



**Stanford – Vienna
Transatlantic Technology Law Forum**

A joint initiative of
Stanford Law School and the University of Vienna School of Law



European Union Law Working Papers

No. 78

**Can the European Union Effectively Protect
the Rule of Law in its Member States?:
Evaluating Enforcement Tools in the
Context of Poland and Hungary**

Matthew Wigler

2023

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share “works in progress”. The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at <http://tlf.stanford.edu>.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law’s LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at:

Stanford-Vienna Transatlantic Technology Law Forum
<http://tlf.stanford.edu>

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Matthew Wigler holds a MSc in International Politics from Trinity College Dublin, where he was a George J. Mitchell Scholar, and a BA in Political Science from Stanford University, where he earned CISAC Honors in International Security. He is currently completing a JD at Stanford Law School and an LLM in European and International Business Law at the University of Vienna. Wigler previously taught Politics and English at Eton College in the United Kingdom as an Annenberg Fellow and interned for the U.S. Department of State at the U.S. Mission to the United Nations. He is a Member Editor on the *Stanford Journal of International Law* and a Jean Monnet EU Law Research Fellow. He is from Long Island, New York.

General Note about the Content

The opinions expressed in this student paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum, or any of TTLF's partner institutions, or the other sponsors of this research project.

Suggested Citation

This European Union Law Working Paper should be cited as:
Matthew Wigler, Can the European Union Effectively Protect the Rule of Law in its Member States? Evaluating Enforcement Tools in the Context of Poland and Hungary, Stanford-Vienna European Union Law Working Paper No. 78, <http://tlf.stanford.edu>.

Copyright

© 2023 Matthew Wigler

Abstract

The rule of law is one of the core values of the European Union – without it, the Common Market would cease to function. However, the principle has been all but eviscerated in the Member States of Hungary and Poland, where it has fallen under assault by their governments. In the face of this challenge, the European Union has attempted to use several tools to protect one of its most hallowed principles, with varying degrees of success. This paper evaluates the effectiveness of some of these tools in the context of the recent struggle between Brussels on the one hand and Budapest and Warsaw on the other. Namely, it explores the impact of Article 7 sanctions, infringement proceedings, and the new tool of rule of law conditionality. It concludes that while Article 7 sanctions have been a disappointing failure and infringement proceedings a mixed bag, rule of law conditionality has been the most effective tool thus far, though it too has important shortfalls. Consequently, this paper urges that to defend the rule of law in Member States both now and in the future, the European Union must innovate to create new tools and enhance existing ones so it can more effectively rein in attacks on this essential principle.

Table of Contents

I. Introduction.....	1
II. Article 7: The Nuclear Weapon that Wasn't.....	6
III. Infringement Proceedings: A Mixed Bag.....	13
IV. Rule of Law Conditionality: The Most Effective Method - But Not Enough.....	20
V. Conclusion: The Need for New and Enhanced Tools.....	28

I. Introduction

The rule of law is nothing short of a foundational organizing principle of the European Union, as essential to it as the twelve gold stars emblazoned on its flag. The Treaty on the European Union (hereafter ‘the TEU’) evokes “the rule of law” twice in its preamble alone, with the signatories “confirming their attachment” to the principle and citing it as a “universal value” from which they “[draw] inspiration.”¹ Article 2 TEU enshrines “the rule of law” as one the core values upon which “the Union is founded,” proclaiming it as “common to the Member States,” at least “in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.”² Article 21 TEU identifies “the rule of law” as a “principle which has inspired [the Union’s] own creation, development and enlargement and which it seeks to advance in the wider world,” guiding its “action on the international scene.”³ “The Union shall define and pursue common policies and actions,” Article 21 TEU decrees, to “consolidate and support . . . the rule of law” amongst other key values.⁴

Indeed, on a practical level, the European Union could not work without a universal commitment to the rule of law across its Member States. As Professor Christophe Hillion stresses, “Rule of Law deficiencies potentially disrupt the very functioning of the Union legal order, based as it is on mutual legal interdependence and mutual trust among its members.”⁵

Yet, despite the dedication evinced by exalting language in the Union’s primary law and its importance to the Union’s legal order, the universality of commitment to rule of law in the European Union has since come under threat. Indeed, the rule of law can now hardly be claimed

¹ Treaty on the European Union preamble.

² *Id.* art. 2.

³ *Id.* art 21.

⁴ *Id.*

⁵ Christophe Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, 59, 61 (Carlos Closa & Dmitry Kochenov, eds., 2016).

to be common amongst all Member States. While rule of law has been undermined by governments in Member States as varied as Romania and Italy, no assault has matched that of Hungary and Poland's autocratically inclined governments, which have effectively eviscerated the rule of law in their countries.

In its 2022 Rule of Law Index, the World Justice Project, which annually measures the strength of the rule of law across 140 countries, bestowed Hungary with the lowest score across the whole of the European Union.⁶ Indeed, Hungary's rule of law score has declined every year since 2015 and is below the global average.⁷

Viktor Orban, Hungary's Prime Minister and the leader of the country's ruling Fidesz Party, has systematically dismantled the independence of the country's judiciary since 2010. In its 2022 Rule of Law Report on Hungary, the European Commission highlights "challenges faced by the independent National Judicial Council in counter-balancing the powers of the President of the National Office for the Judiciary, the rules on electing the President of the Supreme Court, and the possibility of discretionary decisions as regards judicial appointments and promotions, case allocation, [and] bonuses to judges" as key causes for concerns.⁸ The Commission also highlights the deprivation of judicial independence to deal with corruption as a rule of law issue. "The lack of judicial review of decisions not to investigate and prosecute corruption remains a cause of concern . . . in an environment where risks of clientelism, favouritism, and nepotism in high-level public administration remain unaddressed."⁹

⁶ *WJP Rule of Law Index: Hungary Overall Score, 2022*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2022/Hungary/> (last visited Apr. 7, 2023).

⁷ *Id.*

⁸ EUROPEAN COMMISSION, *2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Hungary*, at 1 (July 13, 2022), https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf.

⁹ *Id.*

Orban has used emergency powers first granted during the COVID-19 pandemic and now extended to undermine the rule of law and subvert the judiciary. While Hungary's Parliament ended the COVID-19 state of emergency in June 2022, after using it "to regulate matters unrelated to the COVID-19 pandemic," it did so only having adopted the Tenth Amendment the month before, allowing the Government to assume extraordinary powers whenever it declares a state of danger.¹⁰ The Commission notes that Hungary's government has "used its emergency powers to overrule judicial decisions."¹¹ In fact, a new 'state of danger' was declared in May 2022 related to Russia's invasion of Ukraine.¹²

Since winning power in 2015, the Law and Justice Party, headed by party boss Jaroslaw Kaczynski, has taken steps to assert its political control over Poland's judiciary, undermining the rule of law. Zbigniew Ziobro, Poland's Minister of Justice since 2016, has suppressed judicial independence in his role combining the power of not only the nominating authority of Poland's judges, but the chief prosecutor and disciplinary authority of Poland's judges too.¹³

The 2022 European Union Justice Scoreboard continued an undesirable streak for Poland as perceived judicial independence in the country declined among the general public and companies for the seventh straight year in a row.¹⁴ According to the European Commission's 2022 Rule of Law Report for Poland, only a dismally low 24% of the Polish general public and 19% of Polish companies currently believe that the level of independence of courts and judges is either 'fairly good' or 'very good.'¹⁵ As the Report explains, "the main reason cited . . . for the

¹⁰ *Id.* at 25.

¹¹ *Id.*

¹² *Id.*

¹³ Zerofsky, *Poland's War on Two Fronts*, N.Y. TIMES (April 4, 2023),

<https://www.nytimes.com/2023/04/04/magazine/poland-eu-ukraine-war.html>

¹⁴ EUROPEAN COMMISSION, *2022 Rule of Law Report, Country Chapter on the Rule of Law Situation in Poland*, at 3 (July 13, 2022), https://commission.europa.eu/system/files/2022-07/48_1_194008_coun_chap_poland_en.pdf.

¹⁵ *Id.*

perceived lack of independence of courts and judges is the perception of interference or pressure from the Government and politicians.”¹⁶

The Commission’s 2022 Rule of Law Report expresses “serious concerns related to the independence of the National Council for the Judiciary.”¹⁷ Constitutionally designed to safeguard judicial independence, the National Council for the Judiciary has come under scrutiny for the method of appointment of judge-members as well as the premature ejection of its previously appointed members in 2018.¹⁸ The politicized Council has called on Poland’s Prosecutor-General to take action against judges based on the content of their ruling rather than actual wrongdoing.¹⁹ Consequently, the European Network of Councils for the Judiciary voted to expel Poland’s NCJ from the organization in October 2021 after determining that it lacked sufficient independence itself.²⁰

The judicial disciplinary chamber created by the Law and Justice Party has been a primary focus of concern for those raising the alarm on declining rule of law in Poland. The judicial disciplinary chamber has the capacity to remove judges who stood in the way of the its platform and consolidation of power.²¹ As Michal Wawrykiewicz, co-founder of Poland’s Free Courts Initiative (‘Wolne Sady’), a leading rule of law advocacy group in Polish civil society, describes, “the inquisition chamber is fully staffed by people very close to government whose job is to repress judges.”²² In a July 2021 ruling, the European Court of Human Rights ruled that

¹⁶ *Id.*

¹⁷ *Id.* at 1.

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ Piotr Maciej Kaczynski, *European Association of Judges ENCJ Expels Poland’s National Judicial Council*, EURACITY (Oct. 28, 2021), https://www.euractiv.com/section/politics/short_news/european-association-of-judges-encj-expels-polands-national-judicial-council-krs/

²¹ William Schwartz, *Protecting the Rule of Law in Hungary and Poland*, WILSON CENTER (Nov. 7, 2022), <https://www.wilsoncenter.org/article/protecting-rule-law-hungary-and-poland>

²² Wawrykiewicz, *supra* note 22.

the procedure for appointing judges to the Disciplinary Chamber represented a fundamental irregularity compromising its legitimacy as a tribunal inconsistent with rule of law.²³

These flagrant violations of the principle of rule of law beg the important question of what the European Union has done to defend the bedrock principle against attacks within its Member States. As Professor Hillion notes, the rule of law is not only “among the founding *values* of the Union” but is also featured in EU primary law “as an *objective* that EU institutions are specifically mandated to pursue.”²⁴

Indeed, the European Union has not slept on these challenges to one of its core precepts. As rule of law has declined in Hungary and Poland, the Union has attempted to deploy the full range of tools in its institutional arsenal to restore it. These efforts have ranged from Article 7 invocations and infringement proceedings resulting in rulings from the European Court of Justice to financial penalties against their governments. Each instrument has been met with varied levels of success in restoring the rule of law to the people of Hungary and Poland.

The key question is whether, together, these instruments are fit for the challenging task that the European Union confronts protecting the rule of law in its Member States now and in the future. Thus, this paper aims to evaluate the effectiveness of the European Union’s equipment to protect the rule of law in its Member States through the lens of how each of its key tools have fared when put to the test in the context of Hungary and Poland’s ongoing crises.

Of course, given that the situations in both countries remain fluid and ever-changing, it is impossible to place a definitive period after any conclusion. There remains the possibility that a headline tomorrow can upend this analysis. Nevertheless, based on several years of empirical

²³ EUROPEAN COMMISSION, *supra* note 14, at 7 - 8.

²⁴ Christophe Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, *supra* note 5, at 61.

evidence deriving from the tug-of-war over the rule of law between Hungary and Poland's governments on one side of the rope and the European Union on the other, it is possible to draw relevant insights about the relative strength and weakness of various maneuvers the Union has employed in its struggle to win the crucial contest.

Consequently, based on observations from the European Union's efforts in Hungary and Poland, this paper argues that while Article 7 has been a woefully ineffective guarantor of the rule of law and infringement proceedings have produced only an unsatisfying mixed bag of results, the European Union's new tool of rule of law conditionality has been the most promising and effective so far. However, new and enhanced tools are still necessary to empower the European Union to effectively protect the rule of law in Member States and make good of the vision laid out in the TEU.

II. Article 7: The Nuclear Weapon that Wasn't

In Poland, the saying 'raz na Ruski rok' or 'once in a Russian year,' refers to something that never actually happens. As it is currently formulated, the overly limited Article 7 TEU has been useful in curtailing breaches of the rule of law 'once in a Russian year' – which is to, it has not been very useful at all. As Michal Wawrykiewicz opines, Article 7 "was supposed to be a very serious tool – a nuclear weapon – but it is totally ineffective."²⁵ Much like a nuclear weapon, Article 7 was meant to protect the Article 2 principles of the European Union – including rule of law – within Member States by threatening those that might fail to comply with curtailment of their rights as members. However, due to its highly demanding structure, Article 7 has not only fell short of deterring Member States from shirking their commitment to the rule of law, but has been impossible to put in effect to sanction such violations altogether.

²⁵ Wawrykiewicz, *supra* note 22.

Article 7(2) TEU creates a burdensome sanctioning procedure whereby “the existence of a serious and persistent breach by a Member State of the values referred to in Article 2” – which include, of course, the rule of law – can result in a decision “to suspend certain of the rights deriving from the application of the Treaties to the Member State in question,” including voting rights on the Council.²⁶ Upon a proposal by the European Commission or one-third of Member States, with the support of at least two-thirds of the European Parliament, the Council may vote to implement Article 7 sanctions.²⁷ Such sanctions can include suspending the voting rights of Member States in the Council.²⁸ While the Member State in question may not participate in the vote, all other Member States must unanimously support the decision.²⁹ Sanctions can be revoked and the full membership rights of Member States restored by the lower threshold of a qualified majority.³⁰

In addition to a sanctioning mechanism, Article 7 includes a preventive mechanism under Article 7(1). On the proposal of either one-third of Member States, the European Parliament, or the Commission, the Council can vote, by a four-fifths majority with the consent of Parliament, to identify a “clear risk of a serious breach” of Article 2 principles like rule of law.³¹

On paper, this mechanism appears to empower the Union with its most powerful tool in support of the rule of law. The threat of invoking Article 7 sanctions alone should theoretically be sufficient to prevent Member States from attempting to dismantle the rule of law, to say nothing of the reality of facing them. What Member State would dare risking its membership rights in the Union?

²⁶ Treaty on the European Union art. 7.

²⁷ Wojciech Sadurski, *Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jorg Hairder*, 16 COLUM. J. EUR. L. 385, 388 - 89 (2010).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Yet, Article 7 has proved no potent deterrent against Hungary and Poland as the rule of law has lapsed in each state. Why? Because of the highly restrictive protocols that govern Article 7's use, would-be violators of the rule of law can rely on one another to evade suspensions more effectively than the Union can rely on it to prevent breaches. Here, the emergency hatchet is hidden behind a glass barrier too strong to break even when necessary. The red button of this 'nuclear weapon' cannot be reached.

Much of Article 7's fatal weakness derives from its origin story as a compromise intentionally designed for difficulty. The story of Article 7 begins with the contentious Reflection Group established by the European Council at the 1994 Corfu Summit, which suggested "a provision allowing for the possibility of sanctions or even suspending Union membership in the case of any state seriously violating human rights and democracy."³² As Wojciech Sadurski argues, the expansion of the Union eastward raised concerns that such a provision was necessary, as future violation seemed possible "in countries whose very recent past had been marred by massive and systemic violations of human rights and undemocratic political systems."³³ This fear is conveyed by its report's language that a provision like this was necessary "above all in the run-up to enlargement."³⁴ When the Union was composed of mostly Western European states that believed in the inherent strength of each other's democracies to protect rule of law, such a provision felt unnecessary to many.³⁵ In fact, even when the Reflection Group delivered its report, some Member States were still skeptical, believing that the protection of core values was "already thoroughly dealt with internally by Member States,"

³² COUNC. EUR., Reflection Group's Report, pt. I (Dec. 1995).

³³ Sadurski, *supra* note 27, at 386.

³⁴ *Id.* at 392.

³⁵ *Id.*

making them reluctant to develop the idea.³⁶ Consequently, while the Reflection Group discussed the idea of expulsion as the ultimate sanction for violations of Treaty principles, such talk was shut down by Member States who thought it went too far and was unlikely to be necessary.³⁷

The proposed sanctions mechanism was watered down to be less stringent until it was eventually adopted in the 1997 Treaty of Amsterdam. At the 1996 IGC, Austria and Italy arrived with a joint proposal for a sanctions mechanism much broader than Article 7(2) would eventually become. Critically, under the path not taken here, the Austrian-Italian proposal would have imposed sanctions via a qualified majority rather than requiring unanimity on the Council as Article 7 does.³⁸ However, fearing that a sanctions mechanism like that would be too easily triggered, Member States modified the proposal to require the unanimity that would become the key feature of Article 7(2).³⁹

Of course, this threshold lacks the imagination that more than one Member States at a time might turn away from core Article 2 values and that these States might shield one another from the consequences of their respective breaches. Withholding support for the suspension of the other's membership rights, two Member States acting in concert can thwart the Article 7 mechanism, continuing to enjoy the benefits of full Union membership while abrogating the values of the Union with impunity. Indeed, the governments of Poland and Hungary have cooperated successfully in exactly such a strategy, undermining the effectiveness of Article 7.

With sanctions procedure under Article 7 so purposefully difficult to pull off, crises of commitment to Article 2 values in Member States would lead to its further supplementation with the preventive mechanism now anchored in Article 7(1). As Sadurski argues, the Union's

³⁶ *Id.* at 390.

³⁷ *Id.*

³⁸ *Id.* at 393.

³⁹ *Id.*

decision to add preventive measures in the Treaty of Nice was largely (though not exclusively) “triggered by the inclusion of an extreme right-wing political party” in Austria’s governing coalition in the so-called ‘Haider Affair’ – an irony, to be sure, given that Austria had originally proposed the stronger sanctions procedure not long before Haider’s Freedom Party joined the government coalition in Vienna in 2000.⁴⁰ The Haider Affair encouraged the creation of an intermediate step in anticipation of a breach that could be used to deter threats to Article 2 values without impinging on states by invoking sanctions.

However, the addition of the Article 7(1) preventive mechanism effectively functioned as an acknowledgment of the impracticability of the sanctions mechanism designed earlier, as the sanctions became known as a paper dragon. Designed as a powerful wrist slap to supplement impossible sanctions, Article 7(1) would prove just about as strong a deterrent as Article 7(2), as recent outcomes in Hungary and Poland amply demonstrate.

Without the possibility of successful enactment of Article 7(2) against them, the initiation of the Article 7(1) process has been ineffective in deterring the governments of either Hungary or Poland from continuing to wage attacks on the rule of law.

In 2018, the European Parliament took the unprecedented step of voting to initiate the Article 7(1) procedure against Hungary, the first time Parliament has ever called on the Council to act against a Member State in this fashion, doing so with an overwhelming majority eclipsing two-thirds of the chamber.⁴¹ In opening the preventive phase of the Article 7 procedure, the Parliament’s key concerns explicitly included “the independence of the judiciary.”⁴²

⁴⁰ *Id.* at 387.

⁴¹ European Parliament Press Release, Rule of Law in Hungary: Parliament Calls on the EU to Act (Sept. 12, 2018), <https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act>

⁴² *Id.*

However, Orbán's government has been unphased by the preventive phase of the Article 7 process and not changed its behavior in response. As the European Commission's 2022 Rule of Law Report on Hungary conceded in its very first sentence four years after the preventive procedure was opened, "as regards judicial independence, concerns expressed in the context of the Article 7(1) TEU procedure initiated by the European Parliament . . . remain unaddressed."⁴³

Rather than seek to remedy the rule of law situation in earnest, Hungary launched a frivolous legal action contending that the vote to trigger the Article 7(1) procedure against it was improperly counted and "seriously infringed" on Treaty provisions and the Parliament's rules.⁴⁴ The Court of Justice of the European Union dismissed Case C-650/18 in June 2021.⁴⁵

Poland too is facing an Article 7(1) procedure for its own breaches of the rule of law. Proceedings against Warsaw were launched by the European Commission in December 2017 in relation to thirteen judicial reforms passed by the Law and Justice that it derided for eliminating separation of powers "as the country's judiciary is now under the political control of the ruling majority."⁴⁶ Yet, rather than take the initiation of proceedings seriously and attempt to mollify the concerns that brought on preventive action, Warsaw doubled down. Justice Minister Ziobro defiantly responded to the Commission's move by stating Poland "must continue the [judicial] reforms."⁴⁷ Naturally, Hungary's government responded in kind to its partner's condemnation, casting asstance on the measure and promising to "defend" Warsaw against any actions.⁴⁸

⁴³ EUROPEAN COMMISSION, *supra* note 8, at 1.

⁴⁴ Maia de la Baume & Lili Bayer, *EU's Top Court Rejects Hungary's Bid to Halt Punishment Proceedings*, POLITICO (June 3, 2021), <https://www.politico.eu/article/ecj-ruling-hungary-rule-of-law-article-7/>

⁴⁵ Case C-650/18, Hungary v. Parliament, 2021 ECLI:EU:C:2021:426. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0650&from=en>

⁴⁶ DEUTSCHE WELLE NEWS, *EU Triggers Article 7 Against Poland* (Dec. 20, 2017).

<https://www.dw.com/en/european-commission-triggers-article-7-against-poland/a-41873962>

⁴⁷ *Id.*

⁴⁸ *Id.*

These Sisyphean Article 7(1) procedures have been demoralizing and undermined the mechanism's value as a deterrent. Martin Michelot at the Institute for European Policy opines that the proceedings against Hungary and Poland “highlight the inability of Article 7 to correct potential deviations from rule of law in Member States.”⁴⁹ So scant is the progress that in May 2022, the European Parliament found it necessary to pass a follow-up resolution (2022/2647) expressing its dissatisfaction with the progress of rule of law procedures against Poland and Hungary under Article 7(1) TEU, calling on the Council to take more concrete steps forward.⁵⁰

With a struggle over Article 7(1), in this context, it should come as no surprise that Article 7(2) has never successfully been invoked. Poland and Hungary currently shield one another in a political pact from ever facing suspension of rights under Article 7(2). Given the likelihood that when autocratic impulses contrary to the rule of law take root in any one Member State, they tend also to simultaneously infect more than one polity within the broader political landscape of the Union, it seems doubtful that in moments of peril when Article 7 is most needed it can truly be relied on. Michal Wawrykiewicz puts it this way: “blocking voting rights would be incredibly important – but we cannot use Article 7 right now because we need unanimity.”⁵¹

Thus, Article 7 is what Poles would call ‘promising pears on a willow’ – a guarantee that can never be delivered. Unfortunately, it was meant to be that way. The unfruitfulness of Article 7(2) was by design and Article 7(1) offers only the weakest of buttressing to it. A further safeguard for the rule of law is thus needed beyond the so-called ‘nuclear weapon.’

⁴⁹ Martin Michelot, *The Article 7 Proceedings Against Poland and Hungary: What Concrete Effects?*, INSTITUTE FOR EUROPEAN POLICY (May 6, 2019) https://institutdelors.eu/en/publications/__trashed/

⁵⁰ Resolution on Ongoing Hearing Under Article 7(1) TEU Regarding Poland and Hungary, EUR. PARL. 2022/2064(RSP) (2022) https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204_EN.pdf

⁵¹ Wawrykiewicz, *supra* note 22.

III. Infringement Proceedings: A Mixed Bag

While Article 7 TEU hangs over Member States as a means to address ‘serious and persistent’ breaches of Article 2 TEU, the infringement procedure is the bread-and-butter mechanism by which the European Union handles breaches of its rules by Member States. The Treaties empower the European Union to enforce its laws over Member States in violation primarily through the instrument of infringement proceedings. As Hillion points out, “nothing in EU primary law appears to exclude the provisions of Article 2 TEU from this.”⁵²

Under infringement procedure, the European Commission identifies infringements of European Union law based on its investigations and the complaints of citizens and businesses, taking legal action against countries that fail to adequately implement Union law, with the Court of Justice able to institute financial sanctions against Member States for noncompliance.⁵³

Infringement proceedings have overall proven a mixed for the European Union when it comes to enforcing the rule of law. While some rulings of the Court of Justice have successfully pushed the needle slightly towards the rule of law, the overall effect of infringement proceedings has been marginal in the context of recent disputes, which have focused more on Poland than Hungary. Given that the ultimate consequence of failing to comply with a Court of Justice decision in an infringement case is financial penalties, the incentive to fall in line with the law as decided by the Court can be limited in scenarios where a Member State is dead-set against doing so. In Poland, this has been the case on the most contentious issues, as the Law and Justice government, despite implement rulings in some cases, continues to ignore important rulings with impunity, even as it racks up massive fines over time that have not altered its behavior.

⁵² Christophe Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, *supra* note 5, at 66.

⁵³ EUROPEAN COMMISSION, *Infringement Procedure* (last visited Apr. 9, 2023), https://commission.europa.eu/law/law-making-process/applying-eu-law/infringement-procedure_en

An extensive process of complaints and answers between the Commission and Member States in the infringement protocol is designed to slow it down and avoid the necessity for the courtroom and the imposition of penalties. Under the formal procedure, the Commission will send a letter of formal notice to the Member State targeted requesting more information – the Member State has two months to respond to this request⁵⁴. Should the Commission determine the information produced does not allay its concerns, it may then submit a reasoned opinion to the Member State explaining how it is falling short of its expectations under European Union law, requesting compliance.⁵⁵ The Member State then typically has another two months with which to inform the Commission of what measures it has pursued to rectify the breach - only then, if the Member State does not comply, can the Commission send the issue to the Court of Justice.⁵⁶ Thus several layers of process make the path to the Court of Justice and the imposition of penalties lengthy, with the ultimate goal of avoiding it altogether. This extended process can undermine the Union’s ability to bring speedy enforcement action like financial penalties against Member States undermining the rule of law.

A formal set of criteria governs the imposition penalties as well. Should penalties be imposed, they are calculated based on a formula that weighs the importance of the European Union rules breached by the Member State and the impact of their violation, the duration of noncompliance, and the Member State’s capacity for payment, though the fines are meant to have a deterrent effect on breaches.⁵⁷

Poland has faced multiple infringement proceedings. In 2018, when the government sought to expel 80% of Poland’s Supreme Court judges, the Commission introduced

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

infringement procedures based on the rule of law principle described in Article II for the first time.⁵⁸ In joined cases C-585/18, C-624/18, and C-625/18 (in which Wawrykiewicz was an attorney), the European Court of Justice ruled that laws by the Polish government, with the effect of instilling reasonable doubts as to the independence and impartiality of courts against outside influence from the legislature or executive, constituted a breach of the rule of law and a violation of Member State obligations.⁵⁹ The Court of Justice has since found that the powers of Poland's Disciplinary Chamber violate the European Union's Article 2 commitment to the rule of law.⁶⁰ The European Court of Justice has also "confirmed that there are legitimate doubts as to the independence of the National Council of the Judiciary."⁶¹

The impact of these infringement procedure rulings has been morally and symbolically important on a civil society level domestically and internationally. The Court of Justice's decisions have given important validation to the efforts of those within Poland who seek to defend the rule of law. As Polish rule of law advocate Michael Wawrykiewicz points out, the outcomes of infringement proceedings have been viewed by Law and Justice "as our victory and their loss."⁶² It has also galvanized an international response by the confirming the illegality of the Polish government's actions, isolating the Law and Justice Party in this regard as other Member States note the findings of the Court against it. However, aside from the moral victory, allowing opponents of the Law and Justice Party to claim legal righteousness for their cause, the practical effects of the infringement proceedings have been all but moot.

⁵⁸ Wawrykiewicz, *supra* note 23.

⁵⁹ Piotr Uhma, *Joined Cases C-585, /18, C-624/18, C-625-18*, 144, AM. J. OF INT'L L. 743, 743 (2020).

⁶⁰ European Commission Press Release IP/23/842, The European Commission Decides to Refer Poland to the Court of Justice of the European Union for Violations of EU Law by its Constitutional Tribunal (Feb. 15, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842

⁶¹ EUROPEAN COMMISSION, *supra* note 14, at 3.

⁶² Wawrykiewicz, *supra* note 22.

Despite the European Court of Justice’s multiple judgments against Warsaw’s campaign to undermine the rule of law, the Law and Justice government persists in actions it has been enjoined to stop on pain of penalty. As the Commission points out, “despite the rulings of the Court of Justice, the Disciplinary Chamber decided in several cases to either suspend judges in office in the context of disciplinary proceedings, or to lift their immunity for the purpose of criminal investigation, including in view of the content of their judicial decisions (including Supreme Court justices).”⁶³ Poland has continued to incur a daily fine of 1 million euros every day since October 2021 for its refusal to comply with the European Court of Justice’s order to eliminate the disciplinary chamber for judges and has so far amassed over 475 million euros in penalties as a result.⁶⁴ Rather than pay up, Poland instead launched a lawsuit against the European Union in December 2022, seeking for the fines to be halted.⁶⁵ As Laurent Pech, dean of law at University College Dublin, puts it, the Polish government is “not shy about openly disregarding” the requirements of the European Union.⁶⁶

In fact, responding to so many rulings against Poland’s government, the country’s Constitutional Tribunal, now under the political control of the Law and Justice Party, went a step further and ruled in October 2021 that when European Union law conflicts with the Polish Constitution, the national constitution reigns supreme.⁶⁷ This ruling stands in blatant violation of the core principle of the supremacy of European Union law established in the famous case of

⁶³ EUROPEAN COMMISSION, *supra* note 14, at 7.

⁶⁴ Nicolas Camut, *European Commission Sues Poland Over EU Law Violations*, POLITICO, Feb. 15, 2023, <https://www.politico.eu/article/rule-of-law-law-and-justice-pis-party-european-commission-takes-poland-to-court-over-eu-law-violations/>

⁶⁵ Natalia Ojewska & Piotr Skolimowski, *Poland Sues EU Over Mounting Fine in Rule-of-Law Dispute*, BLOOMBERG, Dec. 23, 2022, <https://www.bloomberg.com/news/articles/2022-12-22/poland-sues-eu-over-fines-for-rule-of-law-infringements#xj4y7vzkg>

⁶⁶ Zerofsky, *supra* note 13.

⁶⁷ Trybunał Konstytucyjny [Constitutional Tribunal] Oct. 7, 2021. Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union. K 3/21. (Pol.).

Costa v. E.N.E.L. in 1964.⁶⁸ It threatens the equal applicability of European Union law across all Member States and in doing so could upend the legal foundation of the common market.

The European Union has responded to this breach with the same measure that failed to evoke compliance from Warsaw in the first place, once again bringing infringement proceedings. On February 15, 2023, the Commission announced that it was referring Poland to the Court of Justice of the European Union due to “the rulings of the Polish Constitutional Tribunal of 14 July 2021 and 7 October 2021, where it had considered provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law.”⁶⁹

Additionally, the Commission is challenging the legitimacy of Poland’s Constitutional Tribunal altogether. It alleges that due to “irregularities in the appointment procedures of three judges in December 2015 and in the selection of its President in December 2016” the Constitutional tribunal “no longer meets the requirements of an independent and impartial tribunal previously established by law.”⁷⁰ While it will surely be a major moral victory for Poland’s rule of law defenders for the Court of Justice to rule in this direction, it is unclear whether the Poland’s Constitutional Tribunal would be willing to comply with a Court of Justice finding impinging its own legitimacy, particularly after declaring it is not bound by European Union law at all. Any outcome in this proceeding will therefore be more symbolic than practical in its impact on the preservation of rule of law in Poland.

Hungary has also been subject to infringement proceedings against it on the basis of its rule of law violations, which have similarly produced judgments against its government. For

⁶⁸ Case 6/64, *Costa v E.N.E.L.*, 1964 E.C.R. 585.

⁶⁹ European Commission Press Release IP/23/842, The European Commission Decides to Refer Poland to the Court of Justice of the European Union for Violations of EU Law by its Constitutional Tribunal (Feb. 15, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842

⁷⁰ *Id.*

example, in Case C-286/12, *Commission v. Hungary*, in 2012, the European Court of Justice ruled that Orbán’s decision to unexpectedly lower the judicial retirement so as to force ten of the most senior judges appointed by prior Hungarian governments off the bench, replacing them with judges friendlier to Orbán and his Fidesz party, was illegal age discrimination.⁷¹ However, despite the Court’s ruling, Orbán was able to evade substantively shoring up the rule of law in his technically ‘compliant’ response. Rather than restore the terminated judges to their roles in place of Orbán’s political allies, the Hungarian government simply offered compensation to the justices forced to retire, which was an acceptable remedy in the discrimination case.⁷² As Princeton University’s Kim Lane Scheppelle describes it, “the Commission had to declare victory . . . even though the government had nonetheless been able to engage in a major reshuffle of Hungary’s judicial leadership. This was a conventional infringement action – successful in legal terms, but it changed very little in the troubling situation on the ground.”⁷³ Such has been the frustrating pattern in infringement actions meant to promote the rule of law.

Hungary has also demonstrated carelessness in complying with judgments from European courts. In its 2022 Rule of Law Report on Hungary, the Commission identified “the ineffective implementation by state organs of judgments of European . . . courts” as “a source of concern.”⁷⁴

In this context, asked to assess the overall effectiveness of such measures in the battle to protect the rule of law in his country, Michał Wawrykiewicz, who argued in the earliest of Poland’s infringement cases, wavered. “I wouldn’t say that infringement is a respected tool,” he explained, “because the Polish government is not respecting the ruling. Even if they are

⁷¹ Kim Lane Scheppelle, *Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, 105, 109 (Carlos Closa & Dimitry Kochenov, eds., 2016).

⁷² *Id.* at 110.

⁷³ *Id.*

⁷⁴ EUROPEAN COMMISSION, *supra* note 8, at 1.

respecting the fines, they are not respecting the rulings of the Court of Justice.”⁷⁵ Consequently, to use a Polish expression, after no less than five infringement proceedings have centered on the deterioration of the rule of law in Poland, one might be forgiven for thinking that these proceedings are tantamount to “throwing peas against a wall:” a repetitive, activity where continued attempts yield no results.

The timing at which infringement proceedings are launched may also be decisive. Wawrykiewicz considers a counterfactual scenario, in which Brussels could have launched infringement proceedings against Poland’s government earlier, with regret. “Infringement procedures seven years ago instead of now would have been more impactful,” he said. “Now it a little too late. Now the ECJ is not even enough.”

Consequently, infringement procedures have only been slightly more useful in the European Union’s protection of rule of law in Hungary and Poland than Article 7 has been, providing symbolic validation for defenders of rule of law without actually achieving anything substantive to force the hands of governments to comply. As long as those attacking the rule of law like the Law and Justice Party are willing to countenance mounting fees as the price of their campaign against judicial independence, there is little more the European Union can do with this tool to effect actual improvement.

As such, it was clear to the European Union that another tool was needed to pressure Member State governments to comply with rule of law principles more than the penalties imposed through an infringement proceeding could. That more effective new tool was found in rule of law conditionality.

⁷⁵ Wawrykiewicz, *supra* note 22.

IV. Rule of Law Conditionality: The Most Effective Method - But Not Enough

Following the frustrations it has encountered in attempting to implement other tools to enforce the rule of law in Hungary and Poland, the European Union recently created a powerful new instrumentality. Billed by the Commission as an “additional layer of protection” for the rule of law built into the EU budget, rule of law conditionality was created through Regulation 2020/2092 in December 2020 and has been in effect since January 2021.⁷⁶ It is by far the most effective tool the European Union currently has at its disposal to protect the rule of law in Member States – but it still has important gaps.

Under the Rule of Law Conditionality Regulation, the Council may decide, based on a proposal from the Commission, to take targeted measures to block the disbursement of European Union funds to Member States found breaching the rule of law.⁷⁷ The Commission’s decision to propose the blocking of funds earmarked for a Member State on the basis of rule of law conditionality can be based on factors including “the Commission’s annual Rule of Law report, decisions by the Court of Justice of the European Union, reports from the European Court of Auditors, as well as conclusions by relevant international organisations” and complaints.⁷⁸ When funds are blocked, the Commission must reassess the bottleneck when the Member State concerned takes remedial measures improving the situation or after one year.⁷⁹ The Council, based on the Commission’s proposal, is empowered to lift measures and release funds back to states when they judge the situation has been remedied appropriately.⁸⁰

⁷⁶ EUROPEAN COMMISSION, *Rule of Law Conditionality Regulation*, https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en (last visited Apr. 7, 2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 2020 O.J. (L 433) 24. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN>

⁸⁰ *Id.* at 25.

Crucially, as a budget mechanism, rule of law conditionality is limited in scope to situations in which a Member State’s breaches of the principles of the rule of law “affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.”⁸¹ The Regulation proceeds on a legal theory tethering the rule of law tightly to sound budgetary management. As the Regulation’s preamble describes, “respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317” TFEU.⁸² Consequently, it concludes, “there is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.”⁸³ While constraining the applicability of the mechanism, this jurisdictional nexus ensured the survival of Regulation 2020/2092 when confronted with scrutiny by the European Court of Justice, as described below.

The preamble of the Regulation 2020/2092 highlights the context of weak enforcement in which rule of law conditionality came about and its goal of buttressing it. Paragraph 14 lays out that “the Union has developed a variety of instruments and processes that promote the rule of law and its application, including financial support for civil society organisations . . . and provide an effective response from Union institutions to breaches of the rule of law through infringement proceeding and the procedure provided for in Article 7 TEU.”⁸⁴ While the careful language of the Regulation’s preamble emphasizes that “the mechanism provided for in this Regulation complements these instruments,”⁸⁵ the political landscape surrounding the regulation’s adoption

⁸¹ *Id.* at Art. 4, Sec. 1.

⁸² *Id.* at 7.

⁸³ *Id.* at 13.

⁸⁴ 2020 O.J. (L 433) 14. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN>

⁸⁵ *Id.*

indicates that it was meant to fill in the gap in rule of law enforcement capability left open by the demonstrated weakness of those other tools. Consequently, when Regulation 2020/2092 sets out to “protect the Union budget against breaches of the principles of the rule of law affecting its sound financial management”⁸⁶ its project is to give teeth to the Union’s rule of law protection capacity that was lacking under the constellation of instruments it is supposed to complement.

How well does the European Union’s shiny new enforcement tool accomplish this major task? The record thus far is promising, as the governments of Hungary and Poland have both taken steps to make reluctant concessions when confronted with the reality of losing important Union funds. However, while its budding track record is cause for optimism, it is also limited and there is plenty of reason to suspect that the efficacy of this mechanism may be limited. Whether the outer bounds of its impact can extend far enough to enable EU enforcement actions in future situations remains to be seen but may prove a challenge based on the strict qualifications constraining conditionality’s use to instances where breaches of the rule of law could directly impact sound financial management.

In a testament to its potential strength as well as its durability, the rule of law conditionality survived Court of Justice cases brought forth by both Hungary and Poland challenging the legal basis of the Regulation and seeking its annulment. That the governments of Poland and Hungary bothered to pursue such legal action against rule of law conditionality indicated early on its potential to incur a meaningful impact on Member States violating rule of law principles. In cases C-156/21 (Hungary v. Parliament and Council) and C-157/21 (Poland v. Parliament and Council), the governments attempted to use the weakness of Article 7 as a strength for them, arguing that the conditionality mechanism undermined the legal order

⁸⁶ *Id.*

established by the TEU and TFEU by circumventing the Treaties' established protocol for dealing with breaches of rule of law.^{87 88} However, in dismissing the twin cases, the Court of Justice found that Regulation 2020/2092 did not undermine the Article 7 procedure established by the Treaties because of its narrow focus on protecting the European Union's budget by applying only in those cases in which breaches of the rule of law in a Member State seriously risk affecting the sound financial management of the funds in question.⁸⁹ Thus, rule of law conditionality proved to be a legally resilient and well-tailored mechanism to survive judicial scrutiny as a valid addition to the enforcement capabilities of the European Union. However, as discussed below, this tailoring came at the cost of limiting the potential scope of the method's use, reducing its potential impact in the future.

Since taking effect, the conditionality mechanism has had indeed had a serious impact on Hungary. The European Union triggered rule of law conditionality for the first time in April 2022, targeting Hungary after Orbán's fourth election.⁹⁰ Hungary has not received 5.8 billion euros in Covid recovery that it is entitled to receive should it restore increased judicial independence.⁹¹ These frozen funds alone represent 8.5% of Hungary's entire GDP, representing a massive blow to Budapest.⁹² In December 2022, Hungary was left without 22 billion euros from its 2021-27 cohesion funding, a program meant to support less prosperous Member States to pursue sustainable development, and missed out on another 6.3 billion euros due to corruption

⁸⁷ Case C-156/21, *Hungary v. Parliament and Council*, 2022 ECLI:EU:C:2022:97

⁸⁸ Case C-157/21, *Poland v. Parliament and Council*, 2022 ECLI:EU:C:2022:98

⁸⁹ Court of Justice of the European Union Press Release No. 28/22, *Measures for the Protection of the Union Budget: The Court of Justice Dismisses the Actions Brought by Hungary and Poland Against the Conditionality Mechanism* (Feb. 16, 2022).

⁹⁰ Zoltan Simon, *How EU Is Withholding Funding to Try to Rein In Hungary, Poland*, WASH. POST, Jan 2, 2023, https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef_story.html

⁹¹ *Id.*

⁹² Schwartz, *supra* note 21.

concerns.⁹³ In Hungary, so the saying goes, “lots of small adds up to a big.” As pertains to Hungarian holds on European Union funding, a lot of big has added up to a massive hit, with Orban facing an unsustainable budget shortfall due to rule of law conditionality.

Budapest has buckled somewhat under the pressure of such massive funding shortfalls due to rule of law conditionality. Orban’s government agreed to adopt the European Union’s recommended raft of anti-corruption reforms as part of an effort to release the funding back into its coffers.⁹⁴ Significantly, Orban promised that Hungary would strive to meet the European Union’s benchmarks for judicial independence by the end of March 2023.⁹⁵

Poland has also felt the freeze due to rule of law conditionality with a raft of funds withheld from Warsaw. On top of 75 billion euros in cohesion funds frozen, the Law and Justice Party has been unable to claim any of the 35.4 billion euros that Poland is entitled to through the Covid recovery program.⁹⁶ Poland was meant to be the biggest beneficiary of the package but has not received a cent.⁹⁷ Consequently, as the Polish expression goes, rule of law conditioning has ‘drilled a hole in the belly’ of the Law and Justice party’s government.

As such, the funding cudgel has proven effective in pressuring the Polish government to backtrack in important ways on its dismantlement of rule of law. In order to access its 35.4 billion euros in Covid-19 recovery funds, Poland initiated actions to dismantle its judicial disciplinary chamber and meet further judicial reform milestones meant to restore the rule of law. In January 2023, its Parliament voted – albeit narrowly and with plenty of grumbling – to

⁹³ Simon, *supra* note 90.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Simon, *supra* note 90.

⁹⁷ Wawrykiewicz, *supra* note 22.

move judicial disciplinary matters from the politicized Disciplinary Chamber to the more neutral Supreme Administrative Court.⁹⁸

Based on these results, rule of law conditionality firmly appears to be the most effective tool the European Union has deployed thus far to protect the rule of law. Michal Wawrykiewicz calls it “the most effective tool when it comes to my experience these last few years.”⁹⁹ He explains that “blocking funds is the most effective tool because Poland and Hungary are trying to treat the European Union as an ATM – they have a golden card in membership they want to use to withdraw money, but they cannot if they don’t want to follow the regulations and obligations of the bank. When the funds designated for them are blocked, they are in trouble.”¹⁰⁰

However, as successful as this method might appear from its results thus far, it is unclear whether the apparent wins for rule of law are genuine and whether they would be achievable under circumstances other than the extraordinary situation of the current moment. Such progress will also be hard to replicate given the constraints placed on the application and extent of rule of law conditionality, which will make it more difficult to apply to future scenarios.

As significant as recent successes appear, they are still only tentative. Whether Orban, who complained as recently as February 2023 that Brussels was “nitpicking about the state of rule of law in Hungary” will follow through on his promise to meet more than twenty European Union for the rule of law necessary to unlock funds remains in question and seems dubious based on Budapest’s track record delivering on previous promises to remedy the situation.¹⁰¹ In Poland, the rule of law package that the Law and Justice Party narrowly approved to appease Brussels

⁹⁸ Jan Cienski, *Poland’s Rule of Law Legislation Moves Forward – But Fights Remain*, POLITICO (Jan. 13, 2023), <https://www.politico.eu/article/poland-european-union-rule-law-legislation-moves-forward-but-fights-remain/>

⁹⁹ Wawrykiewicz, *supra* note 22.

¹⁰⁰ *Id.*

¹⁰¹ Gabriela Baczynska, *Hungary Must Bolster Judiciary ‘Very Soon’ to Recover Billions from EU, Official Says*, REUTERS, Feb. 18, 2023, <https://www.reuters.com/world/europe/hungary-must-bolster-judiciary-very-soon-recover-billions-eu-top-official-2023-02-18/>

and unlock its badly needed COVID funds has hit a new snag. Against the wishes of his party, eager to reclaim the blocked funds, President Duda acted on his misgivings about the reforms by referring them to the Constitutional Tribunal for “preventive control,” so that they will not come into force without review.¹⁰² As University of Sussex professor Aleks Szczerbiak points out, given the extremist bent of the Constitutional Tribunal, its internal divisions, and its lack of legitimacy, the chamber could well strike down the rule of law reforms as unconstitutional – at the very least, it is sure to drag its heels in a lengthy process.¹⁰³ Even if the bill does pass, many experts contend that it hardly rectifies that deep deficit in the rule of law in Poland.¹⁰⁴ Brussels will need to decide whether this band-aid on a gaping wound will satisfy its demands for improvement or to keep demanding more.

Furthermore, it is uncertain whether the recent achievements of rule of law conditionality would be replicable in future scenarios given that the withholding of funds now comes at a particularly vulnerable moment for the governments of both Hungary and Poland. Hungary currently faces double-digit inflation, putting enormous pressure on its budget.¹⁰⁵ Budapest’s budget was already drained during an aggressive spending push by Orban through his re-election campaign in early 2022, leaving him no choice but to levy an unpopular windfall tax on the population to fill gaps.¹⁰⁶ Similarly, as Poland also faces high inflation, with elections approaching in October 2023, the Law and Justice Party needs the frozen European Union funds to continue to support its generous welfare spending on its older and more rural base of voters.¹⁰⁷

¹⁰² Aleks Szczerbiak, *Why Does the Polish President’s Judicial Reform Law Constitutional Referral Matter So Much?*, NOTES FROM POLAND (March 13, 2023), <https://notesfrompoland.com/2023/03/13/why-does-the-polish-presidents-judicial-reform-law-constitutional-referral-matter-so-much/>

¹⁰³ *Id.*

¹⁰⁴ *Poland’s Rule-of-Law Conflict with the EU is Coming to a Head*, ECONOMIST (Feb. 16, 2023), <https://www.economist.com/europe/2023/02/16/polands-rule-of-law-conflict-with-the-eu-is-coming-to-a-head>

¹⁰⁵ *Id.*

¹⁰⁶ Simon, *supra* note 90.

¹⁰⁷ *Id.*

Both sharing a border with Ukraine, Hungary and Poland have been particularly impacted by Russian leader Vladimir Putin's illegal invasion of the country. Both states have been struggling to accommodate the high numbers of Ukrainian refugees who have sought safety within their borders, straining public resources, while also grappling with particularly high energy costs given their proximity to Russia and prior dependence on it. Both also perceive themselves as particularly vulnerable to the threat of further Russian aggression. If either government were not in such a position of weakness as they currently find themselves in and demand for frozen European Union funds were thus less desperate, it is unclear whether conditionality would pack quite the same punch against Orban and Kaczynski as it is currently exhibiting.

There are also limitations on the implementation of rule of law conditionality that can be used by targets to dull the impact. For example, under exceptional circumstances, Member States facing funding sanctions can request the matter be referred to the next European Council if they can successfully allege bias, preventing the adoption of measures in the meantime in a process that can take up to three months after the Commission submits its proposal to the Council.¹⁰⁸ The application of the principle of proportionality, stressed by the Regulation, can be used by targeted Member States to try to mitigate measures against them as well.¹⁰⁹

However, perhaps the most important limitation on rule of law conditionality is the narrow tailoring that saved it from Court of Justice, for its applicability to only those circumstances where a Member State's rule of law deficit would likely adversely impact its management of European Union funds can halt its invocation in scenarios where it might prove useful. Consequently, as the Wilson Center points out it will be difficult to attach rule of law

¹⁰⁸ 2020 O.J. (L 433) 26. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN>

¹⁰⁹ *Id.*

conditionality to funds where breaches do not implicate sound budgetary management.¹¹⁰ One can imagine any number of scenarios where the tenuousness of connection between sound budgetary management and rule of law violations could excuse a breaching Member State, enabling them to enjoy access to Union funds with impunity.

Given these limitations, it is necessary to temper optimism about how effective rule of law conditionality may continue to be in the future, even given the optimism engendered by its apparent recent efficacy. Just as this new tool was crafted to shore up the deficit in enforcement capacity the European Union encountered before its creation, further tools can buttress the Union's enforcement equipment for the rule of law even further.

V. Conclusion: The Need for New and Enhanced Tools

As this paper's analysis has indicated based on observations from the European Union's recent efforts to protect the rule of law in Hungary and Poland, the Union's enforcement tools vary considerably in effectiveness. Article 7, though meant to represent the harshest measure to protect Article 2 values like the rule of law, is actually the weakest measure, essentially designed to be inoperable. Infringement proceedings have given a moral and symbolic victory to defenders of the rule of law, but have had little practical effect as the financial penalties imposed by the Court of Justice have not been enough to substantively change behavior. While the newest tool of the European Union, rule of law conditionality, has certainly been the most effective so far, there is reason to question whether it can maintain its high level efficacy confronted with future scenarios beyond those in Hungary and Poland today. Such scenarios will surely come in the future and the worst mistake the European Union can make is to repeat that it made in the

¹¹⁰ Schwartz, *supra* note 21.

creation of Article 7 by having too rosy an optimism to understand that robust tools will be necessary to utilize in inevitable future crises.

The dire warning that one of Poland's fiercest defenders of the rule of law, Michal Wawrykiewicz, shared in his generous interview for this paper, is worth repeating. "We are at a moment when two countries are violating the rules of the European Union in every open and brutal way," he said. "If other countries follow and do exactly the same actions as the Polish government – denying fundamental principles of the Union – we could face its collapse because it is based on the rule of law. If the rule of law is not respected, it could cause a domino effect and the European Union could collapse completely."¹¹¹

The next dominoes to fall in the chain reaction sparked by Hungary and Poland's are already beginning to shake. In Romania, Bulgaria, Croatia, and Italy, there are worrying signs that the rule of law is insecure and vulnerable to attack.¹¹² Whether or not the rule of law tumbles down in capitals like Bucharest, Sofia, Zagreb, and Rome may depend largely on whether Brussels has the wherewithal to combat its erosion more effectively than it has proven able to thus far. Should the European Union depend on the same tools that it has relied on unsuccessfully to protect the rule of law in Budapest and Warsaw, the future does not bode well as the global democratic recession may spread across more European capitals, empowering autocratically inclined governments to chip away at rule of law in their states without potent checks on their ability to do so.

As this paper argues, Article 7 will not deter would-be attackers of the rule of law to back down, nor can infringement proceedings be counted on for compliance even if they may make some difference. Though rule of law conditionality has proven promising, its potential remains

¹¹¹ Wawrykiewicz, *supra* note 22.

¹¹² *Id.*

limited and unpredictable. Thus, just as Brussels went back to the drawing board when it developed rule of law conditionality, creating new tools and enhancing current ones will continue to be necessary to stop the next dominos from falling. Only with an expanded tool belt can the European Union effectively protect the rule of law in its Member States moving forward.

While Article 7 is deliberately weak, the European Union is in need of a sanctions mechanism that is deliberately strong to protect the rule of law. The paths not taken in the original deliberations that led to Article 7 are worth revisiting. The original Reflection Group proposal allowing for expulsion as the ultimate sanction and the Austrian-Italian 1996 IGC proposal allowing sanctions to be imposed by qualified majority rather than unanimity in particular deserve another look. In contrast to the all-but-impossible to exercise Article 7 of the present, these visions would have endowed the European Union with a more robust sanctions mechanism capable of actual deterrence.

Unfortunately, though, to change the Treaties to incorporate them, more cooperative governments in Budapest and Warsaw will be necessary partners. For now, Hungary and Poland's governments can block any progress on that front, just as they can block the imposition of Article 7 sanctions on one another. Thus, in the short term, more creative tools and narrowly tailored tools are needed. Just one example of the many credible proposals that have filled the pages of academic articles might be the creation of a European Union 'Rule of Law' watchdog, a concept expounded by Princeton University Professor Jan-Werner Müller, who argues persuasively for the creation of a so-called 'Copenhagen Commission' to fulfill the role.¹¹³

¹¹³ Jan-Werner Müller, *Protecting the Rule of Law (And Democracy!) In the EU: The Idea of a Copenhagen Commission*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, 206, 209 (Carlos Closa & Dimitry Kochenov, eds., 2016).

“The European Union has to be more practical,” said Wawrykiewicz, “and think about new and efficient tools it can use against governments like Hungary and Poland.”¹¹⁴ These tools must not pre-suppose the best of situations and a broad commitment to the rule of law persisting across all or even the vast majority of Member States like Article 7 did in its original pitfall. “Tools need to take account of the fact that everything is possible and autocratic government can happen anywhere.”¹¹⁵ To survive and thrive in an uncertain future, the European Union must have the capability to effectively defend against breaches of the rule of law in all its Member States – including in more than one at the same time. Only by taking such action can the European Union remain an entity that is not only inspired by the rule of law itself, but one that inspires others in the wider world to believe in and follow its example of rule of law as well.

¹¹⁴ Wawrykiewicz, *supra* note 22.

¹¹⁵ *Id.*