategies due to political considerations. The EU's measured actions faced resistance, and the decision to either accept or fight backsliding is heavily influenced by the political landscape within the EU. This is complemented by Feisel (2022), who explains that political considerations delay actions and lead to compromises. The impact of political considerations on the EU's response to democratic backsliding was underscored by several other scholars (Bakke & Sitter, 2022; Herman et al., 2021; Meijers & van der Veer, 2019; Scheppele et al., 2022; Winzen, 2023; Wolkenstein, 2022; Wunsch & Chiru, 2024).

This has also been reflected in some of the most recent literature on this topic. Kelemen (2024) discusses how party politics, intergovernmental norms, and institutional indulgence or leniency influenced the EU's response to autocratic shifts in Hungary and Poland, which were ineffective for a while according to Kelemen (2024). Blauburger & Sedelmeier (2024) highlighted the role of domestic electoral incentives and the increasing public awareness of backsliding as factors driving the EU's decision to impose sanctions, reflecting further political considerations. Hernández & Closa (2024) explained that the EU's response to the rule of law enforcement was influenced by the political preferences of member states, especially in the context of the war in Ukraine. This was reflected again in Hungary strategically positioning itself when voting on Ukraine aid, which caused the EU to have to engage these decisions in a more political context.

Raube & Costa Reis (2021) noted the mixed responses from different EU institutions, influenced by varying levels of commitment from member states. The reluctance of some member states to take strong actions against Hungary and Poland, due to political alliances or fear of future sanctions against themselves, reflects the limitations of the normative institutionalism framework, as these member states arguably compromise their democratic values to some extent by refusing to sanction democratic backsliding in other member states. This hesitation undermines the EU's ability to enforce its values uniformly, as highlighted by the slow and fragmented responses. For example, Scheppele et al. (2022) and Durakçay (2023) criticised the EU's response to Hungary's systemic rule of law issues, arguing that it was inadequate due to political barriers and member state reluctance. Similarly, Pech et al. (2021, p. 21) argued that the EU's response to Poland has been systematically "too little, too late", exacerbated by political considerations. The need for unanimity in imposing severe sanctions allows politically aligned member states to block decisive actions. This strategic inaction is not really explicable through the established theoretical framework.

However, this has shown that the findings of this research are comparable to the existing literature and also complement it.

7 CONCLUSION

7.1 Answering the research question

This research focused on the research question: ‘**What explains the European Union’s response to backsliding member states?**’.

This comprehensive study has shown that the EU’s response to democratic backsliding is explained by the different roles taken up by the institutions, the EU’s legal and procedural mechanisms, (inter)institutional dynamics, political considerations and the influence of the member states. The combination of these different factors, which the EU institutions all have to take into account, illustrates the complexity of responding to democratic backsliding in EU member states.

Multiple steps were taken to formulate an answer to the research question. A literature review and desk research were performed to establish a conceptual and theoretical framework around democratic backsliding and its application to the EU context. Next, the EU’s response to the cases of democratic backsliding in Hungary and Poland were analysed through a document analysis to identify the way the EU responded in these cases. Next semi-structured interviews were held with EU officials from multiple EU institutions and members of civil society organisations. A content analysis was carried out on the results of these interviews to gain a deeper understanding and establish patterns and identity factors that explain the EU’s response to backsliding member states.

Through the application of a normative institutionalist approach, the EU’s reliance on its established legal frameworks and regulations was highlighted. The EU’s values related to democracy and upholding the rule of law are enshrined in the EU’s treaties, which further clarifies why the EU tends to base itself on the established regulations. It is often not a question of how hard a member state’s transgressions should be punished, but rather which action the EU legislation prescribes. This also reflects the logic of appropriateness, as the strict adherence to the established rules means that EU institutions act based upon what is deemed suitable according to the regulations and according to their own institutional roles. This also means that the EU is constrained by what the regulation provides and what it does not provide. In the case of the Commission, this means that clear evidence of democratic backsliding that breaches EU law is needed before the Commission will act against a member state. Lastly, some of the EU’s existing tools within these legal frameworks follow the logic of consequences as they incentivise a member state to follow certain rules by being tied to financial or legal consequences.

The roles and interrelationships of the EU institutions shape the EU’s response. The European Commission, as the executive body, is the guardian of the treaties and has the duty of ensuring that these are complied

with. The European Parliament is often the first institution to bring issues of democratic backsliding to light. The Council of the European Union is where some sanctions under specific articles of EU treaties must be adopted. The Court of Justice of the European Union provides clarification on specific issues and on how EU regulation must be adopted through its jurisprudence. The interaction between the Commission, the Parliament and the Council of the EU influences the EU's overall ability to respond. There is not much information sharing between these institutions and they often act separately, leading to a fragmented response. Institutional rigidity, following from the EU's legal procedures that must be followed, can lead to hesitancy and slow responses to democratic backsliding. This is exacerbated by the complexity of these issues, which often permeate multiple aspects of democracy and the rule of law in member states.

Political considerations are the next factor explaining the EU's response. Member states are directly represented in the Council of the EU and often also indirectly in the EU's other institutions. Member states use political strategies and are reluctant to sanction each other for fear of future reprisal, which reflects the logic of consequences. The EU operates in an inherently political context and sometimes political strategies are applied in the EU's response to member states who exhibit politically motivated behaviour. For example, this research has shown how member states can use their position in the Council of the EU strategically to gain a favourable outcome.

The influence of member states can be seen as a separate factor explaining the EU's response. A member state's own behaviour is a determining factor. The willingness of member states to combat democratic backsliding within their own borders will lead the EU to aid in this process, as was exemplified in Poland. Conversely, the case of Hungary has shown that a member state's opposition to the EU's institutions can lead it to become more of an outsider. However, the EU is still bound to treat all member states according to the same standard. Additionally, the cases of Hungary and Poland showed that backsliding member states can support each other strategically in the Council of the EU and hinder the EU in engaging or sanctioning them.

7.2 Limitations to this research and recommendations for further research

The potential limitations of this research must be acknowledged. Firstly, the case study analysis only used the EU's response to Hungary and Poland as cases, because these were identified as the two member states that are most commonly seen as examples of democratic backsliding within the academic literature. But the findings of this case might be specific to the context of these cases and thus might not be representative of the EU's approach to backsliding in other member states. Findings for the response to other member states might be different. This was somewhat mitigated because the interviews focused on the EU's approach as a whole. The findings of the interviews are based on the interpretations of individuals, and

though they have relevant experience, their responses might be biased. The EU is a very big organisation, while the interview analysis is based on twelve interviewees with different roles within the EU or civil society. This can have implications for the generalisability of the findings. My own interpretation and coding of the interview data might have affected my reporting on this data. Lastly, this thesis has alluded to the uncertainty around the 2024 European elections. The EU's policy discourse might be entirely different during the next legislature and the results of this thesis might not be representative of the EU's approach to democratic backsliding in the future.

Further research on this topic can potentially corroborate the findings, which would increase their internal and external validity. Therefore, some suggestions for further research are in order. Future research could look at the occurrence of democratic backsliding in EU member states which have not been discussed as much. Most literature seems to focus on Central and Eastern Europe, and it might be interesting to assess the existence of democratic backsliding in other EU member states. This could identify other relevant cases on which a case study of the EU's response could be done. Case study research could also be used to assess how democratic backsliding impacts an EU country's own development. The spillover effects of backsliding in one member state on potential backsliding in other member states might also warrant a full-length study. This thesis has touched upon many other subjects that could be interesting topics for further research. The effectiveness of the EU's response to member states can be evaluated further. The impact of interinstitutional problems, member states' influence and political considerations, and the role of civil society organisations could individually be explored in detail. The impact of democratic backsliding on public support for the European Union has thus far not been assessed either.

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APPENDIX

This appendix contains the transcriptions of the interviews with Interviewee 1, Interviewee 2, Interviewee 3, Interviewee 4, Interviewee 5, Interviewee 9, Interviewee 10, Interviewee 11 & 12 (who were interviewed together) and interviewee 13. Interviewees 6, 7, 8 and 14 did not allow a transcription to be made and are thus excluded from this appendix. Any information in the transcription that could compromise the interviewee's identity was left out and replaced by '(...)'.

Annex 1: Anonymised transcription, Interviewee 1

Organisation	Polish civil society organisation
Date	21 March 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 1

X: What do you think, from a legal-technical perspective, are some of the key challenges that the EU has faced in its response to Poland in the past?

Y: Alright, so we can divide this question either between each institution of the European Union, or each procedure that concerns the rule of law. When it comes to institutions, I think, which stems from the treaties, it is obvious that the Commission has the first word when it comes to enforcing the rule of law in member states. But after, you know, eight years of rule of law backsliding in Poland, we can observe that the decisions of the Commission regarding infringements, regarding legislation, approach to Poland, to me, they were, and they are mostly based on political, rather than legal issues. Especially when it comes to bringing Poland to the European Court of Justice or starting infringement proceedings against Poland concerning the changes in the judiciary. And the main the main point which I can make here is that when the breach is obvious and it concerns the very essence of an institutional balance, organisation of the judiciary, the Commission wants to act very quickly. This was the case of the Supreme Court in Poland and the disciplinary chamber. When it comes to the Supreme Court, the case C-619/18 when the government lowered the retirement age of judges of the Supreme Court, the Commission acted very swiftly, asked for interim measures before the Court of Justice. Even this was under the special proceedings, under which Poland didn't need to be heard. So, in absence of the Polish response, and it was granted. And similarly in the case of the disciplinary chamber, the action of the Commission was very swift. When it comes to more systemic and more complicated issues, such as the National Council of the Judiciary and the procedure of nominating unlawful judges. Or the so-called muzzle law, which prevents judges from questioning the statuses of other judges, the approach of the Commission was slow or there was no response. See the case concerning the muzzle law. Which was decided last year as I think. Or two years ago. Sorry, I don't remember exactly. So the infringement proceedings before the Commission and the procedure before the court lasted very, very long, I think more than more than two years or something like that. And in the meantime, the Commission, decided to supplement the recent opinion. So to bring new charges against Poland.

So it also delayed the whole procedure. So, it was probably not well prepared, legally speaking. And even though the Commission was pretty sure that Poland's response would be, you know, very similar to other cases. So: everything is fine, we are fully in compliance with EU law and so on and so forth. See also that when it comes to the National Council of the Judiciary, which, as you probably know, was deemed unlawful by the European Court of Human Rights in a series of judgments. There is no infringement action from the European Commission. Despite numerous open letters from civil society in Poland. I was responsible for writing, I think four or five letters to the European Commission, clarifying that after the case law of the Court of Justice, it is very clear that the National Council of the Judiciary is unlawful, and it threatens the EU legal order as well. And the case concerning the Constitutional Tribunal in Poland. So the issue of the Constitutional Tribunal was the very first stage of dismantling the rule of law in Poland. It was the main reason to activate Article 7 procedure against Poland. But the case was brought to the Court of Justice only after the judgement of the of the Polish Constitutional Tribunal, questioning the constitutionality of the treaties. And it was, I think, something like also two years ago when the Commission started the infringement procedure and now the case is pending before the Court of Justice. So, to conclude, yeah, when the case is easy and it's very obvious and it is a very blatant violation of EU law, the Commission acts very swiftly. But when the case is more complicated and in the case of countries which suffer from rule of law backsliding, the cases are usually very complicated. They are systemic, they involve many actors and it is not easy, legally to grasp the main problem with a set of regulations. The Commission does not act swiftly or does not act at all. So, but after eight years of the backsliding, we as the civil society realise that you know, it is mostly not a legal decision by the Commission, but rather a political decision.

X: So, this means the Commission faces political challenges. What do you think the main causes of the political challenges and considerations are?

Y: Well, how to respond to that? I think the Commission is reluctant to start some cases against Poland because there are very similar problems in other member states. For example, when it comes to judicial nominations, there are doubts about the independence of the judicial nominations in Spain, for example. But also the politicisation of that process in Germany and the main argument by the previous government, was always that 'we shouldn't be blamed for what we what we did with the judiciary, because in Germany the judges are nominated by the Minister of Justice'. So a purely political body. And the Commission is applying double standards to the member states. And I think this was the main source of reluctance from the European Commission. But also, there are non-legal or non-political issues. For example, when the Law and Justice government changed their Prime Minister from Beata Szydło to Mateusz Morawiecki in Poland. This change was meant to start a fresh relationship with the European Commission. Prime Minister Morawiecki was a banker. He has very good knowledge of EU law. He was an author of an academic book on EU law. So the Law and Justice thought it would be a leverage in talks with the European Commission. And politically speaking, he's very good in saying, in convincing the Commission that everything is fine, we are deeply committed to European values and so on and so forth. However, and I think that the leadership of the Commission, especially the President von der Leyen was very affected by his assurances that, you know, everything is fine and so on and so forth. Because comparing to the previous Prime Minister, so Beata Szydło, now we have a very European partner that thinks in a European way, speaks very good English. He is a banker, so he's from the elite. So he was able to persuade the leadership of the Commission not to act. And this is also reflected in in the legislation put forward by the Commission, especially the conditionality regulation. I was following the whole legislative process and, as you probably know, the first draft was a very powerful tool to combat the rule of law by not allowing Member States to have EU funds. But in the course of law-making procedure, it was watered down. And in the end it practically won't

be applicable to Poland. Because I had a conversation with people from the European Commission and they want a very hard evidence and very obvious evidence to show that EU money is spent in violation with the rule of law. In terms of Hungary, it is easy to demonstrate that link, but in Poland the problem is more systemic and the impact on the lack of independence of the judiciary is not, you know, as evident as the European Commission wants it to start proceedings under the RRF, under the conditionality Regulation. And the third thing is that the Recovery and Resilience Facility was meant, especially in Poland, by the opposition and civil society, as a tool to make the previous government make some concessions towards the European Commission, when it comes to the judiciary. They are milestones concerning the courts and judges. However, the European Commission accepted the state of play we have now, virtually without any changes in the legislation. Only the practise and the appearance have changed in Poland so far. And I haven't read the justification of the decision to release the recovery and resilience facility to Poland, but I'm very curious how the Commission justified that decision. Because legally speaking, I don't see any room for that move.

X: Speaking of the Commission's reluctance to use the conditionality regulation, do you think there are any other factors that influence their decision?

Y: Well, if you read the guidelines on the application of the regulation issued by the Commission, I think that the level of violation of the rule of law is set be very, very high. So obvious cases of, you know, corruption, and unlawful spending, something like that. And as I said, it is practically not easy to apply it to Poland because of, you know, systemic issues. But I can find some justifications to apply that regulation, that also civil society told the Commission how to approach this issue. For example, we have administrative courts, which are composed of unlawful judges, which decide on, I don't know, VAT cases or EU funds. And when a party to those proceedings goes to the Strasbourg court, I think it is obvious that he or she will, or the company will win because of the composition of the Polish Court. However, to the Commission, it is not enough. Well, so the threshold for violation is set very, very high.

X: The Commission hasn't fully been inactive in in responding. From your standpoint, do you think there are clear considerations that the EU uses in their choice of when to trigger a certain regulation or sanction or is there no real clarity on that?

Y: Well, there were some recommendations in two procedures. The first is Article 7 and the second is rule of law report. When it comes to Article 7 procedure, I think it didn't go as positive as we expected, purely because of political reasons. So the fact that Hungary will block any decision to sanction Poland and vice versa. So the dialogue with EU Member States at the Council was mostly meaningless. When it comes to rule of law report, I think it lacks decisive tools. For example, the Commission started to issue recommendations in the rule of law report. However, no meaningful actions follow those recommendations when the Member States do not comply with them. So, for example, last time the European Commission recommended to split the position of the Minister of Justice and Prosecutor General in Poland. However, no legal basis was made for that recommendation, and there is also no follow up. I don't know, no infringement procedure, no further recommendations and so on and so forth. So, it is purely for, you know, it is a purely persuasive tool and I don't the Commission can achieve anything meaningful with that.

X: Do you think that ties back into the more political side of things and that these issues get politicised more than legally considered?

Y: Well to some extent, yes. Because you know, legally speaking, the violations that have been identified, for example in the motion for Article 7 procedure, are very clear to challenge from the EU-law point of view. We have the

judgement in Portuguese judges' case, which can be applied to the situation in Poland. We have a very broad application of Article 19. And you know the reluctance of the Commission to trigger the Article 7, the infringement proceedings, as I said, was the more the case is complex and systemic, the more political approach the Commission will make. If the case is easy, it is also easy for the European Commission to start a decision. Compare the situation to preliminary references from the Polish courts. They touch on very systemic issues. And there were a number of requests from various Polish courts, from the top courts and lower courts as well. And the Court of Justice has clarified some issues and did its job instead of the European Commission. But the nature of preliminary reference is different than the infringement action. So in the preliminary reference procedure, the Court of Justice only gives the interpretation of EU law in this and in that procedure. It cannot, you know, it cannot interpret national practices, national legislation. So in many cases, that Court of Justice also gave some margin of appreciation to EU members that not clarifying whether something is lawful or unlawful. I think the most striking case is the case concerning the secondment of judges in Poland, C-748/19, in which the Court of Justice clearly said that the mechanism to second judges by the Ministry of Justice in Poland is unlawful, but the question of the delegation of judges to higher courts is not a rule of law issue. It's rather a very systemic problem that was in the Polish legal system since 1920-something, you know, more than one hundred years. When it comes specifically to rule of law issues, there are two important judgments in response to preliminary reference questions. The first is a judgement in W. Ż. C-487/19, in which the Court of Justice said that in the course of domestic procedure proceedings, when a decision was issued by an unlawful judge, it can be deemed null and void. So, this is a very powerful tool. But not used by Polish courts so far. And the second is judgement concerning the decisions of the disciplinary chamber. The case is called YP and Others from 2023, in which the Court of Justice said that decisions of unlawful disciplinary body must be set aside under the principle of primacy. So, these are the two important issues, important judgements. So, the Court of Justice involved infringement proceedings and preliminary reference cases. They did its job very, very well. The Commission, you know, not so good. As we expected.

X: So, given the complexity and persistence of the rule of law crisis, in Poland, do you think it's important for the EU to adopt a more multifaceted approach that would, combine legal, political and democratic and diplomatic strategies more?

Y: Legally speaking, I think the Commission should consider whether it is possible, for example, to codify some of the requirements of effective judicial protection. Some of them are codified. For example, there is a, I don't know, directive on the presumption of innocence. There are regulations concerning EU spending, which require that unlawful spending of EU money can be challenged before independent courts. However, there are no systemic pieces of regulation that address all the issues identified by the Court of Justice or the requirements of effective judicial protection. So, for example, the independence of judges, the manner of appointment of judges, I don't know, case allocation between courts and so on and so forth. So, it may be advisable to check whether the treaties allow the European Union to, you know, give codification of these principles. Because it will be very useful from the point of view of EU backsliding, because when the principle is written, it would be also legally easier to, you know, scrutinise EU member states.

X: So would you say certain legal areas or institutional frameworks could benefit from being strengthened and maybe should be?

Y: Yeah, absolutely. And in my opinion, some diplomatic approach, I don't think it would work in countries which face rule of law backsliding. Mostly because there is no, you know, enforcement mechanism. Diplomacy is not about enforcing the compliance, but rather convincing the member states to comply and there were numerous examples when the Polish government assured member states of the European Union that everything is fine, while on the other hand, doing very bad things in Poland and in the Polish legal system. And there is also a problem that other member states, they don't have, you know, experts in Polish legislation. So they can be assured by the government that everything is fine and we are clearly in line with European standards. And member states must, you know, take it for granted, because they have no tools to verify whether it is true or false. And there were examples when other Member States asked Polish civil society organisations for help to clarify what the government said under Article 7 procedure, for example. So, there was some kind of fact checking between Polish government assurances and the reality, however, it was very rare. I think only two member states asked some Polish organisations about it during the last, since late 2015. So as I said, diplomatically, okay, diplomacy is fine, but it does not have any meaningful impact on containing the crisis.

X: And do you think that the coordination between these different countries and EU institutions adds to the complexity and can lead to more tension?

Y: I don't think so. I don't think this an issue at all when it comes to containing the crisis or responding to rule of law crisis in Poland. Yeah, I have nothing to add but I don't see any effect on the crisis.

X: What lessons would you draw from this past response to rule of law to the rule of law crisis in Poland, with regard to future responses to rule of law issues?

Y: Well, as I said in the most important issues, the European Union acted too little and too late. Should the Commission start with the Constitutional Tribunal in Poland, I think we won't have too much problems with the rule of law. Because the main problem is that we have no effective constitutional review in Poland, so any piece of legislation can be adopted without constitutional scrutiny in Poland. So should the European Commission start its actions concerning directly the Constitutional Tribunal, the crisis will not spill, will not evolve to that degree. And the second issue is the National Council of the Judiciary, which nominates judges. And as I said, that the European Commission was reluctant because there were similar practises in other Member States which do not face rule of law crisis and the Polish government blamed the Commission for, you know, adopting double standards on EU Member States. So, what is the lesson to the European Union? I think it should prioritise enforcement because systemic rule of law problems in Member States have a very important effect on the whole European Union. Especially the mutual recognition of judgments, you know, business issues, family issues, cross-border trade and so on and so forth. And it would be advisable to act as quick as possible. Compare it to the situation with Great-Britain and Brexit. Until now some cases can be brought against the United Kingdom to the European Court of Justice. And during the negotiations of the of the Brexit, when the British side adopted pieces of legislation which was clearly against EU law, the Commission acted very swiftly. I remember one case, the United Kingdom was given something like seven days to respond to the charges brought by the Commission and then the case went to the Court of Justice. In Polish cases, the Polish government was usually given two months to respond, and in the meantime it could, you know, complicate the situation even further and make the situation worse. So act quickly and act decisively. That is, that the main lesson in my opinion.

X: Poland has recently elected a new government under Tusk. They seemingly have taken a more positive stance towards the EU. Tusk also has experience working as the President of the European Council. Do you think this will resolve some of the existing rule of law issues by itself from the Polish side?

Y: Well, the internal situation of Poland has a very important effect on the relationship between Poland and the European institutions. First of all, as I said with regards to the Recovery Facility, no legal changes have been made so far because the President, President Duda, has announced that he will veto every piece of legislation that challenges the current situation in the judiciary. So, until September next year, when the term of office of President Duda ends, no meaningful reform to roll back the crisis can be introduced, and the government is fully aware of that. This is the one side and on the other hand, you know, also appearance matters. Donald Tusk is well known in the European Union institutions. The Minister of Justice, Adam Bodnar, is also a person who is known for his devotion to restoring the rule of law. And because of that and because of, you know, changing the attitude of the government towards the rule of law, some decisions have already been made by the European Union. You know, the release of European funds. The Recovery and Resilience Facility. Poland has also applied for European Public Prosecution Office, so this has also some impact on the approach of the European Union towards Poland. But as I said, these are just very cosmetic decisions. Essentially the changes in the practise of the government, and until any meaningful piece of legislation is introduced, there is no real hope for bringing Poland back to rule of law standards. So, we have still problems with unlawful judges, with judges that cannot question the status of unlawful judges, with the Constitutional Tribunal that is issuing some judgments concerning the judiciary and the treaties as well. So yeah, that is how the situation looks like now.

X: To touch upon the unfreezing of the assets in EU funds, the EU did same thing with Hungary which has faced immense criticism from the Parliament. Would you say that specifically towards Poland that they also were a bit too eager to release these funds? Do you think this decision came too early or not?

Y: Probably yes, but when it comes to cohesion funds, the criterion was a self-assessment of the member state whether it complies with Charter of Fundamental Rights and UN Convention on People with Disabilities. So, the previous government, the Law and Justice government under its health assessment of fulfilment of these criteria, this assessment was negative. And because of that, the Commission froze the cohesion funds for Poland. Now this has changed. Poland pledged to the Commission that, you know, the effective judicial protection and principle of non-discrimination are applied in everyday business in Poland and the Commission had no other decisions than to release the funds. When it comes to their Recovery and Resilience Facility, if you look at the decision, with the milestones and the concrete reforms that Poland was meant to make, it was clear that it needs some legislative changes. Get rid of unlawful disciplinary regime in Poland, allow judges to freely ask preliminary reference questions to the Court of Justice, address the status of judges and so on and so forth. No legal act has been adopted so far. As I said, only the changes in the practice or in the approach towards judges, this was the only thing that has changed. So, the Commission, I think, should have not released the Recovery and Resilience Facility. And let me let me just find my e-mail to my colleague, because the Commission also contradicts its own opinion about the Polish legal system. Take a look at the case of April 23, C-204/29. Instead of the dismantled disciplinary chamber in the Polish Supreme Court, a new professional liability chamber has been created. And the Commission in the case which I mentioned, said that this new Chamber is also not independent. Because it consists of unlawful judges. That was the main argument of the Commission before the Court of Justice and now in the decision to release the European funds, the Commission said,

I quote, “the disciplinary chamber was abolished and replaced by an independent and impartial court established by law”, namely the professional liability chambers. So, for the passage of one year. There we can see a strong contradiction between the opinions of the Commission. So from the point as a (...), I can't explain that and I can only say that it was mostly a political decision. Not justified, you know, legally, because if you say a year ago that something is unlawful and nothing has changed in the meantime and then you say that this institution is fully in line with European standards, you know, this is strange.

X: How would you describe where things stand right now between the EU and Poland in the democratic backsliding debate?

Y: You know, this is a very problematic question because, also from the European and the Polish point of view, because both sides want to contain the crisis as quickly as possible. But internally, the Polish government has no tools to make meaningful decisions. There are also some institutions in the Polish legal system that have been captured by the previous government and are acting, you know, contrary to European standards. I mean the Constitutional Tribunal and the National Council of the Judiciary. The government has no tools to make these institutions in line with European standards. So there is a paradox, but the government should, I think, rely on the European institutions to help Poland to get rid of the crisis. So in practise it should ask the Commission to, you know, be more decisive in terms of Poland, you know, bring some cases to the Court of Justice and so on and so forth. But politically speaking, it cannot act. It cannot ask the Commission, you know, to act more decisively because it would be unpopular. And it would be, you know, viewed by some Polish citizens as, you know, some treason or something like that. You know, asking European Union to help in containing the Polish internal issues. So, the situation is difficult. Also, the European institutions, especially the Commission, I think it wants to calm the situation down. Not start new proceedings and it is said that on the 1st of May, on the anniversary of when Poland joined the European Union, Article 7 procedure will be finished with concluding remarks. So this is a time of many contradictions. Because, yeah, EU law does not want to act meaningfully, and Poland has no tools to contain the crisis. I think the problem will be over after the next presidential elections because it is expected that a candidate closer to the government will win the presidential election. Andrzej Duda, the current president, cannot run for the first term, so he will not take part in the elections. So, there are chances that, with the president, the government will be able to legislate and, you know, change the regulations that are the most problematic from the rule of law point of view.

X: Do you want to add anything else to what we've discussed so far.

Y: What I can add? You know, I think, speaking about the European Commission and its approach, I think that I can also blame the Commission for the lack of sincere communication with Polish civil society organisations. Many of open letters that we sent to the European Commission and the President of the Commission herself, we had no response at all. Asking for, you know, some meaningful actions against the previous government, bringing new cases. And also showing the legal strategy which the European Commission can adopt. There was no response at all. One of the biggest open letters from Polish judicial associations, which gathered something like 2000 signatures of Polish judges. Their response came after two and a half years, something like that. So, this is very strange because in the meantime the situation has changed completely in Poland. So yeah, the lack of, you know, any sincere cooperation with civil society and the Commission. I think this is the issue I can blame the European institutions for.

Annex 2: Anonymised transcription, Interviewee 2

Role	EU Parliament official
Date	22 March 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 2

X: MEPs have continuedly expressed concern over Hungary's persistent breaches of EU values and the treaties with regard to rule of law regulation. And they've called upon the Council to act, but this has faced difficulties. What efforts would you say have the MEPs made to try and convince the Council to apply their Article 7 procedure?

Y: So first of all, I think it's important to distinguish Article 7(1) and Article 7(2). Because one of them is dealing with the risk of a serious and persistent breach of EU rule of law and the other one the Article 7(2) is a kind of sanctioning mechanism once this breach has actually occurred. And Article 7(1) procedure as you know has been triggered by the Parliament in 2018. But since then as you have also alluded to, the Council fails to reach this four fifths majority, which is needed for suspending voting rights. And different to this, Article 7(2) can only be triggered by the Commission or by one third of the member states, so it cannot be triggered by the Parliament. And Article 7(2) is the one which is normally also called the nuclear option because this is the one that really can then take all the EU membership benefits and rights, but also this is the one that will need unanimity in the end. And here we can see that we have not even reached one third of the member states, so it's not even possible to trigger it. I mean for the Article 7(1), as I said, MEP's have triggered it in 2018. Since then, they have continuously tried to convince the Member States to move further and to reach this four fifths majority which is needed for the so-called recommendations. They have done it, for example there's always a rapporteur and shadow rapporteurs in the Parliament. On Article 7, they are organising meetings with the perm reps. They are always trying to talk to the member states and to their allied parties in government to convince the Council to move forward, but it is not happening. Concrete example, what MEPs have done is also that in the latest resolution on Hungary, which was adopted by Parliament in January 2024, the Parliament has, with a very large majority, called, there's an explicit sentence in this resolution which calls on the Council for triggering Article 7(2), so this is what MEPs have done or are doing, to kind of convince the Council.

X: Poland and Hungary, in the past, have helped each other, by blocking the votes. Do you think that's major institutional issue?

Y: I mean, so I think it's not only the problem between Poland and Hungary helping each other, because as we can see, even these four fifths that we would have needed for Article 7(1) is not reached. And this is because the member states, yeah, there's this very ingrained traditional view of staying out of each other's business basically and not interfering. Also, they don't want to sanction one another because they fear that also in another case, it could be them. And then also, as you have said, that unanimity is always prevented because Orbán usually has at least one friend. I don't know, for a long time it was Kaczyński. Now it's important, the situation changed and we still expect problems

with Fico in Slovakia. I mean a lot of fear was that Meloni would be very, very tightly allied with him. This has not happened until now. So yeah, let's see how it develops, but even though that Poland is now not there anymore to help Hungary, still the problem is not solved.

X: Even moving away from, central and eastern European countries, which the discussion is usually focused on. Even in Spain for example there are certain concerns over judges' independence. So do you think that that national governments perceive these regulation as a threat to their national power?

Y: I mean, yes, I guess and to a degree. But then also I think that these regulations, I mean you asked now only about Article 7, but I think even more or not even more important, but for now more useful are the financial sector instruments. I mean we have three different kinds of financial instruments to sanction rule of law problems and for example Orbán's government is always portraying it as the EU sanction instruments are a threat to our national sovereignty. But actually I don't think, I don't know if this narrative has been picked up by other countries and I don't think so, or at least not to that extent. Because I mean, there are there are rule of law problems in many member states, not only in Poland and Hungary, also in Greece, also in Slovakia. These instruments are also trying to look at systematic infringements a bit or this is at least what we would like to see from the Commission, that they are looking at the big picture.

X: On the financial sanctions side, the Commission has decided to release over €10 billion of Hungary's frozen funds, which has faced a lot of criticism recently, especially from MEPs. How would you say the Parliament has expressed their concern to the Commission?

Y: So, these 10 billions they were, released, or I mean they're not released yet, they're unfrozen. And now the Hungarian government can kind of submit their payment requests for money, which they have already spent, to get reimbursed. So, it's not that in December 10 billion were just paid out to Hungary on the same day. Up until now, it was only 500 million, which was paid out on December 27th. But yeah, we are expecting up to 10 billion to be paid out over the next couple of months, years. And I think that the Parliament has been very critical on this and also on other financial instruments. For example for the conditionality regulation, for a very long time, the Commission was very hesitant to trigger it. Then, when they finally triggered it and they only decided to freeze 55% of 3 operational programmes and the Parliament has always along the way criticised the Commission. There were joint studies which were commissioned by different political groups, which were arguing why we need to use the conditionality regulation now. Why we need to use it to its full extent and it's the same thing that we have done with the so-called common provision regulation, the CPR. And this is the instrument that was used to unblock these 10 billion. And the Parliament has in October, I think, the five no, what was it, it was EPP, S&D, Renew, Greens, so four political groups issued a joint analysis. And with the help of Hungarian legal experts, they kind of looked at these four so-called judicial super milestones that needed to be fulfilled for the money to be dispersed. And they showed why, in their opinion the money should not be released. So, this was back in October, I think. And then again in December when the decision was imminent. The MEPs also issued a joint letter which was sent to Commission President von der Leyen, on the same day as the money was dispersed, arguing why it shouldn't be, and why the milestones are not fulfilled. And then the third thing that has happened, after the decision, the European Parliament decided to go to Court and to take a so-called action for annulment against the Commission's decision from December 13th. And this decision is quite new to go to court. I think it was decided in the JURE committee Monday of the week before this week.

X: Is this the first time a court case like this has happened?

Y: No, I mean, I think it's the first time for annulment action relating to these kind of financial rule of law instruments. But there has been another action. It was action for failure to act, which was triggered by the same political groups before the Commission finally decided to trigger the conditionality regulation because the Commission for a very, very long time, was very hesitant on this. So that's why the Parliament also there, they handed in this action for failure to act. But I don't know if it was the only or the main reason, but I'm sure that it contributed to the Commission backtracking and then they started to act. So, in the end Parliament withdrew the action, so it was not completed in front of the court.

X: You touched upon the Commission's hesitance to apply their conditionality regulation. You also talked about certain studies that have been commissioned. Can you explain how the triggering of that conditionality regulation works in practise?

Y: There's one study on why the conditional regulation should be applied to Hungary. And then there's another one, which makes the case why the conditionality regulation should have covered 100% of all EU funds. But it's done by the same author. So you should be able to find it if you look for, I think it was (...). So wait, I took some notes. Let me check. Yeah, so this regulation's quite clear. You can if you look at the text of the regulation, you can also read most of these things. I mean one thing that is very important is that this conditionality regulation really has to have a close link to the budget. We wanted to have it a bit more broad, but then and in the course of the negotiations, it got a bit watered down, I would say. But also the Commission always argued that it has to be with this quite narrow, scope in order to be really enforceable and not to be attacked in front of the CJEU by Hungary and Poland. So you need a serious rule of law breach with a clear link to a risk to the budget. And if the Commission sees something like this then it sends a written notification to the member state in question. Then there is a lot of back and forth. The member state has three months to react. The Commission can ask more questions, then the Member State has again time to react. I think they can also propose so-called remedial measures. So they themselves can also say, okay, we see problems, but we are proposing to do this, this and this in order to remedy the situation. But then, if the Commission finds that these remedial measures are not appropriate, or if they think that the problem persists, then they propose to cut funding and they can decide themselves how much funding they want to cut. They propose this to the Council and the Council then has to agree with a qualified majority. This is also one crucial part. It has been a bit watered down in negotiations. I think they were completed under the German Presidency. And Merkel was still in office back then. And Orbán back then said he would block the Covid Recovery Fund, which was back then coming into force. So this is why he could kind of, yeah, I don't know how to say it, blackmail, a bit, the EU into watering it down a bit because initially Parliament wanted this regulation to work like, the Council has to agree with a qualified majority in case they don't want to freeze spending. So it was kind of turned upside down. And in the end, if then these measures are entering into force and then if after some time the Commission, or to lift the measures the member state first has to give a notification with a self-assessment telling the Commissioner, okay, we are now complying with all the remedial measures. They are not called milestones under the conditionality. And then the Commission has to reevaluate. If the member state doesn't hand in this notification, then the Commission has to reevaluate anyway after one year. This is what happened also in December of last year. And if the Commission finds that the problems are solved and the Council, they can propose to the Council to lift the measures, which has again to agree with qualified majority voting. And one interesting thing is also that the money is lost at n plus 2 years. So the money has been frozen in December 2023, so there would be no disbursement after the first of January 2025.

X: The Commission, only acts when there's a clear risk of real backsliding. Would you say this bar of when the Commission can act or should act is maybe set too high?

Y: Yes. I think it's too high because the Commission has, and this is also a point in this court case. The Commission, they can, I don't know how to call it in English, like they have this discretion so they can decide and it's their decision and the Parliament doesn't have influence on it. And actually it's very hard to challenge this and they can always say, okay, well, we could have our own room for interpretation basically. But historically they have been very, very lenient. I don't know. There have been political considerations. We have seen it in December with this veto. And also, which is what is a problem is that these three instruments, they are not working very well together. And in the Commission there are different services, looking at the conditionality, at the CPR at the RRF, so the Covid funds. And very often all very intransparent. We very often asked the Commission: can you please tell us which Commissioner really has the oversight over which of these mechanisms, who takes the decisions in the end, how does it work? And they are never answering us. Sometimes we have a feeling like these three different things are not working together and they are all just looking at their very narrow problem and they are therefore not seeing that there are really systematic problems in Hungary. One more thing I wanted to say also, there was a new report by the European Court of Auditors, it came out the last couple of weeks, about the conditionality regulation. And there the European Court of Auditors found that the Commission is really not able to transparently show that they are really safeguarding the rule of law in all countries systematically and they especially said that for the conditionality regulation there was not enough personnel, there is not enough IT-infrastructure and they found that the decision why conditionality was issued or was activated against Hungary but not against Poland or other countries was not documented at all. Which is, in my opinion, quite shocking. And there was a hearing in the Committee for Budgetary Control. I think it was this week, where we asked the Commission about this and they just said, oh yeah, it's our duty to document the cases in which we are taking action. So we very well documented the Hungarian case. But in the case where we don't take action, we don't have to document. And I think that is a bit ridiculous.

X: One thing I've been noticing is that the Commission's decision-making process is sometimes influenced by political factors. What political factors would you say play a role in this decision-making process?

Y: I mean, they are always saying that there are no political factors whatsoever and that they are just bound by law. But I think that this is probably not true. For example, because this December 13th decision, they are always arguing that they were bound by the regulation, by the CPR to unblock this money and they had a legal obligation to do the assessment when they did it. But actually, they didn't have to do it because they had at least nine more days. And I think this is a very good example for the importance of political considerations in blocking or unblocking funds, which is also, I think, been said in this European Court of Auditors report. So I think this report is actually very telling. So yeah, we have seen in December that the Commission was really, really in a rush to do this assessment. They were doing it in a couple of hours after the final change in the Hungarian legal text was made. So they really, really rushed through this written decision. It was not even discussed in the College of Commissioners. And then on the very next day, there was already the EUCO taking place where Orbán decided to withdraw his veto or decided to walk out of the room. So I think this is a very big hint towards it being a political decision. Also because already in October there was an article in the Financial Times which said, okay in December probably these funds are going to be reimbursed in order to prevent a veto by Orbán. And back then of course, everyone got very nervous and there was a lot of rumours, and the Parliament also was quite nervous. This was also reason why and there was this legal analysis by the

four different political groups. And back then the Commission really pretended like the Parliament is crazy and they said like, no, no, it was just a fabricated article. There's no reason, this is not true. And then in the end, three months later, it turned out to be quite accurate.

X: Recently, this has sparked a lot of discussion between the Commission and the Parliament. It's almost being reported as kind of a battle in popular media.

Y: Which is I think very sad because I feel like the Parliament and the institutions should all work together in order to safeguard the rule of law in all of the member states. And I sometimes have the feeling we put a lot of energy into just pushing the Commission to do the right thing. Whereas we should put this energy to really trying to think about how we can make the instruments we have better and how to really improve the situation on the ground, instead of fighting each other.

X: How would you say these differences between the Commission and the Parliament and the Council, lead to problems in the EU's general response to backsliding countries?

Y: I think it's quite obvious that just the instruments we have, because now we have really good instruments, actually. We didn't used to have instruments at all, because this democratic backsliding, it was not foreseen when the EU was founded. Also, with every treaty change, no one really expected to see a country going in the backwards direction, basically. Then there was this whole Fukuyama, end of history talk after the transformation in the former Soviet countries. And so this is why no one was really prepared for it. But I mean then instruments were developed. This conditionality regulation, it's a new instrument. Then also the CPR that it has this conditionality. This is a new thing. I think it was, I don't know when it was first supplied or entered into the CPR, with the last revision I think it must have been 2021 or 2022. And of course also this Covid Recovery Fund is a new instrument. But I think these instruments could work very well if they were used properly, but I think that they are used too hesitantly. For example, that only 55% were frozen of these three operational programmes under the conditionality. When it should have been 100% and there was a compelling legal argument why it could have been 100%. Also, 55% is very arbitrary number. I don't know how they came up with it. Also this decision to unblock this funding now under the CPR, they could have waited. So, I think this is the most obvious problem, that the institutions are not working together, and that especially the Council and the Commission are quite hesitant. I mean, Parliament has also been hesitant. There were a lot of party lines or party connections between Fidesz and the EPP. Fidesz was for a long time, part of the EPP. There was also von der Leyen, some people said she was not keen on doing anything against Orbán because Merkel wasn't. Because of also the German car industry. So, there are a lot of reasons that this hesitancy has been going on for a long time. So, it's not that Parliament is always the good guys, but I think now in the last couple of years the Parliament has been quite progressive on these issues and quite critical and the other institutions have been more lenient.

X: Do you think in the past, the Parliament's hesitance, sometimes also related back to political factors?

Y: Such as?

X: Well, you said for example von der Leyen almost followed Merkel's stance and you touched upon Germany's car industry. Would you say those are also politically influenced decisions?

Y: Yeah, for sure. Also, I mean personal reasons also. For example, in the last Commission there was Frans Timmermans, who was the Commissioner who was dealing with rule of law, and he was really pushing and it was

really, I think he was quite committed and with the Commissioners. So we have now, now we have Commissioner Hahn, who is dealing with the conditionality and then Commissioner Reynders, Schmit, Ferreira. And especially Commissioner Hahn, I don't know, because for example, the Parliament has under the conditionality no real role, but they should be duly informed of all the steps. And the Commission has never informed the Parliament properly about these instruments, about what money they are going to block or freeze or whatever, and Parliament always just has really big troubles to get this information.

X; So how does that interaction go between, the Parliament trying to get certain information, and the Commission?

Y: I mean, eventually we get the information, but we always have to ask and we always hear it first from the media. So all of these single steps like, will the conditionality be triggered now or not? How much money will it be? Also, this media leak about the December decision which was coming from the Financial Times in October, then in the end if the funding will be unblocked or not, we always get informed when it's too late basically. Although I have to say for this December decision, it was a bit different. Because there, the different Commissioners and their cabinets, they were kind of making a tour and they were speaking to all of the important, or not important, but the MEPs who are dealing with this topic and they were informing, okay, probably we're going to release the funds for this, this and this reason. But still then, I mean, they informed the Parliament, but it was too late. Nothing could have been changed any more.

X: And why you think this almost lack of communication from the Commission happens?

Y: We don't know because it's such a black box to us what they are thinking and why they are deciding to act or not to act. But I'm guessing there is a bit of political pressure from above. Other topics are more important. For example, this Ukraine accession. Or like to get Orbán to drop his veto and other things. So there's political pressure from above. I'm going to say from von der Leyen to make this possible by unblocking funds, for example by being more lenient. So of course they cannot give us all of the information because then we could prove that these decisions are not taken on factual grounds. And I mean, of course they make themselves attackable and vulnerable, the more information they disclose.

X: Were there any clear differences, from a Parliament perspective, in how the European Commission responded specifically to Poland's rule of law issues and to Hungary's rule of law issues?

Y: I think that the Commission was quite lenient on both of them for years. As I have already mentioned, there was this report which showed that there is no clear documentation and I think this is an example that where they were treated differently is that they did document why they triggered the conditionality against Hungary but not against Poland. So they can really not prove why they did it or didn't do it. And I think it also now interesting, the situation because of this unblocking of funds, because the Commission recently also unblocked a huge amount of money for Poland and there we can see that apparently the Commission is quite lenient on both countries in a way that the Hungarian justice reforms were actually almost proven not to be sufficient and still the Commission decided to unblock. And the same thing, not the same thing, but with Poland also, they have now a very, very active and very motivated government. They are really trying to do everything they can to take back all of these reforms or so-called reforms that have been undertaken for last years under the PiS government. But it is very hard because it has been very prolonged attacks for over five years on all kinds of judicial aspects. So of course, it cannot be undone in a couple

of days or weeks or months. And still the Commission decided to unblock everything all at once. Also, I think this was a bit short-sighted because they lost all of their leverage like this. And they just unblocked it based on promises and while I am very happy with the new Polish government, I still think that they didn't really do themselves a favour there. So yeah, they seem to unblock funds to both of them based on promises, but for different reasons. In one case, to buy a veto, and on the other hand to reward this more pro-EU and pro-democratic government. And I think one more difference, which is important, is that the situation in Hungary is much worse than the situation in Poland was. Because in Poland, of course, there were also big, big problems, but they were mainly focused on the judiciary and kind of not like in Hungary, where we have like this really, really big autocratic, you can also say kleptocracy, which has also problems in all areas and like democratic backsliding visible and all different kinds of areas of life, which is not the case in Poland.

X: The new government under Tusk has better relations with the EU. But there have been concerns because the Law and Justice Party in Poland still holds a lot of power. There have been certain institutional positions that have been captured by that party. So there were concerns that it would be difficult for the new government to actually, do what they said they want to do. Do you think, with this in mind, that the Commission's decision to unblock all funds at once has come a bit too early?

Y: Yeah, for sure. This is what I meant. Because also the Commission gave away leverage and like also they could have helped. We heard a lot from Polish civil society who were in favour of keeping the funds blocked and to say, like, okay, we can have a clear road map, we can try to fulfil all the milestones one by one. So this could even help us structure this whole reform process or also to put pressure on President Duda in order to say, okay, we have all of the reforms. Laws are in place, but he's not signing them, so he is the only person responsible for Poland not getting the funds. But by unblocking everything at once the Commission took away all of this. I think in our opinion or Parliament's opinion was okay to unblock some funds and there was also time pressure because some of these have to be spent, Covid money has to be spent because there's also in the end, a deadline and after that you cannot get this money anymore. But it shouldn't have been all 137 billion at once.

X: You touched upon civil society organisations also getting involved. As the Parliament it's sometimes difficult to get a response from the Commission. Do you think that is also the case for other civil society organisations as well.

Y: I don't know. I'm not in an NGO, so I don't know how hard or easy it is for them. But I know, and this is, I think, really surprising also that the Commission for example, for the conditionality, they have five to ten, like they have ten people working on it, which makes 5 full-time positions. And this is the people who work on this regulation. I think this is not enough at all. They can of course not make a detailed analysis of all twenty-seven member states. They don't have the manpower for this and they are relying a lot on analysis from the civil society. For example, in Hungary, the civil society is doing all of the job. And I mean, we don't know how much information the Commission takes from them. I think they have regular meetings. But without them, no one could do an analysis of what is actually going on. And it would really be a black box, the country. So I think that the Commission should be more aware that these experts, are actually the best and the only source of information they can have, because otherwise they get the information from the government and the government is of course going to tell them that everything is fine. So I think civil society, especially in Hungary, the Helsinki Committee, the Amnesty International, there a lot of NGOs which have been doing these assessments for the judicial milestones and they have been doing a really, really important job.

X: There have also been concerns over Hungary's upcoming Council presidency in the latter half of this year. Especially in combination with the new elections coming up in the European Council there are concerns that this might fall into Hungary's and Orbán's hands. Are there any measures that the European Parliament can take to mitigate this risk?

Y: I mean this is two different things. One thing, the role of the Council President to go to Viktor Orbán, this was a real concern, which is actually now not there anymore because this was just an exceptional situation when Charles Michel, who is now the current President of the EUCO, he decided to run for the Parliament. And if he had gone to the Parliament and became an MEP then he would have left the Council in, I don't know if it is like right after the elections in June or only the first session in July, but he would have left. And if they hadn't found a replacement soon enough, then by default the presidency would go to the longest standing member of the EUCO, which would have been Orbán. But since Charles Michel decided again, then in the end he backtracked and he decided against running, this problem is not there anymore, but for sure the Hungarians will take over the Council Presidency in July and Parliament really, really wanted to push for suspending the Presidency or swapping out with later presidency. For example, I think the Polish Presidency is coming two presidencies after or something. So it would have been a very good signal also maybe to say, we are putting the Polish Presidency before the Hungarian one. But in the end there was no support from the Council. We have asked the Council and the Commission if they are already doing preparatory meetings. They have been meeting with the Hungarians as if nothing happens. The Spanish and the Belgian presidencies were not willing to talk about this a lot. And I think it's a bit hypocrite, especially because the Belgian presidency, they are putting rule of law as one of their top priorities. They are in every panel discussion, the Minister for European Affairs is standing there and telling that this is the top priority for them, but they are not doing anything. For example, every Presidency has to organise or should organise at least one hearing in this Article 7 process. And I think the Spanish presidency, they didn't even do a hearing. They just did a so-called point of view or exchange of views or something. And the Belgians, I think they are organising a hearing, but it's only going to be in the summer. I'm not sure if it's even going to be before the election. I think they shouldn't boast this so-called priority of theirs so much.

X: Are there any other issues that you think are pressing or should be mentioned in the EU's general response to democratic backsliding in member states?

Y: It's important that we get a more systematic approach, that we kind of consolidate these instruments and we start to use them like they are supposed to be used. Not be so hesitant with them because, in the Polish elections, I mean, the polls were very inconclusive. Some said that rule of law on EU topics were quite important in the view of the voters and in deciding the elections. Other Poles said it was not like that. But I think for sure it didn't hurt. And it showed that that these money instruments, I think they can work. And also the Hungarians, you can see that they are getting quite nervous because the economy is really, really suffering and they really urgently need this money. So I think we just have to press on a little bit better and longer. But also I think the best sanctions are not worth anything or not working from Brussels top-down and so we also have to think about how to really support civil society and how to, yeah, help people on the ground.

X: Are there any discussions on further instruments being developed?

Y: There are always calls for finding instruments to directly give money to the municipalities. So that the governments cannot take all of the EU money, basically, or also that the EU money which is frozen still can go to the grass

roots level. But actually we are not so sure about this because there is no real legal possibility to do it, at least not yet. I think one thing which is said often is that the conditionality regulation should be expanded to Article 2. And to cover also the Charter of Fundamental Rights so that you don't have this very strict focus on corruption and budget. Yeah, I think this is the most important thing. I think if we could use the conditionality to its full extent and to cover all of the funds, that would already be a huge step forward.

X: Then where would you say things stand right now in the situation between the EU Parliament and the Commission?

Y: I hope that this court case will send a strong signal, even if the Parliament loses it, which is a very real possibility. But still to show the Commission that they shouldn't, unblock these funds for political reasons and that if they do, the Parliament is really going to look into these decisions. But I don't know. I don't know what's going to happen. I think that we are maybe going to be very unlucky after the elections, because if we have a really big shift to the right, then we will not have a Parliament which is as critical, maybe we will lose the progressive majority and then the Parliament will not be able to pressure the Commission anymore. So let's see.

X: Is there anything else you still want to add?

Y: I don't think so.

Annex 3: Anonymised transcription, Interviewee 3

Organisation	European Partnership for Democracy
Date	29 March 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 3

X: Specifically on the rule of law debate and trying to influence the EU's decision-making. How does that work in practise?

Y: So for the rule of law, it's maybe trickier than on other files. Just maybe as a pretext, just because when we talk, for example, about a specific file, the European Media Freedom Act, then you have like one piece of, you know, text coming out, you can really discuss the exact wording and the exceptions and the definitions. It's very legal work in that regard. The rule of law work is, of course, also very legal, but at the same time, the rule of law toolbox is quite large. So it's not one file you're talking about, you're talking about like a phenomenon as such. And so what we do is we talk mostly to the European Commission. Because the European Commission has this kind of observer role and has, you know, the toolbox at its disposal. Whereas the European Parliament, I mean, they're also involved and you have, like, different MEPs coming out and kind of talking about the rule of law. But in the end, when it really comes to legal steps against countries who breach the rule of law in Europe or in their member state, it's the Commission who's able to act. So we talk to them mostly. We meet with the relevant cabinet, so the cabinet of Commissioner Reynders. But also sometimes with the cabinet of Commissioner Jourová, because she is somewhat involved in these discussions when it comes more, again to like media freedom, disinformation and so on. And the key is really to like, stay on top of the developments in the Member States. I mean you have kind of the obvious ones like Hungary of course, the only country that has really, you know, felt the consequences of EU engagement or of Commission response to rule of law breaches. But our attempt is also to inform the Commission about other member states that, you know, are maybe not as bad yet, but are kind of on the brink of breaching the rule of law. And you have the rule of law reporting once a year. So we're usually coordinating a joint statement with other civil society organisations, we actually just published one two days ago. I can send that to you afterwards. Where we have like kind of horizontal recommendations for the Commission on how to go about this. Meaning that we as a European network go less into like the specifics of the country chapters of the rule of law report, so we don't comment on, you know, what's in the Slovakia chapter. But what we do instead is to kind of observe overall trends for the rule of law, kind of review how the reporting itself is being done. One very common point that we raise is like both the timing of the rule of law report, which is very, very unfortunate because they usually have the cycle start in September and then end in July with a publication. But July is, you know, Brussels is dead in July. So, there's no point in in doing that. So it doesn't get the attention it deserves in our opinion. That's one of the major points. The other one is, what do I say, so civil society engagement. So we do really appreciate that these rule of law reports take place and are so structured. But at the same time, the Commission, you know, goes on country visits to speak to stakeholders in each member state, but then doesn't really involve civil society to an amount where we think it would be enough, because the civil society in each

member state is usually the best informed about rule of law breaches. They're usually also the ones that feel it first when there is any kind of restriction to their freedoms of assembly, of you know, you name it. And so we think that if the Commission did a better job in including civil society throughout the entire reporting cycle, the reports would really profit and benefit on a qualitative level.

X: Yeah, that's interesting. I've heard that before that civil society is kind of closest to the issues. Does the Commission also, with that in mind, rely on your organisation and other civil society organisations for information?

Y: I think yes and no would be the answer to that because, on the one hand it's received very well usually by the Commission and the Commission always reassures us that they're quite open for this. You know, there have been a bunch of major, like, conferences and convenings with the civil society like ourselves throughout the past two years. So you can see the Commission tries and they do rely on information from us, but at the same time it only goes so far and it seems like, on an institutional level, you know, they need to move on, they have a lot of other stakeholders as well who come in and discuss these kind of things. So, at some point it seems like, you know, they have their own channels, they have their own representations in Member States, they talk to the governments. So how much they need the information from us is hard to assess. But we obviously believe they do because we have a lot of information that they can't have by themselves. How open they are to receiving that is a bit questionable. Because obviously doing advocacy, you don't see every point you make being integrated, but some things have changed. So, for example, you know, the reporting cycle for the rule of law report includes a stakeholder consultation, meaning there's an online consultation that anyone like a private citizen or a civil society organisation or a private business, really anyone could contribute to and write their opinion to the Commission. And we of course feed into that. But because of the awkward timing of this whole thing, that is always done over the Christmas break, so, they have been publishing it like in mid-December and then closing it mid-January when again Brussels is kind of dead. And we have talked to them about this repeatedly and that has changed, for example, they have prolonged this period. So, things make it into their decision-making and I think now is a special time because we're in an election year, so there will be a new Commissioner, there will be a new Commission college President, maybe. So we'll see if, you know, more of these type of recommendations are being picked up because in our opinion now is the time to really, yeah, make those changes.

X: And during the Commission's decision-making process, does the Commission also consult civil society organisations of its own accord sometimes?

Y: Yes, very rarely. But it's, in Brussels. it's a very kind of bilateral thing between, like how well an organisation knows certain policy officers, for example. So, it's really like on a more like personal professional basis. Because the Commission itself sticks to the kind of standard practise of having, like stakeholder consultation, then anyone can write to them. But it happens that, you know, we get a request from someone working on a specific issue to ask us to, you know, review something or to give them feedback. But compared to other things or other issues we work on, it's relatively little, I would say.

X: Do you guys also try to get certain information from the Commission and is that easy or difficult?

Y: Yeah. Again, that kind of depends on the relationship you have with them. In the rule of law, I would say it's a bit more difficult. I think that has to do with the fact that the toolbox is quite large and that the decisions made are not

always like as straightforward because they're the co-decisionmakers involved and so on. So we do get some information. We work quite a bit with the Agency for Fundamental Rights, so the FRA. They are usually kind of a good intermediate because they are in touch quite a lot with the Commission and they kind of feed back to civil society. But like the direct contact, yes, we have, but it depends a little bit on where we stand, on what decision. When it's the big decisions, like blocking funding for Hungary for example, we're not the first ones to hear about it.

X: I'm also using Hungary and Poland as the two most obvious cases in my thesis. From a more external perspective, how would you compare the response to democratic backsliding in Hungary and in Poland?

Y: I mean, I think they've been treated fairly similarly, until the invasion of Ukraine and you know the influx of refugees, especially to Poland. So it seemed like Poland, even before its elections and before its change of government, benefited from the fact that the EU was quite pleased with how Poland dealt with the migrants coming from Ukraine. And it seemed to have an impact on how the EU punished, you know, rule of law breaches. But then, you know, then they also had elections, and now you know, there's this very hopeful, kind of spirit of Poland kind of, you know, coming on a better path and, you know, the past being kind of undone. So I think the Commission is a little bit hesitant on going strong on Poland because there is a little beam of hope and there is like this idea that maybe it's not too late for Poland. Whereas for Hungary, I think it's pretty clear that this is not going anywhere. At the same time, though, Hungary has been quite successful in blackmailing the EU. Blackmailing is actually the wrong word because blackmailing would assume that, you know, that the EU did something wrong. Hungary is just blocking funds and Hungary is very aware of the position that it holds again, especially in relation to Ukraine. But, we hear from all Commission sides that Hungary is really, you know, the black sheep and there's no secrecy around this anymore. I think the Commission tried, for a really long time, to kind of cover it up or to find more diplomatic ways to deal with the situation. But I think we came to a point where there's very little patience for Hungary. And yet there's very little, you know, manoeuvre, because in the end Hungary holds powers in the European Council. So, you know, like there's little that you can actually do, other than withhold funds here and there. But then, as you know, the funds are being released ultimately. So there are a lot of like backdoor deals, it seems, that are probably from a strategic point of view very important. Also, you know like, when it comes to defence and security. But it's, from a very strict rule of law point of view, it's questionable if Hungary should in any way be in an advantageous situation here.

X: You already kind of touched upon it. The Parliament has also been vocal about this recently. The EU has, in spite of everything, still decided to release fund for Hungary and Poland. Specifically with everything you just said about Hungary, what would your perspective on this decision be?

Y: I wouldn't fully comment on that because I am not sure I'm aware of all the background considerations that play into it. Because, you know, I don't work in defence. I would definitely say it's fair to say that, you know, the these were the considerations that drove the EU to make that decision. I mean, I do see that there's a war at Europe's doorstep, so it's definitely not something I can judge as being right or wrong. What I can say though is that it is definitely not helping the relationship with Hungary, because in the end, you know, Viktor Orbán and his government got what they wanted. So it seems to be working, their ways of, you know, blocking EU decisions and one thing that would work, but that is that is kind of a different topic, is treaty change and get rid of qualified majority voting and just, you know, make sure that people like Victor Orbán cannot just block, you know like, major decisions just because they're being petty about decisions that are made against Hungary on a very different legal basis.

X: I know certain civil society organisations in Hungary have also been quite vocal about this. Is your organisation in contact with any Hungarian civil society organisations?

Y: Yes. So, they're not members of ours, but we work a lot with the Hungarian Helsinki Committee. Who are, you know, the best placed really, because they're a team of very excellent legal personnel. They were actually part this time of our joint statement that I mentioned. So we do work with them quite a bit. Also, when it comes to like conditionality of funding and so on, we rely a lot on their expertise because they really know what's happening on the ground in Hungary.

X: Then to kind of revert back to the EU's decision-making process. From your perspective, what factors do you think mainly influence the EU's decision-making? For example, when to decide: now we're taking action or now we're not taking action?

Y: I think in recent years it's really the security situation that has been kind of overriding everything. That's not just true for the rule of law, but that's true for a lot of things. The kind of fear of, you know like, kind of new geopolitical times, where it's not just a matter of like, you know, strengthening the democracy in the Union or kind of building on those values, but really to say, well, again, there's a war and we need to kind of see how we want to position ourselves. And then another big issue, I think, are the upcoming elections and the kind of fear of, like, the right wing taking more ground. So the overall idea of like citizens being quite unhappy, the EU being like a very easy, you know, victim to blame. When you say something's going wrong, then it's the EU's fault. So I think these all play a part in the decision-making.

X: And do you think that also ties back to internal political discussions and factors?

Y: Again, I think this year is quite special. So I think there are also certain staff considerations. You know, everyone's thinking about what they do after the election. We've seen it with a bunch of, you know, Commissioners leaving office to, like, go back to their member state. We see that, you know, there's like, a reshuffling happening already. Members of cabinet who go and become EU ambassadors. So like, I mean, everyone's looking out for themselves and trying to like, form their own career. And I think that plays into the political decision-making as well. There will be very little happening between now and June. And then, you know, it will take the entire summer, then it will take the hearings for the new Commissioners and so on. So I don't see anything, much happening before November at the earliest. And I think that is political too in a way, because obviously we don't know if there are any more rule of law breaches. But it's basically a matter of the EU machinery just working as it does and being quite slow, and then the political will, that's just not there to say, well, you know, we have to like step in with like some kind of emergency measures because the emergency, when you really want to talk about one, is Ukraine and not anything else.

X: Is that also reflected in the interactions you guys have with the Commission? For example, that now the focus may have shifted a bit because of the upcoming elections?

Y: Yes and no. Not so much, I would say, because the last discussions we had at like a higher political level, were really just, you know, everything's changing. So it's nice that you guys want to give us advice, but in the end, you know, we won't be the people working on this soon anymore. So the advice, basically, from the Commission was: just prepare for the next Commission, make sure you have, like some good advocacy points in place, meet these people, and then step in there. But that's the general kind of mood now in Brussels, is that if you talk to any kind of

policymaker, they say: look, what's the point in discussing this right now? Maybe we talk about this later this year when we know a bit more about the new Commission's priorities and so on.

X: In general, do you think EU institutions could support civil society better in any way.

Y: Yeah, absolutely. So I mentioned before there were like a bunch of conferences that the Commission, there were three conferences over a span of, I think, a year and a half or so, where the Commission really kind of went out of its way to have, like, a big kind of gathering of civil society from all of Europe to kind of, you know, discuss and see a little bit how they can better work with the civil society. So the interest is there. There's also, you know, the Defence of Democracy package that came out in December that has a part on civil society. So there are definitely attempts to do it better. But ultimately, the question's, of course, how much is taken on board. So it's nice to have a meeting, but if the Commission just does it to say we met with the civil society, then it's of course not sufficient. Then there is a funding issue. I mean there are certain grants that go out to civil society from the EU on different projects, but, you know, maybe not so much in Brussels. But in the member states, like a lot of civil society organisations struggle with the finances. Because depending on how the government situation is, they have a very hard time raising funds, for example, for their activities. So the EU can definitely also support in financial aid to kind of see civil society as a strategic partner that if you fund it well, can, you know, make your life and your work easier.

X: How would you describe the current relationship between EU institutions and civil society organisations?

Y: How would I describe it? I don't have to do it like in a word or something, right?

X: No, no, just where do you think things stand right now?

Y: Yeah, I think it's almost sufficient, is I think what I would say. So it's definitely there. I don't want to say that, you know, the Commission is not interested in doing it and as I said, like they have tried to improve their relationship, but there's definitely room for improvement and that goes with transparency. Very often it's very difficult to know what they're actually doing. It kind of goes back to your earlier question and how much we actually know about developments. So yeah, I would say it's a matter of the Commission opening up to civil society more. Not just in financial support, but also to really being eager to get this feedback and to take the feedback into account when making decisions. But I mean again, it's difficult, it's a giant machinery. You have a lot of different points of view to take on board, you need to be diplomatic because it's like basically, like highest diplomacy at the Council level. So I understand it's not an easy task, but I think that the EU or the Commission specifically needs to be a bit more open to civil society being a partner. Maybe that being said, when we talk about the Parliament, not necessarily only rule of law related, but I think the Parliament, it's very much up to the political groups and to the MEPs to decide how open they want to be. You have some that are very, very open. But if we look at the legislation that's coming out of the Commission and the kind of statements that are coming out, also of the Parliament, on civil society, and usually in the framework of like foreign interference, on foreign funding, and this fear that civil society are basically, you know, foreign agents that can, you know, that can influence the whole process for the worse. There have been some very damaging narratives lately from the Parliament, and it's problematic because that's obviously what autocratic governments would do, is to just discredit civil society and stigmatise them. And in that sense, I think we need to be very careful on the kind of official narratives that we create about civil society and their role also.

X: Do different political parties within the Parliament have clear differing stances on the role of the civil society?

Y: I mean obviously you have like a difference between the right and the left. That's very generally speaking because obviously you have several fractions on each side. The European Greens are quite vocal on civil society. Also, the Social Democrats have been inclusive. You know now all the parties are developing their election manifestos and the Greens and the Social Democrats were the only ones who actually had public consultations with civil society, really inviting us to sit down and say, what do you think we should do? What do you think is important on the way forward? So I mean, that's one thing. There have been several reports where, especially MEP people from Germany have been quite vocal against the role of civil society and in favour of restricting it. So the EPP, so the Conservatives have been critical of civil society. They would of course not agree with that because they're not critical of civil society as such. But again, it's fairly easy to discredit civil society publicly by questioning their motives, their funding, and so on. So it's currently a debate that's still ongoing because there is this Defence of Democracy package and the foreign funding legislation. So, the parties are currently, you know, wrapping their heads around a little bit on what they want to do. Yeah, but I think overall like, we've gotten most open arms from the Greens and from the Social Democrats.

X: Does discrediting of civil society also hinder your organisation's work when you go back to speak to the Commission?

Y: Ours, not so much, because, again, we're a Brussels network. I think this really hits the smaller organisations on the Member State level more, who are already struggling to, you know, be valued for the work they do. But ourselves, no.

X: Then I want to ask, is there anything else you want to add or you think should be mentioned with regard to what we've discussed?

Y: No, but if you need anything, as in, you know, if you, you know, I referred like, to a bunch of like, legislation and stuff, please let me know. I can provide you with the different things. For us, like one of these big topics, is the Defence of Democracy Package because it will have a major impact on how, the different institutions basically take a stance when it comes to, you know, funding for civil society engagement. And that will be quite relevant, because it's about foreign funding and the intention is to make it about foreign funding from like Russia and China. But making it foreign funding also makes it funding from the UK or from the US, you know, lots of us get money from the Open Society Foundation. So it's, yeah, the stigmatisation aspect is you know still like a very big issue that we as a platform in Europe, like, fight for, you know, for those who are actually truly affected because it wouldn't affect us as much. We can continue our work, but others potentially couldn't and that would be very dramatic for the entire scene.

Annex 4: Anonymised transcription, Interviewee 4

Role	Member of European Parliament
Date	2 April 2024
Medium	Telephone
X	Research interviewer
Y	Interviewee 4

X: There have been a lot of discussions between the Parliament and Commission back and forth. Sometimes it seems the Commission has the final say. How would you describe the role that the European Parliament plays in addressing rule of law and backsliding issues?

Y: Well, I do not entirely agree with your remark that the European Commission always has the final say. First of all, the European Parliament is entitled to trigger the Article 7 procedure, and we have done so in the case of Hungary. The final, final, final say in actually imposing sanctions lies with the Council, not with the European Commission. The European Commission does play an important role in the conditionality issues, but there too, in many cases, it's the Council which actually has to take a decision. Personally, I feel that the European Parliament should also use its budget powers more actively and more assertively than it has done so far. So there too, it could play a role. Parliament can also pressure the European Commission into being more active when it comes to infringement proceedings. So, Parliament can do a lot, and actually Parliament has done a lot. But I have to say that in the last five years the European Parliament has been very outspoken, but always shied away from putting real pressure on the European Commission. But we can do a lot.

X: And why do you think the Parliament has shied away? Is that from internal disagreements?

Y: No, it's more generally that the European Parliament has become weaker vis-à-vis the Commission and the Council. I think the erosion of parliamentary democracy is a phenomenon that we can see in many places, also at European level. And Parliament, for a number of reasons, (...). And for a number of reasons the European Parliament is, let's say, it's a very good legislator, it's using its legislative powers, but it's very weak as a democratic watchdog when it comes to holding the European Commission to account, or providing the necessary counterweight against the European Council, or the Council *tout court*. This European Parliament since 2019 has not done very well.

X: Then you also touched upon the Parliament's ability to call upon the Council to act, specifically on the Article 7(2) procedure. The Parliament, especially recently, has come back into discussion, but has faced difficulty in convincing the Council to do so. What efforts have parliamentarians recently made to try and convince the Council to apply this Article 7(2) procedure?

Y: Basically, by keeping the topic on the agenda. But again, I think the European Parliament has seen a general weakening of its position vis-à-vis the European Council. It has given far too much space to the European Council. I mean, the European Council is not a decision-making body, and yet it's behaving as if it's a European government. And the European Parliament has allowed this to happen. The European Council very often, together with the

European Commission, has sidelined the European Parliament. New instruments that were created in the last five years have been designed in such a way that there is no scrutiny role or not even a decision-making role for the European Parliament. So that makes the position of Parliament very weak vis-à-vis the Council. We also see that national governments have got a firmer grip on the European Parliament now than they had a number of years ago, and on specific MEPs, on national delegations. And so, you know, Parliament has become very timid. When it comes to, for example, scrutinising the European Commission, Parliament has not demanded that there is a monthly question hour. Parliament has accepted the fact that von der Leyen is refusing to register the text message exchange that she had with the CEO of Pfizer. Parliament is accepting, you know, how she behaved in the case of the conflicts in the Middle East. I mean, each time Parliament has accepted that the European Commission refuses to be held to account. And what we see is that then the group leaders occasionally say, well, okay, we should speak to Mrs. von der Leyen, but we do so in camera between the group leaders and the President of the European Parliament and the European Commission. But that's not scrutiny. It's not public. There's no pressure. They behave as if they are allies of the President of the Commission rather than the ones who have to scrutinise her. So, it's the whole setup which is not very favourable. And only in the case of Poland, we see that European Parliament and the European Commission together have been very much on top of things. But why was that? Because the EPP was not represented in the Polish government. But other governments, like the government of Greece, which is very rapidly descending into a kind of mafia state, there the European Commission is looking the other way, actually refusing to intervene. And the thing is, sometimes the Hungarian government or the previous Polish government used to say, oh, this whole rule of law thing, it's politicised. Yes and no. The decision to intervene is not politically motivated. It is rather the decision not to intervene in certain cases, which is politically motivated, leaving certain governments alone. We've seen that with Hungary for a long time. The fact that Hungary or Orbán could carry on for as long as he did was politically motivated. The fact that Mitsotakis can do whatever he likes is politically motivated. However, the decision to intervene and the interventions are extremely timid, extremely slow. They're not politically motivated. It's rather the decision not to intervene and the decision to look the other way, which is politically motivated.

X: Yeah, this ties into something else I had noticed. I have been considering political factors. For example, the Commission decided in December to unfreeze 10 billion euros of Hungary's funds. And this decision was argued by the Commission to be a legal obligation to do the assessment. But if you look at it, they didn't need to do it when they did. They had nine more days to do another assessment. Why do you think this is?

Y: This is actually why I think, for me, what happened, this was just before the Christmas break. And it was on the eve of the European Council Summit. And so, what the Commission did was wrong on substance, because a child can see that Hungary is not meeting the criteria. So, it was a wrong decision. But what was even worse, what was much worse than that, was indeed the timing, which was a political decision. And in choosing that timing, von der Leyen made it very clear that she is serving the European Council. And that is a very grave violation of the treaties, the treaties which require the European Commission to be strictly independent and not serving anybody. The Commission is accountable to the European Parliament but is not serving the European Council. Yet that is what she's been doing all along. And this was the instance that made that very clear. And again, the Parliament failed here because it was just before Christmas, but we were all in Strasbourg. It was on a Wednesday, I believe. I mean, she should have been summoned to appear before the European Parliament and explain the next day, the very next day. And yet Parliament failed to do so.

X: So you would say that in decisions like that decision, for example, political factors definitely do play a role in the Commission's decisions?

Y: Yeah, and this is why I was a rapporteur a number of years ago for (...). And in the proposal of the European Parliament, the rule of law report would have contained some triggers. I mean, (...), it would have been automatic triggers. Let's say a member state is measured every year against a set of criteria. It can be independence of the judiciary, freedom of the media, gender equality, data protection, you name it, everything which is Article 2. And then if a member state has, you know, they get a score, red, yellow or green, and if they have so many reds or so many reds in a row, automatically sanctions would kick in. Okay, in the end, Parliament did not retain that proposal. But there was an element of, not automaticity, but a link between having a bad score year on year on year and sanctions. And this is something that the European Commission didn't retain either. They're producing the reports, which is a very good report. It's really a point of reference. But it's increasingly clear that although they are including critical points for every single member state, that they are not, it's not a full assessment. Because for political reasons or rather diplomatic reasons, they hold back. They hold back. They're not, you know, they're not being as critical as they should be and as frank as they should be. And this is where the problem again arises of the European Commission, and certainly under Mrs. von der Leyen, is far too close to national governments.

X: And why do you think the Commission tends to hold back?

Y: Well, because as I said, the European Commission over the years has moved from being an independent community body. It has become increasingly intergovernmental and certainly under Mrs. von der Leyen. Let's not forget that on the basis of the Lisbon Treaty, the president of the European Commission is also a member of the European Council, which is an insane construction. And she, you know, von der Leyen, it's also a matter of personal preference, but also a matter of the way in which she was elected. I mean, she was very much the candidate of the European Council and not the candidate of the European Parliament. And this is why, you know, the Spitzenkandidat is so incredibly important because it determines the relationship between the Parliament and the European Commission from the start. And because she felt very much that she was the candidate of the national governments, she didn't, you know, she showed nothing but contempt for the European Parliament for five years. Really nothing but contempt. And it got worse over the years. And I mean, her predecessor, Juncker was very different. Very different. I mean, I think von der Leyen generally doesn't like transparency. She doesn't like accountability, democratic scrutiny. It's just not her thing. And I mean, she's very hands-on and very, you know, takes initiatives. And you have to give her that. But she doesn't like scrutiny at all. Her predecessor was a different matter because he was clearly, he was a political animal and he liked the interaction with the European Parliament. But also he had been a Spitzenkandidat, so he realised he was the candidate of the European Parliament. So it really makes a difference in what way the president of the European Parliament is selected.

X: Yeah, that's interesting. I asked again because I'm also going to talk to Commission officials. So I think it might be interesting based on everything you just said to kind of track that the Commission's almost more political, more aligned with the Council's stance.

Y: But the Commission, if I may interrupt because this is, people sometimes say, oh, the Commission has become more political. No, the commission has always been political since day one. And that is not a bad thing in itself. Being political is not bad, they're all politicians. They're taking political decisions with political consequences. Of course they're political. It's a political body. The point is that if you're a political body and not a diplomatic body but political,

then with it comes the need for greater accountability, greater transparency and greater scrutiny. And that is where there is a problem. Because that scrutiny has to be exercised by the European Parliament, and Parliament is not doing its job.

X: So would you say these issues and maybe differences between the Commission and the Parliament lead, in a more general sense, to a problem for the EU's general response to backsliding countries?

Y: Yes, of course. Yes, we have weak leadership because of this. We have a European Council which has no official powers but is grabbing power every day with the help of the European Commission. The Commission is at the moment acting like the servant of a member state. But the Commission is also the only institution which is responsible for enforcement of the law. But you cannot be a law enforcer and a servant at the same time. Those two roles are mutually exclusive. And that is the problem.

X: Then with maybe regard back to the Hungary's funds being unfrozen and the pending court case between the Parliament and the Commission, is there any other action that can be taken by the Parliament?

Y: We can take plenty of actions. We can use our elective power. We can hold von der Leyen to account. We can hold individual Commissioners to account. We can request their resignation. We can send the whole Commission packing. We can use our budget powers. We can use our scrutiny powers. Why has the European Parliament, for example, not insisted or not enough that we get access to all the documents underlying this so-called analysis of Hungary? Since when is that confidential classified material? What for? And yet the European Parliament doesn't use it. And any citizen can also request access to those documents. And we do. But the point is that then you need to wait for months until you get an answer. The answer is always negative. Then you need to go to court. It takes five years. So, you know, Parliament should have used its powers, its prerogatives to say, dear Mrs. von der Leyen, you've got it all wrong. These documents are not confidential. We demand access to them straight away. And yet Parliament didn't do that.

X: Let's say Parliament loses the case, which is a real probability, I think. Do you think Parliament will try to do more?

Y: I don't know. It depends on the next Parliament. But to be frank, the signs aren't good because the Spitzenkandidat would be a key element in redressing the balance of power between the institutions. And the European Parliament is just letting it go completely. Von der Leyen is Spitzenkandidat for the EPP, but she's not even willing to be on the list. She's not even willing to present herself as a candidate to the public. Then the S&D have a candidate who's probably a very good technocrat, but nobody knows who he is. He's everything but charismatic. The European liberals, (...), but I'm afraid they've messed it up as well by basically not proposing a Spitzenkandidat. The Greens and the other groups have done so, but they're not the big hitters. So I'm afraid that Parliament is shooting itself in the foot.

X: So you would say that, let's say the situation doesn't really change, this will lead to further hesitance in addressing the democratic backsliding in, let's say, Hungary, for example?

Y: Well, I don't know. I mean, if I compare now to 10 years ago, it's a difference of day and night. I mean, at the time, the rule of law wasn't an issue. Okay, Parliament was grumbling a bit about Hungary, but that was it. And that has changed radically, and it's not going to go away anymore. But the question is indeed how credible the European Union is as the rule of law or the values watchdog, if you want. And for the time being, it's not very credible. And if that lasts for too long, then people will start losing trust.

X: Are there any other further instruments being developed? For example, there is the conditionality regulation that's been developed. Are there any discussions on newer instruments to be developed?

Y: Well, there is, as I said, the annual report should be strengthened a lot. And there should be a closer connection to sanctions or to budget conditionality. But we also think that the Commission could be a lot more assertive in using infringement proceedings, also bundling infringement proceedings, so as to make clear the gravity of the problem. And then also, I think the Commission should not go to court over issues which are painfully clear. The European Commission is, rather than answering questions itself, political questions, it's taking it to the European Court of Justice and leaves it to the Court to sort out painful issues. And I think that's not the right development either.

X: And lastly I want to ask you, is there anything else you would want to add to what we discussed so far?

Y: No, I think this was the essence. And as I said, if you want more detail, more examples, (...). It's basically elaborating on this theme in a bit more detail.

Annex 5: Anonymised transcription, Interviewee 5

Role	EU Commission Official
Date	5 April 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 5

X: How would you compare the Commission's response to Poland and Hungary in a general sense?

Y: Well, I think that what we try to do and what we ensure for sure is the equal treatment between all member states in this process. So there was no difference in treatment. There were objective differences in these countries that led the Commission to adopt a different approach. There were, for the two countries initially an Article 7 procedure which had been initiated and for which Poland had announced some measures to solve the situation for the future. And there were the same treatment when we looked into the situation or the fulfilment of the Horizontal Enabling Condition, which is about the effective implementation and effective respect of the Charter of Fundamental Rights in the implementation of cohesion policy funds. And so for the two countries, they themselves considered that they did not fulfil the Horizontal Enabling Condition. So they admitted themselves that they had an issue, which meant for us that we could not reimburse payments for no payments at all for any of the programs except technical assistance, because it's not affected by the Charter respect issues. But we froze basically the funds for the two countries until the discussion started and things were solved because, well, there were several problems, but the main problem which had an impact on all programs was that the independence of the justice was not being respected. Then we consider the arrangements in these two countries to ensure the respect of the Charter of Fundamental Rights, were not respected, were not in place. So the two countries were treated the same. Now, on top of the general issue of independence of the judiciary, we add also some more specific issues linked to the countries because of the situation of academic freedom in Hungary, the protection of children, and what else? There was a third problem, I don't have in mind now. But so we looked into the situation of the two countries according to the same rules, according to the same guidelines, and there was no difference of treatment from this point of view. Then as regards the budget conditionality regulation, same, we treated all countries the same. For Hungary and Poland, we feared that the use of the funds, the EU budget was at risk. So sound financial management was at risk and the effective protection of EU financial interest was at risk. We started a discussion with the two countries. Poland replied and on the basis of the reply and on the basis of the analysis we carried out, we considered that there was no reason to activate the budget conditionality regulation for Poland. But for Hungary, we considered that it was the case that we had serious issues. And I must say that the measure taken concerning Hungary was a suspension of fifty-five percent of the commitment of three big cohesion programs. And as regards the management of funds in Hungary and Poland, the situation is not the same. So it does not come as a surprise also that the treatment of the two countries was different under the budget conditionality regulation because Hungary has a practice of what we call overbooking a lot. Overbooking means that in order to get 100 from the cohesion policy funds, they need to declare to the Commission 130. I simplify, it's not exactly this. But they would declare 200 because when our auditors or the Court of Auditors goes on the ground and audits projects and find

problems, they would immediately decertify the expenditure which is affected by these problems. And then, I mean, from the perspective of the good use of EU funds, the problem is solved. But what this shows, this very generalised practice of overbooking, us finding problems or the Court of Auditors finding problems and Hungary decertifying expenditure, it shows that basically there are some problems in the use of public money in Hungary and in particular in the use of EU funds. So we don't have these kind of very generalised issues in Poland, not at all. They have a very good track record of using structural funds. It does not mean that there's never, ever any irregularity or fraud, but it is very punctual and not generalised. So it explains that we activated the budget conditionality regulation with Hungary and not with Poland.

X: You mentioned the fifty-five percentage of the suspension of Hungary's funds. In practise, how did you get to that percentage, are there any standardised criteria?

Y: So there is a basic criteria, which is that any measure that we take needs to be proportionate. So this is one thing. The second thing is, it was the first time we were activating this regulation and we wanted to get it right. So we were overcautious about what we were doing, so to say, and we proposed actually a higher level of suspension to the Council and the Council decided a lower level of suspension of commitments. Also, because in the meantime, Hungary did certain things. It's not scientific. I mean, it has to be proportionate to the risk on the EU budget. But, I mean, it's very difficult to quantify. The basis for taking these three programs and cohesion programs was that we have a very rigorous audit system of cohesion policy funding. And we identified in the past, in Hungary, certain types of irregularities. So it was also a way for us to, let's say, to freeze the funds on the policy on which in the past we had evidence of irregularities, of fraud, widespread. So that's a bit how it was done. We at the time looked into, because we, I mean, (...) Commissioner, we were not greatly happy to be the only ones taken into this procedure of suspension of commitments under the conditionality regulation. So we looked whether there were audit findings under the rural development, under the other shared management funds. But the audits were not so detailed on the points on which we wanted Hungary to correct their laws, which were conflict of interest, which were public procurement rules, which were a fight against fraud and corruption. So that was how we ended up with the situation.

X: Are there any other criteria that are used, on a more practical level, when doing these assessments.

Y: So the article 7 is on the values, but the budget conditionality regulation is something else because we need to prove that the breach of the rule of law has an impact, well, affects the financial interest of the EU. So it's another, much more, I would say, concrete level. But of course, we take into account lots of sources, the judgment of the Court of Justice, some Court of Auditors reports, the EU Justice Scoreboard, the OLAF and European Public Prosecutors report, the conclusion and recommendations from international organisations and networks. So I mean, we take on board the existing evidence either on breach of rule of law and values, let's say, or for the budget conditionality regulation as well, from the bodies which are in charge of auditing the EU budget and fighting fraud and corruption.

X: The Commission has recently been criticised for its decision to unfreeze Hungary's funds, especially from the side of the Parliament. The main criticism is that this decision maybe came a bit too fast, with Hungary not really having fulfilled its commitments. How would you respond to that criticism?

Y: Well, I don't think so, actually. I think we went as far as we could. And I'll tell you why, because, so we had some exchanges in July, August of '23 with Hungary. And they adopted some laws and we questioned things. But the issue is that when we launched the budget conditionality regulation, our initial questions and our initial doubts, they framed

the whole procedure up to the end. What we didn't want to do in order to be on the safe side legally for the moment, that the Court of Justice will have to judge if what we did was correct or not. We wanted to remain in the frame. That was the one when we launched the procedure. So in the meantime, things happened. Some people were willing to say, we cannot just look at the text that will be adopted by Hungary. We need also to look at the implementation of these rules because the rules are a piece of paper and we should not be tricked by the Hungarians and by, let's say, the paperwork while afterwards they might not implement the rules in a proper way. But this was not what we asked Hungary to do in the first place. So we could not extend the procedure as it was initially framed to new things requiring to look into implementation and so on. I think we went as far as we could. We asked some additional questions to Hungary. Now I don't remember if it was once or twice after September. And we were at the limits of what we could ask them in the context of this procedure that was handed in. So what I would reply to people that criticised, that said, okay, you acted too quickly. Well, it's clear that between this week before the European Council discussing the Ukrainian facility budget, we could have decided two weeks after or three weeks after. There was also a political element there. But in terms of, let's say, being lenient or not in order to try to convince Hungary to agree on the facility, I don't think it's a criticism which is grounded because I really think that the procedure was at the end. What we can do in any event and both for the budget condition regulation and for the enabling condition is that, when we consider the independence of the judiciary source for Hungary, we considered fulfilled the horizontal enabling condition. But still, the budget condition regulation is activated. And the other issues that we have with Hungary as regards the horizontal enabling condition, not the independence of the judiciary, the other issues, they are still on. So everything is not finished with Hungary. And then the other thing that I want to say is that both for the horizontal enabling condition and for the budget conditionality regulation, we can still reactivate things if we have evidence that the rules are not implemented properly, that the paperwork remains just paper and is not followed by a change in the practice in Hungary.

X: Then another thing I've heard from people I've spoken to is suggesting that political factors and considerations also play an important role in the Commission's decision-making specifically. One of the bigger examples is Orbán using the Ukraine position strategically. Would you say that it's fair to say political considerations also influence the decision-making process?

Y: Of course it does. As I said, we could have adopted this decision considering that Hungary fulfilled the horizontal enabling condition two weeks, three weeks after. Well, actually, we have deadlines as well to respect and I should correct myself. I think we did not have two or three weeks left, but we had a bit of margin.

X: I think it was nine days.

Y: Yeah, something like this maybe. But you see what I mean. Okay, the decision to go for the decision just before the discussion on Ukraine was political. Also to activate or not the budget conditionality, eventually there's some political considerations which are taken into account. But that's normal, I would say. I mean, you don't treat the same a country which commits to the European values, and a country which over and over is criticising and blocking and slowing down the process of policymaking. Yeah, so there is a political element for sure.

X: Can you give any other practical examples of situations in which political considerations also play a role?

Y: Well, for Poland, most recently, of course. So when Donald Tusk now comes and says, look, I cannot bypass the Polish president who can still veto all the laws that will fix the rule of law situation, but everything I can do with

creative solutions and I will. Then, of course, we need to help. I mean, it makes sense that the Commission is giving some support in such a situation to a country which is willing, and not only willing, but taking measures to solve the situation. Yeah, this is the other obvious example which comes to my mind.

X: In what way does the Commission, on its own accord, involve the European Parliament and the Council when going into discussions and decisions on a rule of law issues?

Y: Well, I mean, every year since four years, we adopt the rule of law report, which is presented to the Council and to the Parliament. So there's this yearly debate, which is very welcome, which is meant to be a preventive type of tool to kind of screen the situation of all member states as regards independence of the judiciary, the corruption, the media, the situation of the media and the other checks and balances and which, well, identify gaps somehow without really putting it like this, but provides a benchmark for member states and, yeah, helps solving preventively some issues. So this is a yearly exercise now on the activation of the budget conditionality regulation. The Parliament is not so much involved, but it is informed of the measures that the Commission intends to propose that are adopted, that are lifted. The Council, of course, is the main one deciding on the activation of the mechanism and lifting of the procedures. And then on the horizontal enabling condition. The decision is with the Commission, but we adopt reports which are then discussed with the Parliament. There's a very regular contact and discussions with the Parliament on the implementation of cohesion policy and plenty of occasions to discuss the issue. And yeah, in any event, I mean the, every month the College is going to the Parliament and there are occasions to have discussions, observations, own initiative reports, resolutions, everything from the Parliament. So opportunities to discuss about the different concerns of the Parliament as regards the rule of law in different member states.

X: Does the Commission also consult civil society organisations?

Y: Not really. What we do that I think of now, is we are financing NGOs active to check the implementation of, the respect of the rule of law, which is a kind of useful and sound mechanism to ensure that one of the democratic players is informing people, alerting people and also alerting the Commission on problems on the ground. But consulting on the rule of law, not really. I mean, NGOs are coming to us, for instance. I don't know, with the LGBTIQ problems in Poland. Yes, they inform us that they are excluded from receiving grants in some municipalities and so on. And then we discuss with local authorities to make sure that either they change their rules or they are excluded from receiving funding, for instance. We had these discussions one year ago, two years ago, as regards cohesion policy funding. But, yeah, it's rather they are alerting us rather than us consulting. Well, I must say in the governance of cohesion policy programmes, we are discussing with the monitoring committee rather than consulting them, and they include representatives of civil society organisations. But it's more of a dialogue, they warn us, we inform them, we discuss, rather than us consulting: are you aware of something that is at risk for the rule of law in this and that?

X: Are there any examples you could discuss of instances where the European Commission has demonstrated a more punitive stance towards a backsliding member state?

Y: Well, I mean, as I said, we tried to ensure equal treatment between member states, so I wouldn't say we have been more strict to Hungary compared to how we treated other member states. Hungary went very far in the breach of lots of rules or circumvention of rules. But no, I wouldn't say we were stricter with them.

X: So would you say the leniency or the strictness is more in proportion to the member state in question?

Y: Yeah.

X: How does the Commission balance its commitment to upholding democratic values with the member state sovereignty? Does that sometimes cause tension?

Y: I mean, we are working on the basis of treaties. Treaties have been ratified by all member states or Parliament. They contain values which have been interpreted by the Court of Justice at length. The Charter of Fundamental Rights has now the same legal value as the Treaties since a while. It has also given rise to lots of case law now. I mean, there's a principle of primacy of the EU law. In some countries, some people can say, look, we cannot do what we want because of Brussels. But I mean in the first place, they decided to adhere and stick to the rules. So, I would not enter into this discussion of whether now that they are in and they benefit from all the rules which they like, access to internal market, funding from the EU budget and so on. For certain issues their sovereignty is at stake and is, let's say, impeded by the rule of law system. No, what I think is that we made clearer with this rule of law report, the kind of minimal requirements that have to be ensured in all member states on these four pillars. And I find it very useful because it's very easy to be tough on exiting countries but not to accept some, how to say, supervision. I don't like to say supervision and control, but a kind of transparent exercise of checking how each Member State also performs itself. So for me it's a very good exercise which has been launched.

X: The Parliament has taken the Commission to court because of its decision to unfreeze Hungary's funds. Where would you say the EU Parliament and the Commission stand right now in the rule of law debate.

Y: Well, you know, there's elections in June. So the Parliament's decision, it was announced. I don't want to say that the only motivation of the Parliament is the election, but probably it's weighed a bit in the decision to launch this case. I don't find it bad. I mean, the Court of Justice is there to judge whether what the Commission did was right or wrong. Whether the Commission had such a great discretion in deciding how to interpret the rules, to look into the member state systems, to qualify them as requiring adaptations or not. So, for me, it's not the sign of a particular dysfunctioning of the system. I would say it's also even sound. And we know as I said, that we were extremely cautious in the way we ran the procedure because we had this feeling that this could happen either by Hungary or by the Parliament or by someone. Not an individual because it could not attack, challenge the decision, but you see what I mean. So, we were cautious. We did, in good faith, what we thought we had to do. Let's see what the court says.

X: Is that sentiment shared among other Commission officials?

Y: I don't know, because I mean, we are not above the laws. I mean, we are implementing a regulation which has been approved by the Council and Parliament, so it's normal. We are accountable, we need to explain what we did and the Court of Justice is there to judge whether we did right or wrong. So for me it's all fine and there was also a report of the Court of Auditors on what the Commission did. And also, not everyone here was so pleased that the Court of Auditors audited what we did. It's normal, it's usual activity of the Court of Auditors, so I think, I mean, we need to be as reasonable as possible in the way we run this procedure. We used all the leverage we had at, I think, the right moment for Hungary to move and we used all the tools we had in a consistent way in order not to create some holes that would undermine the Commission's plan and now we have to explain and yeah, be criticised by those that do not agree with what we did. It's the normal functioning of the system. So for me it's not a problem. I think we are well able to defend what we did. But normal that people make up their mind, criticise, judge. No problem.

X: You referred to the upcoming elections, so does that mean you would also say that the Parliament's decision, or maybe specific Parliament Member's decisions, are also motivated by political aspirations?

Y: Well, I mean, they have to find some fights as well. Which is what's happening in all countries before elections and yeah, as I said at the beginning, it's probably not the only reason why some MEPs decided to, I have in mind some MEPs that since the beginning are pushing for the Commission to activate up to the maximum extent the budget conditionality regulation, which would have liked, certainly the Commission to do more to push Hungary even further. So those ones, maybe they would have challenged the Commission without elections. But there are some MEPs. We are not totally blind to the next election.

X: Is that also noticeable in interactions the Commission has with the Parliament?

Y: I mean, yes. It's normal, but the elections are the moment when, even if the relationship between the Commission and Parliament, overall during the last four years has been very smooth. I mean, we managed to have 200 and I don't remember now where we are, 280, I think, legislative proposals adopted. It went well, but there are elections, so people need to explain their differences and be elected on that, on the basis of the agenda which they show.

X: In popular media the court case is almost portrayed as a battle between the Commission and the Parliament. From what you said earlier, I'm inclined to think you disagree with that. Would you say that it's right to kind of portray this as causing problems between the different European institutions or not?

Y: How do you call a member states bringing another member state to the Court? How do you call the Commission disagreeing with the Council of Parliament on delegating or implementing act? And I mean, if you are a journalist, you call it a battle. Okay, it sounds much more interesting for attracting readers. But as I said, I mean, in the Parliament, the one that brought the Commission to court, they were kind of presenting things also with this type of approach saying: how is it possible that the Commission let it go? Yeah, they did not do it for the pleasure of getting the Court saying whether it's wrong or bad, what the Commission did. They also wanted to show that they did not agree with the Commission, with what they called the Commission's leniency. But my opinion is that it's not bad that in the end there will be a Court judgement on this. The Court, as we know, generated lots of advances in EU law thanks to judgements, so not bad.

X: To conclude, I want to ask is there anything else you think should be mentioned or you want to add to what we've discussed so far?

Y: Well, I mean, I suppose that you are not only working on Poland and Hungary and you are looking wider to what's going on in other member states, no?

X: Yeah. But it's mainly from the perspective of the European Union's response in general to member states.

Y: Yes. So well you, I'm sure you are looking closely in these rule of law reports which have been adopted regularly. I don't know when you will give your study, but follow what is being discussed with Slovakia. Follow what is being discussed with Georgia, for instance. Yeah, there are developments on this topic. But yeah, some improve, some don't go in such a good direction maybe.

Annex 6: Anonymised transcription, Interviewee 9

Organisation	Hungarian civil society organisation
Date	10 April 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 9

X: How would you describe the role your organisation plays in trying to influence the EU's response to rule of law-related issues and to democratic backsliding?

Y: Well, we have been monitoring rule of law backsliding and various aspects of it for a very long time now, and what we usually try to do is to provide information and objective reports of what is happening on the ground, and also produce original research content, which is relevant for rule of law issues. And since we think it's very important that international stakeholders maybe, you know, international organisations, EU or other EU member states, get precise and up-to-date information in English very swiftly. This is, I think, one of our priorities, that we report on events of rule of law backsliding, legislative developments, or other kinds of events, in a concise manner in English, and we try to explain what various legal changes mean and what they could entail in the long run. We publish all of our contributions and reports and analyses, you can access it on (...). We also disseminate it quite widely, we also do advocacy activities, and we also do litigation, although when it comes to rule of law it's a bit tricky to do strategic litigation. But historically (...) and in those areas we have gathered a very large litigation experience, and of course this is a resource you can try to use. And maybe just, you know, one specific example, which is really very closely related to the rule of law, is that we have been submitting so-called stakeholder contributions to the annual rule of law reports of the commission, and we have been doing this jointly with other seven or eight Hungarian NGOs, and (...).

X: So would you say that the Commission relies on your organisation for specific information related to Hungary?

Y: Well, I think this is a question for the Commission, to be honest. I mean, we publish our findings and we disseminate them widely, but this is a question for the Commission.

X: And does the Commission sometimes consult your organisation of its own accord?

Y: I think one of the issues when it comes to working on EU law issues is that you have very few formalised entry points for most processes. So there is the rule of law report and there is the stakeholder contribution survey attached to that, which is open to everyone basically. You can submit a contribution as an NGO or, you know, a journalist association or judges association, but that is one of the very few formalised entry points. And beyond that, what I think can be an issue is that there is, due to what is called the principle of sincere cooperation between member states, there is an issue of lack of transparency and lack of accessibility for outside entities, so for civil society organisations. So if you look at various procedures, such as the conditionality mechanism, for example, or other procedures which are related to accessing EU funds, you won't find these formalised entry points. And I think that's a challenge.

X: So does that make it harder to engage with EU institutions, and with the Commission specifically?

Y: I think it makes your job as a civil society organisation harder because you don't know when and what kind of information is useful or what kind of analysis is useful, at what point in time, and who is the audience of that analysis or argument you are trying to present.

X: So, does that mean it's kind of not clear on how your input is used by the Commission?

Y: I think it's hard to see that. Yeah, it's hard to see that.

X: But you guys do try to influence the rule of law debate. How does that interaction go, what does it look like in practice?

Y: I mean, as I said, we always disseminate our findings widely. So we publish them and we disseminate them. And it's, of course, there are instances when this is a targeted dissemination. So you specifically send certain materials to certain stakeholders you think would be interested in that analysis or in that information.

X: Is it easy or hard to get a response to your input?

Y: I cannot speak to that. I'm not (...).

X: I also mentioned I'm looking at the cases of Poland and Hungary specifically. How would you compare the EU's response to democratic backsliding in Hungary versus in Poland?

Y: Yeah, so I would say that in Poland, as far as I could follow it and see it, it was a very rapid process. It was very swift. And also it was much more blatant. I mean, the rights violations you saw were much clearer and it was a really kind of an aggressive process in a sense. And I think what was different in Hungary is that it was a very slow process. So this started already in 2010 or a bit after that. And it has been developing since then. So almost 15 years now. And I think the issue was for a very long time that this is a very legalistic process, what is happening in Hungary. So I mean, for an outside stakeholder, it's very challenging, I think, to understand what different legal reforms or legal changes can result in, in the long run or what is the bigger legal infrastructure they operate in. So I think in the Hungarian case, it was really, in a number of instances, a devil is in the details kind of issue. And yeah, I think that's the main difference. I'm not sure if in your country there's this saying, but we have this saying about the frog in the boiling water, that if you put a frog in water, which is already boiling, that it will jump out and save itself. But if you put the frog in the water, which is cold, and you start to boil it, it wouldn't realise that it's boiling. And I think it pictures the situation quite.

X: Yeah. No, we don't have that here. But I get the metaphor. Do you have any examples where you would say the European Union has been quite lenient toward Hungary in its approach?

Y: I wouldn't say lenient. I would say that there were instances where they didn't deal with certain issues as part of a larger picture. And the standard example, we always say to this type of question is that when they lowered the mandatory retirement age of judges back in early 2010s. It was, you know, a step against judicial independence, because the mandatory retirement age was lowered from one year to another, basically, which meant that they could basically decapitate the top tier of senior judges because they had to retire. And, of course, then you had the vacancies and there were opportunities to transform how the top tier of the judiciary looked like. And the EU dealt with this issue back then as an age discrimination issue, which is, I think, very telling. It was not about EU values. It was not about rule of law backsliding. I think at that point in time, nobody really used that term yet. But I mean, even though there were a lot of voices saying that what is happening to these judges is part of a larger picture, it's part of a

much bigger endeavour to undermine judicial independence, the Commission still decided to take this on as an age discrimination issue. But, you know, this was a very long time ago. And I think a lot of things happened since then. Also, the Luxembourg Court jurisprudence transformed in a very meaningful way when it comes to rule of law issues. But I think for us, or at least for me personally, that's a very strong memory that you are sitting there and you see that this is an age discrimination issue in their view, which it is, but it's not just that. So I wouldn't say lenient. I think it took a lot of time, not just for EU institutions, but also other EU member states to see what is really happening in Hungary and to kind of understand that behind all the legal changes, there is a systematic and willful demolition of rule of law. So I think that's a telling example.

X: And what do you think the Commission's interpretation or maybe lack of interpretation of that issue comes down to?

Y: I honestly couldn't say. I think it was very early in this story. There is this saying, and if you have been dealing with this issue, I'm sure you came across various studies which analyse how the Commission launches infringement proceedings, for example. There is a very good study by Daniel Kelemen, I think, and other authors, which kind of tries to understand how the Commission decides on launching infringement proceedings. And one saying which I hear often is that the Commission will only launch cases which they are certain they will win. So, you know, I mean, it was a clear age discrimination issue. It was clear in that sense, and you wouldn't have to go into a murky territory of traditional independence and rule of law. And also, it was, as I said, very early in that story, and the Luxembourg Courts jurisprudence was just not there yet. So, the Portuguese judges case, which also I'm sure you came across, you know, happened years after that. So, I think it was, you know, a safety play. So, you are playing it safe. It's that, okay it's kind of clear that it will stand on age discrimination grounds. And also, I think, for a very long time, and maybe this is part of what your question kind of referred to, is that in the early days, I think there was a lot of talk about constructive dialogue with Hungary and also with Poland. That the EU and other member states should engage in a constructive dialogue with Hungary to kind of convince the government to roll back measures which undermined rule of law. And I think, I mean, if you're advocating for constructive dialogue on the one side, then you cannot bring, you know, infringement proceedings. So, in my mind, at least, I'm not sure about this of course, but in my mind, you know, there was an era where they tried to deal with this whole issue of Hungary with much softer or more diplomatic or more dialogue based tools.

X: Would you have any examples where you would say the Commission has taken a more punitive stance towards Hungary?

Y: Again, I wouldn't use the word punitive. And because from where I stand, and I think that's the objective take on it too, is that the only thing the EU and the other member states do is to enforce the EU values Hungary subscribed to when we entered the European Union. And I think here, it's very important to underline that it's not just, you know, the EU, some institutions, somewhere in Brussels, but these are the other member states. So, when there were the decisions about the conditionality mechanism, for example, you know, there are the other member states involved. It's not officers in the Commission, but it's the other member states voting on that. So, I wouldn't say punitive for sure. From my perspective, it's, you know, we joined the club, we accepted the rules, and it was time that we are asked, hello, would you care to respect those rules that you subscribe to? So, you know, the Hungarian government's rhetoric is often that, oh, these are new requirements, and, you know, they ask for more and more every time when we negotiate, and this is not what we subscribed to when we joined. But I truly believe as a (...) that this is not true. I mean, you

look at the founding treaties, it's there black and white. And yes, there is a developing caseload of the Luxembourg Court, for example, and there are new tools et cetera. But it's still a community we are part of, and that community's rules we should accept, and we accepted them already.

X: The Commission decided in December to unfreeze funds for Hungary so they can be claimed again by Hungary. But some MEPs have reacted to this by saying Hungary has not fulfilled its demands, so this shouldn't have happened. What would your perspective on this decision be?

Y: Well, we made this, I think, quite clear. And if you want, you can check on our website again, or related papers, is that we felt that the funds should not have been released, or unfrozen, or whatever the term you want to use at that point. We are talking about judicial independence issues here, and we saw that there were certain requirements set in the EU documents which were just not complied with fully. So we thought that this was a premature decision. And also there were areas, and I don't want to go into the technical details of how court administration works in Hungary, but just to put it very briefly, there is a National Judicial Council, which is the Hungarian judiciary self-governing body, and then there is the National Office for the Judiciary, with the President, who is elected by the Parliament. And one of the core issues, it was not the only one, but one of the core issues when it comes to requirements around judicial independence was that the National Judicial Council, so this body composed of judges, should be strengthened, that it could operate really as a checking balance on the President of the National Office for the Judiciary. And yes, this happened on a legal level. They got a lot of new powers, and their position was really strengthened. But the issue is that for the Commission, it was enough to see these requirements be complied with on paper, in law. But there was no time to see how these work in practice. So there was no time to see whether these can be effectively applied. And I think this was an issue, actually, with a lot of EU requirements related to the various EU funds, that sometimes they just required that a law is adopted and entered into force. But you know, there is a lot after that. How will this work in practice? You have to look at that. So yeah, I mean, I'm not the one working on the judiciary. So I don't think it's good for you if I go into many more details about technicalities. But for example, this was one of the issues, the National Judicial Council. The other issue was the case allocation system at Hungary's highest court. And we documented and reported on that in detail. And so you can find it on our website. (...).

X: So far, are there any lessons you would draw with regard to the EU's capacity in responding to these issues?

Y: I think one message would be that you have to react very early and very swiftly to any sign of rule of law backsliding. Also because if you look at what is happening in Poland right now, and, you know, in that sense, your research is very timely, because you can also see how this can be rolled back. It's not an easy task. And so the reasons for it not being easy, one of them is that, when all areas of public life are permeated by the problems, and when you have problems all around your institutions, then you don't have to just repair, you know, one point, but you have to repair a whole system. Whereas if you catch it at the very early phase, then you can still, you know, the rest of the infrastructure is still kind of intact, and it still can function and help you in this endeavour. But now, I mean, if you're looking at Poland, you can see how difficult the job is, I mean, if you want to do it properly. So I think that would be one of the issues, that you have to react very early and very swiftly. And I'm not sure about this, again, if you're speaking to Commission officials, that's another question for them. But sometimes I felt that it's not enough cooperation or flow of information within the Commission, for example. Or at least that's the impression that I got. I mean you have this tendency in the EU, which is, of course, a huge organisation, that if there is something about the media, then you just look at the media. If there is something about competition, then just look at the competition law

and if it's about something of the judiciary then, you know, and these are dealt with by different stakeholders within the Commission, for example. And then I'm just not sure whether all the information meets at the right point in time, but it's just my impression, so I may be wrong about this.

X: Do you think EU institutions could play a better role in supporting civil society?

Y: It would be, I think, very useful to have a dedicated access points for civil society. That, you know, this is the address where you can write if you have this and that kind of issue which concerns the situation of civil society organisations, for example. So a focal point of some sort I'm sure would be useful. And then you can think about whether this focal point could, you know, serve as a channel to signal that there are attempts to intimidate or harass civil society organisations in member states or stuff like that. So I think this kind of, you know, focal point could serve multiple purposes. Financing-wise, one thing I would think of is that when you look at, and this has been changing recently with the new programme called CERV, I'm sure you came across that. But I think how the EU finances, or supports financially rather, civil society projects is still very project based in the sense that it's not about an institutional support. It's about you producing certain project materials in a very structured and very non-flexible way. So I think that's one of the issues for many civil society organisations that, okay, you get a project fund, but you have to have, I don't know, 10 or 20% on the contribution. So you have to get that money from somewhere else and it's not about, you know, keeping up your office and keeping up your electricity bills. It's about producing project material, which is of course fine, but then you still have to, you know, rent your office from something. So I think that there is an issue there. Especially for smaller organisations which tend to live from project to project. Yes, and what I also see is that strategic litigation or litigation as such is still not financed, as it should be. So you can do research and monitoring and reporting up to a point. But then after a point I think there's a time for litigation and that's also an issue where I think more financing could be beneficial. I think that's the two points I can think of right now.

X: How would you describe or where would you say things stand right now between EU institutions and civil society organisations?

Y: Well, I honestly can't answer that. Sorry, I don't know.

X: Maybe for your organisation specifically, do you think it works quite well or do you think there's room for improvement?

Y: That's not a question I can answer. I don't have an answer to this.

X: Is there anything else you would want to add or you think should be mentioned to what we've discussed so far?

Y: No, I think you had great questions and I'm sorry I couldn't reply to all of them.

Annex 7: Anonymised transcription, Interviewee 10

Role	EU Commission official
Date	11 April 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 10

X: How would you compare the Commission's response to democratic backsliding in Poland and Hungary in general?

Y: You mean compared to each other?

X: Yes.

Y: Okay. So what I would say is the Commission hopefully responds to all member states to what they do, you know, so to basically respond positively of course, first of all. You know, I want to frame this a bit larger. So for example in a lot of areas where milestones need to be met for money to disperse, of course money gets dispersed et cetera, but in the same way we also monitor, we're the guardian of the treaties, the rules. That's our sort of, so to speak, constitutional role in this EU setup. So of course we also monitor what's happening and we do so in the rule of law very prominently. This makes it to the front pages of the newspaper, but of course we also do it for things like cleanliness of beaches and phytosanitary standards and these kinds of things. So yeah I want to kind of normalise this thing a little bit. Of course, the rule of law is special in the sense that has very much to do with the functioning of our democracy and our system in this case, but on the other hand you know if you talk about food safety it's also to do with the functioning of your body. Right? So I always like to sort of try and put this in a context of, you know, this is one of the areas we do. And within the rule of law, what is also really important for us is that of course we monitor all member states. Right? So you will be familiar with the fact that we publish annual rule of law reports on certain areas and having gone through them you will have also noticed that there are precious few angels in the EU. Right? None of us are unfortunately perfect as we know so there are rule of law issues in every single member state and which I hate to say is also pretty normal. Right? What is different is that we as a union including every single member state have committed to strive to continuously improve these areas. Right? So this is the angle from which we are looking at this. It is, I really refute this notion, which you hear a lot and also in your interviews you will hear a lot, that there are sort of some black sheep which need to be taken care of et cetera. There are basically a lot of shades of grey in our sheep group, including also the European institutions themselves, I suspect. So in this context of course there have been specific factors identified in Poland and identified in Hungary. So both of those countries have had encounters, let's say, with several of our tools from the rule of law toolbox, which we like to call it. So both have had article seven issues in the in the treaty, both have had first touches of the conditionality regulation, that is to say the first informal steps, a request for information. I will focus a little bit on the conditionality regulation (...) and basically there under this particular instrument, and the paths departed a little bit, because Poland replied to our concerns, to our questions, where you can imagine such a request for information being essentially a long questionnaire, a quite legal long questionnaire. And they replied back to us in a way that we were convinced that the conditions to deploy a formal first

step under the conditionality regulations were not given, which in itself is a good thing. Because you know this is also important for us. We and, especially, I would say, the (...) Commissioner is not in a position where he's keen to block money. We want to spend money because we want this money to achieve our political goals. Right? So in a way, when we establish that we do not need to trigger this mechanism, this is for us a good thing. Right? So because it suggests that in this from this angle things are working well. Now, in Poland what the important thing is, which is a broader point for this instrument for this conditionality instrument, what we did not establish was that there was a specific link between the clearly existing rule of law issues, there are other tools as I said which have been triggered on Poland because of this, horizontal enabling conditions of the cohesion funding, article 7 and also accesses through to the recovery fund, all of this is triggered for Poland. What sets the conditionality regulation apart is specifically that you need a link between the rule of law issue and specific EU funding and this match we do not have in Poland. Right? We did not establish. So when, you know, I want to give you an example where there is no such match. Right? Because everybody knows in the European political arena that there is this new tool. So of course you know when you have a new hammer a lot of people tell you to use a new hammer. Especially our friends in the Parliament, no specific party or political family meant. But they all said look at what they are doing on abortions. Right? Why don't you use your new tool to block the money? Well, as you know, we have positioned ourselves on this issue and I certainly also personally have views on what happened there. But is there therefore a link to European money to abortions? Thank God there isn't, I would say. But there very clearly isn't so we just simply cannot use this tool for everything that we quote unquote don't like. Right? I hope I'm making myself clear here. So this was the case in Poland. In Hungary we had the experience that we could link specifically the use of EU money to rule of law issues which we found. And again we frustrated some people because the money link is not, in what people might call authoritarian tendencies or you know forbidding this NGO or making this university move or something. The money is in much more, let's say, boring areas, for the newspapers, let's say, such as how public procurement works, such as how you can contest a public procurement decision, how your audit framework works, you know, which are not sort of sexy topics let's say. But that's where we found it and the end result finally when the Commission you know deployed this tool because the link was found led to the blocking of money specifically in those areas. So from my point of view that's where I would describe the difference, not of handling, I think we handled them the same way, but the difference of situation on the ground.

X: Something that has come back in the other interviews is the idea that political considerations play an important role? Would say political considerations play an important role?

Y: Yeah, so my short answer is yes, absolutely. But it's not about trying to link, this is a law. Right? And it says what we can do and what we cannot do. Yeah, you know, this is not a question of sort of creative writing. This is a sort of, there needs to be such a link and I can add from our political situation here, we have this new tool. The new hammer. Right? We have a (...) Commissioner who's very aware that this is specifically a new tool. Right? So if, especially in your first case you go a bit creative and you know you stretch here and there and there all that happens is you will definitely be taken to court at the Court of Justice of the European Union. And the Court of Justice will say: guys, why don't you just read the law and stick to it? You can put your case into the bin and if the first case goes to the bin you can forget about this instrument. So basically, first of all we are bound by what the law says. But secondly, I would say the human consideration behind that, is really the very first one you do not want to mess up. You have to be as classical as possible because otherwise, you know, there are a lot of people out there who wanted this tool to fail. Right? And that would have been a one hundred percent recipe to make this tool fail. As you may be aware, so if

I can just add this, when this entered into force it was voted by qualitative qualified majority. Right? And some people, some member states who felt this law was aimed at them not only voted against this law and were outvoted which is of course their good right. That's a political process, but they also use the opportunity which every member state has after a QMV law is voted to challenge the legality of the law in front of the court. So this law was first of all challenged in Luxembourg at the court. So for saying, basically was challenged for a so-called ultra vires scenario, meaning that the EU has gone beyond the powers that have been bestowed upon it by the treaties. Now they lost this case. Right? In, you know, by probably not entirely coincidence, the two member states challenging separately this law were Hungary and Poland. So, but they lost this case. But only then did we really have a sort of legal certainty that we can go ahead.

X: That kind of ties into to one of my questions about specific criteria to assess severity. But from what you've told me it seems that it's all very based in what the legal texts provide.

Y: Yeah, but that's not a choice. That's our daily bread. That's what we have to do. You cannot just, you know, invent things as you go along.

X: You kind of touched upon it earlier, from certain parliamentary corners there were even studies on why in the case of Poland the conditionality regulation should have been applied. How would you reply to why the Commission in the end did not decide to reply?

Y: Well, like I said earlier we did not feel we had a solid enough link. Right? I would like to underline, hypothetically, how do we, let's start this way. Are there issues of judicial independence and of the judicial system in Poland in the view of the Commission? Definitely. That's why we've got an article 7 issue and we are in contact with our Polish partners to fix this. Right? And this is one hundred percent clear. Now so we never obviously said, there is no issue there. The question is, is it linked to EU money. Right? So you could, and I believe in rough terms some of these studies said this, say, well, if there are issues of judicial independence and theoretically every single EU project, every single Erasmus grant in the world ever could be contested in front of a court in Poland one day. Right? So yes, you could say that therefore there is a link between judicial independence and EU projects going ahead because they could be challenged, any project could be challenged. Now, if that's the case and you say any project could be challenged, any subsidy or grant or farming subsidy could be challenged, then, if you think this through, the consequence is then you just block all EU money going to the country. So, A: we definitely had no intention of doing that and did not feel that the law wanted to do this and B: there's a specific obligation under the law, but also in the Court's judgment about the challenges to deal with proportionality. Right? So this would have been, in our view, manifestly disproportionate. Right? To say theoretically things could end up in front of the court and therefore we block everything. Right? The idea of proportionality is you suppose this is not a punishment tool, this is not a blackmailing tool, this is a tool to protect EU funds. Right? So if there's a specific problem that leads to us not being sure that certain EU funds go where they should go, then we can protect those funds. We can't just sort of arbitrarily switch off the tap, let's say. So that's what I would answer to that.

X: Then another relatively recent piece of criticism, mainly coming from the Parliament again, is related to the unfreezing of the Hungary funds in December. The argument there is that Hungary has not really fulfilled all of its demands and so the funds should not have been made available. How would you respond to that criticism?

Y: So that criticism I would reject one hundred percent. Right? One hundred percent. I can be very clear on that because it is about, and now I'll elaborate a little bit. But the baseline is this is just wrong because we are specific. Right? Under all our different instruments. What happened here is that under the horizontal enabling conditions dealing with this, so this is the set of rules that deals with essentially cohesion funding, regional funding. Right? Under there, there were some specific issues flagged under judicial independence. So what, and this is very important, what we did not do is say, you need to have the most perfectly angelic independent judiciary ever. Right? Because this is essentially, A: impossible to verify and to attain and secondly, it is not specific to achieve. So the Hungarians had a specific list of asks which they were supposed to do and they did exactly that. Right? And part of the rule of law is also our side to stick to their words. Right? They did what they were asked to do and then the corresponding funds were made available for reimbursement. So also, very important for us, these were not then, sort of 10 billion euros that's the summit stake, which were then somehow transferred to Hungary. Right? They were just made available again to be claimed against project bills. And of course, each project, I don't know, whatever, a solar plant or whatever you build, you need to hand in the bill. This gets checked again by us in terms of, you know, has this money been correctly used? And then the money gets reimbursed. Right? You can imagine this, sorry if I'm telling you stuff you already know, but you can imagine it a little bit like going to the doctors in Belgium. Right? You pay up up front yourself and then you hand in the bill to get the money back. That's how cohesion funding works in very simplified terms basically. And this is what they can do now with 10 billion euros. There are other areas under this cohesion funding such as migration and asylum, such as LGBTI rights, what the Hungarian law calls child protection. And then also academic freedom. Right? These are three areas where Hungary did nothing and the money was not free but under judicial independence, the biggest bulk of this money, they did it. So we deliver then also. Right? And on the same day in December there was also an assessment about the other tool, about conditionality where unfortunately Hungary also submitted nothing to solve the issue, so we did nothing there because it's the same. Right? So we had basically five decisions to take conditionality and four areas of cohesion funding. In one area Hungary delivered so they got it liberated all other four remain blocked. That's how we operate.

X: So is that also how the remaining risk that was established at fifty-five percent to the budget? Is that how you came to that percentage?

Y: So this is specifically under the Council's decision for conditionality. Right? So this is not linked to the cohesion funding enabling conditions that I said. This is the money that is found problematic under the conditionality regulation. Right? So under the conditionality regulation for these funds which are blocked, we found that there were issues with public procurement. So how EU funds are being tendered. So you're saying we want to refurbish a bridge, you know, please put in your offers et cetera. So for example what was happening there is that for more than half of the public calls for investments, you know when they put out an advert saying we want to do this bridge up, magically only one company bid, you know. And then for the next bridge another company was the only one to bid et cetera. So that looked a bit, you know, special. Normally there's of course supposed to be competition. Right? Between bidders and there seemed to be very little of that. So we took the three most procurement intensive programs. Right? So, where basically around nine out of ten projects are tendered out and said a good proportion of those needs to be protected because, of course, you will never have a hundred projects which are all corrupt et cetera. So there is a sort of, let's say, within this we had suggested to the Council, we suggest sixty of those or sixty-five I honestly cannot remember now, but you can look that up we said sixty or sixty, anyway, we said something slightly higher. I mean, do we have a mathematical formula in a big basement here to work out if it's sixty or sixty-five? We don't. Right? To be clear on

this. Right? But we said a good part of this money needs to be protected. Right? To essentially protect taxpayers' money and to be, also, let's be fair, a financial incentive with enough power behind it to say look guys you really want to solve this issue. Right? In the Council, this is only ever a Commission proposal under conditionality which goes over this side of the street to go to the Council where they take a qualified majority votes on this. And because Hungary had addressed some of the minor issues we had said, the Council said okay look we follow the Commission in general but we lower the percentage down from sixty to fifty-five or something. But I mean this is not very scientific or something. Either way, this is not going to, in my personal opinion, that's obviously not a Commission opinion, it's not going to change the world spinning around. Now we have a blocking of 6.3 billion, otherwise I think it might have been 7.1 or something. But honestly that is not going to change the world.

X: This relates to something else I heard in another interview related to Hungary fulfilling its demands. One of the criticisms was that, yes, they did it on paper, but in practice, they don't actually execute it the way they should, and that the Commission should consider that. How would you respond to that?

Y: So yeah, that's indeed a point we hear a lot. Right? And especially we heard it around the December decision. Right? And of course in general you know, you always want to see how laws are applied or not. Right? But basically, it's again about the rules. Right? What was asked and what needs to be done. Right? So around the December laws there was a very quick decision after Hungary changed a law and I'll tell you in a sec what the last change was. And we basically immediately afterwards said yeah this is fine. Right? But this is situation specific I have to underline, because basically if you say something like stop discriminating, make sure there are you know, whatever, make sure the percentage of female senior management gets higher or something. Of course, you can't just say when you adopt a strategy, you know, oh you've got a strategy so that's fine. Right? However, in this case one of the last points there were, was that under the judicial independence I'm talking now, which liberated 10 billion there was a point whereby, so, sorry. I'll start again. So just to say, I don't know how familiar you are with this general system. So in general every judicial court in the European Union has the right to directly address Luxembourg to ask for what's called a preliminary ruling. Right? To say here I think I have an issue of European law, can you please tell me how you guys, the experts see this? Any court can go what there was in Hungary was a right to basically, I would informally call this filter such requests. Right? So the highest court in Hungary could tell a local court you're not asking that. Right? And so they had the right to sort of intercept such a request in a way, if you like. All right, that was just a rule they could say unless, you know, the court says don't do this. Right? So they needed to, I'm simplifying, but they basically needed to have the okay to go ahead with a question to Luxembourg. Right? And the law which we had asked Hungary to change, the last one, the one we are qualified about just removed this possibility for the filter. So it just took away the right of the court to do this, so if you see where I'm trying to get is to say this possibility was just struck out it, it just wasn't there anymore. The right was gone. So this is, in the law either it's there or it's not there, it's a black and white thing. It's not a sort of, oh how what percentage of women do we have next year, you know? It's just there or not there. It's black or white. That's why we didn't go for an implementation there. Right? We just said it's gone, it's gone, thank you very much. We waited until it was in the, like, the equivalent of the Moniteur Belge or whatever. And then it was gone. Punto.

X: In what way does the Commission, from your perspective, involve the European Parliament and the Council when making decisions on these rule of law related issues?

Y: Yeah, so basically, first of all there are rules in the conditionality regulation, and also in all the other tools, when we need to inform the Parliament of what. But beyond the minimum rules, I can tell you, so I happen to be the (...) dealing with (...). And basically, the (...) Commissioner very regularly addresses the two responsible committees in the Parliament about this to inform them publicly in a streamed meeting et cetera. But also, there are of course some specialist members of the Parliament to deal with this in a more, you know, regular daily way, not the entire committee. And those, the (...) Commissioner, (...), also sees very regularly, in a small group in a closed room basically to tell them what's going on. And those involve basically all the specialist MEPs, some of whom I'm sure you will have interviewed about this, to see them and to also see them informally. What we do not do and what is not foreseen is to basically consult them in any sort of formal way. No, this is a task for the Commission. So that's an institutional prerogative.

X: And does the Commission also consult civil society organisations of its own accord in this process?

Y: Yeah. So when we say this process, I'm talking now about the conditionality regulation. Yeah, so we certainly, we invite and solicit feedback. Yeah, so there is a general, for example, also a general mailbox where anonymously or under your name, you can fill out and send in a case. By the way, to our great regret, the uptake of this is very poor, really very poor. I mean, you get a lot, you get hundreds of emails of saying, you know, I'm using an example now, one line email saying, you know, I don't know, Orbán is a criminal. So, but of course, this is of complete uselessness for us, you know, to be very blunt. But to have really people right in there and say, okay, we are an organisation or I'm an individual, and I'm aware that this situation here, this case has been influenced in this way and therefore, EU money has been affected here. As far as I'm aware, in all these years, I think we are literally at zero with this sort of whistleblower system, et cetera, to have had input. So it's very nice to have such a tool, but it's unfortunately not being used and not for our failure to advertise it. If you Google it for one second, you will find it. And there's a very simple form to fill in where it's very clear that you can either be anonymous or you can ask to speak to someone with us, but the uptake is poor. But, yeah, for example, we also commissioned some studies, et cetera, about situations, about where we analyse. And by the way, also some MEPs in this case, for example, Mr. Freund at the beginning of this, who I'm sure you're familiar with, is very active on this file. And he invited us and we gladly took this up. He put three professors in this area into a video conference with us to sort of show his point, their point of view about the Hungarian file, et cetera. So, yeah, we absolutely speak to that. We're grateful for input on that.

X: Well, my next two questions are kind of related to you know, the Commission, when they're more lenient or more punitive. But I feel like from what you've said so far it will relate back again to what legally you're allowed to do or you're supposed to do as the Commission.

Y: I think you feel correctly.

X: Well, is there anything you would want to say on those questions?

Y: Yeah, I would like to put the word punitive back in your box, basically, because I mean, this is something really that is very important for us. For us, there is no punitive element on this. Right? There is no pretension and no role for the European Commission to punish any member state. This concept doesn't exist. Right? So it's not our role and it's certainly not our desire. Right? But the angle from which we look at this and from which it's powerful is especially, I'm talking now about this conditionality tool is that it's about budgetary protection. Right? And I would like to give you an example of what I mean by that on the Hungarian case. Right? Because those in the Hungarian government at

the time who tried to, you know, play down the aspect that we had, what is essentially found things that looked like corruption and problems like this. They tried very hard to make this, to conflate this, to bring this together with the Article 7 issues. Right? To say, those crazy woke guys in Brussels, the, you know, woke rainbow, whatever brigade in Brussels has found another tool to sort of. And basically, from literally the Commission president downwards everybody made clear that this issue is not about values or whatever, et cetera. So we obviously also have tools to protect European values, et cetera. But this is not it. This is about how deep pockets are. Right? This is about corruption. And we very much try to keep on the straight and narrow of this. Right? To say, no, this is about where the money goes. Right? And this is and therefore I, you know, I relate back to what I was saying earlier. I think it's really important that we don't somehow stretch it to find a link to, for example, the abortions. Right? It is very important that this message stays clear. This is about there is something in the public administration and the government that is corrupt. It's not about, you know, whether we like who holds hands with whom or something. It's about, is your money being stolen? And that speaks to a very different public to the other issue.

X: Does that relate back to member states trying to say the EU sometimes infringes on their sovereignty in relation to this commitment of upholding democratic values?

Y: And yeah, so this is, for example, this overstepping issue is what I referred to earlier, the so-called ultra vires. Yeah, that's what these court cases were about, about this law. But of course, I wouldn't say member states are saying that. I would say specific governments or members of governments of individual states have said something like that in the past. As you can see in some other member states, you know, the colours also change quite quickly. You know, that's thankfully one of our things of this small thing called democracy, that the weather can change quite quickly for the good or for the bad. But yeah, so, yeah, that's exactly that point. And that's why we sort of in a very boring, you know, and a very focused way, stay within our rules. Because within our rules, we will be as firm as we can be. But as soon as we sort of step out of this rule, which we don't do, we are basically freewheeling. Right? And we will not just be smacked down at court, but we will also lose our credibility. And there is zero percent desire to do that, basically. It's about credibility, but also about fairness.

X: Then we've kind of not really mentioned it yet, but obviously, what the media likes to portray as a legal battle between the Parliament and the Commission, there is a pending case. Where would you say the EU Parliament and the Commission stand right now within the rule of law debate?

Y: Yeah, if you're talking about the legal challenge, about the liberation, the freeing up the 10 billion, I have to say, from my point of view, you know, we obviously take a legal challenge extremely seriously. Don't get me wrong. But these are just issues which are the competence of the Commission. The Commission can definitely demonstrate that we have precisely analysed the situation. We know what we are doing. It is our role to look at this. We asked for specific things from Hungary, and I'm one hundred percent certain that these specific things were done. And more importantly, the College of Commissioners, not just us, is certain that this was done. This is why this decision was taken. You can take, that's a great thing in our free system, you can take whatever you want to court. Right? I would like to point you to the fact that as far as I'm aware, no letter has gone to the court yet. Right? It just hasn't happened. But the great thing is, it's already in the press. Right? And we happen to have elections in a few months. Right? And so everybody knows. I can tell you specifically, my own mother called me and told me, are you being taken to court? Right? And so, who is not, I reassure you, an EU expert. Right? And so basically, the news is out there. And without me wanting to put words in anyone's mouth, but maybe that was the main point of this, arguably, stunt. Right? The

letter, the actual court case has not been filed yet at all. In the same way, three years ago, the Parliament tried to put political pressure and arguably succeeded to put political pressure on the Commission by filing also a lawsuit against the Commission for so-called failure to act. The Commission can be taken to court by, for example, the Parliament for not doing its job. Right? Because we hadn't built a case yet. So let me just tell you from that experience, at some point, when we were ready and we acted, magically the Parliament somehow just very discreetly and very quietly pulled back this case and put it into the bin. Right? So and I wouldn't be a hundred percent surprised if this happened again. But the great news and the action and the decisiveness of the Parliament have been underlined in the meantime. They make more noise about the launching or maybe just announcing of launching a case than about withdrawing a case.

X: Yeah, that's interesting, because, as I said, the idea of the Commission having political considerations is a topic that has come about in other interviews. I don't want to put words in your mouth, but I feel like that can be said for the Parliament as well.

Y: Yeah, well, of course. It can't just be said. It should be said. I mean, that's their job. They are elected on political ballots. That's their job. It's not our job, but their job. It's absolutely legitimate.

X: Then do you think differences between the Commission and Parliament, for example, lead to problems in the EU kind of having a general response to democratic backsliding?

Y: No, I think there will always be differences. Right? There will be and there should be. You know, and the whole point is, you know, I would like to make a broader point. For me, the entire point of this system is where there is a plethora of opinions. You know, you have from the extreme left to the extreme right. Everybody can speak freely in the European Parliament. Right? And that's a great thing. Right? I certainly don't agree with everything the Parliament says. I agree with many things the Parliament says, but not with all of them. And also, crucially, amongst themselves, they don't agree. And we as a Commission and the Parliament, but we all do this in public, in the openness. And the whole point of being a member and member state of the European Union is that we are ready to essentially open our books. Right? We show the others and we let the others, the Commission and others look what our judiciary looks like, how it works. And basically, the price of that is we have peer pressure to sort of sort things out. Right? And I tell you one hundred percent, if Hungary and Poland, in this case, were not in the European Union, you would not be writing this Master's thesis. Right? You would probably not be aware of what the judicial issues are in, I don't know, Moldova or Norway, maybe even. Right? Because they're not part of the cycle. Right? And the reason we are looking, this is positive, we're looking into this and we're aware of it because it creates peer pressure to go for the better. And by the way, what we don't talk about is also, you know, the deterrent effect all of this has. Maybe a lot of people have nice temptations to do slightly sporty things with the judiciary, et cetera. But they think like, yeah, but, you know, they're going to write a report about it. Do I want to be in this company? Probably not. You know, and off we go. So, for example, the last thing to say on this is also the case in Poland. Right? So there was obviously a very prominent change of government in Poland. And one of the top items of the platform election campaign of Mr. Tusk and co was to say, if we get in, Poland will join, on the day one, my first decision will be to sign an application to the European Public Prosecutor's Office. Right? Which, honestly, probably like in Germany, and I suspect possibly like in Ghent, not even ten percent of the public even know that that exists, you know. So, in my family certainly not everybody knows the European Public Prosecutor's Office exists. But there, because this became a public issue, it's suddenly an election winner, which, you know, I mean, it's not bad for an office in Luxembourg.

X: Then to conclude, I want to ask, is there anything else you think should be mentioned to what we've discussed so far that we haven't touched upon?

Y: Not really. No, that's that.

Annex 8: Anonymised transcription, Interviewee 11 & Interviewee 12

Role	EU Commission Officials
Date	22 April 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 11
Z	Interviewee 12

X: Maybe to start generally, what does the relationship with civil society organisations from your department look like?

Y: Yes, so we are in contact with several civil society organisations in the sense that if a civil society organisation considers that there is a violation of fundamental rights in some countries, that may relate to both violation of fundamental rights of others, like of citizens or some minority group and so on, or like a violation of their own fundamental rights, meaning that they are hampered and they are facing increasing difficulties in carrying out their function, including by violating their own fundamental rights, then in this case, they address to the Commission some complaints and then if it comes within the remit of the competences of the Commission, we could act. So for instance, we have acted when there were some national measures that were restricting the possibility for civil society organisations to receive funding from abroad. And in that case basically, the Court at the end decided and it considered that there was a violation of the free movement of capital rules and in that connection also a violation of Article 12 of the Charter on Freedom of Associations. So it goes basically from dialogue and sharing of information on what the situation is on the ground. That could be done in a regular form, like for instance in the preparation of the rule of law cycle there is like a specific moment where civil society organisations collect information about of course all the four pillars or some pillar of the report and provide information about, how is the situation on the ground, including what is the framework for civil society. Which is under pillar 4 on checks and balances, there. And in that connection of course, it's like a structured moment where we receive the information from them. But of course, all over the year, if something happens or if there are like some fears from the civil society organisation of something that is happening in some member states, they reach out to the Commission and then we see what is the situation, we keep it monitored and so on and so forth. So from this way of dialogue with them, in case something is happening, then if there are measures that are implementing EU law of course and then that might consist in a violation of the Charter. Then we do also assess the compatibility with both EU law and the Charter and in that case, we do act if there is something problematic and then we use the infringement instrument which remains one of the strongest tools that the Commission has to tackle these issues.

X: So, in cases where you guys get specific information from civil society organisations, is it also the case that you guys then share that information with other EU departments? For example other people involved in the rule of law report?

Y: It depends, so no, we don't share them with other institutions. But of course, we may share them with other services in the Commission if this is needed. For instance, if there are, as in that case that I mentioned, aspects that are linked to the breaches of the fundamental freedoms, of course this is not something that is dealt with by my DG. And so in that case we work together with the colleagues of other DGs. Then there is always a DG that is the chef de file, we call it. So a DG that is the main responsible and then another DG or more than other DGs that are associated. And it's a bit like depending on the centre of gravity of the violation.

Z: (...). That's how the commission would split these things and then of course you'd have more or less the same legal service people. Because whilst in terms of policy making there are differences because you have the rule of law mechanism which is very, sort of, structured and exact. And we have a much more operationally focused and let's say, informal approach to the (...) side. Not least because the Commission's competence on (...) is sort of different.

X: And can you give an example of what you mean by a more informal approach?

Z: Well, we've been working with the member states for the last ten years gradually evolving what has become a policy, a general policy on democracy within the EU. Based on the hard rights that exist in the treaties for mobile citizens to vote in municipal and European parliamentary elections and then the electoral act and some other rules which concern this. Necessarily, given that it's the competence of member states to organise elections, the way that we approach this is usually through coordination and encouraging member states to honour their international obligations. Obviously, they have to honour their international obligations, but where for instance they receive recommendations from an international standard setting body, we may point to that and say well you should probably do something about that. But mostly it's a question of mutual encouragement. For instance in Covid, we have a network of national authorities that discuss elections, regularly discuss practices and exchange information on elections. And during Covid we exchanged on how you could adapt elections to sanitary conditions. Lots of member states had to, some of them had difficulty with it, others came up with some quite interesting ideas for making them work. I think the ones that had elections near the beginning of the Covid lockdowns had the most difficulties obviously and as we gradually got more experience of it, we were able to help each other. That's the sort of thing that we do. I mean, obviously sometimes we take action where there's a clear violation of either a manifest treaty, right or where there is a let's say related potential violation of broader principles related to elections and democracy.

X: Would you say it's more difficult to take action in an informal way maybe because the Commission's competence is less defined in these areas?

Z: Well it depends, on the one hand it's obviously more difficult to make specific outcomes happen if you cannot force them to happen. But in this sort of area member states tend to be more willing to do things when they don't feel that they're being coerced. Sometimes some member states of course don't want to cooperate, and we have to be careful and circumspect and gradual in most of our approaches. But it also results in a willingness for member states to discuss these matters at quite a high level and has allowed us to take the Council's lead and intervene to legislate. For instance, on political advertising, where member states asked us, we need something, do something there. So it's not entirely, there are advantages and disadvantages.

X: Well it's interesting you said member states are more willing if they're not coerced. Do member states also look at each other, so for example if one member state makes a change that would be seen as progressive from the EU standpoint, does that sometimes cause other member states to follow?

Z: Yes and I'd say that a lot of member states, I mean, sometimes that happens but the other thing that happens is that member states do look at each other and say. But you see this in the rule of law process as well. Member states review their own laws and they say well this seems to be an area for development sometimes in the policy cycle, if they have the right kind of government they might find themselves. And you know, people will take advantage of favourable wins to try and advance in particular issues. The difficulty is always when you have an administration that doesn't want to do something and then finds that becomes a hot button issue with them. Because then it can, you can find that, I mean, member states, what I mean by not being coerced is that member states will get entrenched in positions that they feel they defend as a political reaction to external pressure.

X: But does that sometimes also happen in the opposite direction? For example, the two poster boys have always been Poland and Hungary and people have kind of accused the previous Polish government of modelling itself on Viktor Orbán's government. Do you think it sometimes also happens that if a member state sees, for example, Hungary taking certain measures that go in the opposite way, to follow that?

Z: Yeah I'm not sure that they do that as much as a government might see political advantage gained by another administration and push for the same political narrative. I don't see them aiming to try, I mean there are cases where for instance member states might have tried tweaks to campaign finance laws or something like that, where they might have seen that this was useful in another situation. But usually it's more the narrative than the substantial measure that is of importance in states that like to have a conflict with the Commission.

X: Would you also say civil society organisations are very active in your specific department?

Z: Yeah. Yes, CSOs and NGOs are very active.

X: What does that relationship look like? Is it more you guys wait for NGOs to come to you or do they also get consulted sometimes?

Y: As I said it's a very open type of relationship. So on the one hand if they do see that something is ongoing in the member states they flag this to us. So normally I will say that it is not likely that we are caught by complete surprise with what is happening. Of course the detail and sometimes also the contextualisation of some measures is definitely also provided to us by the civil society organisation that works on the ground. So I would say that in some cases it's them reaching out to us to flag something to us or to provide us with additional information and context information. In some cases of course we do have, as I was saying, a regular meeting with them for instance in the rule of law country visit, kind of, framework and in that case it's us reaching out to them and then asking some specific questions. Then of course for instance when we do have policy documents, for instance, we do have an annual report on the application of the Charter of Fundamental Rights. So we do have some specific moment where we are either issuing policy documents. And of course, when it comes to legislative proposal in particular, those that have an impact on civil society organizations as it has been for instance for the Strategic Laws Against Public Participation Directive, that of course is aimed at protecting journalists and human rights defenders. Or in other cases like the European Cross-Border Association Directive. So when there are legislations that have a clear impact on civil society organisations, then also in this case the Commission proactively reach out to the sector in order to gather their views.

X: Would you say that it's more prevalent for civil societies to take the first step?

Y: No. I mean, we do have obligations to consult. So the general approach is that we always consult for everything that we do, being it policy or being it like the decision-making process. So the consultation it's always done by the

Commission. Then on some specific instance then it might be that we are the recipient of other information outside this structured dialogue moment. But I would say that it's the Commission reaching out first.

X: Because one thing I heard from a civil society member I spoke to in this context, was that they said it wasn't always clear which department or how to make the approach for delivering information and that they also don't always get responses. Is that something you guys notice?

Z: I'm sure that the Commission is rather impenetrable from the outside. But we do our best to make sure that we coordinate when we're responding to particular points. So that if someone contacts our colleagues in the Secretariat-General or in a, let's say, DG Connect or DG Home to discuss something on (...), it will eventually get to us and we'll deal with it. But it's a complex public sector organisation and it's not always immediately obvious where you should go. That is partly their job. The ones whose purpose is to engage with us usually know where they have to go. There can be, let's say, sometimes, it's also because they engage at the political level as well as the technical level. So they might go to, let's say, the cabinet of Commissioner Reynders or Vice President Jourová and they'll talk to them. And they might also need to talk to someone at the technical level. But they might not take that step so they might feel that they haven't got all the answers that they needed. I would generally say that from our side we are always consulting because we have to. But we also invite CSOs to participate in our events. The point is, of course, that you have to be balanced and civil society have a particular, say, watchdog role. We channel our consultations through the proper, for instance, this Have Your Say platform. Because otherwise you could be accused of favouring one over the other, in the same way that we would engage with all political parties in the Parliament.

X: Do you have anything to add to that, Y?

Y: No, no. This is exactly the thing. This is one critique that we receive. But I would say that there are several civil society organisations operating at EU level that perfectly know how to reach out to the Commission and we are more and more providing feedback on the consultations. So, yes, but no, I'd say.

X: Another thing I also heard from two civil society members I talked to was that they sometimes have difficulty with knowing to what extent their input is used and they'd like to have clear vision on that. Is that something you guys have heard?

Y: We do have heard. But I would say that this is indeed what I was trying to tell you, that normally when we do consult with them in particular, when we have targeted consultations with them, we do provide feedback and then the occasion to, you know, at different levels, being it at the political one or the more technical one are simply, you know, provided when is it possible. So sometimes if the decision-making is still ongoing it's simply not possible to disclose what is happening within the institution. But this does not mean that once the decisions are taken, then they are not absolutely shared with the ones that contributed or motivated to those that indeed contributed to that decision making. So, yeah.

X: Do you guys also play a role in coordinating civil societies to other departments?

Y: This is mainly a task for the Secretariat-General. So the entity that within the Commission ensures that there is a dialogue with a civil society organisation is the Secretariat-General. Of course, when each unit is developing or, you know, preparing a legislation or initiatives that contains both policy and legislative measure, of course it's up to that unit to engage with civil society organisations along the rules in the better regulation and so on and so forth. So each DG then has its own stakeholders, let's say. So then of course, we do reach out with the ones that are mainly affected

by what is decided at our level and then every DG has its own. But the centralised approach is a task for the Secretariat-General.

X: In assessing the backsliding from democratic values in specific member states, are there any specific criteria that you guys use or is it more case-to-case?

Z: I think it's more case to case.

X: Does that make it more difficult?

Z: I'm not sure. Sorry. Yeah, the thing is, I think that, as Y was saying, I mean there's a coordinating role in the Sec-Gen forum and there's also, let's say, we also have a horizontal unit. I mean they're more involved in coordinating with other services in the Commission or internationally, but others might be more systematic about these things than we are.

X: Then as this topic's kind of been a highly discussed topic, especially the rule of law backsliding, and others I've spoken to have seemed to suggest that political factors and considerations also play a role in these discussions and in decisions being made. How would you respond to the criticism that political considerations also play a role?

Y: I would say that this is mainly for the rule of law colleagues I think that you have spoken to. But I mean from a more general point of view I mean the tool is not like something that it's not in a context I would say.

Z: Yeah, exactly. And political considerations are always going to play a role in a political organisation. I mean we're not the Parliament but we also have political leadership and they have to choose what to do. And certainly with these subjects the Commission has to choose its battles.

X: The Parliament has now taken Commission to court, also over a specific decision concerning Hungary's funds. Is there anything any opinion you have on that on that decision?

Z: No. No, especially because, you know, the Commission's being taken to court, we couldn't express an opinion over that. I mean, like you can imagine, like, speaking individually, that it's a very big and complicated decision, right? I'm sure that they have to balance quite a lot of things against each other, but there may be a legal reality which comes out.

X: Others have also accused the Parliament of doing this because it's elections. Do you guys notice a shift in parliamentary work when the elections are upcoming?

Y: Honestly, I mean from our side, like, I mean the work continues and what is for us, what changes our way of working is the, you know, renewal of the Commission. So of course in this moment we do prepare for on the one hand, the end of this mandate and then the other one, but this is done at technical levels. So you know, like concluding, what was ongoing and then preparing for the restart. But it's not that much linked with the, you know, political side of it, I would say.

X: Are there any other technical or legal ambiguities that sometimes hinder your work?

Y: No, it's just like for instance, just maybe, you know, to point out that we do work in a strong, you know, cooperation with all the different services. So something that may not be seen clearly from the outside but it's actually how it works, that all these decisions might then being more linked to the financial interest, the protection of the financial

interest of the Union, the work on rule of law, the work on democracy, and of course, the one of fundamental rights, I mean, are really all, they can in close cooperation, by all the services and also under clear supervision of both the legal service that oversees the legal part. And the Secretariat-General, that oversees the other part in order to keep that everything is consistently, you know, made and put forward in order, of course to ensure the equal treatment of all the Member States. And to ensure indeed that yeah, I would say like a consistent approach. So I think that this is like an important point to be made and I don't know if Z has anything to add.

Z: Not to that, not to that. That seems to cover it.

X: And you would say that that consistent cooperative approach within the different departments works well?

Y: I would say so.

Z: Yeah.

X: Is there anything else you guys think should be talked about or mentioned in the context of what we've discussed so far?

Z: No, I'm afraid not.

Annex 9: anonymised transcription, Interviewee 13

Role	Member of European Parliament
Date	30 April 2024
Medium	Online interview via Microsoft Teams
X	Research interviewer
Y	Interviewee 13

X: To start, generally, how would you describe the role of the European Parliament in addressing democratic backsliding within the EU?

Y: Well, I would describe it as immense and very, very useful and maybe also sometimes the only one useful. I mean, it's, of course, in accordance with its competencies and its powers, and the Parliament has no executive competencies, executive powers. So that's the big limit of what the Parliament can do. But in flagging things, in alerting, in running everywhere to say, you know, something must be done, at least the Parliament was there. I think that Parliament fulfilled this role of representatives of the citizens and really being the one that echoes what is happening in member states and listening to civil society, listening to activists, journalists, lawyers, judges, all of those that have seen their conditions degrading because of rule of law backsliding. So I really think that on all of this, the Parliament really managed to be the right place to say things and to say them rightly, and then to put pressure on Commission and Council. And even in actions, I mean, if Council and Commission have been acting, it's most of the time because of the pressure of the Parliament. It would not, neither of these two institutions would have acted in a number of cases if there was not the Parliament putting pressure on it. So it's the triggering of Article 7 on Hungary, it's the pressure about Poland, but it is also the pressure on Slovakia and the situation in Slovakia and Malta when the two deaths of the journalists occurred in 2017. So Ján Kuciak and Daphne Caruana Galizia, all of this is always because of Parliament. And in Hungary, I often recall the fact that the first resolutions in Parliament were already in 2011. So just after Viktor Orbán getting into power and Viktor Orbán making the first constitutional changes, already the Parliament said, you know, wow, something is happening here, even though Fidesz was belonging to the biggest group in the Parliament. And then again, when there were resolutions, another big one in 2013, one every year after 2013, until the triggering of Article 7, and all of that was while Fidesz was in the biggest group in the Parliament. So even in these conditions, Parliament did manage to get something done. And it has also to be said that in the case of EPP, so the right-wing group, some of them were at least courageous enough to accept reading things and listening to things. And even some of them started flagging things. And some of them abstained on the vote of the Article 7 procedure. So they made it possible. Once again, it was their own colleagues in their own group. So I think that all of this has been, yeah, the Parliament has fulfilled its role as representatives of the citizens and fighting for European values, knowing that in the text, it's not the Parliament that is the, how do you say, the guardian of the values, it's the Commission. But then, of course, all of that, as I said, is limited by the fact that there's so much that the Parliament can do. Just to finish, in this term, we managed to get one resolution before the end of the year, before the end of the term on Greece. So this term was a bit more problematic, maybe because, as I said, Victor Orbán comes to power in 2010, the first resolution in parliament in 2011. In Greece, where a number of backsliding have been witnessed these

last two, three years, Mitsotakis is much more protected by EPP and by the President of Parliament, Roberta Metsola. And it was, who has been an ally for rule of law in a number of topics and in a number of cases. But on Greece, it's been difficult to make things heard in the Parliament. So it's the first time that we can feel, and I know by people that have been there much longer than me, like (...), (...) has been saying that it was, it's been much more difficult to talk about Greece than it was about Hungary.

X: Well, yeah, that kind of ties into another MEP I spoke to, who also said that in the past five years, the Parliament has not really taken up an active enough role in these issues. Would you agree or disagree with that?

Y: Sorry, that in these last five years, the Parliament has not been active?

X: Yeah, that they have not been active enough in kind of getting the Commission to act.

Y: No, I would not agree. I really think that there is this problem on Greece, which has been the big taboo of this term and things are being hidden about Greece and we could be much more vocal on other countries. That's for sure. I mean, if there really is someone that is very protected, it's Mitsotakis, the prime minister of Greece. I would say that on this one, but I would not say it on the rest. And I mean, I think that we were relentless on Hungary, relentless on Poland. We really did our best. Maybe we're not enough. That's another question, that there's not enough MEPs involved in that. And I am very concerned about the next term because I'm leaving, (...) is leaving. A number of fighters are leaving. It's not good times for rule of law defenders, for sure. So the next term is not, I'm concerned, but I would not say that this term the Parliament was not active enough. I would just say that we had a clear resistance and taboo on Greece, which was problematic.

X: You said acting might be more difficult in the next Parliament, but let's say that situation continues as now. Is there anything you think that Parliament should do more actively or differently?

Y: No, I think that on Hungary, the Parliament should go on doing what it has been doing. Now, it's really not the fault of Parliament. It's really the fault of Council and Commission, specifically Council, but Commission also not acting on Article 7. On Poland, I think that the Parliament was very active in this term and very listening to civil society. And I would be concerned if they would let this go because the situation is not stabilised. Civil society is not yet being heard enough. On women's rights, very little has been achieved. On the judiciary independence, things are going along, but it needs to get support. On a number of democratic redress, things are not being done yet. So if the Parliament doesn't do its job, there's a risk in Poland. Things will not progress well enough because Commission and Council will be very eager to stop everything. Council will be very eager and it's probably going to happen very quickly. In fact, maybe before even this end of term, that Council will take out the Article 7 procedure on Poland. Commission is probably going to give all the money and take out all the infringement procedure just on the promises, pledges of Donald Tusk, because Donald Tusk wants to give. Its politics. It's normal. It's his job as a leader of the country to say, you know, you must give me a clean page and you must give me a good image because my population must know that everything's fine now. But this is not the job of the Commission and the Council and they should go on asking for the changes to be done in time. And if the Parliament is not there to pressure them, it won't happen. So Parliament has a great role on Poland too, to go on. And then, of course, we have bad developments in Slovakia, very bad developments at the moment in Slovakia. Very bad developments, as I said, in Greece and even Malta. And they need to go on monitoring. So and then once again, if nothing happens for Greece in the next two years, we will see

the situation become so bad that like Hungary, it will be more difficult to come back. So on this, if the Parliament goes on in this taboo, which is a real, there I see a real danger because it was already difficult in this Parliament. So in the next one, if it's a bit weaker on rule of law issues, if it's a bit more with friends of Mitsotakis, more right wing and far right wing, of course, then there's a risk that on Greece nothing happens.

X: Then you mentioned it earlier with regards to the response to Hungary and the article 7 procedure not really getting through the Council, specifically the article 7(2) procedure that is. What efforts have MEPs made to try and convince the Council to apply this procedure?

Y: Well (...). So, yeah, I mean, we did. We were the only ones asking for recommendations. We were the only ones asking for sanctions. We were the only ones saying hearings must be done. I mean, we should be now in a situation where there's systematically hearing at each presidency, so every six months. It's still not the case. A number of presidencies have managed to not do their hearing during that presidency, finding good excuses. And we were always the one requesting the hearing, saying the hearing should be done. And we were the one requesting the Commission. And it was a great disappointment for me that I really thought that during Belgian presidency, recommendations would be done. They would be drafted and voted. Belgian presidency had taken that duty upon and they really worked with the other presidents' firm webs to get there. But then at the end, they were left alone and Commissioner Reynders blocked it. So, yes, I mean, we've been doing everything. I think that we did everything that we could. And there's a moment where we're not just we're just the ones putting pressure, but we can, we don't have anything in our hands. So we just put pressure. But I think that we did everything that was possible. And we even are now saying, you know, we made this big text this autumn on the treaty changes the Parliament would like to see, the most important ones, the most essential treaty changes. And in these most essential treaty changes, we have said that we wanted more powers in the process for the Parliament. And we wanted also hearings to be systematic every six months. So we've tried all the ways that we could institutionally and pressure ways and media, you know, in convincing with arguments. We've tried everything to say you must act more on Article 7.

X: And another heavily reported on topic is the unfreezing of Hungary's funds and the Parliament taking a clear stance and criticising the Commission, though the Commission argued that they just followed procedures. What is your view on this?

Y: It's a long view. I've never been the best supporter of this mechanism. I think it is very useful as a tool complementary to the others. You need to have all of them activated. I never thought it was a miracle tool. And in fact, it's not. So that's my first remark, is that, indeed, it didn't deliver the promises we hoped it would. Because Orbán is now having so much, put enough money in his own pockets that he doesn't really care about his population. So the conditionality mechanism is not that much of a problem for him. Second is that he hopes that the next Parliament and next Commission and next Council will be much less rule of law friendly, much more close to him and much more indulgent with him. So he hopes to, he wanted to wait for the end of the term to get a better situation. So he didn't find that much to have it. And third, it was used in a political way. The report that they did on Hungary to activate the tool was really well done and it was quite surprisingly well done. So that way we were happy. We had the feeling that it would go all well. And then it was stopped for political reasons. And I'm not saying that it's not a difficult situation because, indeed, things were not precise enough. And the ticking of the box is sufficient today in the way that it's drafted for it to be for the funds to be released. And that should not be the case. It should be very clear that funds should be released in a very progressive way, dependent on the implementation of things and not only on the ticking

of the boxes. So, indeed, there were rational reasons to say, you know, they ticked all the boxes, nearly all of them. One of them was not ticked at all. So that was still a very big problem. So there were three sets. The first one is that one of the boxes was not ticked. So that was still an argument not to give the money. Then, indeed, once they were ticked, we have the problem that it could give arguments to give the money. But in fact, then it's badly designed because it should be clear that it's dependent on implementation and not on just ticking the boxes. And then third is that anyway, the very precise day when they did it and the very precise way that they did it with no transparency on the reasons, no good argument, no good report then, clearly made it a political decision that they needed a vote in Council favourable. And so they gave the money in exchange of this vote. The way that it was done was so bluntly, clearly a blackmailing exchange that that is the worst thing about it. It's really bad because it gave the impression that the tool is going to be used in a political way and it discredited the tool. And now it's going to be more difficult to enforce that tool in a credible way.

X: That's interesting, because one of the Commission people I spoke to kind of argued the opposite and that they were careful in using it because if they went overboard, then the tool would be challenged and in court and then they wouldn't be able to use it in the future. How would you respond to that?

Y: That's very bizarre they told you. Because it was challenged in court and they lost. So I really don't get what Commission was meaning. The tool itself is now completely validated. It was challenged in court. They didn't act until it was in fact clearly validated in court, legitimatised in court. So I really don't get this. It is very clear. Now, what they could say, but I don't understand then what they said, what they could say is if once again, by the fact that it's not designed in a way where it's very clear that we need implementation, they were maybe indeed under pressure because of the ticking of the boxes nearly completely done. So it was becoming difficult for them to keep the money. If Hungary, government of Hungary had ticked the last box, which is the clarity on the allocation of cases in judiciary, this one was still not clear. So today, still, we don't know how cases are allocated to judges in Hungary. And they were supposed to clarify that. And that's the thing that is still not clarified. So until that was not clarified anyway, there was no reason to give the money. But if that box was ticked, yes, they were coming into under pressure. But once again, they did it before. And, but the worst, once again, is exactly that they did it in the very day that it was clear that it was to have, the weekend after, the vote they needed. And that really gave a very bad image.

X: Yeah, so something that has come up in most of the interviews is the political aspect of decision-making. Obviously, the Commission is a political body. That's not a secret. Parliament is also made up of politicians. So to me, this is not a surprise. But how important would you say the political considerations are in the decision-making process specifically?

Y: I would say a third. A third is institutional rigidity, which is very normal. Difficulty of the institutions to go after member states. Difficulty of a member of a Commission and Council to act on tools. They have tools, but then it's slow and they don't know how to use them. And so a third of it is really institutional weakness, rigidity that you could maybe find normal. I would like it to be less there, but yeah. A third of it is really, really, really cowardice. And this cowardice is a people problem. And it's not always a political strategy or political calculation that it's, they want to become friends with Orbán or friends with whoever we saw. That's not even that. Sometimes a third of it is just plain cowardice. Who am I to act? I'm just a Commissioner, I'm just a DG in Commission, I'm just a member of Parliament, I'm just a member of state. I mean, they are very good, these member states, to say lovely things, but to act, they are very coward when it comes to European Union level, because they feel that they are all equal. And if they get into a

fight with other member states, it's going to be very difficult. So you have a general cowardice, political cowardice that you always have in life, and has always, I mean, as has always been there and sometimes comes to the worst. And that's why we have very bad episodes in history, because people didn't act in time. And most of the time is just, yes, plain cowardice. It's not a calculation. But then you have a third of it that is clear political decision. I want to protect my friend. Orbán is too powerful or I need this vote in the next announcement, so I'm going to give Orbán what he wants, because we really need that vote. I mean, Ukraine, of course, was in everyone's mind. So there was a lot of political calculations, sometimes with good intentions, sometimes with really bad intentions. But I would say that's a third of it. When the institutions are not capable, it's not just because they are mean and they make a calculation. It's often a lot of other reasons, as I said, passivity, rigidity, cowardice. But from time to time, it's clear that there is a political reason behind it.

X: Then do you think that these differences between Commission, Parliament and Council lead to problems in the EU having a general response to democratic backsliding?

Y: Oh, yeah, of course. Yeah, of course. I mean, I think that today we have we are facing this very specific moment where the maturity of the system, of this democracy, this is a very mature democracy. And it's not abnormal. I mean, it's a very young democracy and it's a very complicated one. It's not a fulfilled one. It's a mix of a bit of federalism, a bit of a neighbouring of national member states, someone doing whatever they want and a mix of goodwill of people. So it's still not, I mean, institutionally, there are problems like the unanimity and a number of other things. But there's also the mental immaturity that people still don't feel a leader of a member state is today 90 percent devoted to his member state and only 10 percent devoted to European Union. That's the state of mind, which is normal, because for the moment, these people, they feel that they are the leaders of Netherlands, the leaders of France, the leaders of Germany. They're not there to save the other members of the European Parliament. Very little people feel that European feeling. So all of this creates immaturity, symbolically, diplomatically in the minds and in the very way the institutions are made. So all of this is immature. And this immaturity was not that difficult until we were confronted to very bad problems because it was frustrating. Federalist people were always frustrated that some decision would take a long time and we would not advance quickly enough on this and this and this. And we would also be able to imagine already the problems. I mean, Verhofstadt has been saying for years, you know, if one day there's a war, how will we react if we're not united and we don't talk in one voice? Yes, now there's a war and we can see the problems. So federalists have always been previewing what the challenges would be. But now we are confronted to it. It's not just frustration. It's not just us imagining problems and oh, how will we do? We're facing them. And the immaturity of the system is not helping us to react in a good way. So, yes, it has a very big influence on how European Union today is not responsive enough. On democratic backsliding, on how to act against Russia, on how to incorporate for the future the Western Balkans and Ukraine. All of this is, we are getting to that point where we see the problem also. And on some things like consumption protection, market issues, some regulation, even climate change, the fact that the tools are there and they are efficient, the fact that it's very clear that there's a European competence and the fact that now member states do think in a European, everyone, not only member states, everyone in Commission, Council, Parliament, in the countries think more European than they think national. I don't know, on a number of commercial things, people will think European much more than national today. That means that it is responsive on this topic, very efficient, but it's not on democratic backsliding, on diplomacy, on foreign affairs and all of this.

X: And obviously, it's also been reported that the Parliament is taking the Commission to court. I'm actually not sure, the court case itself, has it been started yet or not?

Y: No, I don't think so. We voted this in half April, and I don't think the Parliament has been already active on it.

X: I thought so. But either way, in light of this, where would you say that the EU Parliament and Commission stand right now in this rule of law debate?

Y: What do you mean, sorry?

X: So, I mean, the relationship between the Commission and the Parliament, how would you describe it right now?

Y: We're in a frozen moment, so it's difficult to say. Members of Commission, a number of Commissioners involved are leaving. All of them. Jourová, Reynders, Hahn on the budget. So, you know, the, yeah, members of Parliament were busy with the campaign and their own elections. It's a frozen moment, so it's difficult to know. And I think everyone is, it's not like other terms where, you never know what to expect completely from elections, but you have a clear vision of basically it's going to be the same. There will maybe be a difference there and difference there, but there will be no big changes. And there's a bit of mystery about names casting things, but that's it. For the first time, I think everyone is a bit paralysed by the fact that we really don't know what this Parliament will look like, what the state of the member states would look like. So even the Commission, a number of national elections are at the same time as the European ones. I mean, all of this is going to, there's a real wonder about what the next EU will look like and what the institutions will look like. And depending on how the institutions, people are going to act in very different ways. So I think that at the moment we're in a frozen moment where nothing is really happening on both sides. And everyone is going to see after the election, you know where to put the pressure, where to fight. As I said, I mean I can see easily maybe people not doing anything about Greece even in Parliament, thinking we have enough to do with other countries, so okay, we'll not take care of Greece. I don't think the pressure on Hungary is going to stop. But maybe this will be the only one. Maybe Hungary is going to be forever the black sheep that it's very comfortable and easy for everyone to fight about. And that allows to not look at the others.

X: Have there been any discussions on further instruments? For example, the latest one is the conditionality regulation. Are there any further instruments being developed or discussions on this?

Y: No, I mean, I don't think so. And I really would not encourage it. I mean, we have enough tools. We need to use those that we have. Of course then you have improvement. The conditionality mechanism needs to be improved. I think everyone thinks that. The report of the rule of law report each year of the Commission needs to be improved. It has been very much improved all these years, but it needs to go on being improved. It cannot be one page for each country. Some countries need three pages and some countries maybe need half a page. This sort of automatic, equality, equity about everyone because the Commission wanted to look very, you know, fair, it has no sense. Today we have countries going much, there's problems in some countries much more than in others. Article 7 procedure really, really, really needs to be improved. So I think that it's very clear for everyone that now we've fulfilled the circle of tools. They're all there. The puzzle is, all the pieces of the puzzles are there, but now they're not fitting well because they need to be improved. So I think that's more the consideration of everyone and it's very clearly mine.

X: Then I want to ask: is there anything else you want to add to what we've discussed so far or you think should be mentioned?

Y: No, I'm fine. Yeah. I think you've got a lot already to work with.