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The new Rule of Law conditionality mechanism and its implications on the democratic backsliding in Eastern Europe

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SUMMARY

INTRODUCTION

One of the essential and fundamental features of a fully-fledged democratic regime is the respect of the rule of law principles which assures the correct interplay between the legislative, executive and judicial powers as well as the respect of those check and balances that avoid a possible democratic backsliding of the country into question. This objective is pursued by the European Union, as established in art. 2 TEU, and its Member States so that in the last years the actions aimed to the protection and enforcement of the rule of law have mushroomed due to the increasing democratic backsliding that affects the global scenario. In fact, according to the last report of Freedom House, 2020 marked the 15th consecutive year of decline in global freedom since the countries experiencing deterioration outnumbered those with improvements by the largest margin recorded since the negative trend began in 2006 [1].

In this context, even the European Union has not been spared since it has been experiencing a rule of law crisis in some of its Eastern Member States. However, the European institutions have already applied in the last decade some contrasting measures and operative tools to face the deepening democratic backsliding even though the peculiar institutional asset of the European Union presents some criticalities that have dumped the effects of the contrasting measures. For this specific reason, in the last two years the European Union has elaborated and then launched a new instrument to contrast the democratic involution of the concerned Member States. In a nutshell, it represents a conditional measure, laid down in the EU's multiannual financial framework (MFF) for 2021-2027, that links the disbursement of European funds to the respect of the rule of law principles by the Member States; that is, if a Member State compromises or undermines the financial interest of the European Union by infringing the rule of law principles, it may not receive its part of European funds.

Therefore, the main aim of this thesis is to provide a clear outlook of this new conditional mechanism by first identifying and understand what the terms conditionality and rule of law mean, describing which Member State are experiencing the democratic decay and how the new rule of law conditionality mechanism works in detail.

The I chapter will thus focus on the vast field of the concept of conditionality in order to provide a clear perspective of the term, its origins and how it developed throughout the centuries. Soon after the general description of the term, the analysis will shift to the main distinction between positive

[1] Repucci S. and Slipowitz A., *Freedom in the World 2021. Democracy under siege,* in FreedomHouse.org, accessed on 27th December 2021, freedomhouse.org

and negative conditionality, by highlighting the main features of each type and providing examples in order to understand this fundamental differentiation. Then, the third paragraph will point out the strict correlation between conditionality and sovereignty, since it acquires a crucial role in the European legal framework. In this context, the explanation of the link will be followed by examples dealing with the environmental field as the first challenge to the redefinition of the conditionality in relation to national sovereignty, the explanation of the *sui generis* nature of the European Union and how the correlation conditionality-sovereignty changed during the years. The last two paragraphs will deal with an analysis of two practical implementations of conditional measures since it will be thoroughly described the process of accession to the European Union by the Eastern countries in 2004 and 2007 and the entire process of implementation of the *Acquis Communautaire* while the other analysis will concern the application of economic conditionality measures during the European debt crisis by even highlighting the most contested measures and the subsequent reforms.
The II chapter will provide an exhaustive definition and outlook of the concept of the rule of law, by clarifying the most troubling elements and by adopting Tom Bingham's definition of the rule of law as the model on which the discussion on the rule of law will continue. Then, the thesis will proceed with a focus on the description of the European legal framework concerning the protection and enforcement of the rule of law principles, by pointing out the legal sources of the rule of law principles, the legal instruments that the European Union has at its disposal to face the democratic backsliding in the Eastern countries and the weaknesses that they present. Finally, the last paragraph is dedicated to the analysis of the Rule of Law Framework, the "new" legal instrument launched by the European Commission in 2011 to contrast the criticalities that started to emerge in that period in Hungary; it will be discussed the reasons why some legal tools have never been activated or have been delayed by the European institutions towards the recalcitrant Member States and the role of important stakeholders, such as the Venice Commission, in the assessment of this democratic backsliding and in the delivering of important guidelines to the European institutions and Member States for a proper management of the rule of law principles.
After the analysis of the fields of application of conditionality and an overall outlook of the definition and the main features of the rule of law, in the III chapter the analysis will deepen the democratic backsliding in Poland and Hungary since they represent the two Member States where the governments in office have been reforming the democratic regime in order to undermine the fundamental checks and balances. In particular, the first paragraph will focus on the situation in Poland, by first providing a chronological description of both the political party responsible of the rule of law crisis and the reforms implemented; the same approach will be adopted in the analysis of the democratic backsliding in Hungary. Then, the paragraph will analyse the characteristics that the

democratic backslidings in Poland and Hungary share. To sum up, the PiS and Fidesz governments are both far-right, populist and ultra-catholic parties that won free and fair elections by appealing to the discontent of the population towards the ruling elites and that, once in office, implemented some reforms aimed to undermine the judicial independence thus unbalancing the golden rule of the independence of the three powers. The analysis will also deal with the jurisprudence of the ECJ concerning a peculiar interpretation of Art. 2 and Art. 19 TEU since it had and will have important consequences on the rule of law backsliding in Poland and Hungary by imposing a legal duty on Member State to assure the judicial independence of ordinary national courts and tribunals.

The IV chapter is entirely dedicated to the description of the functioning of the new rule of law conditionality mechanism, and it has the main purpose of providing an exhaustive outlook about this revolutionary new legal instrument. However, the first paragraph will sum up the structural problems that affects the European legal framework in contrasting the democratic backsliding. The remaining paragraphs will thoroughly provide the content of the conditionality mechanism and in particular the cases when it can be triggered by the European institutions and what are the effects on the Member States. This new instrument of conditionality represents a compromise between the different European institutions since in the negotiation process the European Commission and the European Council had different visions on the implementation of the mechanism. In fact, the third paragraph will deal with this topic and will point out the common grounds and the divisions during the negotiation process and, finally, the last chapter of this thesis will sum up both the functioning and the peculiarities of the conditionality mechanism and will also deal with the NextGenerationEU, by mentioning the main features of the new European recovery package which, it must be highlighted, is tied to the rule of law conditionality mechanism.

At the end of the thesis, the reader will have a clear vision on the rule of law backsliding in Europe and the various contrasting mechanisms that the European institutions have introduced in the years. Moreover, the reader will comprehend what it is intended for conditionality and rule of law in the context of international relations and the fields of application of both the terms. Finally, it will be clarified what are the criticalities and the structural problems that have been affecting the European legal framework in facing the rule of law crisis in some Member States and even what reforms the affected Member States have implemented to dismantle the checks and balances that differentiate a fully-fledged democratic state from hybrid regimes.

CHAPTER 1

THE CONCEPT OF CONDITIONALITY

1.1 Definition and fields of application

The term "conditionality" defines "*The quality of being subject to one or more conditions or requirements to be met"* [2] and it refers to a vast range of concepts that shape the international relations between countries. Therefore, it denotes the obligations that a subject must satisfy in order to obtain what previously agreed. Different scholars have defined the term in several ways depending on the field of application and it is necessary, for the purposes of this thesis, to define "conditionality" both in its economic and political aspect. According to Cesare Pinelli, "conditionality" indicates the practice of both international organizations and states of making aid and cooperation agreements with recipients States conditional upon the observance of requirements such as financial stability, good governance, respects for human rights, peace and security; the EU approach to conditionality was for long centered on these requirements [3]. Pinelli defines the term in reference to two different contexts: the former deals with the conditional measures that states have to fulfil in order to obtain international aid or international recognition (this is the case of states that request international aid from the International Monetary Fund in order to solve financial problems) while the latter describes the requirements and rules imposed from the European Union to each country or group of states that made official request to join the supranational organization. In this last case, conditionality seems to be stricter and more defined if compared to measures imposed from other international organizations as it will be analysed in the following chapters.

Steunenberg and Dimitrova give a similar definition of conditionality, they denote it as "*the practice of allocating aid resources to be used consistently with a set of previously agreed objectives and if the recipient country does not follow these objectives or the conditions linked to them, the donor can stop the flow of resources (World Bank, 2005)*" [4]. The authors point out the conditional measures adopted by international organizations such as the World Bank but, unlike Pinelli, the definition focuses also on the possibility to stop the flow of resources if the requirements

[2] Oxford Dictionary

[3] Cesare Pinelli, *Conditionality and Economic Constitutionalism in the Eurozone,* Italian Journal of Public Law, 11(1), 22-42, 2019

[4] Bernard Steunenberg and Antoaneta Dimitrova, *Compliance in the EU enlargement process: The limits of conditionality,* European Integration Online Papers, 11(5), 1-22, June 2007

are not met by the applying states.

Historically, the first mention of conditionality goes back to the 1950s and it is linked to the establishment of the International Monetary Fund (IMF), an international organization created appositely to support requesting countries with international aid in order to solve financial problems. At the beginning, the conditional measures within the economic organization were not thoroughly defined. Art. 1 (V) of the IMF's Articles of Agreement only referred to "*adequate safeguards to be respected in order to give confidence to members by making the general resources of the Fund temporarily available to them*" [5]. In detail, "*the article referred to (1) the assistance that the IMF would give to members to overcome their balance of payments difficulties (2) in a manner consistent with the purposes of the institutions*" [6]; these clauses constituted the first body of procedures to be respected to obtain funds and thus they represented the first kind of conditionality. However, the first official body of conditional measures adopted by the Executive Board of the International Monetary Fund only appeared in 1979, in the aftermath of the Bretton Woods Agreements, when the Executive Board stressed the importance of preventive adjustments to be fulfilled before the request of international assistance and the periodical reviews of conditionality practices [7]. The forerunner body of conditional measures adopted by the International Monetary Fund would be soon emulated by other economic international organizations but, till the end of the XX century, the term conditionality would principally refer to this field because of the flourishing of international organizations after the Second World War. The only relevant exception regarded the United Nations (UN) and the conditions to join the most important international organization in the world. Art. 2(3), (4) explicitly states that in order to become an official UN member, *the requesting state must refrain the use of force as a means to solve international disputes as well as it must respect the territorial integrity or political independence of any state* [8].

In this case conditionality is intended in a different way from the conditions set in the IMF. First, the context is different and the conditions to join the UN are political while the conditions to ask for aid from financial international organizations are economic. Then, the UN requirements are not as stricter as the IMF conditionality, denoting a different use of the term due to the purpose of the international organization. Effectively, the main objective of the UN is to ensure the peaceful cooperation between states and thus the main criterion to join concerns the sphere of values, a vast field that requires extensive but vague set of conditions. In contrast, the IMF is a sectorial international organization and the objectives to be fulfilled must be detailed in order to prevent

[5] *Staff Papers (International Monetary Fund)*, Dec. 1995, Vol. 42, No. 4 (Dec. 1995), pp. 792-835
[6] *Ivi*, p. 793
[7] *Ivi*, p. 808
[8] Art. 2 UN Charter

bureaucratic problems.

From 1992 onwards, also the European Union has developed a set of conditions to join the supranational organization, outlined in the Copenhagen Criteria, that covers several aspects. The political facet regards the values, declared in art. 2 of the TUE, that must be respected and shared by every candidate country as well as the partial loss of national sovereignty on behalf of the European Institutions. The economic and administrative aspects concern the assimilation of the *Acquis Communautaire* into the bureaucratic system of each candidate country and the fulfilment of the Copenhagen Criteria.

To better understand the several typologies of conditionality it must be also analysed the internal and fundamental difference between the positive and the negative conditionality, since it refers to a different approach that the international organization has towards the targeted country or institution.

1.2 Positive and negative conditionality

The distinction between positive and negative conditionality focuses on the behaviour of the donor institution towards the recipient state based on the purpose of the conditional measures. Even in this case, scholars have given several definitions and have highlighted different aspects.

Leonardo Morlino's distinction of positive and negative conditionality is included in an ampler debate concerning the methods of influence used by states or international organizations towards other states or institutions. In particular, he defines "*negative conditionality as the use of non-military, coercive political, diplomatic, and economic measures used to induce policy change in a targeted country while positive conditionality is depicted as a policy to induce statal actors, especially the post-communist countries at the beginning of XXI century, to adhere to democratic values and structures"* [9]. Morlino also defines positive conditionality both as an *ex-ante* measure, which applies prior to the confirmation of the country to the conditions, or as a *reinforcement by reward* conditionality [10]. In the first case the benefits, given prior to any application of conditional measures, are meant as an encouragement to commit the country to the proper fulfilment of objectives despite the risk that the recipient country does not satisfy the requested conditions and use the rewards differently. The second method focuses on the most used type of positive conditionality, in which the rewards are given step by step based on the fulfilment of intermediate objectives. This type of conditionality is considered safer than the *ex-ante* method because the recipient country is induced to invest the received rewards properly and is committed to the

[9] Leonardo Morlino, *Changes for democracy: Actors, Structures, Processes,* Oxford Scholarship Online, January 2012
[10] Ibidem

requested aims.

The distinction between the two types of conditionality becomes clearer with Veebel's differentiation. The author labels positive conditionality as *the method of the carrot* whereas negative conditionality is considered as *the method of the stick* [11]. The two nicknames refer to a motivational approach that comprehend the offer of a carrot (the reward) for good behaviour and the stick as a consequence for the poor performances. Thus, positive conditionality is asymmetric by nature because involves two actors that respectively embody the donor, who determines the conditional measures to be fulfilled, and the receiver, who implements what is requested in order to receive the reward.

Veebel deepens the differentiation between the two methods, by highlighting the success of positive conditionality over the negative since *the long-term effects of positive conditionality involve prosperity, stability, security and more favourable conditions to develop friendly relations* [12]. Moreover, the main variable of positive conditionality is efficiency: if the conditional measures are implemented properly by the recipient country and the process is efficiently monitored by the donor institutions, conditionality turns out to be successful. Finally, the process is further facilitated by the establishment of independent institutions and agencies, the use of voluntarism and functional and economic reasoning [13]. According to these definitions, several examples of practical actuation of positive and negative conditional measures may be made.

Focusing on the relations of the European Community with Central Eastern European countries (CEE), the first form of negative conditionality appeared in the Agreement on trade and economic cooperation with Albania and in the Agreements with Baltic States signed on May 11, 1992. Art.1 of the Agreement with Albania and Baltic countries stated that "*democratic principles and human rights are an essential element*" in conjunction with Art.21 that gave the parties the authority to "*suspend all or part of the agreement with immediate effect if a serious violation of the basic provision occurs*" [14]. Here, the negative conditionality focuses on the coercive measure, the withdrawal from the agreement, that may occur whenever a contractor does not respect the agreed

[11] Viljar Veebel, *European Union's positive conditionality model in pre-accession process*, Trames, 13(63/58), 3, 207-231, 2009

[12] Ibidem

[13] Ibidem

[14] Council Decision 92/535/CEE concerning the conclusion of the Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation.
Council Decision 92/601/ CEE concerning the conclusion of the Agreement between the European Economic Community and the Republic of Estonia, on trade and commercial and economic cooperation.
Council Decision 92/602/ CEE concerning the conclusion of the Agreement between the European Economic Community and the Republic of Latvia, on trade and commercial and economic cooperation.
Council Decision 92/603/CEE-EURATOM concerning the conclusion of the Agreement between the European Economic Community and the European Atomic Energy Community and the Republic of Lithuania, on trade and commercial and economic cooperation.

provisions. Other similar forms of negative conditionality may be found in the Agreements on trade and economic cooperation with other CEE countries, such as Bulgaria or Romania. As mentioned previously, negative conditionality is rarely applied in the context of international relations because of historical events that paved the way for the use of positive instruments to develop friendly international relations. Alternatively, some coercive measures may concern the economic sanctions imposed to states that systematically violate human rights, as it has happened recently with bans imposed by the European Union on Russia and Belarus.

Certainly, positive conditionality mushroomed since the establishment of the European Union even though the approach adopted by the EU derived from international financial institutions such as the World Bank and the IMF. In the concerned case, the agreements concluded by these actors with recipient states included positive conditional measures based on voluntarism and support instead of sanctions and with a detailed set of rules and goals to achieve [15].

The European Union developed a clear set of rules and goals to achieve only with the Fifth Enlargement, occurred from 2004 to 2007 when 12 countries joined the European Union, prior to an arranged set of objectives to be fulfilled step by step till the final reward: the accession to the European Union. The system adopted by the EU followed the *method of the carrot* and thus it represented a perfect example of positive conditionality: the acceding countries implemented structural reforms in order to shape their internal legal systems to the European standards and in order to obtain the status of member.

1.2.1 The European External Policy: an application of positive and negative conditionality

The most incisive and, for some aspects, controversial body of conditionality adopted by the European Union in these years has been the EED, the acronym of the European Endowment for Democracy, an instrument collocated within the European Neighbourhood Policy (ENP). The ENP governed the EU's relations with 16 of the EU's closest Eastern and Southern neighbours, from Maghreb to Ukraine and the Caucasian countries. The rationale behind the establishment of this external policy instrument created in 2004, was the strengthening the prosperity, stability and security of the neighbouring countries, by funding actions, volunteering programs, NGOs and the governments themselves in order to create an area of shared prosperity and values and to prevent the country or region from destabilizing actions.

However, due to the Syrian refugee crisis of 2015, the ENP proved to be ineffective and was

[15] Elena Fierro, *The EU's approach to human rights conditionality in practice.* Martinus Nijhoff Publishers, London, 2003

revised and replaced by the EED. The causes of the dismissal of the ENP major actions were several: the NGOs involved in the process of reform of the civil society applied a top-down approach and the initiatives themselves were criticised for their excessive focus on structured Western-style non-governmental organisations (NGOs) at the expense of grassroots movements; as a consequence, nowadays the EED primary aims to bolster the *"likely actors of change"* by involving both a wider spectrum of potential actors and stricter selection criteria[16]. Therefore, the EED reflects a different understandings of democratisation processes with different rules and aims. First, legally speaking, the EED is a private law foundation established in Belgium and autonomous from the EU; then, the main purpose is funding pro-democracy activists and/or organization for democratic transition in the European Neighbourhood space.
According to its Statute, the institution provides:

a) Financial support to the activities of civil society organizations.

b) Direct financial supports to beneficiaries including project activities.

c) A limited number of its own activities [17].

The differences and the advantages of the EED confronted to the ENP are that the former is supposed to be more rapid, less formal and more engaged to the local organisations and NGOs that support the democratisation process so it fits better for the intervention in delicate contexts where other EU democracy programs would fail.
In sum, the EED focuses primarily on actors rather than structures [18]. Technically speaking, the passage from an instrument to another, signals also the shift from an instrument of negative conditionality to a positive form of conditionality. The *method of the stick* is replaced by *the method of the carrot* since funding is granted to civil actors and grassroots movements without the risk of imposing sanctions or other negative measures.

1.3 The relation between conditionality and sovereignty

There is a strong correlation between the concepts of conditionality and sovereignty. While the former has been discussed in the previous paragraphs, it is necessary to point out the meaning and the evolution of the term sovereignty in order to focus on the strict relation between the two notions.

[16] Serena Giusti & Enrico Fossi , *The European Endowment for Democracy and Democracy promotion in the EU Neighbourhood*, The International Spectator, 49(4), 112-129, 2014
[17] Ivi, p. 121
[18] Ivi, p. 122

The term sovereignty, although already used in the Early Medieval Period, acquired the current meaning in 1648 when the Treaty of Westphalia recognised the existence of several sovereign, equal and independent national states. These national entities possessed both the internal and external dimension of sovereignty. The former refers to the territory, made up of land, internal water and sea, under the control of the state and where it has the authority to impose its presence, the latter deals with the recognition of international borders and the exclusion of external factors that may influence the state authorities [19]. In general, the Treaty of Westphalia established the *status quo* among national European states and gave birth to the modern meaning of "sovereignty" which survived till the outbreak of the two world conflicts.

The I World War and the II World War, to a greater extent, triggered the strict relation between conditionality and sovereignty. The birth of international organizations, in the aftermath of the conflicts, started to erode the state sovereignty because, for the first time, the states themselves chose to lose part of their sovereignty in order to establish international organizations which, in turn, imposed rules and sanctions to their member states. At the end of the first world conflict it was established the League of Nations (LoN), following the famous Wilson's Fourteen Points Speech, the first comprehensive international organization that was supposed to maintain universal peace, to develop friendly cooperation between states and to assure peace and security [20].However, due to the refusal of the US Senate to sign the Treaty of accession, the LoN presented an enormous vacuum in its membership and, despite some discrete successes in shaping friendly international relations like the Locarno Pact [21], the League of Nations proved to be inefficient neither in preventing Japanese invasion of Manchuria nor in the Ethiopian annexation by Italy. The sanctions imposed, if really enforced, were not respected by the US, the Soviet Union and other influential states thus demonstrating the inefficiency of the LoN [22]. In the aftermath of the II World War, the United Nations (UN) greatly replaced the LoN thanks to a radical change in the internal functioning, particularly, the establishment of the United Nations Security Council (UNSC). The UNSC is a group of five permanent Member States that makes decisions concerning the use of coercive

[19] R. Bifulco, A. Nato, *The concept of sovereignty in the EU – past, present and the future,* Reconnect Europe, April 2020, p.9

[20] League of Nations, in United Nations, accessed on 24th August 2021, https://www.ungeneva.org/en/history/league-of-nations

[21] A series of international agreements drawn up in Locarno in 1925, a health resort in Switzerland at the north end of Lake Maggiore. Their object was to ease tension by guaranteeing the common boundaries of Germany, Belgium, and France as specified in the Versailles Peace Settlement in 1919.

[22] League of Nations, in United Nations, accessed on 24th August 2021, https://www.ungeneva.org/en/history/league-of-nations

measures in case of serious threats to international peace and security[23]; for the first time in history, a functioning organ of an international organization could enable coercive actions towards other states, could impose sanctions and every Member State of the UN was obliged to comply with Council decisions. However, over time, the balance between sovereignty and conditionality remained more or less stable due to the difficulty to impose sanctions on a global scale even though the global challenge of climate change and the development of the European Union towards a quasi-federal supranational organization would cause a radical change in the concept of sovereignty and conditionality relation.

1.3.1 The environmental challenge: the first redefinition of sovereignty

During the second part of the XXth century, the field of the environmental protection provided new developments in the relation between conditional measures and state sovereignty due to the increasing global warming. To face the situation, the UN deemed urgent the approval of containing measures to limit the damages of climate change and the responses to current challenges caused the redefinition of national sovereignty [24].

In the previous centuries, climate warming and the subsequent challenge was still unknown since the outbreak of environmental crisis happened at the end of the twentieth century. It triggered a radical change in the concept of sovereignty as states understood that climate change could only be faced by taking a joint action and by reducing collectively the CO_2 emissions. This action implied the redefinition of national sovereignty over natural resources since the countries that based their economy on the exportation of raw materials or resources had to regulate their internal laws according to international laws. The first comprehensive meeting of the UN members that regulated the international environmental law took place in Kyoto in 1997 and defined some conditional measures to be respected in order to contain the CO_2 emissions. However, the Protocol proved to be inefficient due to the disrespect of international rules by states and therefore in 2015 the Paris Agreement (PA) was signed with the hope that stricter measures, in line with the Sustainable Development Goals [25] enshrined in the 2030 Agenda of the UN, would improve the environmental situation worldwide.

[23] United Nations Security Council, in United Nations, accessed on 24th August 2021, https://www.un.org/securitycouncil/

[24] Ivi, pag. 13

[25] The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (SDGs), which are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth

Actually, the international environmental law failed in the achievement of constraining the States to respect the environmental objectives, mainly because of the blurred definition of the law, without substantive sanctions to the inefficient states and, above all, the lack of a central controlling authority to assess the performance of the states. An example of the weakness of the international environmental law deals with the true effectiveness of the Paris Agreement. In fact, state transparency in providing data is an institutional precondition for the PA to be effective since it relies on the coordination between applicant states in order to track progress towards the PA goals but, at the same time, existing means of review are not yet effective thus denoting the lack of a monitoring body [26] . Moreover, the withdrawal from the Paris Agreement of the United States of America (USA) in 2017, decided by Trump's administration, caused another primary barrier to the ineffectiveness of the PA [27] and the Biden's presidency decision to join again the Paris Agreement is another signal of the lack of a central authority, able to impose sanctions on reluctant member states, that characterises the environmental international law.

1.3.2 The sui generis nature of the European Union

While the environmental crisis demonstrated a failure on the imposition of binding conditional measures on states, on a global level, the European Union, in the 1970s and 1980s, has turned into a *sui generis* supranational organization thanks to the progressive intrusion and expansion of European Institutions into the national competences of every single Member State. Hence, it has distinctly changed the relation between conditionality and national sovereignty in several fields but not without arousing doubts and dissatisfactions among national courts. To a better understanding of the topic, it is wise to recall the division of competences within the European Union and how it works.

Nowadays, the EU Treaties distinguish between five categories of Union competences enshrined in art. 2 TFEU namely: exclusive, shared, coordinating and complementary policies while a special mention copes with the Union's competences in Common Foreign and Security Policy an area where the European Union acts differently; in addition, the division of competences is further analysed from art. 3 to art. 6 TFEU.

Art. 3 TFEU refers to the EU exclusive competences, areas where *"only the EU may legislate and*

[26] Kilian Raiser, Ulrike Kornek, Christian Flachsland and William F. Lamb, *Is the Paris Agreement effective? A systematic map of the evidence,* Environmental Research Letters, August 2020, p. 12

[27] Ibidem

adopt legally binding acts "[28] while Member States are able to do so only if authorized by the European Union [29]. The EU exclusive competences concern:

1. The Common Commercial Policy (CCP), the first one officially recognized.
2. The conservation of biological resources of the sea.
3. The custom union.
4. The establishment of the competition rules necessary for the functioning of the internal market.
5. Monetary policy for the Member States whose currency is the euro [30].

Then, the area of shared competences represents a field where "*The Member States shall exercise their competence to the extent that the Union has not exercised its competence"* [31]. In this case, the European Union pre-empts the Member States from taking the initiative in several fields such as internal market, transport, agriculture and fisheries (except for the conservation of biological resources), economic, social and territorial cohesion. Curiously, art. 4(3) and 4(4) TFEU states the existence of the so-called parallel competences, policy fields such as research, technological development, development cooperation and international aid where both the European Union and the Member States can legislate since "*the exercise of that competence shall not result in Member States being prevented from exercising theirs"* [32] .

The coordinating policy areas are defined in the third paragraph of art. 2 TFEU; the role of the European Union in this field, which comprehends economic, employment and social policies, is to provide support for the Member States to exercise their competences in a coordinating manner, by offering guidelines and initiatives to reach coordination [33]. The mere coordinating role of the European Union points out the substantive nature of the European Union and the strict correlation between sovereignty and conditionality; in fact, these fields represent sensitive areas for the Member States since they concern internal matters and for this reason a political consensus on the regulation of such competences at the European level was not reached. Because of this, the European Union only acts as a coordinating force that manages to control and to ease cooperation between Member States.

[28] Art. 2(1) TFEU
[29] Ibidem
[30] Robert Schutze, *European Union Law,* Oxford University Press, 2021, p. 242
[31] Art. 2(2) TFEU
[32] Robert Schutze, *European Union Law,* Oxford University Press, 2021, p. 244
[33] Ivi, p. 245

The field of complementary policy defines, according to art. 2(5) TFEU, "*actions to support, coordinate or supplement the action of Member States".* Here the EU's role is marginal and aimed mainly to fund Member States' initiatives. The concerned fields regard areas strictly linked to the internal matters of states, such as education, tourism, culture, civil protection and public health, where the European Union's harmonizing action is prohibited since it must not affect existing or future national legislation [34]. The last area deals with a field where the European Union still reflects its intrinsic intergovernmental area: the Common Foreign and Security Policy area. Here, the European Union does not act as a regulating authority since it is required the consensus of the Member States in order to decide whether to take an action or not.
In this context, it must be also highlighted both the principles and the boundaries enshrined in art. 5 of the Treaty of European Union (TEU) that governs the competences of the European Union. Art. 5 TEU states that the EU acts only within the limits of the competences that EU countries have conferred upon it in the Treaties […] competences not conferred on the EU by the Treaties thus remain with EU countries. This principle must be read together with the principles of subsidiarity and proportionality, which state that the "*decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at the EU level is justified in light of the possibilities available at national, regional or local level as well as these EU actions should not go beyond what is necessary to achieve the aims of the Treaties"* [35]. Therefore, the EU is obliged to act within the scopes of the Treaties in a proportional way, leaving the residual powers in the hands of Member States, in the capacity of masters of the Treaties. In this passage the relation between conditional binding measures imposed at the European level and the discretion that Member States own as founding entities of the supranational organization is defined.
Throughout the years, the European Union has progressively expanded its limits of action, as the milestones sentences of the European Court of Justice (ECJ) (*Van Gend en Loos* [36] and *Costa vs E.N.E.L.* [37]) explicitly express. The first sentence defined the European Union as a supranational organization imposing obligations not only on States but also on citizens, therefore differentiating European law from international law while *Costa vs E.N.E.L.* stated the supremacy of Community law over national law, unbalancing the equilibrium between European conditionality and national sovereignty in favour of the former. In particular, in *Van Gend en Loos* judgement, the ECJ embraced the constitutional approach to European Law and pointed out that the objective of the EEC was to create a common market, the functioning of which directly concerned national citizens

[34] Ivi, p. 247
[35] Principle of subsidiarity, in EUR-Lex, accessed on 24th September 2021, https://eur lex.europa.eu/summary/glossary/subsidiarity.html
[36] Van Gend en Loos, in EUR-Lex, accessed on 24th September 2021, eur-lex.europa.eu
[37] Costa VS E.N.E.L., in EUR-Lex, accessed on 24th September 2021, eur-lex.europa.eu

and implied that the European Law constituted a *"new order of international law"* which went beyond the contractual relation of international law [38]. Moreover, in *Costa vs E.N.E.L.* decision, the European Court of Justice (ECJ) explicitly expressed that, from the "*integration into the laws of each Member State"* and from *"the terms and the spirit of the Treaty"* it was impossible for Member States' organs to accord precedence to domestic measures over Community law as doing so would jeopardize the attainment of the objectives of the EEC Treaty and the "*very character"* of the EEC, contrary to the principle of loyal cooperation [39] .

In this complicated pattern, the national courts intervened since the excessive intrusion of European institutions into the national legal systems would undermine state sovereignty. Two main constitutional courts paved the way for reaffirmation of national sovereignty: in 1984 the Italian Constitutional Court, in *Granital* judgement, proposed an original approach comprehending the relationship between internal order and supranational order, attempting to limit as far as possible the generalized recognition of the primacy of European law over national law [40]. The limit regarded, and still regards, the applicability of European law within the inviolable boundaries of the respect of human rights and the fundamental provisions of the Italian Constitution. The Italian Court thus formulated the theory of *counter-limits* which, still nowadays, represents a milestone for the reformulation of the relation between European conditionality and national sovereignty. The same approach was followed by the German Federal Constitutional Court in *Maastricht- Urteil* in 1993. In that case, the German judges reserved the task of checking "*whether the acts of the European Institutions and bodies respect or exceed the limit of the sovereign powers devolved to them*" [41]. The judgement concerned the application of the Treaty of Maastricht and the introduction of the European citizenship that, according to the German judges, would undermine the legal German system. Consequently, the national legal authority imposed boundaries to expansion of European competences, by checking in advance whether European provisions are compatible with the German Basic Law. From the two judgements, it follows that the national constitutions of Member States represent the fundamental body that European law must respect in the transposition into the national legal systems otherwise they may be declared unconstitutional.

The Lisbon Treaty, approved in 2009, that reformed the structure of the European Union (introducing the principles aforementioned), implemented the sentences of the Constitutional Courts both in art. 4(2) that binds the Union "*to respect the national identities of the Member States,*

[38] Morten Rasmussen, *Revolutionizing European Law: A history of the Van Gend en Loos judgement,* Oxford University Press and New York University School of Law, 136- 163, 2014, p. 154

[39] Amedeo Arena, *From un Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa vs ENEL,* European Journal of International Law, 30(3), 1017-1037, 2019, p. 19

[40] Costa VS E.N.E.L., in EUR-Lex, accessed on 24th September 2021, eur-lex.europa.eu

[41] R. Bifulco, A. Nato, *The concept of sovereignty in the EU – past, present and the future,* Reconnect Europe, April 2020, p.73

inherent in their fundamental structures, political and constitutional, inclusive or regional and local self-government" [42] and by enhancing the role of national parliaments that can now present a reasoned opinion to the Commission if they consider that a draft EU law does not comply with the principle of subsidiarity.

However, the relation between sovereignty and conditionality continued after the ratification of the Lisbon Treaty and the subsequent implementation. In fact, in June 2009 the *Bundesverfassungsgericht*, that is the Federal Constitutional Court of Germany, in *Lissabon-Urteil* judgement analysed the compatibility of the *Bundesrat* federal law for the implementation of the Lisbon Treaty with the German Basic Law theorizing for the first time an *Identitätkontrolle*, that is a further control in order to assess whether European provisions are compatible with the German constitutional identity in addition to the ordinary controls such as the compatibility control with human rights protection and the control on the *ultra vires* acts as stated in *Maastricht – Urteil* judgement [43]. Thoroughly, paragraph no. 252 of the judgement explicitly lists the sensitive matters concerning the protection of German constitutional identity such decisions dealing with criminal law and criminal procedure, national security matters such as the use of military personnel, fiscal management, provisions regarding welfare state, family law, education and religion [44] that need the *Identitätkontrolle*. The same approach has been followed by other Constitutional and Supreme Courts especially in Poland, Hungary and Czech Republic; in the case of Hungary, the references made by the Hungarian Constitutional Court [45] to the *Lissabon-Urteil* judgement have been seriously exaggerated since the judges mentioned it to justify the rejection of a mandatory redistribution quota of immigrants on behalf of the protection of the Hungarian identity [46].

The abovementioned events shows that the European Union is facing a phase of transformation which reflects two historical streams that have debated for a long time on the destiny of the European Union: the neo-functionalist approach and the intergovernmental perspective. The neo-functionalist approach believed, at the beginning, that the integration of the European economies would eventually lead to a "*spillover*" into other categories thus inducing to a more united and integrated Europe [47]. Jean Monnet's thought, one of the pioneers of the European project, is still today alive and the European Union itself is developing in the direction of a more integrated

[42] Art. 4 TEU

[43] Pietro Faraguna, *Alla ricerca dell'identità costituzionale tra conflitti giurisdizionali e negoziazione politica,* Crisi e conflitti nell'Unione Europea, Fascicolo n. 3(1), 2016, p.201

[44] Ivi, p. 202

[45] Hungarian Constitutional Court, decision no. 22/2016 (XII. 5.) AB of 16th December 2016, available at hunconcourt.hu

[46] Pietro Faraguna, *Alla ricerca dell'identità costituzionale tra conflitti giurisdizionali e negoziazione politica,* Crisi e conflitti nell'Unione Europea, Fascicolo n. 3(1), 2016, p. 204

[47] R. Bifulco, A. Nato, *The concept of sovereignty in the EU – past, present and the future,* Reconnect Europe, April 2020, p. 23

supranational organization. The functionalist approach has some contact points with the federal perspective even if the European Union does not present, so far, the features to be defined as a federal entity. The intergovernmental approach developed in the opposite direction: it conceives the European Union as a Union of States and not as a quasi-federal entity. According to this theory, which dominated the scene till the late 60s, the Member States are the solely masters of the treaties which gave power to the European Union, but the organization still must reflect the will of the states [48].

Nowadays, the European Union shows this divergence in its structure. While in some areas such as the custom union the European Union is the sole which can legislate and take action, in other areas such as immigration, justice, transport and environment both the EU and member countries are able to pass laws, but member states can do so only if the EU has not already proposed laws or has decided that it will not [49]. There is another area, mainly concerning tourism or education, where the EU provides only support and preserves the national sovereignty of Member States. Nevertheless, the European Union may interfere in ambits not explicitly assigned to itself according to the *flexibility clause* [50], entailed in art. 352 TFEU, a provision that can enable the EU to act outside its normal areas of responsibility under strict and particular conditions.

1.3.3 The immigration policy and the sensitive theme of sovereignty within the EU

The immigration topic has developed throughout the years because of the historical changes and events that took place since the establishment of the European Union. The Maastricht Treaty, approved in 1992, placed the immigration policy under a separate intergovernmental "pillar" especially for the legal treatment and admission of "third country nationals" (TCNs) [51] . The same Treaty also incorporated the discipline regarding the right of free movement of EU citizens within the Schengen Area, a space without visa control and checks established by the Schengen Agreement in 1985 between France, Germany, Belgium, Luxembourg and the Netherlands which further expanded and became efficient in the following decades [52] . At the beginning, the action of the European Union towards the management of TCNs was very limited and caused several divisions even though the European institution's informal control progressively expanded and ultimately

[48] Ivi, p. 24

[49] Areas of EU action, in European Commission official site, accessed on 1st October 2021, https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en

[50] Art. 352 TFEU

[51] Gallya Lahav and Adam Luedtke, *Immigration Policy,* The Europeanization of European Politics, Chapter 8, p. 109-122, 2013, p. 112

[52] Schengen Agreement, in Schengen visa info, accessed on 1st October 2021, www.schengenvisainfo.com

enshrined in the Lisbon Treaty in 2009, which nowadays regulates the immigration policy. In particular, art. 79 and 80 TFEU explicitly list the European competences and objectives and the sharing of responsibility with Member States. According to art. 79(1) TFEU, "*The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of illegal immigration and trafficking in human beings"* [53] and, at the same time, *"The European Parliament and the Council […] may establish measures to provide incentives and support for the action of Member States"* [54] with the great exception of not affecting the right of Member States to determine the volume of admission of third-country nationals [55]. Therefore, the immigration policy falls into the field of the shared competences as stated in art. 80 TFEU [56] with the aim of establishing a certain degree of harmonization which, however, was not accomplished in all areas. Policy proposals have come in many areas, including asylum, illegal immigration, visas, border control and labour recruitment [57]. The first three areas have reached a certain degree of harmonization (not without tensions between Member States) whereas few successful initiatives regard labour recruitment. Nowadays, the European Union has developed a common European asylum policy enshrined in the Dublin Convention (approved in 1990 and modified in 2013): the Convention states that that the Member State where the asylum seeker lands is the sole responsible for the asylum application. In this context, even if a great harmonization at the European level is reached, the Convention caused several problems between Member States, especially during the Syrian civil war in 2015 when the Southern European states were hit by an enormous flow of immigrants from the Maghreb area and were limited in actions due to the Dublin Convention. In fact, the Convention was conceived and modified in a historical context completely different from the 2015 situation and thus proved to be inefficient because, obviously, the Mediterranean states faced a huge flow of asylum seekers and found themselves in difficulty whereas Nordic countries did not have this problem. In that period, the European Union demonstrated its divided nature on sensitive themes since Southern states called for an equal redistribution of immigrants and a reform of the Dublin Convention while Nordic countries fought for the maintenance of the Dublin rules. This ideological fight between two opposite factions reflected the ideological division between

[53] Art. 79(1) TFEU
[54] Art. 79(3) TFEU
[55] Art. 79(4) TFEU
[56] The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.
[57] Gallya Lahav and Adam Luedtke, *Immigration Policy,* The Europeanization of European Politics, Chapter 8, p. 109-122, 2013, p. 113

states who wanted a closer Union made up of solidarity and share of responsibilities and states who claimed first the defence of their borders despite a closer Union.

Focusing on visas and illegal immigration, the level of harmonization is very high since the European Union now has a common border patrol called Frontex [58], a common format for visas and a common list of countries whose nationals are granted visa-free entry, respectively the Visa Information System [59] and the Schengen Information System [60] with biometric data on foreign entrants [61]. On these topics, concerning mainly restricting and controlling measures, the European Union demonstrated to be close since the approval of these provisions concerned the fight against human trafficking and cross-border cooperation against international terrorism, sensitive topics for the European countries since the resurgence of terrorism in Europe from 2015. The fight against terrorism is further enhanced by some European actions, as art. 88 states, such as the supporting action of the Europol to police and other law enforcement services of Member States [62] or the activation of the *solidarity clause*. According to art. 222 TFEU, which regulates this mechanism, in case of a terroristic attack in a European Member State, the Union is required to mobilise all of the means at its disposal, including military made available by Member States and assist a Member State on its territory at the request of its political authority [63]. The discrepancies between the high level of harmonization in certain areas regarding freedom, security and justice and, at the same time, the quarrels between Southern Member States and Nordic Countries underlines the *sui generis* aspect of the European Union and its development towards both an intergovernmental organization in area such as foreign policy and a quasi-federal entity in areas that do not concern the loss of internal sovereignty.

[58] Frontex is the European Boarder and Coast Guard Agency that coordinates and organises joint operations and rapid border interventions to assist Member States at the external borders, including in humanitarian emergencies and rescue at sea. It supports Member States with screening, debriefing, identification and fingerprinting of migrants. Moreover, Frontex focuses on preventing smuggling, human trafficking and terrorism as well as many other cross-border crimes

[59] The Visa Information System (VIS) allows Schengen States to exchange visa data. It processes data and decisions relating to applications for short-stay visas to visit, or to transit through, the Schengen Area. The system can perform biometric matching, primarily of fingerprints, for identification and verification purposes.

[60] The Schengen Information System, then Schengen Information System II, is a large-scale information system that facilitates cooperation between national border control, customs and police authorities in the Schengen Area.

[61] Gallya Lahav and Adam Luedtke, *Immigration Policy, The Europeanization of European Politics*, Chapter 8, p. 109-122, 2013, p. 116

[62] R. Bifulco, A. Nato, *The concept of sovereignty in the EU – past, present and the future,* Reconnect Europe, April 2020, p. 54

[63] Ibidem

1.4 The application of conditionality: the 2004 enlargement

The current European Union (European Economic Community – EEC - till 1993) [64] has continuously enlarged its borders since the first enlargement in 1973. However, till 1992, few conditions were imposed on applicant countries and mainly dealt with the consolidation of the democratic apparatus, as it happened in "the southward enlargement" when Greece, Spain and Portugal acceded the European Union respectively in 1981 and 1986. Although these states had to fulfil some important criteria for acquiring the membership, the conditional measures to be satisfied easily changed and some were also excerpted due to the economic challenges the European Union was facing. Other applicant countries that joined the European Union before the Southern states, such as Denmark or Ireland, did not encounter particular problems thanks to the consolidated rule of law and the strength of their own economies.

The fall of the Berlin Wall in 1989 and the subsequent dissolution of the Soviet bloc in 1991 were the main historical developments that completely changed the ideological approach of the European Union towards the new applicant countries. At that time, the main problem was the different economic and social structure between the European Union and the Central Eastern European (CEE) countries: the former was shaped according to a neoliberal agenda and a capitalist ideology whereas the latter had been under the communist rule for almost 50 years. This huge economic and ideological difference reflected also a different cultural aspect because the Eastern states had always been considered for a long time distant countries, far from being accepted within the European space. Hence, the economic and political vacuum originated from the dissolution of the Soviet bloc stuck the European Union in such a difficult dilemma: on the one hand, the enlargement was an opportunity to fill the vacuum and to strengthen its position in the European continent but on the other hand, the EU had to face the economic consequences of a too quick accession of the CEE countries.

[64] European Community (EC), previously (from 1957 until Nov. 1, 1993) European Economic Community (EEC), byname Common Market, former association designed to integrate the economies of Europe. The term also refers to the "European Communities," which originally comprised the European Economic Community (EEC), the European Coal and Steel Community (ECSC; dissolved in 2002), and the European Atomic Energy Community (Euratom). In 1993 the three communities were subsumed under the European Union (EU). The EC, or Common Market, then became the principal component of the EU. It remained as such until 2009, when the EU legally replaced the EC as its institutional successor.

1.4.1 From the PHARE aid programme to the Copenhagen criteria

The first years after the fall of the Soviet bloc were dedicated to the establishment of tools of positive conditionality, such as the PHARE aid programme, which funded and supported the economic transition of these countries by giving technical assistance in a very wide range of areas [65]. The main aim of the programme was to support the countries in the transition from a communist economy to a market-led one, following a neo-liberalist approach; moreover, the programme also aimed to strengthen the fragile democratic system of the post-communist countries especially from 1992 to 1997 [66]. In sum, the PHARE programme implemented some important reforms in the CEE countries such as the liberalization of the economy following the GATT guidelines [67], the abolition of restrictions on import of EU goods and the macroeconomic assistance for these countries.

Finally, all these measures converged in the so-called Europe Agreements, a set of formally structured trade relations, including political and economic provisions, that explicitly subordinated the CEE membership status to five fundamental conditions (rule of law, human rights, a multi-party system, free and fair elections and a market economy) that, if not met, would jeopardize their entrance in the EU [68]. The European Agreements thus represented the first serious imposition of conditional measures on acceding countries and were soon followed by a comprehensive document containing the official requirements to join the EU.

Consequently, at the Copenhagen European Council in 1993, new measures were designed to minimize the risk of new entrants to become politically unstable and economically burdensome to the existing EU [69]; they were then incorporated in the Maastricht Treaty and in the Lisbon Treaty, constituting art. 49 of the TEU. The criteria state that an eligible country, to be part of the European Union, must have:

1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for democracy

2. A functioning market economy and the ability to cope with competitive pressure and market forces within the EU

[65] Heather Grabbe, *The EU's Transformative Power: Europeanization through conditionality in Central and Eastern Europe,* Palgrave Macmillan, Great Britain, 2006, p.6
[66] Ibidem
[67] Set of multilateral trade agreements aimed at the abolition of quotas and the reduction of tariff duties among the contracting nations.
[68] Ivi, pag. 9
[69] Ivi, pag. 10

3. The ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law and adherence to the aims of political, economic and monetary union [70]

Hence, the Copenhagen Criteria established the official measures that, from that moment onwards, acceding states had to satisfy to be part of the EU. In detail, the third condition, that is the capacity to implement the entire *Acquis Communautaire*, required an efficient bureaucratic public system. For this reason, the fourth enlargement that occurred in 1995, which welcomed Austria, Sweden and Finland in the European Union, did not present critical issues since these countries already had both the requirements aforementioned and an efficient bureaucratic system. Otherwise, the CEE countries faced several problems both in the field of the protection of minorities (e.g. the Baltic Countries) and in the implementation of the *Acquis Communautaire* as it will be seen in the following sections.

In addition, the launch of the Copenhagen criteria was soon followed by a "*pre-accession strategy*" that incorporated both the PHARE and the European Agreements and added two new elements to facilitate the process of adaptation to the EU requirements: the Single Market White Paper and the Structured Dialogue [71]. Meanwhile, the conditional measures became stricter when the Commission started to present its own Opinion, that is an overview of the political and economic situation of the candidate countries. Each Opinion was divided in chapters and a final judgement was presented: if the candidate country did not satisfy a certain level of adaptation to EU rules in each field, the reward would not be bestowed. Technically speaking, the Opinions were an important step forward in EU conditionality in two fields: they provided the basis for the first active application of conditionality on involvement in the accession process and, by providing assessments, they allowed differentiation between the applicants according to how near they were to meeting the Copenhagen conditions [72]. The conditionality became stricter from 1998 to 2002 when the EU set out its most explicit list of tasks to be undertaken: the Accession Partnerships. They united all EU demands and assistance for meeting in a single framework, by setting timetables of short and medium-term priorities and shifted the Commission's control from the first two Copenhagen criteria to the obligations of membership. The ten candidate countries had different priorities in four main areas:

[70]Accession Criteria, in EUR-Lex, accessed on 1st October 2021, https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html

[71] Heather Grabbe, *The EU's Transformative Power: Europeanization through conditionality in Central and Eastern Europe*, Palgrave Macmillan, Great Britain, 2006, p. 11

[72] Ivi, p. 13

Political criteria, Reinforcement of institutional and administrative capacity, Internal Market and Justice and Home Affairs [73].

1.4.2 The implementation of the Acquis Communautaire

The implementation of the entire *Acquis Communautaire* was divided into thirty-one different chapters and each country, on different times, could open a chapter and close another one. This process reflected the fact that the EU conditional measures on this aspect were an evolving process highly politicized especially on the EU side since it acted in a twofold position. On the one hand, the Union embodied the aid donor imposing conditions on relations with third countries that are intended to benefit them by supporting post-communist socio-political transformations but, on the other hand, it guided these countries towards membership which requires creating incentives and judging progress in taking on specific EU models [74].

The administrative capacity of the ten countries was heavily put under pressure especially because the legacy of communism did not allow the development of an efficient bureaucratic apparatus and often what asked from the European Union requested the creation of new institutions from scratch, leaving space for mixed outcomes and unfavourable conditions for a durable influence of rules adopted during the pre-accession period [75]. For this reason, worries arouse about the post-accession compliance with EU law transposition but only five out ten newly member states started with rates well below the average of EU15, then consistently recovered in the following years, denoting the winning approach of EU conditionality on membership [76].

The same outcome is found in the infringements of EU law because, by analysing the Reasoned Opinions made by the Commission and referrals to the European Court of Justice for each member state from 2005 to 2007, the performance of CEE countries was better in almost all cases than every old member state, with an outstanding performance of Lithuania. These states showed a lower incidence of infringement cases and performed better in the management of individual infringement, showing an optimal transposition of EU body law although they presented an obsolete judicial system prior to accession [77]. The optimal performances of the new member states were caused by different factors but, essentially, despite their reluctance towards a top-down

[73] Ivi, p. 16
[74] Heather Grabbe, *European Union Conditionality and the Acquis Communautaire,* International Political Science Review (2002), 23(3), 249-268
[75] Ulrich Sedelmeier (2008), *After conditionality: post-accession compliance with EU law in East Central Europe,* Journal of European Public Policy, 15(6), 806-825
[76] Ivi, p.812
[77] Ivi, p. 814

hierarchical nature of conditionality, the monitoring process was the main factor that triggered a form of *"hegemonic socialization"*, that is the perception of conditional measures resulted in compliance, which became the appropriate behaviour for community members.

In the process of the implementation of the *Acquis Communautaire*, the candidate countries surprisingly excelled also in another field that marked the difference between the neoliberal agenda pursued by the European Union and the communist heritage of the CEE countries: the establishment of an internal system of state aid control. Similar local and state authorities did not exist in the CEE countries thus they have been established from scratch. Under Art. 108(3) of the Treaty of the Functioning of the European Union (TFEU), every central and local institution of a candidate country had to notify any new subsidy scheme to a monitoring authority, embodied in the Commission, which then assessed the impact of the subsidy on the free competition in the market and decided whether to approve, block or impose conditions on the notified aid schemes [78]. The main consequence of this conditional measure is that, depending on the determinacy of conditions, the size and speed of rewards, the credibility of threats and promises and the size of adaptation costs, states aspiring to join the EU have strong incentives to comply with the *Acquis* while the negotiations are still on-going, but this incentive substantially decreases once membership is almost certain, that is, just before or as soon as the accession treaty has been signed (Böhmet and Freyburg 2013: 252). Thus, as long as the benefits derived from the application of conditional measures, such as incentives and subsidies, exceed the size of adaptation costs, the candidate countries are willing to fulfil EU rules at least till the goal of membership is reached. The willingness of adaptation to EU conditionality indeed decreases when membership is almost sure or when the official status of member states is reached thus from that moment onwards the compliance with EU conditionality is expected to decrease. For instance, Romania and Bulgaria were excluded from the first enlargement round in 2004 due to poor performances in almost all the chapters of the Single Market White Paper. In order to join the European Union within 2007, the two candidate countries engaged in a last-minute effort to reduce state aid control to prevent being excluded from the accession and thus Bulgaria obtained an extension of the deadline from 2006 to 2008, while Romania approved an action plan to increase compliance and reached the objective in 2006, just in time for the entrance [79].

The compliance of candidate countries has been demonstrated also in sensitive topics dealing with the relationship between national state and the protection of minorities since the first Copenhagen

[78] Marco Botta & Guido Schwellnus (2015), *Enforcing state aid rules in EU candidate countries: a qualitative comparative analysis of the direct and indirect effects of conditionality,* Journal of European Public Policy, 22(3), 335-352

[79] Ivi, p. 344

criterion implicitly contained the delicate field of the protection of minorities both in the respect of rule of law and human rights. This element is essential in defining a fully-fledged democracy and even reflects Art. 2 TEU, concerning the shared values that all Member States must respect and pursue. In this context, some problems arose especially in the Baltic States during the pre-accession period since the first Copenhagen criterion had to be translated into policy and enforced in the case of violations. The Regular Reports made by the Commission highlighted problems of the Russophone minority in Estonia and Latvia and other isolated problems with the Roma minority across Central and Eastern Europe to be solved through the adoptions of laws protecting the citizenship, naturalization, language and elections and the establishment of institutions or programmes targeting minority issues [80]. As previously said, the main problem regarded the Baltic States where the 35%-42% of the population was Russophone and, after the collapse of the Soviet bloc, the minority was mainly disregarded by the two Baltic States. Latvia and Estonia had to face the problem otherwise the membership would be jeopardized so that, in the pre-accession period, several international actors interacted to find a solution and ultimately the European Commission approved some conditional measures dealing with three main areas: the amendments of the citizenship legislation and the rate of naturalization, the development of the language law and policy and Latvia ratification of the Framework Convention for the Protection of National Minorities (FCNM), a comprehensive treaty designed to protect the rights of persons belonging to national minorities [81]. From 1997 to 2003 Latvia and Estonia approved laws aimed to satisfy European conditionality for the same reasons explained above: the benefits exceeded the domestic adaptation cost. The only problem remained the ratification of the FCNM by Latvia which only occurred in 2005 and it demonstrated that Latvia's post-accession ratification highlighted the importance of domestic political considerations shaping the adoption of internationally binding documents [82]. However, post-accession compliance did not prove to be efficient since the language laws and their implementation have remained ambivalent beyond EU membership. For instance, in Latvia, the number of minority-friendly deputies decreased to 23 in 2006 because the international involvement on sensitive issues in Baltic States has triggered a strong negative reaction among the political elites which narrowed the domestic scope for a rethinking of minority policies[83].

[80] Gwendolyn Sasse (2008), *The politics of EU conditionality: the norm of minority protection during and beyond EU accession*, Journal of European Public Policy, 15(6), 842-860
[81] Ivi, p. 849
[82] Ivi, p. 851
[83] Ivi, p. 855

1.4.3 The importance of compliance in conditionality: the Schimmelfennig and Sedelmeier's model

Despite everything, there had been some controversial aspects on European in the 2004 enlargement. As Sasse pointed out in her paper *The politics of EU conditionality: the norm of minority protection during and beyond EU accession*, the ultimate reward of accession is far removed from the moment at which adaptation costs are incurred: hence conditionality is a blunt instrument when it comes to persuading countries to change particular practices and second, the effectiveness of conditionality was reduced by the inconsistencies in the EU's advice to applicants (for instance, the EU stressed the need to control budget deficits while undertaking systemic reforms and at the same time it demanded major investments in infrastructure, environmental reform as well as agricultural innovations) [84] .

As seen, the 2004 enlargement and the subsequent conditional measures produced different outcomes and, surely, they presented their pros and cons. In 2005, Schimmelfennig and Sedelmeier proposed a model to describe how EU conditionality worked on the enlargement topic and the effects it provoked. They started with the assumption that governments would adopt EU rules if the benefits of EU rewards exceed the domestic adaptation costs: if the costs to the adaptation and the implementation of the entire EU legislative body are covered and exceeded by EU incentives and economic rewards the compliance of the candidate countries is ensured. Then, the cost benefit balance would depend on four sets of factors: the determinacy of conditions, the size and speed of rewards, the credibility of threats and promises and the size of adaptation costs.

According to Schimmelfennig and Sedelmeier's compliance game, the EU as institution and the candidate country may follow two main strategies in the negotiation process: the EU may aim to expand its jurisdiction whereas the candidate country may follow the EU dictates or pursuit its domestic agenda. The game may lead to four distinct scenarios: when both the candidate country and the EU work together, the country will implement the *Acquis Communautaire* and then become an EU member. In the second scenario the applicant is not ready to satisfy the reforms needed and the EU is not willing to support the country. The third outcome presents the same country's situation as in the second situation, but the EU maintains the applicant's perspective of membership by eventually freezing the membership status and postpone it. The last scenario denotes the EU unwillingness to accept the candidate country into the community while the candidate country continues to carry out the reforms. Assuming that both the EU and the candidate country know that the game will be played once, an agreement between the two institutions is not self-enforcing

[84] Ivi, p. 263

because both players have their dominant strategy: the EU will prefer delaying the reforms while the candidate country will halt them. The consequence, called Nash equilibrium, will result in a "no enlargement" outcome but this game works only in the case there is not a fixed date for accession. In the 2004 enlargement, the candidate countries had to negotiate becoming a candidate first and then continued to negotiate on other aspects of the *Acquis Communautaire* in view of membership while the Nash equilibrium described above can be applied to the Turkish request for membership [85], where both the Turkish government and the European Union followed their own agendas and the Turkish accession was therefore postponed and eventually frozen.

1.5 The conditional measures in the EMU accession

The Economic Monetary Union (EMU) is the outcome of a deeper economic integration of 19 out 27 European Member States that share a common currency, the euro indeed, and represents the crowning of a closer European Union since The Hauge Summit held in 1969. From that Summit onwards the Member States have been working for the creation of a full economic and monetary union to achieve full liberalization, the total convertibility of Member States' currencies and the irrevocable fixing of exchange rates [86]. However, due to the economic crisis occurred in the 1970s, the project was delayed although in 1978 it was created the European Monetary System (EMS), a scheme that fixed the exchange rate of the various currencies based on the European Currency Unit (ECU). Only with the establishment of the Single Market Programme in 1985, the Member States understood the need of a single currency to avoid the high transaction costs between different currencies and the exchange rate fluctuations. The turning point occurred with the adoption of the Delors Report which established a three-stage introduction of EMU and ultimately pointed out the first guidelines to be received by Member States such as the convergence of economic policies as well as the creation of an independent institution, the European Central Bank, which would be responsible for the Union's monetary policy. Finally, the Treaty of Maastricht, signed in 1992, set out the stages the European countries had to follow for the establishment of the EMU:

1. Stage 1 (from 1990 to 1993) establishing the free movement of capital between Member States

[85] Steunenberg Bernard, Dimitrova Antoaneta, *Compliance in the EU enlargement process: the limits of conditionality,* European Integration Online Papers (2007), vol. 11, p. 10

[86] History of economic and monetary union, in Fact Sheets on the European Union, accessed on 2nd October 2021, www.europarl.europa.eu

2. Stage 2 (from 1994 to 1998) establishing the convergence of Member States' economic policies and the strengthening of the cooperation between Member States' national banks which had to become independent during this period.

3. Stage 3 (from 1st January 1999) provided the implementation of a common monetary policy under the control of the Eurosystem and the gradual introduction of the Euro, the common currency [87]

The transition to the third stage was subject to a series of several criteria to be fulfilled by Member since, by signing the Treaty of Maastricht, they bound themselves to the adoption of Euro (art. 3 TEU and art. 119 TFEU). Therefore, the first conditional measures that states had to implement were principally broad guidelines within a long timeframe. Instead, the criteria to fulfil for acceding to the third stage represented the first body of conditionality for EMU. In detail the Maastricht convergence criteria are:

1. Each country's rate of inflation must be no more than 1.5% above the average of the lowest three inflation rates in the European Monetary System (EMS).

2. Its long-term interest rates must be within 2% of the same three countries chosen for the previous condition.

3. It must have been a member of the narrow band of fluctuation of the ERM [88] (Exchange Rate Mechanism) for at least two years without a realignment.

4. Its budget deficit must not be regarded as "excessive" by the European Council, "excessive" being defined as deficits greater that 3% of the Gross Domestic Product (GDP) for reasons other than those of a "temporary" or "exceptional" nature.

5. Its national debt must not be "excessive", defined as above 60% of GDP and not declining at a "satisfactory" pace [89]

Although the Maastricht convergence criteria were supposed to be respected by each member of the EMU who wanted to adopt euro currency, the third criterion was then relaxed due to the 1992-1993 exchange rate crises which allowed for both greater flexibility and the withdrawal from the ERM by

[87] Ibidem
[88] An exchange rate mechanism set up to ensure that exchange rate fluctuation between the ECU first and the Euro, with the adoption of ERM II, then would not disrupt economic stability within the single market, and to help non-euro area countries prepare themselves for participation in euro area. Currently, the ERM II includes the currencies of Bulgaria, Croatia and Denmark.
[89] Mark Beimbridge, Brian Burkitt & Philip Whyman (1999), *Convergence criteria and EMU membership: Theory and evidence*, Journal of European Integration, 21(4), 281-305

UK and Italy [90]. Eventually the third criterion was not taken into account as a precondition to join the EMU. Some flexibility arose even in the fourth and fifth criteria, the two quantitative conditions for adopting the euro currency. In fact, in 1997 Spain, Ireland, Italy, Netherlands, Austria, Portugal and Sweden all possessed a government debt ratio exceeding 60% in 1997 and the only country that actually fulfilled the five convergence criteria was Luxemburg, an atypical country due to its size, economy and the lack of an independent central bank [91]. Moreover, in 1997 Member States agreed to be part of the Stability and Growth Pact (SGP) in order to help implement the obligation to avoid excessive deficits as laid down in the Treaty; within the Pact it was established the *excessive deficit procedure* aimed to encourage governments to quickly correct deficits over 3% deficit/GDP ratio by implementing procedures involving tighter surveillance and sanctions [92]. The governance and the approval of actions and sanctions were on behalf of the Commission and the ECOFIN [93]. In this contest of interrelated conditional measures between the Maastricht convergence criteria and the SGP, the states' compliance with economic conditionality, especially Southern Member States' compliance, did not reach a satisfying level but, on the contrary, recorded a progressive positive respect of the conditional measures during the pre-EMU accession phase and a descending performance once the membership was fully achieved[94], in line with the Schimmelfennig and Sedelmeier's compliance game.

Focusing on the fourth criteria and on the golden rule of the deficit-to-GDP ratio below 3%, conditionality relied on the adoption of measures aimed to ensure fiscal adjustment and to redress fiscal imbalances by engaging in substantial structural reforms involving a high political cost for the incumbent government [95] but, once the measures were met, Member States could rely on the Stability and Growth Pact, controlled by the highly politicized ECOFIN and hence more willing to implement measures of "*soft conditionality*" such as the relaxing of budgetary pressure of the external constraints, and prone to avoid the adoption of sanctions against Member States [96]. For instance, Spain, Italy, Portugal and Greece well performed in the reduction of government debt and in fiscal adjustment in the 1990-1997/99, the period of the pre EMU accession, but the performance deteriorated from 1997/99 to 2005 when the Primary Balance of Greece skyrocketed to 6.5% GDP

[90] Ivi, p. 285
[91] Ivi, p. 288
[92] Schuknecht, Ludger; Moutot, Philippe; Rother, Philipp; Stark , Jürgen, *The Stability and Growth Pact - crisis and reform*, ECB Occasional Paper, No. 129, 2011, pp.1-20, p.9
[93] The Economic and Financial Affairs Council (ECOFIN) is responsible for EU policy in three main areas: economic policy, taxation issues and the regulation of financial services. The Ecofin Council is made up of the economic and finance ministers from all member states. Relevant European Commissioners also participate in meetings.
[94] Spyros Blavoukos and George Pagoulatos, *The Limits of EMU Conditionality: Fiscal Adjustment in Southern Europe*, Journal of Public Policy, No 12, March 2008, pp.1-35, p. 6
[95] Ivi, p.7
[96] Ivi, p. 9

deficit in 1999 and Italian equivalent reached 6.7% in 1997 and only achieved 2.7% in 2002 [97]. The Italian macroeconomic policies after 1998 relaxed, thanks to a softer approach of Germany and France on fiscal policy as reflected in the ECOFIN and showed a significant deterioration and a delay on the need of structural reforms; the same situation took place in Greece and, with a lesser extent, in Portugal [98] while Spain represented the only country that respected the conditional measures by thus showing a GDP/ratio in line with the SGP and Maastricht convergence criteria. Furthermore, the EMU presented several critical issues: first of all, it lacked a certain degree of political integration since it did not present a well-functioning fiscal system, suffered from a democratic deficit [99] and, art. 103 EC (then art. 125 TFEU [100]) entailed the so-called *no bailout clause*, that is Member States' prohibition of taking on the debts of another Member State; this clause will cause several problems during the European debt crisis. In this context, the ECB has been entrusted with the aim of pursuing the monetary policies of Eurozone member states while euro members were obliged to align their economic policies and thus the multi-level framework of economic policy in EMU was justified as a symbolic relationship between national and EU policymaking [101].

1.5.1 From the European debt crisis to the regime of strict conditionality: the EFSF, the ESM treaty and its reform

The European debt crisis unveiled the limits of the EU projects, such as the democratic deficit, and provoked a change in the conception of economic conditionality. Before 2010, the only statement concerning economic conditionality was art.143 TFEU which provided *the possibility of financial assistance to Member States facing economic difficulties [102] and the European Union participated, in cooperation with the IMF, to the disbursement of funds to third countries that requested financial assistance through its "Macro-Financial Assistance to Non-EU Countries" even though it was*

[97] Ivi, p. 11
[98] Ivi, p. 22
[99] Professor Dr. Henrik Enderlein (2006), *The euro and political union: do economic spillovers from monetary integration affect the legitimacy of EMU?*, Journal of European Public Policy, 13(7), 1133-1146
[100] 1. Art. 125 TFEU explicitly states that: The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.
[101] Ivi, p. 1137
[102] Art. 143 TFEU

bound to neighbouring countries [103].

Nevertheless, the outbreak of the debt crisis of 2010 revealed the unpreparedness of the European Union, because of its lack of an instrument or procedure to face the crisis of the Eurozone. In May 2010, the Eurogroup signed a Draft Statement to activate, further to a request form the Greek government, stability support to Greece via bilateral loans centrally pooled by the European Commission and prescribing a regime of strict conditionality [104], which was officially established under the rules of the European Financial Stability Facility (EFSF), an intergovernmental economic organization appositely created in order to avoid the spread of the Euro crisis in other Member States which presented an high deficit/GDP ratio. The EFSF governance was mainly shaped by Germany and France, the two most relevant economies in the European Union and the most exposed to the Greek crisis. Ultimately, the EFSF was an intergovernmental mechanism expected to rely on the Commission for technical work, but the decisions were taken by the Member States in the Council [105].The rescue plan of strict conditionality to save Greece was defined in the Memorandum of Understanding between Greece and the so-called *Troika*, that is the group made up of the European Commission, the International Monetary Fund and the European Central Bank which funded and supervised the Greek financial assistance and called for systemic reforms in delicate sectors such as pension system and fiscal framework. In detail, the regime of strict conditionality provided for the reduction of the fiscal balance from 14% of GDP to below 3% of GDP in order to realign the Greek deficit to the Maastricht convergence criteria, strong wages and pension cuts (for instance the replacement of Easter, summer and Christmas bonuses with a *una tantum* bonus) and a plan of privatizations in order to reassure the markets [106].

However, the EFSF revealed some controversial aspects because, on one hand, it improved the Irish financial situation under a regime of strict conditionality but, on the other hand, the situation in Greece was far from being solved due to the increasing market speculation and scepticism about the EFSF actions [107]. Effectively, the EFSF was soon replaced by the European Stability Mechanism (ESM), an intergovernmental organization under public international law, introduced by the European Council, as a permanent financial assistance programme to replace the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (EFSM) funds

[103] Macro-Financial Assistance (MFA) to non-EU partner countries, in European Commission official site, consulted on 4th October 2021, ec.europa.eu

[104] Statement by the Eurogroup, in European Council official site, consulted on 4th October 2021, https://www.consilium.europa.eu/media/25673/20100502-eurogroup_statement_greece.pdf

[105] Sophie Meunier, *Time will tell: The EFSF, the ESM, and the Euro crisis,* Journal of European Integration, 35(3), April 2013, pp. 239-253, p. 245

[106] Statement by the Eurogroup, in European Council official site, consulted on 4th October 2021, https://www.consilium.europa.eu/media/25673/20100502-eurogroup_statement_greece.pdf

[107] Sophie Meunier, *Time will tell: The EFSF, the ESM, and the Euro crisis,* Journal of European Integration, 35(3), April 2013, pp. 239-253, p. 247

[108]. Art. 3 of the abovementioned Treaty states that the purpose of the ESM "*shall be to mobilise and provide stability and support under strict conditionality*" in favour of ESM members that experience by several financial problems; art.12 highlights that *"conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions"* and art.13 affirms that the *governance is entrusted to the European Commission in liaison with the ECB and wherever possible, with the IMF, with the task of negotiating a Memorandum of Understanding with the assisted Member State and detailing the conditionality attached to the financial assistance facility*, as it happened in the Greek case [109].

In detail, the ESM provided six forms of conditional financial assistance but just one, the *Precautionary Conditioned Credit Line* (PCCL), was preventive as it was reserved to Member States that presented a sound economic and financial situation as stated in the SGP or Member States that did not satisfy this criterion but had a generally sound economic situation [110]. The other five forms of conditionality only intervened after the economic default and regarded the "*loans for indirect bank recapitalisation*" applied to Spain in 2012 and 2013 and generally applied for that States that did not present critical issues on fiscal policy; the *"loans within a macroeconomic adjustment programme"* for that States, such as Cyprus from 2013 to 2016 and Greece from 2015 to 2018, that needed a macroeconomic adjustment programme; the "*Primary Market Support Facility"*, *"Secondary Market Support Facility"* and the *"Direct Recapitalisation Instrument"* have never been used and the last one would be subject to the ESM reform [111].

The ESM was ultimately reformed in 2020, in order to develop further the ESM's role and position as the euro area crisis-resolution mechanism, while also refining the financial mechanisms and introducing new ones [112]. The main aim of the reform has been the de-politicisation of the procedure to provide financial assistance as the power on behalf of the Commission are ultimately circumscribed in favour of the ESM by involving it both in the risk assessment of the Eurozone, in the sustainability of the requesting Member States' debt and in the monitoring process concerning the Member State's compliance in the implementation of conditional measures [113]. Other important reforms, as previously said, concern the reformulation of the financial assistance instrument, aimed

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[108] Antonia Baraggia, *Conditionality measures within the Euro Area Crisis: A challenge to democratic principle,* Cambridge Journal of International and Comparative Law, 4(2), 268-288

[109] ESM Treaty, in European Stability Mechanism official site, consulted on 4th October 2021, https://www.esm.europa.eu/sites/default/files/migration_files/20150203_-_esm_treaty_-_en.pdf

[110] Alessandro Somma, *Inasprire il vincolo esterno. Il Meccanismo Europeo di Stabilità e il mercato delle riforme,* Economia e Politica, pp. 1-18, p. 5

[111] Ivi, p.7

[112] Jasper Aerts and Pedro Bizarro, *The reform of the European Stability Mechanism,* Discussion Paper Series/14, September 2020, pp.2-24, p. 2

[113] Alessandro Somma, *Inasprire il vincolo esterno. Il Meccanismo Europeo di Stabilità e il mercato delle riforme,* Economia e Politica, pp. 1-18, p.9

to make it more attractive by providing a detailed list of eligibility criteria to access to the PCCL: requesting Member States will need to meet quantitative benchmarks and comply with qualitative conditions related to EU surveillance in addition to a two-year track record, prior to PCCL request, of the SGP pact concerning the debt/ GDP ratio [114]. In this context, the main difference with the previous ESM treaty is that in the newly reformed mechanism entails a detailed list of conditional criteria to access to the credit line thus making it more attractive to requesting Member States since they can know in advance what measures must be implemented and what to comply with. Moreover, the ESM reform also implies the abolition of the Memorandum of Understanding, replaced by a Letter of Intent, therefore changing the instrument from a bilateral to a unilateral one and increasing domestic ownership of the measures needed to ensure continuing compliance with the eligibility criteria [115].

1.5.2 The role of the ECJ in the European debt crisis

The fact that the European debt crisis outbreak caught the EU institutions unprepared arises the question whether the EU acted within its competences or whether it used other expedients to solve the crisis. According to Baraggia, the first financial programme for Greece and the EFSF was legally in accordance with art. 122(2) TFEU that states *the possibility of a State, hit by natural disasters or exceptional occurrences beyond its control, to require Union financial assistance* [116]. However, Baraggia outlined the ambiguous interpretation of the article since the Greek debt crisis has been created also by the Greek government itself and thus it did not constitute an exceptional occurrence beyond its control [117]. The newly established ESM required a revision of the TFEU in order to address the uncertainties of art. 122(2) and thus the modification of art. 136 TFEU was adopted by European Council Decision 2011/199 [118] that clarified the functioning of the ESM mechanism as below:

[114] Jasper Aerts and Pedro Bizarro, *The reform of the European Stability Mechanism,* Discussion Paper Series/14, September 2020, pp.2-24, p. 12
[115] Ibidem
[116] Art. 122 TFEU
[117] Antonia Baraggia, *Conditionality measures within the Euro Area Crisis: A challenge to democratic principle,* Cambridge Journal of International and Comparative Law, 4(2), 268-288, p. 272
[118] European Council decision of 25th March 2011 amending art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, in EUR-Lex, accessed on 4th October 2021, eur-lex-europa.eu

The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality [119]

The macroeconomic conditionality mechanism has been interpreted by the European Court of Justice (ECJ) in two landmark decisions: *Pringle* and *Gauweiler and others*. In detail, in *Pringle* decision, the ECJ was asked by Mr. Pringle to assess whether Ireland, by ratifying, approving or accepting the ESM Treaty, would undertake obligations which would be in contravention of provisions of EU and FEU (nowadays the TEU and TFEU) concerning economic and monetary policy and would directly encroach on the exclusive competence of the Union in relation to monetary policy [120]. He claimed that by establishing the ESM the Member States whose currency is the euro are creating for themselves an autonomous and permanent international institution with the objective of circumventing the prohibitions and restrictions laid down by the provisions of the FEU Treaty in relation to economic and monetary policy [121]. Further, he claimed that the ESM Treaty confers on the Union's institutions new competences and tasks which are incompatible with their functions as defined in the EU and FEU Treaties [122] .

The ECJ rejected Mr Pringle's action stating that art.136(3) TFEU was introduced with the aim of legitimizing a mechanism and therefore it constituted an emergency rule specifying not only the level of cuts to be made but also in what areas they are to be made by a Member State [123]. Thus, the regime of strict conditionality imposed by the ESM treaty was compatible with the coordination of national economic policies. In this way, the ECJ made the imposition of strict conditionality a constitutional requirement.

In *Gauweiler and others*, the ECJ was asked whether a programme for the purchase of governments bonds on secondary markets (OMT) could be covered by the European Central Bank powers under the TFEU provisions. The court affirmed that the purchasing of government bonds by the ECB was not intended as an equivalent of an economic policy measure because it interfered indirectly in the field of economic policy; if the same action is undertaken under the ESM context it constitutes an economic policy to safeguard the euro economic area while the ECB in doing so acts within the scope of maintaining price stability and hence acting within its limits. Pinelli explains, first of all, that *Gauwalier and others* justifies all the actions the ECB had taken beyond the TFEU Treaty because it simply acted within its scope; then, both the ECJ's decisions reveal an extreme caution of

[119] Ibidem
[120] Pringle vs Government of Ireland and others, in EUR-Lex, accessed on 4th October 2021, eur-lex-europa.eu
[121] Ibidem
[122] Ibidem
[123] J. White, *Authority under Emergency Rule,* 78 The Modern Law Review 4, 585-610, 2015.

the Court in scrutinizing under EU primary law how the conditionality mechanism is activated, be it by the ESM of by the ECB [124]. What really matters is that the analysed aspects reveal a double contradiction that characterised Eurozone's crisis management: the pretention of national governments to create a system based on automatisms and the discretionary powers acquired by the ECB contradict the premises on which functions are usually distributed between governments and central banks [125].

1.5.3 The democratic deficit

Another problem arisen from the Eurozone's crisis management has been the deep democratic deficit. The negotiations around the Memorandum of Understandings had left the national parliaments and the European Parliament (EP) aside. In detail, the EP was not included in the stipulation of the ESM treaty since it was an intergovernmental treaty although Regulation 472/2013 at art. 7 introduced the obligation for the Commission to orally inform the Chair and Vice-Chairs of the EP about the ESM authorities' decisions on the macro-economic adjustment programmes [126]. The role of national parliaments, in vests of donor and recipient representatives of the country, varied: in donor countries the national parliaments have strengthened their control powers and their participation in economic and financial matters whereas national parliaments of recipient countries have only been entrusted in the ratification of the financial programmes thus covering a marginal role [127]. However, thanks to the ESM reform now the Managing Director, on a voluntary basis, may inform the EP about the important developments on ESM activities [128].

The democratic deficit around the establishment of the ESM and in general around the management of the Euro area crisis has exacerbated the conflict between the working class, the section of population that suffered the most form the conditional measures of the adjustment programmes, and the so-called technocracy that still today manages the ESM. In fact, the ESM founding treaty entails the complete immunity to all the staff, members and ESM representative from every form of jurisdiction, every from of search, seizure, expropriation derived from executive, judicial and

[124] Cesare Pinelli, *Conditionality and economic constitutionalism in the Eurozone,* Italian Journal of Public Law, 11(1), 22-42, p. 33

[125] Ibidem

[126] Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21st May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, in EUR-Lex, accessed on 5th October 2021, eur-lex.europa.eu

[127] Antonia Baraggia, *Conditionality measures within the Euro Area Crisis: A challenge to democratic principle,* Cambridge Journal of International and Comparative Law, 4(2), 268-288, p. 281

[128] Jasper Aerts and Pedro Bizarro, *The reform of the European Stability Mechanism,* Discussion Paper Series/14, September 2020, pp.2-24, p. 16

administrative actions as well as the inviolability of documents and headquarters [129]. This legal framework has been criticised both by the EP and the German Federal Constitutional Court which precisely pointed out that the inviolability of archives and documents as well as the immunity of members and staff of the ESM may be allowed only after the green light of the German representative [130] thus circumscribing the power of the ESM in case of macroeconomic adjustment programmes. Similar actions have been taken by other Member States such as Austria, Estonia or Finland but such statements did not take place in affected states that requested adjustment programmes. In this context, as Antonia Baraggia pointed out in her paper *Conditionality measures within the Euro Area Crisis: A challenge to democratic principle,* the marginalisation of national parliaments was completely in conflict with the spirit of the Treaty of Lisbon which strengthened national parliaments in light of the alarming democratic deficit that had characterised for a long period the EU institutions.

The austerity policy that has characterised the previous decade has fuelled both the Euroscepticism and, as a consequence, the increasing spread of animosity towards the European integration project. Since the approval of the first adjustment programme to Greece and the consequent period of austerity the Eurosceptic parties have continuously spread and increased their leverage in several Member States and in the European Parliament too: in the 2019 European elections, the *Rassemblement National* (RN), famous for its Eurosceptic positions and a profound contestant of the austerity policies, obtained 23,34% [131] resulting the most voted party in France; in Italy the Eurosceptic party *Lega Salvini Premier* skyrocketed to 35% and in Germany the far right party *Alternative für Deutschland* obtained 11%, just behind the three main German parties. The main consequence of the rise of populist and Eurosceptic far right parties in Europe has been, in some countries, the deterioration of the rule of law and the involution of the quality of democracy. This phenomenon happened principally in the youngest democratic regimes in Europe, that is the Eastern countries such as Poland and Hungary, and in those countries that developed a Eurosceptic feeling due to the austerity regime. For instance, in Hungary and Poland the ruling parties, respectively Fidesz and PiS, are both far-right, conservative and Eurosceptic parties that, since their elections, implemented reforms that worsened the rule of law, by clearly violating the European rules and completely in contrast with the aims and values entailed in the Treaties. The situation, which will be analysed in detail in the following chapters, has continuously caused quarrels and court battles between the European Commission, in the vests of the guarantor of the

[129] [129] Alessandro Somma, *Inasprire il vincolo esterno. Il Meccanismo Europeo di Stabilità e il mercato delle riforme,* Economia e Politica, pp. 1-18, p. 11

[130] Ivi, p. 12

[131] Risultato delle elezioni europee del 2019, in European Parliament official site, accessed on 5th October 2021, europarl.europa.eu

Treaties, and the concerned states for violations of the Treaties concerning the respect of the rule of law; ultimately, the legal quarrel may be solved with a blockage of the European funds, under specific conditions, to those states that do not respect the rule of law.

In this context, some authors harshly criticised the austerity measures and the management of the Euro crisis by pointing out that, even if the European Union is bound to respect the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, in the management of the Euro debt crisis the social protection guaranteed by the Union has been put behind the necessity of maintaining the competitiveness of the European economy [132] thus aligning the social protection to the performances of the markets. The critics around the regime of strict conditionality are linked to the disappointment towards the European integration project and, in a broader context, the belonging of the European countries to the Euro-Atlantic alliance and the neoliberal approach that has always characterised it. According to Alessandro Somma and Edmondo Mostacci, in their volume *Dopo la crisi dialoghi sul futuro d'Europa,* the neoliberal approach has used the market reform as an instrument to implement structural reforms in the assisted countries in exchange for the disbursement of funds and incentives [133]. The main problem is that the neoliberal approach, as previously said, has preferred the alignment of the concerned state economies to the rules of the market without a parallel alignment or protection of social rights; this happened, according to the authors, since the first European Southern enlargement and, to a greater extent, with the euro crisis and now with the Covid-19 pandemic [134]. To conclude, the regime of strict conditionality that has been created in order to manage the Eurozone debt crisis has presented several contradictions that exacerbated the debate around the technocracy in the European Union, the distrust of European citizens and the rise of populist and Eurosceptic parties. The strict conditional measures required great sacrifices by the citizens of the states that requested financial assistance and, consequently, the disenchantment towards the European institutions only worsened. Moreover, the establishment of the EFSF and the ESM institutions has ultimately provoked some legal doubts that put in danger the European institutions since it appeared they have violated the treaties by exceeding its competences conferred in the fundamental treaties; as Antonia Baraggia stated, the Eurozone crisis management has become the symbol of the democratic disconnect of the EU and pointed out the weaknesses of the European project [135].

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[132] Fiammetta Salmoni, *Le politiche di austerity e diritti sociali nel processo di integrazione europea,* Costituzionalismo.it, Fascicolo n. 3 2019- Saggi e Articoli – Parte II, pp.153-208, p.184

[133] Edmondo Mostacci and Alessandro Somma, *Dopo le crisi, dialoghi sul futuro dell'Europa,* 2020, pp. 229-241, p. 229

[134] Ivi, p. 230

[135] Antonia Baraggia, *Conditionality measures within the Euro Area Crisis: A challenge to democratic principle,* Cambridge Journal of International and Comparative Law, 4(2), 268-288, p. 287

1.5.4 Concluding remarks

The first chapter has the main purpose to provide some basic but fundamental information concerning the definition and the characteristics of the term *conditionality* in order to better understand the following sections. At the beginning, the first paragraph provided some historic information on what conditionality is and how it is intended in the context of the international relations. Then, the focus has shifted to the differentiation between the positive and the negative conditionality as the main watershed for a comprehensive knowledge of the main conditional measures adopted by the various international organizations. The other section of the chapter focused mainly on practical examples of application of the conditionality in the context of the European union by firstly pointing out the difficult and thin equilibrium between sovereignty and conditional measures and then by highlighting the most famous example of conditionality in the recent history of the European Union: the 2004 Eastern enlargement. The 2004 enlargement has been thoroughly analyzed both from the perspective of the European Union, and therefore the establishment of an *Acquis Communautaire* to be followed by acceding countries, and from the acceding state too in order to demonstrate the importance of the compliance in this phase even thanks to the Schimmelfennig and Sedelmeier's compliance model. The last paragraph mainly dealt with the definition, explanation and analysis of the conditionality in the economic filed with regard to the European debt crisis occurred in 2010 and the EMU community. In fact, the section explained the Maastricht convergence criteria for acceding in the Euro area and then analyzed the economic reforms that have been made during that period, the role of the ECJ and the critiques that have been launched to the European Union in that particular historical moment. The next chapter will define another important element for the purpose of this thesis since it will be analyzed the rule of law in its content and its main features.

CHAPTER 2
THE CONCEPT OF RULE OF LAW

2.1 The Rule of Law definition, features and references on the EU Treaties and the role of the Venice Commission

The first chapter has been centred on the definition of the term "*conditionality*", its differentiated nature and the context of application. In particular, it has been defined the role that conditionality has played in the European legal framework, in the accession of new countries to the European union and the conditional measures adopted to face the outbreak of the European debt crisis in 2010. However, in order to better understand the purpose of this thesis, the previous section must be read together with a proper definition of the concept of the Rule of Law and the legal European framework within it is safeguarded and enforced. Thus, the following chapter will deal with the vagueness of the definition of the rule of law, its references on the EU treaties and the legal institutions involved in the process of enforcement of the values enshrined in the European treaties. As previously said, the concept of the Rule of Law (RoL) is so ample and undefined that is it necessary to make a brief introduction concerning the origins and the main features that have been characterizing the RoL since its conceptualization. From an historical point of view, the first official resemblance of the RoL may be traced back to the Medieval period and, in particular, to the formulation of the *Magna Charta* in 1215 which stated the equality and freedom of every man and the right of every citizen of not being imprisoned without a reasoned opinion[136]. Throughout the centuries, the milestones in the formulation of the Rule of Law may be chronologically considered the Constitution of the United States of America in 1787, which officially stated the establishment of an effective central government and the preservation of the fundamental rights of the individuals, the French Declaration of the Rights of Man and the Citizens of 1789, which entails fundamental provisions such as the equality and freedom of human beings as well as the right of a fair trial since no one could be imprisoned for reasons not explicitly provided by the law, and the Universal Declaration of Human Rights of 1948, the founding act of the United Nations and the blueprint for regional treaties concerning the respect of human rights and the consolidation of the Rule of Law

[136] Art. 39 of the Magna Charta stated that "no free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land".

notion [137]. In the following paragraph, it will be analysed and then adopted a structural definition of the abovementioned concept, in order to contextualize the references of the rule of law and its enforceable legal instruments stated in the European treaties.

2.1.1 The definition of the Rule of Law

If the concept of the RoL has evolved during the centuries around the pillars of the protection of human rights and the definition of a well-defined democratic regime, the debate around a proper conceptualization of the term is still opened since several scholars have given different opinions and definitions; for the purposes of this thesis, Tom Bingham's definition will be adopted. According to him, the Rule of Law concept is structured on eight principles: (I) the law must be accessible and so far as possible intelligible, clear and predictable; (II) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; (III) The laws of land should apply equally to all, save to the extent that objective differences justify differentiation; (IV) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably; (V) The law must afford adequate protection of fundamental human rights; (VI) Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve; (VII) Adjudicative procedures provided by the state should be fair and (VIII) The Rule of Law requires compliance by the state with its obligations in international law as in national law [138]. Therefore, the RoL definition could be assumed as a set of principle that defines the framework within a well-functioning democratic regime should act. In particular, the abovementioned statements focus on the clarity of the law and its accessibility to the public as the European Court of Human Rights stated in *Sunday Times v. United Kingdom* in 1989 [139], on the proper application of law to all citizens, on the good faith of who acts on behalf of the law. Thus, the definition points out the ultimately aim of the law: the protection of human rights and the compliance of the state in pursuing it both at the internal and external level. The Rule of Law set of principles may be considered as universally applicable since they define cross-national and cross-cultural values that each political system, whatever its cultural underpinnings and objectives, ought to incorporate into its legal

[137] Tom Bingham, *The Rule of Law*, Penguin Book, London, 2010.
[138] Ivi, p. 44
[139] At paragraph 49 the European Court of Human Rights stated that "The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.", European Court of Human Rights official site, accessed on 16th October 2021, hudoc.echr.coe.int

system [140]. Therefore, in order to properly work, the RoL set of principles must be included in a well-defined democratic regime where the executive, legislative and judicial systems are separate and independent from each other and where a system of checks and balances among the three powers is properly enacted.

In this context, scholars have tried to quantify the applicability of the RoL principles on the basis of some requirements: the *generality* of the rules, since their impartial application must be wide, the *publicity* of the laws in order to be available to the public, the *prospectivity* in order not to punish individuals for crimes not considered as such when committed, the *clarity* and *congruence* of the provisions and finally the *stability* and the *possibility* of rules, that is the prohibition of *ultra vires* acts by the institutions and their adherence to a prescribed set of norms [141]. However, it has been proved hard to measure the RoL status worldwide since the necessity of the separation of powers as well as the need of a proper system of checks and balances between the three powers have often resulted in a conflict between the three systems: for instance, a country may possess an independent judiciary with a strong system of judicial review but also a strong unitary executive branch and an inefficient system of legislative control over the executive power [142].

2.1.2 References of the Rule of Law in the European Treaties

In the European context, the first two founding treaties, the Treaty of Paris in 1951 and the Treaty of Rome in 1957, did not contain any reference to the protection of human rights as stated in the RoL definition, although the European Court of Justice in developing its jurisprudence started to treat such rights as unwritten *"general principles of Community law"* thereby granting them the status of primary law. The source of these general principles of Community law were the common constitutional traditions of the Member States and international treaties, in particular the European Convention on Human Rights (ECHR) of 1950[143]. In addition, during the decades, the ECJ stated several times the importance of the protection of human rights as in the case 11/70 *Internationale Handelsgesellschaft* where the European Court of Justice pointed out that the *respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights must be ensured within the framework of the structure and*

[140] Daniel B. Rodriguez, Mathew D. McCubbings and Barry R. Weingast, *The Rule of Law unplugged*, Emory Law Journal, Vol. 59, 2010, pp. 1455-1494. p. 1463
[141] Ivi, p. 1467
[142] Ivi, p. 1474
[143] Rafal Manko, *EU accession to the European Convention on Human Rights (ECHR)*, European Parliamentary Research Service, July 2017, , 2-8, p. 2

objectives of the Community [144]. The judgement highlighted the primacy of Community law even in the field of the protection of human rights since, in case of conflict, the Court held that Community law must prevail over Member States' laws in order for the entire legal basis of the Treaties themselves not to be called into question [145] . In particular, in *Internationale Handelsgesellschaft* the ECJ stated that *"the validity of a community measure or its effect within a member state connot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principle of a national constitutional structure"* [146]. The Court therefore pointed out the fundamental role of human rights and their protection in the European legal framework and Case 11/70 became one of the milestones dealing with the evolution of the system of protection of human rights in the European context. However, the first veiled mention to the ECHR as a source of inspiration only appeared in Case 4/73 *Nold* where the ECJ indicated, at paragraph 13, two parallel sources of inspiration: "*the constitutional traditions common to Member States"* and "*the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories"* [147]. In addition, the ECJ pointed out that in the European legal framework these rights are subject to certain limits justified by the overall objectives pursued by the Union. Finally, with the signature of the Treaty of Maastricht in 1992 the reference to the ECHR as a source of law was enshrined in art. 2 stating that *The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.* The sensitive theme of the protection of human rights within the RoL framework in the European Union was ultimately strengthened with the approval, in 2000, of the EU Charter of Fundamental Rights (CFR), which would not be binding for Member States till the entry into force of the Treaty of Lisbon in 2009. Nevertheless, the preface of the CFR pointed out that the *"European Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law"*[148]. However, both the ECHR and the CFR were official statements or sources of law both not binding for the Member States and without the same importance of the European Treaties since the European Council, in requesting an opinion from the ECJ on the possibility of EU accession to the ECHR, received a negative response; in fact,

[144] Case 11/70 Internationale Handelsegesellschaft, in EUR-Lex, accessed on 16th October 2021, EUR-lex.europa.eu
[145] Bill Davies, *Internationale Handelsegesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence,* in Academia, accessed on 16th December 2021, academia.edu
[146] Case 11/70 Internationale Handelsegesellschaft, in EUR-Lex, accessed on 16th December 2021, EUR-lex.europa.eu
[147] Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, in EUR-Lex, accessed on 16th October 2021, EUR-lex.europa.eu
[148] Charter of Fundamental Rights of the European Union, in European Parliament official site, accessed on 17th October 2021, europarl.europa.eu

according to the ECJ in its opinion 2/94, the adhesion of the European Union to the ECHR would imply a substantial change in the Community system for the protection of human rights and thus no treaty provision would confer on the Community the power to adhere to the ECHR[149]. The adhesion of the European Union to the ECHR would imply a review of the current Treaties and, for this reason, the substantial enshrinement of the official documents for the protection of human rights only took place on the 1st December 2009, when the Lisbon Treaty entered into force. The treaty of Lisbon made the CFR a binding source of the European Union and imposed upon the EU a legal duty to accede the ECHR as entailed in art 6(2) TEU[150].

However, it must be highlighted that the process of EU accession to the CFR has not been as simple as it may seem and it has not been completed yet. In fact, it is true that it has become a legal duty for the European Union the accession to the Charter in order to create a single European legal space and achieve a coherent framework of human rights protection throughout Europe but, the ECJ identified problems and gave a negative opinion in 2014 [151]. Notably, the draft agreement to accede the CFR excluded the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law, which adversely affected the competences of the EU and the powers of the Court [152]. Moreover, additional conditions for EU accession to ECHR are nowadays listed in Protocol No 8 and Protocol No 14, an integral part of the treaties, highlighting that the EU's accession to the ECHR would impose upon its institutions, bodies, offices and agencies the duty to respect the ECHR but, at the same time, the accession would not require them to adopt any act or measure for which the European Union would not have competence under EU law itself[153]. In addition, due to the specific nature of shared competences, the EU could be sued before the European Court of Human Rights (ECtHR) as "correspondent" with one or more of its Member States[154]. According to this provision, the European Union could be brought before the ECtHR by a Member State or a group of Member States in case of alleged violations of the Charter. More recently, the negotiations between the European Union and the Council of Europe have been resumed and mainly dealt with the creation of a particular EU's mechanism for the procedure before the European Court of Human Rights as well as the sensitive topic of the exclusion from the jurisdiction of the ECJ of the EU acts in the Common Foreign and

[149] Rafal Manko, *EU accession to the European Convention on Human Rights (ECHR),* European Parliamentary Research Service, July 2017, 2-8, p. 3

[150] Art. 6(2) TEU states that "The Union shall accede to the ECHR. Such accession shall not affect the Union's competence as defined in the Treaties.

[151] Completation of EU accession to the European Convention on Human Rights, in European Parilament official site, accessed on 16th December 2021, europarl.europa.eu

[152] Ibidem

[153] Rafal Manko, *EU accession to the European Convention on Human Rights (ECHR),* European Parliamentary Research Service, July 2017, , 2-8, p. 5

[154] Ibidem

Security Policy [155].

Nowadays, within the Lisbon Treaty, several provisions point out the importance of the protection of human rights and the RoL preservation. Art. 2 TEU [156] lists a series of values that the Union pursues even though these values can be considered the "principles" on which the Union is based; the elements of art. 2 TEU includes democracy, the Rule of Law and the protection of fundamental rights as the *"very foundations of EU legal order"*[157]. Art. 2 TEU must be read together with Art. 7 since the former can be enforced via the latter; in fact, Art. 7 TEU entails the penalties a Member State can face when the RoL or the other values listed in Art. 2 are violated, as it will be seen in the following sections. Moreover, in the Treaty of the Functioning of the European Union (TFEU) several articles list the infringement procedures that a Member State may face when it consistently violates the legal obligations imposed by the Treaties.

2.2 The system for the protection of the Rule of Law in the European legal context

In the European legal framework, different solutions have been designed in order to face allegedly violations of the European law by Member States or even by the official bodies of the European institutions. In this context, the values that embody the rule of law are enshrined in art. 2 TEU while Art. 7 TEU is the legal instrument to enforce a violation of the abovementioned values; however, due to its peculiar nature the activation of art. 7 TUE is particularly difficult to trigger as it will be seen in the following paragraphs. Furthermore, different legal procedure coexist in order to safeguard the values on which the European Union is founded even though they are not directly linked to Art. 2 TEU but intervene indirectly to punish those countries that have been demonstrating a democratic backsliding. In detail, the legal instruments concerned are art. 258 TFEU with its direct consequence enlisted in art. 260 TFEU and art. 259 TFEU, which will be discussed in the following section.

[155] Completation of EU accession to the European Convention on Human Rights, in European Parilament official site, accessed on 16th December 2021, europarl.europa.eu

[156] 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.

[157] Dimitry Kochenov, *The Acquis and its principles: the enforcement of the "law" versus the enforcement of "values in the European Union,* University of Groningen Faculty of Law Research Paper Series, No. 28/2016 pp.1-24, p.3

2.2.1 The functioning of art. 258, 259 and 260 TFEU

In this context, Art. 258 TFEU allows the Commission, in the vests of the Guardian of the Treaties, to deliver a reasoned opinion to a Member State concerning alleged violations of the Community law and, in case of no response within the period laid down by the Commission , the Commission itself may bring the Member State before the ECJ. In particular, the first step of the concerned article deals with an unilateral action that the Commission decide to initiate since it delivers a reasoned opinion to the concerned Member State regarding an allegedly violation of the European Union law. Moreover, the Commission itself may start a structured dialogue with the country involved in order to decide whether to withdraw the accusations or to continue with the infringement procedure [158]. Once the Commission receives no response from the reasoned opinion delivered it may decide to initiate another infringement procedure according to art. 260 TFEU which states that *"If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court*" [159] and continues with "*If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances"*[160]. Thus, the Commission has a discretionary role since it may decide the sum of the penalty that the Member State shall pay for the violations it committed and for the unresponsively behaviour adopted under the circumstances of Art. 258 TFEU.

Moreover, another infringement procedure that may help in contrasting the rule of law violations in other Member States is Art. 259 TFEU. It is different from Art. 258-260 TFEU since it does not present the Commission as the main player of the proceeding since it states that *"A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.*" [161]. Therefore the procedure regards two Member States as litigants even though the Commission is involved since paragraph 2 of the abovementioned article states that the Member State who aspires to bring before the Court another Member State shall previously bring the matter before the Commission and, only after the

[158] Massimo Condinanzi and Chiara Amalfitano, *La procedura d'infrazione dieci anni dopo Lisbona,* in Federalismi.it, n. 19/2020, pp. 217-300, p. 249
[159] Art. 260 (1) TFEU
[160] Art. 260 (2) TFEU
[161] Art. 259 (1) TFEU

delivering of a reasoned opinion, the Member State may proceed[162]. However, the procedures under Art. 259 TFEU are rarer than Art. 258 given the fact that the Member State must firstly ask the Commission an opinion and, at this point, the procedure is often halted and then led by the Commission itself [163]. For this reason, nowadays there are scarce records concerning the application of Art. 259, it may be reminded *Spain v United Kingdom (C-145/04),* which concerned a dispute over voting rights in Gibraltar; *Hungary v Slovak Republic (C-364/10),* which concerned freedom of movement and a diplomatic conflict between the two and finally the case of *France v United Kingdom (Case 141/78),* which dealt with a fisheries disputes [164].

In sum, the European Union has developed several instruments for the protection of human rights and the preservation of the Rule of Law, both by adopting as binding documents the ECHR and the CFR and by providing mechanisms for imposing penalties on Member States who fail to comply with the concerned themes. Even in the case of the Eastern Enlargement occurred in 2004, the *ex ante* conditional measures aimed also to the strengthening of the democratic regime and to the resolution of problems that may put in danger the rule of law, as it happened with the Baltic States concerning the preservation of the Russophone minority. However, since the last decade, the European Union has been facing a rule of law backsliding in some Member States, in particular Poland and Hungary, where the incumbent governments are systematically violating and dismantling the Rule of Law thus regressing into semi-authoritarian or hybrid regimes. In facing this involution of some of its Member States, the European Union found itself in a sensitive position since it possesses some legal tools to enforce the violations of Art. 2 TEU, like Art. 7 procedure, but it has soon discovered that the initiation of the mechanism is difficult to apply. In the following section it will be analysed Art. 7 procedure and effectiveness and the other instruments that tried to compensate the scarce performance of Art. 7.

2.2.2 The system for the protection of the Rule of Law in Europe: art. 7 procedure and effectiveness

In order to contrast the democratic backsliding in some Eastern European countries, the European Union already provided for some resolutions and infringement proceedings in its Treaties. In addition to the already mentioned Articles 258-260 TFEU concerning the actions that can be taken

[162] Art. 259 (2) (3) TFEU
[163] Guillermo Iniguez, *The enemy within? Article 259 and the Union intergovernmentalism*, in The New Federalist, accessed on 16th December 2021, thenewfederalist.eu
[164] Ibidem

by the Commission or a Member State towards a Member State or a group of States dealing with the disrespect of the obligations enshrined in the Treaties, in 1997 the European Union, during the approval of the Amsterdam Treaty, inserted Art. 7 procedure as the main tool to prevent democratic backsliding by empowering the European Union to monitor and eventually subject any of its Member States to sanctions in a situation of serious and persistent breach of the values laid down in Article 2 TEU, comprising the rule of law[165]. Art. 7 was amended in the following years and nowadays it presents a *"preventive arm"*, that is paragraph 1 which states that in case of a clear risk of a serious breach of art.2 values the Council may address recommendations to it, while art. 7(2) and (3) represent the so-called *"sanctioning arm"* since in case of serious and persistent breaches of the concerned values the European Council in its unanimity may suspend the voting right to the targeted Member State. The "nuclear option", as art. 7(2) TEU is labelled, has never been activated since it is very difficult to reach unanimity in the European Council, due to the presence of two illiberal states that support each other while even art. 7(1) is difficult to activate since it requires a two-thirds majority of the European Parliament and four-fifths of the Member States in the Council to agree. Moreover, with respect to infringement proceedings, they proved to be ineffective in some cases since infringement actions could not be effectively used against "illiberal governments" when they act outside the strict scope of EU law. This is the reason why the infringement proceedings towards Hungary and Poland indirectly targeted some domestic reforms that undermined the rule of law but officially concerned topics related to the violation of EU law[166].

2.3 The Rule of Law Framework

Given the alleged difficulties in targeting and punishing the actions of the two illiberal States, in 2014 the then-president of the Commission Barroso presented a new tool for both the prevention of the rule of law backsliding and for filling the space between the Commission's infringement powers laid down in articles 258-260 TFEU and art.7 TEU[167]. The instrument is called Rule of Law Framework and is considered as an early warning mechanism consisting both in the establishment of a structured dialogue with any concerned Member States and as a tool able to detect any possible action aimed to the dismantle of the rule of law or other values enshrined in art.2. The Rule of Law Framework is made up of 3 main phases: in the first stage, an assessment is

[165] Laurent Pech and Kim Lane Scheppele, *Illiberalism within: rule of law backsliding in the EU*, Cambridge Yearbook of European Legal Studies, No. 19, 2017, pp. 3-47, p. 4
[166] Ivi, p. 13
[167] Ibidem

conducted by the Commission in concerned countries and a *"rule of law opinion"* may be sent to the targeted government; the second stage is activated in the case in which the concerned Member State does not take appropriate actions consequently to the Commission's assessment and may end with the adoption of a *"rule of law recommendation"* in which the Commission suggests what measures may be taken to solve the situation; the last stage concerns the rejection, by the concerned country, of following the rule of law recommendation and may end with a recourse made by the Commission to art. 7 TEU[168].

The establishment of this preventive mechanism has been firstly activated against Poland, on 13th January 2016, due to the continuing attacks of the PiS government towards the independence of the Constitutional Tribunal. The first step was not made public and, as soon as Poland did not take any concrete actions to resolve the Commission's rule of law concerns, the second step was activated and the Commission adopted a Recommendation[169]. The Recommendation presented five concrete requests that Poland needed to satisfy mainly dealing with the preservation of the independence of the Constitutional Tribunal. Actually, the PiS government disregarded what the Commission requested since, strictly speaking, both the Rule of Law Opinion and the Rule of Law Recommendation were not legally binding acts and therefore Poland was not obliged to implement the requests and continued to implement reforms against the independence of the Constitutional Tribunal[170]. At this point, it was expected that the Commission continued with the activation of art. 7 TUE but, instead the institution decided to send another complementary Recommendation, since some important issues remained unsolved e new concerns arose meantime, even though this option was not provided in the Rule of Law Framework.

2.3.1 The reasons behind the non-activation of Art. 7

The circumvention of the activation of Art.7 TUE arose several criticisms around the commitment of the Commission towards the respect of the rule of law in Poland for several reasons. First, the Rule of Law framework has been criticized because it was more a delaying instrument, especially in compromised countries such as Poland and Hungary, instead of an early warning mechanism since it adds several steps before the activation of art. 7 TEU just to assess whether there is a breach of values enshrined in art. 2 TEU; second, the first activation of this instrument took place against

[168] Rule of Law Framework, in European Commission official site, accessed on 28th October 2021, ec.europa.eu
[169] Laurent Pech and Kim Lane Scheppele, *Illiberalism within: rule of law backsliding in the EU*, Cambridge Yearbook of European Legal Studies, No. 19, 2017, pp. 3-47, p.15
[170] Ivi, p. 17

Poland as a preventive action but the situation in the Eastern country was, at that time, already critical since the independence of the judiciary system was in danger; third, the non-activation of such early warning mechanism towards Hungary, a Member State that is experiencing a democratic involution since 2010, arose other doubts on the commitment of the Commission as the situation in the Magyar country was more compromised than Poland and a new illiberal constitution has been entered into force since 2014. A possible explanation for the non-application of the Rule of Law Framework to Hungary may be the fact that, as it will be analysed in the following chapter, the PiS government in Poland has continuously violated the Polish Constitution to undermine the independence of the judiciary system and to dismantle the rule of law while in the case of Hungary, Fidesz government, thanks to a supermajority in parliament, approved a new constitution thus, in its illiberal actions, it acted within the boundaries of new constitution[171].

From a political perspective, in the European Parliament Fidesz has been part of the European People's Party (EEP) the biggest group in Parliament, till its suspension last year, and it has been backed up by its European party during the various contestations from the other parties related to Fidesz actions; in the case of Poland, the PiS government belongs to the European Conservatives and Reformists (ECR) a euro-sceptic and far-right political party relatively small in the European parliament and thus with a less political support especially in crucial areas such as the respect of values of Art.2 and the preservation of the Rule of Law[172]. Probably for these reasons, the European Commission continued with the Rule of Law Framework against Poland since after the second Recommendation a third one soon followed in 2017, stating again the necessity of reforming four legislative acts dealing with the independence of the Constitutional Tribunal, the Ordinary Courts' Legislation and the Council for the Judiciary but even in this case the Recommendation did not bear fruits. At this point the Commission decided to follow a different strategy by initiating an in infringement procedure regarding the Law on the Ordinary Courts Organisation on the grounds that this legislation would not only violate EU gender discrimination rules by introducing a different retirement age for female and male judges but would also undermine the independence of Polish Courts since the government could replace the leadership of the lower courts, the independence of which would be required under Art. 19(1) TEU and Art. 47 of the EU Charter of Fundamental Rights[173].

[171] Laurent Pech and Kim Lane Scheppele, *Illiberalism within: rule of law backsliding in the EU*, Cambridge Yearbook of European Legal Studies, No. 19, 2017, pp. 3-47, p 30
[172] Ivi, p. 34
[173] Ivi, p. 20

2.3.2 The role of the Venice Commission

In the context of the definition of the rule of law, the subsequent democratic backsliding which is affecting some Eastern countries and the legal instruments at the disposal of the European institutions to enforce violations of the European law an important role has also been played by the European Commission for Democracy through Law, also known as the Venice Commission (VC). It is an institution of the Council of Europe that deals with constitutional and other legal matters of importance for democratic and rule of law development and has proved to be an effective guidance for states in the assessment of the quality of the democratic regime [174]. The Venice Commission is made up of sixty European, North-African, American and Middle-Eastern states as members and its main task is to issue opinion on its own initiatives or at the request of institutions authorised to ask for an opinion; in most of the cases, the opinions deal with constitutional provisions and legal norms but the Venice Commission also prepares reports, briefs and guidelines[175]. The Venice Commission has played a fundamental role in the strengthening of the quality and the structure of the democratic apparatus in the CEE countries from the fall of the Berlin Wall till the entrance in the European union since most of the opinions delivered by the Venice Commission concerned the CEE countries [176]. In this context, the Venice Commission delivered several opinions concerning the situation in Hungary, Romania and Poland countries that, as it will be analysed in the following chapter, have been experiencing a problematic rule of law backsliding. Moreover, countries are not the only legal entities that may ask an opinion to the Venice Commission since this possibility may also be used by the European Union as it happened in 2012, when the European Commission asked for an opinion to the VC concerning Bosnia-Herzegovina and in 2015 concerning North Macedonia [177]. Nowadays, the European Commission still collaborates with the Venice Commission particularly in the European space of neighbourhood since, thanks to the establishment of a Memorandum of Understanding between the two institutions (CoE and European Union), the European union acts as a donor by providing the majority of funding while the VC assess the situation by identifying deficiencies in public administration or legal justice [178]. Legally speaking, the Venice Commission's opinions are not binding thus they represent a form of soft law, a concept which includes norms that may be binding only to a very limited extent and that lack sovereign

[174] Antonina Bakardijieva Engelbrekt, Andreas Moberg and Joakim Nergelius, *Rule of law in the EU: 30 years after the fall of the Berlin Wall,* Swedish Studies of European Law, Volume 15, Hart, 2021, p. 135
[175] The Commission's activities, in Council of Europe official site, accessed on 31th October 2021, venice.coe.int
[176] Antonina Bakardijieva Engelbrekt, Andreas Moberg and Joakim Nergelius, *Rule of law in the EU: 30 years after the fall of the Berlin Wall,* Swedish Studies of European Law, Volume 15, Hart, 2021, p. 135
[177] Ibidem
[178] Maartje De Visser, *A critical assessment of the role of the Venice Commission in processes of domestic constitutional reform,* American Journal of Comparative Law, 63(4), 2015, pp. 963-1008, p. 980

enforceability. However, it is important to highlight that the Venice Commission is not a "*fact-finding"* body since is largely dependent on the factual information which is made available to it and therefore it has built up over time good contacts with political groups and civil society in the state of most concern [179]. In carrying out its mandate, the VC develops standards from hard law, such as the European Convention on Human Rights, international treaties, human rights covenants but also from the practises and traditions of Member States in order to develop minimum standards to qualify and assess the quality of a democratic regime. Concerning the mere functioning of the Commission, the members of the VC are experts of the law, they reach consensus with a majority of the votes and their opinions need to be implemented by the states concerned, which in so doing have to adhere to the requirements from democratic decision-making applicable to them[180]. The Venice Commission's reports have been used as a source of information or inspiration by the ECtHR which also sometimes invites the VC under Art. 36(2) ECHR to submit comments as *amicus curiae*[181].

2.3.3 Concluding remarks

This chapter focused principally in formulating a proper definition of the concept of the rule of law applied in the European context and giving an exhaustive overview of the European legal framework concerning the protection of the rule of law and the legal instruments at the disposal of the European institutions. In particular, it has been adopted Tom Bingham's definition of the rule of law in order to point out the several components of the rule of law that assess the quality of a democratic regime and may help to identify allegedly deficiencies. Then, the analysis dealt with the references of the rule of law components in the European treaties and jurisprudence since *Internationale Handelsgesellschaft* and *Nold* showed the importance that the ECJ has given to the respect of human fundamental rights as enshrined in Art. 2 TEU. The chapter has also provided a comprehensive overview of the legal instruments at the disposal of the European institutions for enforcing rule of law or European law violations as well as the weaknesses of some of the instruments themselves and the inefficient remedies that the European Commission has recently developed. Finally, a special paragraph has been dedicated to the Venice Commission, since it represent a fundamental institution for evaluating the status of the democratic regimes in Member

[179] Ivi, p 167
[180] Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe – Standards and Impact*, European Journal of International Law, 25(2), 2014, pp. 579-597, p.583
[181] Amicus curiae is a Latin expression that defines one (such as a professional person or organization) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question

States of the Council of Europe as well as it represents a milestone and a source of inspiration for governments, intergovernmental institutions and international courts too. In this context, after having discussed the main element of the rule of law the next chapter will regard the situation of democratic involution in some Eastern European countries.

CHAPTER 3

THE DEMOCRATIC BACKSLIDING

3.1 The Rule of Law problem in Europe: the democratic backsliding in Poland and Hungary

During the last ten years the European Union is facing an internal democratic backsliding, that is the progressive erosion of the rule of law, in some Eastern countries such as Hungary, Poland, Czech Republic and Slovakia. The group of four is also known as the *Visegrad* group and it has recently become a cultural and political alliance that shows some common and alarming points such as the democratic backsliding, especially in Poland and Hungary, the rise of populist and far-right parties, the opposition towards the management of the refugee crisis in 2015 [182] and the peculiarity of being all recipient countries of EU funds. In this context, Poland and Hungary have shown the highest level of democratic backsliding and, at the same time, they represent the biggest recipient countries since Poland has received in 2018 11.6 billion euros while Hungary 5 billion euros [183]. The connection between the highest democratic backsliding in the European Union and the quality of being the biggest recipient Member States of EU funds has been causing several problems between the two Member States, often defended by Czechia and Slovakia, and the European institutions on the alarming RoL crisis. As seen, the European Commission has used art. 7 TEU and has launched different infringement procedures towards Poland and Hungary in order to face the rule of law crisis. Since 2012, the Commission has been using this judicial instrument against the democratic backsliding in Hungary as the Magyar state violated the European directive 2000/78 establishing a general framework for equal treatment in employment and occupation [184]. More recently in case C -821/19 the ECJ declared that Hungary has failed to fulfil its obligation under Article 8(2), Article 12(1)(c), Article 22(1) and Article 33(2) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection of Directive 2013/33/EU of the European Parliament and of

[182] Simon Machalek, 2nd May 2019, *Democratic Backsliding in the Visegrad Group Threatens European's Union Future*, published on Democratic Erosion, accessed on 24th October 2021, democratic-erosion.com
[183] Katharina Buchholz, 13th January 2020, *Which Countries are EU contributors and Beneficiaries?,* published on Statista.com, accessed on 24th October 2021, statista.com
[184] Paola Mori, *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi,* Federalismi.it, n. 8/2020, pp. 196-210, p. 198

the Council of 26 June 2013 laying down standards for the reception of applicants for international protection; in particular, the Court found that Hungary by criminalising in its national law the actions of any person who, in connection with an organising activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, has violated Directives 2013/32/EU and 2013/33/EU [185]. Concerning Poland, the European Commission has launched three infringement proceedings dealing with the judiciary reform of the PiS government. The first procedure regarded the lowering of the retirement age for the judges of the Polish Supreme Court while the second one, C-192/18, dealt with the different retirement age for men or women who were judges or public prosecutors and the further violation of EU law concerning the conferral of powers on the Ministry of Justice of extending the period of active service of those judges [186]. The third infringement procedure, which is still pending, is related to the new disciplinary system which allows ordinary judges to be investigated, processed and disciplinary sanctioned on the basis of the content of their judgements even those concerning the preliminary referral to the ECJ; in this context, the Commission also contested the lack of independence and impartiality of the Disciplinary Chamber of the Polish Supreme Court [187].

3.1.1 The democratic backsliding in Poland

During its communist past, Poland emerged as the land of *Solidarity*, the first independent trade union in the Soviet Bloc and a perfect example of resistance towards the establishment. Since 1989, Poland progressively turned into a newly established democracy that well performed during its accession phase to the European Union, as previously analysed. It is difficult to understand the democratic involution that Poland is experiencing without identifying the social causes that brought the Polish Law and Justice party (PiS) to win the elections and to trigger the rule of law crisis. As already said, the period from 1989 to 2015 has been characterised, on the economic and social side, by prosperity and progress for Poland since salaries steadily increased, unemployed remained in single digits and surveys among Polish citizens showed very high levels of happiness and

[185] Judgment of the Court (Grand Chamber) of 16 November 2021 *European Commission v Hungary*, in EUR-lex, accessed on 18th December 2021, in eur-lex.europa.eu

[186] Court of Justice of the European Union, *Polish rules relating to the retirement age of judges and public prosecutors, adopted on June 2017, are contrary to the EU law,* Press release no, 134/19, Luxembourg, 5 November 2019.

[187] Paola Mori, *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi*, Federalismi.it, n. 8/2020, pp. 196-210, p. 199

satisfaction with life [188]. Even on the institutional side, Poland shifted from a communist and high-centralized country to a Parliamentary Republic with a proportional electoral law and an independent judiciary which assured a well-functioning system of checks and balances. The governments that have been in office from 1989 to 2015 gradually stabilized and internalized democratic norms while preparing the country to the EU accession [189]. In 2015 elections, the PiS party won the presidency and the majority in both chambers of Parliament by basing its electoral success on an anti-establishment aggressive agenda which depicted the old ruling parties as neoliberal traitors who raised retirement age, deprived the country from a state-owned enterprises and opened the frontiers to evil immigrants and refugees who could compromise national security while harshly criticizing the European institutions since they could undermine national sovereignty and catholic identity [190]. In this context, the PiS party obtained a strong public support since it promised and passed tax-free child subsidy and a reduction of the retirement age and, particularly, it gained a strong support both from the Catholic Church, by appealing to the Christian roots and the Catholic identity of the country, and the less educated segment of population thanks to the populist appeal.

Focusing on the disruption of the rule of law in Poland, one of the first actions taken by the PiS government has been the progressive dismantling of the judiciary; in fact, as soon as the government took office on 16th November 2016, it targeted the independence of the Constitutional Tribunal. According to the Polish Constitution of 1997, the courts and tribunals constitute a separate power with the Constitutional Tribunal at the apex since it judicates the compliance of national primary and secondary legislation relating to the Constitution; therefore the 15 judges of the Constitutional Tribunal are bound by the Constitution alone [191]. Art. 194 of the Constitution states that the judges are chosen individually by the *Sejm*, the low chamber of the Parliament, for one term of nine years from amongst persons who are not allowed to be part of a political party. Another function of the Constitutional Tribunal is to decide disputes over powers between central and state authorities and determine "*whether or not there exists an impediment to the exercise of the office by the President of the Republic of Poland." [192]*. Therefore, the Constitutional Tribunal represents the very essence of the judicial power in Poland and it embodies its independence from the other powers thus constituting one of the pillars of the correct functioning of the rule of law. Once in charge, the PiS government approved some amendments (*November Amendments*) that

[188] Hubert Tworzecki, *Poland a case of Top-Down Polarization*, The Annals of the American Academy, January 2019, pp. 97-119, p.99
[189] Ibidem
[190] Ivi, p. 100
[191] U. Jaremba, *The rule of the majority vs the rule of law: how Poland has become the new enfant terrible of the European Union*, Tijdschrift voor Constitutioneel Reecht, 2016(3), pp. 262-274, p.264
[192] Ibidem

would undermine the independence of the Constitutional Tribunal since they stated the appointment of five new judges, term limits for the President and vice President of the Tribunal and provided additional term limits for two sitting judges [193]. President Duda, a declared supporter of the PiS government, signed the amendments which would soon be contested by various parties who appealed to the Tribunal who firmly requested the Parliament to abstain from electing new judges; eventually the concerned judges were sworn into office by the incumbent President but were not recognized as operative judges by the Tribunal. The peak of the crisis reached its highest point with the approval of the *December Amendments* stating several changes to the composition and the functions of the Constitutional Tribunal: they stipulated that the Tribunal would hear cases as a full bench with a composition of 13 out 15 judges requiring a two-third majority for taking decisions instead of the simple majority as stated in art. 190(5) Polish Constitution [194]. Moreover, the Tribunal may be dismissed on request of the *Sejm*, the President of Poland or the Ministry of Justice, the early termination of judge's mandate will be decided by the *Sejm* prior to a motion of the General Assembly of the Constitutional Tribunal [195]. Clearly, the approved amendments aimed at the dismissal of the independence of the highest representative of the judicial power in Poland and represented a serious threat to the rule of law. Even the Constitutional Tribunal itself stated the unconstitutionality of the *December Amendments* in their entirety and several alarming consequences from the entry into force of the Amendments since they make it impossible for the Tribunal to carry out its activity diligently and efficiently and, according to the Polish Constitution, there is no possibility of revoking the Tribunal's ruling [196]..

In its action of dismantle of the judicial independence, in 2017 the PiS government also undermined the Council of the Judiciary which has the competence to submit requests to the President of Poland for the appointment of judges to the Supreme Court, administrative courts common and military courts in addition to the possibility of filing applications with the Constitutional Tribunal for constitutional review of normative acts regarding the independence of courts and judges under art. 186(2) of the Polish Constitution [197]. The main action of the PiS has been the *Act of January*, aimed to the change of the organization and the composition of the Council since the Act would entitle the *Sejm* to elect new judges instead of the judges themselves; another major action concerned a new

[193] Ibidem

[194] Art. 190(5) of the Polish Constitution states that "Judgments of the Constitutional Tribunal shall be made by a majority of votes".

[195] U. Jaremba, *The rule of the majority vs the rule of law: how Poland has become the new enfant terrible of the European Union*, Tijdschrift voor Constitutioneel Reecht, 2016(3), pp. 262-274, p. 267

[196] Ivi, p. 268

[197] Anne Sanders and Luc von Danwitz, *Selecting judges in Poland and Germany: challenges to the Rule of Law in Europe and proposition for a new approach to judicial legitimacy*, German Law Journal, 19(4), July 2018, pp. 769-816, p.775

retirement age for Supreme Court judges, sixty-five for men and sixty for women, and the establishment of an extraordinary appeal chamber with the power to overturn final judgements [198]. The PiS government justified these measures with the same winning populist approach that characterised the elections in 2015; in fact, the PiS stated that the reforms were necessary for the "democratisation" of the judiciary since "*the selection of a judge should be subject to some actual influence of the representatives of other branches of government, in particular the legislative power holding the mandate from democratic elections"*[199]. In this context, the concept that an independent and autonomous power of the State must be subject to the control of the legislative power is clearly in contrast with the separation of powers, one of the pillars of the rule of law since the interdependence of the Statal power undermines the correct functioning of a democracy and the very essence of the concept of democracy itself. The rule of law backsliding in Poland does not only entail the dismantle of the judicial independence but also the progressive endangerment of a specific segment of population and their civil rights, as it is happening with the LGBT community. In this context, even though Poland has not ratified Protocol No. 12 to the ECHR which provides for a general prohibition of discrimination, it is bound by the prohibition of discrimination in relation to rights enshrined in ECHR as well as by art. 2 TEU [200]. Moreover, art. 32 of the Polish Constitution establishes a general prohibition of discrimination in political, social or economic life, on any ground even though there is no provision for the prohibition of hate speech or hate crime on grounds of sexual orientation or gender identity. Since the far-right and ultra-catholic party PiS has taken office, the situation of LGBT people in Poland has remarkably worsened as public attacks and homophobic statements by public officials progressively spread and, for certain aspects, legitimised the stigmatization of LGBT community thus eroding the social protection that a democratic state should assure to its citizens. The most important attack on Polish LGBT community has been the establishment of the so-called *"LGBT-free zones"* in several municipalities, towns of regions across Poland. In these territories, local governments have adopted declarations openly hostile to LGBT people, denoting themselves as *"free from LGBT ideology"* pledging to fight *"homo-propaganda"*[201]. The LGBT-free zones have obtained the support of the government in office, the funding from the Ministry of Justice and even became the main topic on the presidential campaign in the summer of 2020 when the serving President promised to prohibit the *"propagation of LGBT ideology",* defining it *"worse than Communism"* [202]. The hostile environment that the PiS

[198] Ivi, p.779
[199] See POLITYCE article of April 27, 2017.
[200] *Memorandum on the stigmatisation of LGBTI people in Poland*, The commissioner for Human Rights of the Council of Europe, 3 December 2020.
[201] Ivi, p.5
[202] Ibidem

government and Polish institutions have created towards the LGBT communities and the progressive limitation and denigration of civil rights, caused the reaction of the European Commission that decided to suspend European funds for all those territories and cities that established the LGBT-free zones; as a consequence, the Ministry of Justice provided for adjunctive funds to those municipalities by also organizing public conferences and publishing series of inserts with homophobic content in the magazine in question [203]. Ultimately, the politically controlled Constitutional Tribunal declared unconstitutional a 1993 law permitting abortion in cases of severe foetal disabilities that, in addition to the strict measures already into force for abortion, rendered the possibility of abortion almost impossible in Poland since now it is permitted in cases of rape, incest or if mother's health is at risk [204].

3.1.2 The democratic backsliding in Hungary

The democratic involution that has been characterising Poland is widespread also in Hungary. Even though there are similarities between the rule of law crisis in Poland and Hungary, the involution in this last country was conducted in a different way. In fact, whereas in Poland the PiS acted in compliance with the constitutional rules, in Hungary Fidesz, the main responsible of the democratic backsliding, once took office in 2010 changed the constitution thanks to a super-majority in Parliament that allowed the far-right party to elude the checks and balances and to draft a new contested constitution. In particular, in 2010 in a free and fair election, the centre-right political parties, Fidesz Hungarian Civic Union and the Christian-Democratic People's Party got 53% of the votes and gained a super majority in the unicameral Hungarian Parliament [205] . The political forces in office did not tolerate any opposition to the draft of the new constitution, even the Hungarian Constitutional Court has been impaired in this task. Eventually, the new constitution entered into force on 1st January 2012 and instantly led to tensions among the European institutions, the Venice commission and Hungary since some provisions seemed to challenge the rule of law as fundamental value of the European Union as stated in art. 2 TEU and of the Council of Europe [206]. The approval of the Fundamental Law of Hungary, the official name of the new Hungarian constitution, and the subsequent amendments arose several concerns among the institutions especially from the European

[203] Ivi, p. 8
[204] Adam Easton, 23rd October 2020, *What Court's decision means for Poland,* published on BBC official site, accessed on 27th October 2021, bbc.com
[205] Dimitry Kochenov and Petra Bard, *The last soldier standing? Courts vs. politicians and the Rule of Law crisis in the new Member States of the EU,* University of Groningen Faculty of Law Research Paper Series, 5, 2019, pp.1-40, p. 9
[206] Andras Zs. Varga, *Rule of Law in the 21st century,* Pazmany Peter Catholic University, Budapest.

Parliament and the Venice Commission. The first opinion of the Venice Commission was requested by the Hungarian government itself during the drafting of the constitution, explicitly asking whether to incorporate or not in the constitutions the EU Charter of Fundamental Rights and the role and significance of preventive review among the competences of the Constitutional Court [207]. The Venice Commission responded by mainly pointing out that the constitution was being drafted without the consultation of the opposition due to the super majority that allowed Fidesz to act alone and, concerning the incorporation of the ECHR on the Constitution, it was recommended not to do so. In subsequent delivered opinions, the Venice Commission highlighted the alarming and extensive use of cardinal laws since it prevents the legislature from adapting to new conditions and facing new challenges within society [208].

The Venice Commission also intervened on the topic of the court reform laws, requested by the Secretary General of the CoE in 2012, concerning the mandatory lowering of the judges' retirement age from 70 to 62 which would open the way for undue influence on the composition of the judiciary thus undermining the independence of the organ [209]. The second important topic on the independence of judiciary dealt with the powers of the President of the National Judicial Office (NJO) since none of the European countries concentrated such power in the hands of a single person thus arousing concerns among the European institutions[210]. The amendment that troubled the most the Venice Commission was the Fourth Amendment and the subsequent opinion No. 720/2013 delivered by the Commission. In this case, the amendment introduced a new sentence to Article L(1) in order to entrench a particular definition of "family" in the constitution since the article already defined the marriage as the *"union of a man and a woman"* and family as *"the basis of the nation's survival"* therefore the redefinition of the article states that *"the basis of the family is marriage and the parent-child relationship"*[211]. This amendment to the Constitution would undermine the civil rights of the LGBT people and raise several cases of discrimination as this segment of population would not be included in the definition of "family". The Commission even criticised again the position and power of the President of the National Judicial Office and other constitutional provisions that "*no constitutional character and should not be part of the constitution"* such criminal provisions on the communist past or financial control of the universities

[207] Katalin Kelemen, *The new Hungarian constitution: legal critiques from Europe,* Review of Central and East European Law, 42(1), 2017, pp.1-49, p. 5
[208] Opinion no. 621/2011, *op.cit.* note 5, para. 24
[209] Antonina Bakardijieva Engelbrekt, Andreas Moberg and Joakim Nergelius, *Rule of law in the EU: 30 years after the fall of the Berlin Wall*, Swedish Studies of European Law, Volume 15, Hart, 2021,
[210] Katalin Kelemen, *The new Hungarian constitution: legal critiques from Europe,* Review of Central and East European Law, 42(1), 2017, pp.1-49, p. 19
[211] Ivi, p. 27

[212]. Moreover, the Venice Commission intervened in the Hungarian context even when the contested "Stop Soros" Draft Legislative Package was being enacted. The VC criticised Draft Article 353A criminalising organisational activities not directly related to illegal migration[213], such as preparing or distributing informational materials, since it would disproportionally restrict rights under Art. 11 ECHR [214].

In general, the rule of law involution in Hungary did not only entail the approval of a new constitution and the re-definition of values according to the alleged historical roots of the country with a populist and nativist tone, but also dealt with a restriction on the liberties of citizens as it happened with the new Media Laws. The concerns related to the attack on the independence of media and the excessive concentration of powers in the hands of the regulatory agency (Media Agency), the unjustifiably high fines for journalists and media outlets, the inadequate protection of journalists' sources and the government control over the public service media[215]. Due to these approvals, the ECJ, the Commission and the ECtHR intervened against Hungary, in particular the ECtHR found that imprisonment for life without parole, another provision entailed in Article IV(1) of the Fundamental Law, violated the prohibition of inhuman or degrading treatment as stated in Art. 3 ECHR; the Commission launched accelerated infringement proceedings against Hungary as soon as the Fundamental Law entered into force and the ECJ, in Case C-286/12, found a violation of the principle of equal treatment dealing with the mandatory lowering of the retirement of ordinary judges, prosecutors and notaries from 70 to 62 years with retroactive effect as incompatible with EU law and in particular with art. 6 of Directive 2000/78/EC on discrimination in terms of age [216].

3.1.3 Common grounds in the democratic backsliding in Poland and Hungary

It is possible to find a common ground dealing with the democratic involution of Poland and Hungary concerning four main themes. The first one is represented by the invocation of national sovereignty through the promotion of a false opposition between democracy and the legal structures that assure the respect of the rule of law, that is the judiciary system; in Hungary the process started

[212] Antonina Bakardijieva Engelbrekt, Andreas Moberg and Joakim Nergelius, *Rule of law in the EU: 30 years after the fall of the Berlin Wall*, Swedish Studies of European Law, Volume 15, Hart, 2021,
[213] Ivi, p. 30
[214] Art. 11 ECHR states that "Everyone has the right to freedom of peaceful assembly and to freedom of association with
others, including the right to form and to join trade unions for the protection of his interests" and that "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by the law"
[215] Ivi, p. 31
[216] Ivi, p. 43

in 2011 with the first law that attempted to reduce the judges' retirement age from 70 to 62 and in Poland it happened in 2016 with the capture of the Constitutional Tribunal, the Supreme Court and all the other representatives of the judiciary and it was presented as an essential "reform" to implement and a sovereign matter for Poland [217]. The second theme deals with the attempt to disguise rule of law deficiencies in the name of constitutional identity. In Hungary it happened during the refugee crisis in 2015 when, in order to manifest its disagreement towards solidarity for third country nationals, Orban and the Fidesz government invoked constitutional identity on the sole basis that a possible flow of immigrants in Hungary would jeopardize the Hungarian cultural and Christian identity [218]. The third common ground is strictly correlated to the defence of national sovereignty since it deals with the invocation of national security and therefore the approval of repressive laws towards media, university and foreign-funded civil society organisations independent of government funds and able to express criticism towards the government [219] . In Hungary it happened with the approval of Lex CEU and Lex NGO that respectively shut down a university, funded by the philanthropist Soros, and targeted foreign funded NGOs which became evil in the social narrative as they allegedly undermined the national security of the Magyar country. The last point highlights the way in which the several attacks towards the rule of law are conducted: the distortion of the news and the spread of hoax. Focusing on the application of these four main themes, in Hungary Orban has put forward a project of economic nationalism by imposing transaction taxes on foreign and private banks, nationalizing private pension funds and increasing the state's stake in the energy sector, thereby lowering energy prices for household consumes and, as a consequence, these actions have dramatically increased Orban and Fidesz's popularity in Hungary; in Poland, similar actions have been taken by the PiS government since it set up generous benefit schemes for families with children, an increase in wages in the countryside and a nationalization of the banking sector [220]. In both cases two populist and far-right parties, appealing to the Christian roots and identity of the country and exploiting the anti-immigrant rhetoric, won the elections and aimed to change and undermine the institutional checks and balances of the democratic regime. As stated before, in Poland the PiS government acted without changing the Polish constitution but simply circumventing the constitutional provisions while in the Hungarian case, the Fidesz government exploited its super-majority to draft and approve a new criticized constitution. Moreover, in both cases, the first target of the democratic backsliding has been the

[217] Dimitry Kochenov and Petra Bard, *The last soldier standing? Courts vs. politicians and the Rule of Law crisis in the new Member States of the EU*, University of Groningen Faculty of Law Research Paper Series, 5, 2019, pp.1-40, p. 12
[218] Ivi, p. 13
[219] Ibidem
[220] Walter Rech, *Some remarks on the EU's action on the erosion of the rule of law in Poland and Hungary,* Journal of Contemporary European Studies, 26(3), 2018, pp. 334-345, p.338

judiciary independence, by dismantling its independence and undermining the position of judges; in addition, civil rights of minorities have been discredited and a series of anti-LGBT provisions have been enacted in order to ban or to limit the so-called "*LGBT ideology"*. Finally in both counties abortion laws have been seriously limited as well as the independences of media.

3.2 The CJEU's central role: the peculiar interpretation of art. 2 and art. 19 TEU with regard to art. 47 of the EU Charter of Fundamental Rights

In the context of the ineffectiveness of Art. 7 procedures due to the high threshold for the application of the *"preventive arm"* and the virtual impossibility of initiation of the "nuclear option", the situation became a paradox since the two illiberal Member States continued in the dismantle of the rule of law and the European institutions remained paralyzed as the only way out to impose penalties on Hungary and Poland has been Art. 258 TFEU with its limitations on the scope of applications. Meanwhile, both Hungary and Poland continued to use EU funds, in the vests of main recipient countries of the entire European Union, to strengthen their illiberal regimes and to forge clientelist alliances with loyal political and economic actors. In this intricated context, the CJEU has recently delivered some important opinions, concerning the independence of the judicial system, that may change the situation and empower the Commission with new instruments to enforce the values enshrined in Art. 2 TEU and to find a way out for the democratic backsliding in the concerned countries. The forerunner case was the *Minister for Justice and Equality v. LM* delivered by the ECJ on 25th July 2018 which referred to a series of European Arrest Warrants (EAWs) that the Polish courts issued between 2012 and 2013 against Mr Celmer for him to be arrested and surrendered fir the purpose of conducting criminal prosecutions. Mr Celmer was ultimately arrested in 2017 in Ireland and brought before the High Court where he stated that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Art. 6 ECHR since the recent legislative changes to the system of justice in the Republic of Poland denied him his right to a fair trial [221]. The same Irish High Court considered that the judicial reforms that were taking place in Poland would render the Polish judicial system inconsistent with the European standards and therefore the EAWs would be refused since the eventual surrender of the suspect would result in breach of his rights laid down in Art. 6 ECHR. The refusal of the EAWs would even result in a breach of the principle of mutual trust as laid down in art 4(3) TEU as it would presume

[221] Petra Bard and Wouter van Ballegooij, *Judicial independence as a precondition for mutual trust?,* New Journal of European Criminal Law, 9(3), 2018, pp. 353-365, p.356

the adherence of the issuing state to the values enshrined in Art. 2 TEU. At the end, the ECJ stated that the national court would be responsible for refusal of approval of the EAWs based on a two-step procedure: the first stage would entail an assessment of the effectiveness of the justice system in the issuing Member State in order to check whether a real risk of a breach of Art.6 ECHR, due to a potential lack of independence of the courts, exists or not while the second step would entail an analysis concerning the real risk that the surrenderer would experience [222].

The *Minister for Justice and Equality v. LM* case is strictly correlated to the European Court of Justice's case *Associação Sindical dos Juízes Portugueses* where the Court offers a particular combined reading of Article 2 TEU, Article 4(3) TEU [223] concerning the principle of sincere cooperation and Article 19(1) [224] dealing with the principle of effective judicial protection of individuals' rights. The Court's decision may be considered as the first significant answer to the "rule of law backsliding" in Hungary and Poland since this judgement establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals [225]. According to this statement, the Court responds to the Polish government in relation to the Rule of Law Framework in January 2016 and the assertion of the Polish authorities that the European Union could not intervene in the internal matters of the Polish state, in this specific case the reform of the judiciary system, since the reforms fall completely outside the scope of the Treaties and thus outside EU competence [226]. By delivering this statement the Court implicitly considers that the notion of "fields covered by EU law" requires the existence of a virtual link between relevant national measures and EU law in order for applicants to challenge national authorities on the sole basis of Art. 19(1) TEU[227].

[222] Ivi, p. 359

[223] Art. 4(3) TEU states "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[224] Art. 19(1) TEU states that "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

[225] Laurent Pech and Sebastien Platon, *Judicial independence under threat: The Court of Justice to the rescue,* Common Market Law Review, Middlesex University London, 2018, pp. 1-20, p. 2

[226] Pech and Scheppele, "*Is the organisation of National Judiciaries a Purely internal competence?,* in VerfassungsBlog, accessed on 28th October 2021, verfassungsblog.de

[227] Laurent Pech and Sebastien Platon, *Judicial independence under threat: The Court of Justice to the rescue*, Common Market Law Review, Middlesex University London, 2018, pp. 1-20, p. 3

3.2.1 The origins of "Associação Sindical dos Juízes Portugueses" Judgement, Court's opinion and implications

The background of *Associação Sindical dos Juízes Portugueses* developed in Portugal in 2014 when, following the EU macroeconomic adjustment package, the Portuguese government decided to introduce a temporary reduction in the remuneration paid to the administrative personnel and judges so that the *Associação Sindical dos Juízes Portugueses*, acting on behalf of the Court of Auditors, challenged the governmental measures on the main ground that these measures would infringe "the principle of judicial independence" enshrined in the Portuguese constitution, in the EU law in Art. 19(1) TEU and Art. 47 of the ECHR which provides for a right to an effective remedy and to a fair trial [228]. The final judgement of the Court pointed out some important aspects that would be fundamental in the quarrels with Poland and Hungary. In particular, the Court emphasised the role of art 19(1) TEU since it gives *"concrete expression to the value of the rule of law stated in Art.2 TEU"* and, on the basis of a combined reading of Art. 2 TEU, Art. 4(3) and Art. 19(1) TEU, the European Court of Justice highlighted both the duties of national courts in ensuring the interpretation and application of the Treaties and the fundamental right of the Court to be independent form any other power in order for the EU legal system to operate efficiently and for individuals to continue to benefit from the principle of the effective judicial protection of their EU rights [229].

Focusing on the analysis of the judgement, the Court strongly emphasised the importance of judicial independence as a core component of the rule of law and the exclusive consideration of Art. 19(1) TEU in conjunction to Art. 2 TEU in spite of Art. 47 of the Charter [230]. The reason why the Court relied mainly on art 19(1) deals with the applicability of the Charter, which is possible only in national situations where Member States are implementing Union law within the meaning of art 51(1) Charter [231] since the Court would not have jurisdiction in the case where legal cases fall outside the scope of the Treaties. By focusing only on art 19(1) TEU the Court chose an aggressive approach towards those illiberal states since Art. 19(1) empowers national courts to review the applicability of EU law and thus Member States must establish a system of legal remedies and

[228] Ivi, p.2
[229] Ivi, p. 3
[230] Art. 47 ECHR, concerning the right to an effective remedy and to a fair trail, states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
[231] Art 51(1) ECHR states that " The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

procedures which ensure that individuals have a right to effective judicial protection. Moreover, through the direct connection of Art. 19(1) with Art. 2 TEU and the principle of sincere cooperation the Court transformed the rule of law into a legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries [232]. The Case C-64/16 is important in the development of measures aimed to contrast the rule of law backsliding in Poland and Hungary since, according to paragraph 34 of the judgement, *"The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields"*[233] . Thus, in accordance with the principle of sincere cooperation, it is a duty of the Member States to establish and provide an effective system of legal remedies; this statement represents an indirect warning to those state that are experiencing a rule of law backsliding since Poland and Hungary have been criticised and condemned for undermining the independence of the judiciary. The indirect warning becomes clearer and more explicit in the following paragraphs where the ECJ points out that the very essence of the rule of law is an effective judicial review which can only be assured by courts or tribunals [234]. Another fundamental passage of the judgement is contained in paragraph 42 where the Court highlights that *"The guarantee of independence, which is inherent in the task of adjudication is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts*" [235]. Thus the Court again states the importance of the independent judicial systems in order to ensure a correct application of the EU law in every Member State since national courts and tribunals are entitled to do so. Finally, the Court even defines the characteristics of an independent judicial system since "*it presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence*

[232] Laurent Pech and Sebastien Platon, *Judicial independence under threat: The Court of Justice to the rescue*, Common Market Law Review, Middlesex University London, 2018, pp. 1-20, p. 7
[233] Case C-64/16 *Associação Sindical dos Juízes Portugueses*, in Info Curia Giurisprudenza, accessed on 18th December 2021, curia.europa.eu
[234] Ibidem
[235] Ibidem

their decisions"[236] In the specific case, the salary reduction measures did not infringe the EU principle of judicial independence because they concerned a limited and temporary reduction of remuneration but, on the contrary, national measures that are permanent, with a specific target on the independence or correct functioning of the Court must be considered incompatible with Art.19 TEU. Moreover, the concept of effective judicial protection is not only limited to the independence of judiciary but also represents a general principle of EU law stemming from the constitutional traditions of Member States, reaffirmed in art. 6 and 13 ECHR and art. 47 of the Charter. They entail the right to a fair trial, the right to public hearings, the right to be judged by an impartial tribunal and in a reasonable time. The Court, by emphasizing the role of Art. 19 TEU, has increased the number of situations where national litigants may challenge national measures which undermine judicial independence especially in Hungary and Poland but also in other Member States such as Bulgaria and Romania, where some problems with the independence of the judicial system have been detected[237].

3.2.2 The consequences of the judgement on the Polish case and further developments

After the delivering of the sentence, some important developments took place in the long-standing legal proceedings between the European institutions and the two illiberal states. In fact, on 12th September 2018, the European Parliament eventually voted in favour of the activation of Art. 7(1) TEU, the preventive arm of the rule of law enforcement tool, against Hungary thanks to the suspension of Fidesz from the EPP too. In the resolution the EP submitted, in accordance with Art. 7(1), an invitation to the Council to determine whether there is a clear of a serious breach by Hungary of the values referred to in Article 2 TEU and to address appropriate recommendations to Hungary in this regard [238]. Focusing on the Polish case, the European Commission decided to refer Poland to the Court of Justice due to the violations of the principle of judicial independence by also asking to *"order interim measures, restoring Poland's Supreme Court to its original situation"*[239]. Therefore, the judgement *Associação Sindical dos Juízes Portugueses* opens new perspective for the Commission and its infringement proceedings under art. 258 TFEU, concerning the Polish law that empowers the Ministry of Justice with the discretionary power to exert influence over the

[236] Ibidem
[237] Laurent Pech and Sebastien Platon, *Judicial independence under threat: The Court of Justice to the rescue*, Common Market Law Review, Middlesex University London, 2018, pp. 1-20, p. 16
[238] European Parliament resolution of 12 September 2018, in European Parliament official site, accessed on 30th October 2021, europar.europa.eu
[239] European Commission, press release IP/18/5830

judiciary, since the CJEU now sufficiently justify to examine it under EU standards in a more comprehensive way since enables proceedings with regard to the Act on the Supreme Court (SC) dealing with the retirement age of SC from 70 to 65 years which will affect the situation of forty percent of the present SC judges[240].

In this context, case K 3/21 of the Polish Constitutional Tribunal of 7th October 2021 turned the tables since it triggered a legal and political bomb in the context of the application of EU law and the independence of the judiciary system. The case K 3/21 arose from an application of the Prime Minister of Poland, Mateusz Morawiecki, who sought for the Tribunal to examine the compliance of elements of the TEU with the Polish Constitution [241]. He asked the Tribunal to provide him with some legal covering to enable PiS government to circumvent CJEU judgements dealing with the independence of judiciary based on Article 19(1) TEU and to avoid art. 188 of the Polish Constitution that empowers the Constitutional Tribunal to review international treaties for their conformity with the Constitution but does not give it the competence to review the jurisprudence of international Courts such as the CJEU[242]. Moreover, the Prime Minister's application was in violation of art. 9 of the Polish Constitution, which states that Poland shall respect binding international law, and art. 8 too that shapes the relationship between Polish constitution and international law including EU treaties. The judgement of the Constitutional Tribunal consists of three parts. In the first part, which resembles a political declaration, the Tribunal felt empowered to proclaim that some major seismic shift has happened with the European Union and that is no longer what it was before and that Article 1(1) and (2) in conjunction with Article 4(3) TEU are no longer compatible with the Polish Constitution [243]. The second and third part deal with the dismissal of the EU requirements relating to judicial independence based on Art. 19(1) in compliance with the Polish Constitution. The Tribunal's decision is related to the rejection of *Associação Sindical dos Juízes Portugueses* derived jurisprudence that stated the obligation for national courts to apply the principle of primacy of EU law and to discard domestic laws incompatible with EU law. According to the Tribunal, such provision is incompatible with Polish legal order thus, for the first time in history, the primacy of EU law over national law (excluding the fundamental constitutional provisions as stated by the Italian Constitutional Court and the German Federal Constitutional Court) is rejected by a Member State. This judgement surely will worsen the legal battle between the European institutions and the illiberal Member States concerning the Rule of Law crisis. In this

[240] Maciej Taborowski, *CJEU Opens the door for the Commission to reconsider charges against Poland,* in Verfassungsblog, accessed on 30th October 2021, verfassungsblog.de
[241] Jakub Jaraczewski, *The K 3/21 decision of the Polish Constitutional Tribunal,* in Verfassungsblog, accessed on 2nd November 2021, verfassungsblog.de
[242] Ivi, p. 2
[243] Ivi, p. 3

context, it is important to point out even the positions of the retired judges of the Polish Constitutional Tribunal which have recently stated that it is not true that the judgment of the Constitutional Tribunal of 7 October 2021 was issued in order to guarantee the supremacy of the Constitution over EU law, since such a position of the Constitution has been sufficiently established in the previous case law of the Tribunal and that it is not true that the judgment of the Constitutional Tribunal of 7 October 2021 itself falls within the competence of the Tribunal and is consistent with the Constitution [244]. The opinions of the retired judges well displays the situation of the judiciary in Poland and in particular the grave situation of the Polish Constitutional Tribunal which was supposed to be the most important autonomous and vigilant organ of the Polish state that has been transformed into a politically controlled organ in the hands of the Polish executive power.

Recently, the Polish Constitutional Tribunal has delivered another important and contested judgement dealing with the compliance of Art. 6 of the European Convention on Human Rights with the Polish Constitutional Tribunal, following an application from the Prosecutor General. As explained by Ewa Łętowska in *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal* published on Verfassungblog on 29th November 2021, in its judgement K 6/21 the Tribunal declared Art. 6 ECHR unconstitutional in response to the judgement of the ECtHR 4907/18 *Xero Flor v Poland.* In the *Xero Flor* judgement, the ECtHR stated that, that when hearing an individual constitutional complaint, the Polish Constitutional Tribunal is to be considered a 'tribunal' under Article 6(1) ECHR. Beyond that, the applicant claimed that the principle of supremacy of the Polish constitution over other laws prevents an international court from reviewing the appointments of Polish Constitutional Tribunal judges, and that the ECtHR has supposedly created a mechanism for reviewing these appointments which has no grounds in Polish law. By response, the Tribunal justified the fact that the judgment of *Xero Flor* is not binding, as it was delivered *ultra vires* in its judgement and thus the concerned article is unconstitutional because it applies only to Courts and the Polish Constitutional Tribunal does not represent a Court [245]. This new judgement will surely have far-reaching consequences for the Polish citizens because they will be disadvantaged with respect to other European citizens because judgments of the ECtHR may not be implemented and because it may set a precedent in not following the judgement of the ECtHR [246]. Moreover, this judgement clearly shows that Polish authorities have set out on a path of 'disabling' judgements from any international courts whenever such judgments are in some way inconvenient for the Polish Government.

[244] Statement of retired judges of the Polish Constitutional Tribunal, in Verfassungsblog, accessed on 18th December 2021, verfassungsblog.de

[245] Ewa Łętowska, *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal, , in* Verfassungsblog, accessed on 18th December 2021, verfassungsblog.de

[246] Ibidem

3.2.3 Concluding remarks

To sum up, this chapter has pointed out and deepened the characteristics of the democratic backsliding in the two most affected Member States: Poland and Hungary. In the Polish case, the government in office, a far right-wing populist party that appeals to the Christian roots of the country, has proposed and passed some amendments aimed at the dismantle and the control of the judiciary and in particular of the Polish Constitutional Tribunal. Once attacked and undermined the independence of the judicial power, the PiS government has been trying to limit social and civil rights too, by trying to limit and ban the LGBT "ideology" and the right to the abortion. The Hungarian case presents some similarities with Poland since the government in office, a far-right populist and catholic party, has changed the Hungarian constitution due to a super-majority in Parliament and soon attacked the independence of the judicial power and limited the civil and social rights of the LGBT minority too. The main difference between the two situations relies on the fact the in Poland the PiS government acted by violating the constitution while in the Hungarian case the Fidesz government directly changed the constitution before attacking and limiting the power of the judiciary. Then, the chapter has focused on the ECJ case *Associação Sindical dos Juízes Portugueses,* a fundamental judgement in which the ECJ has given a peculiar interpretation of Art. 2 TEU together with Art. 19 TEU. The Court stated that the independence of ordinary courts and tribunals in every single Member State is both an essential feature of the rule of law and a fundamental element for the correct application of the European law. Therefore, by stating that is a legal duty of the Member State the preservation of the judicial independence, the ECJ launched an important signal to Poland and Hungary. The concerned case has been followed by important repercussions by the concerned Member States and in particular Poland, where the controlled Constitutional Tribunal has declared unconstitutional Art. 6 ECHR and has even discarded the primacy of the European law over national law, one of the fundamental milestones upon which the European Union relies on. As it showed, the legal quarrel between the European Union and Poland and Hungary is still continuing while the rule of law situation in the concerned countries is worsening. For this specific reason, the European Commission has created and launched a new conditionality mechanism dealing with the disbursement of EU funds that may heavily affect Poland and Hungary and the behaviour of their governments too. The rule of law conditionality mechanism will be analysed in the fourth and last chapter.

CHAPTER 4
THE RULE OF LAW CONDITIONALITY MECHANISM

4.1 The structural problems of the European legal framework

The decision to suspend the flow of the European funds to those Member States that do not respect the rule of law principles has been conceived in a particular historical moment where the European legal framework has been proved to be insufficient in properly managing the democratic involution of some Member States. Before analysing in detail the new tool of negative conditionality applied on the recalcitrant countries, it will be highlighted the structural problems that affect the European legal framework and its inefficiency in contrasting the democratic decay. The progressive rule of law backsliding in Europe has caused several problems and divisions both among Member States, split into who backs up the illiberal actions of Poland and Hungary as the Visegrad group and who tries to contrast the two Eastern countries, and among the European institutions since the institutional asset of the European Union and the available tools for contrasting the democratic backsliding do not provide for an efficient response against the alarming problem in the Eastern countries. For this reason, in the last years the European institutions proposed some alternatives to the problematic use of Art.7 TEU in order to stop the rule of law backsliding. In particular, in 2018 the European Commission proposed a regulation "*on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States"* which was anticipated by the Commissioner for Justice Věra Jourová who, in 2017, launched the idea of introducing some form of fundamental values conditionality for EU funds [247]. The Commissioner's proposal was not a novelty in the realm of the European institutions since the European Parliament had already referred to the possibility of "*financial sanctions or the suspension of Union's funding as an additional measure"* in its own report from 2016 and various member state governments already in 2013 proposed, as a last resort, the possibility of suspending EU funds [248]. The Commission's proposal of 2018 provided a draft regulation on the protection of

[247] Michael Blauberger and Vera van Hullen, *Conditionality on EU funds: an instrument to enforce EU fundamental values?*, Journal of European Integration, 43(1), 2021, pp.1-16, p. 3
[248] Ibidem

Union's budget with a focus on sanctions in case of rule of law deficiencies since the correct functioning of the rule of law is closely linked to the efficient implementation of the Union's budget; in this context, the legal basis for the draft regulation would be Art. 322 of TFEU [249]. The following section will provide a clear outlook of the current situation in all Europe thanks to the Rule of Law Report, a comprehensive document which assesses and evaluates the perceived situation in Europe regarding the rule of law principles.

4.1.1 The Rule of Law Report

The deficiencies concerning the Rule of Law Framework and the increasing problem of the democratic backsliding in Eastern Europe have been addressed by the President of the European Commission Ursula von der Leyen in the *State of The Union Address 2020* [250] before the European Parliament in September 2020. The President von der Leyen highlighted the crucial importance of the rule of law as a well-established mechanism and as the essence of the proper functioning of the internal market and the European institutional, social and economic structure as a whole [251]. During the speech, the President set out new guidelines for the establishment of a new comprehensive rule of law mechanism; it will be designed as a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening by focusing on the identification of challenges in fundamental fields such as the justice system, corruption, media pluralism and freedom in cooperation with Member States and important stakeholders like the Venice Commission. The report will bolster cooperation between countries and European institutions and will trigger important reforms in such delicate fields by also funding new projects aimed to stimulate inter-institutional cooperation [252]. In the context of the structural problems affecting the rule of law situation, the novelty will concern the elaboration of a rule of law assessment on the situation of the democratic regime in each Member State, by setting out the specific deficiencies of each country in

[249] Art. 322(1) TFEU states that The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations: the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;
rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers.

[250] In September each year, the President of the European Commission delivers the State of the Union address to the Parliament. The address takes stock of the achievements of the past year and presents the priorities for the year ahead. The President also sets out how the Commission will address the most pressing challenges the European Union faces and ideas for shaping the future of the EU.

[251] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report: The Rule of law situation in the European Union, in European Commission official site, accessed on 22nd November 2021, ec.europa.eu

[252] Ibidem

order to build appropriate remedies. According to President von der Leyen, the Report will focus on four main areas that are the justice system, the anti-corruption policies, free and pluralistic media and a transparent and high-quality public administration and it will use an innovative methodology elaborated by a network made up of representatives of the Member States, targeted stakeholders and the European institutions and will comprehend both quantitative and qualitative variables. The Rule of Law Report provides a clear set of the main structural problems of the rule of law situation among Member States and a particular emphasis is given to the situation of the judicial system and in particular to the method of appointment of judges. The Report shows that, according to the Eurobarameter, in nine out twenty-seven Member States the level of perceived independence of the judiciary has decreased and, in some of them, remains very low since in countries such as Poland and Hungary the situation deeply worsened due to the aforementioned judicial reforms. In this context it is important to highlight that also Bulgaria and Romania, even though are under the control of a specific surveillance system called Cooperation and Verification Mechanism (CVM) [253], raised some concerns for the controversial judicial reforms and the composition of some apical judicial organs. The fight against corruption is directly linked to the independence of the judicial system since an impartial judiciary may effectively enforce anti-corruption legislation by conducting impartial investigations and prosecutions [254]. In this context some important actions will be taken by the European institution such as the establishment of a European Public Prosecutor Office [255] and the strengthening of the legislation dealing with money laundering and financial crimes. According to the Eurobarameter perception surveys [256], corruption is a serious concern in Europe since 71% of the Europeans believe that corruption is widespread in their country. Once again, the Eastern European countries show high levels of corruption and concerns about the capacity to fight the phenomenon; in Czechia serious concerns arose concerning potential conflicts of interests and the use of EU funds and in Hungary there is a lack of determined action to start criminal investigation and prosecute corruption cases involving high-level officials [257].

In this context, the situation of media may be considered the amplest area of concern in the rule of

[253] When they joined the EU on 1 January 2007, Romania and Bulgaria still had progress to make in the fields of judicial reform, corruption and (for Bulgaria) organised crime. The Commission set up the Cooperation and Verification Mechanism (CVM) as a transitional measure to assist the two countries to remedy these shortcomings.

[254] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report: The Rule of law situation in the European Union, in European Commission official site, accessed on 22nd November 2021, ec.europa.eu

[255] It will be an independent prosecution office of the EU, with the competence to investigate, prosecute and bring to judgement crimes against the EU budget such as fraud, corruption or serious cross-border VAT fraud.

[256] Special Eurobarometer 502 "corruption", June 2020 and Flash Eurobaromeer 482 "businesses" attitudes towards corruption in the EU, December 2019.

[257] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report: The Rule of law situation in the European Union, in European Commission official site, accessed on 22nd November 2021, ec.europa.eu

law structure since it involves several different fields such as the independence of the media, the political pressure on them and the transparency too. Even in this case it is obvious that where a repressive government is in office, political pressure is firstly put on the independence of the media such as the case of Hungary where journals and other sources of information are highly politicized and, in the absence of legislation and transparency in the distribution of state advertising, significant amounts of state advertising spread pro-government messages and advertisements [258]. Focusing on Hungary and Poland, in the former the establishment of the KESMA media conglomerate via the merger of more than 470 government friendly media outlets, without scrutiny from media and competition authorities, has been perceived as a threat to media pluralism while in the latter the Polish government called for possible plans for legislative changes in foreign-owned media outlets [259].

The last field of the deficiencies of the European rule of law situation concerns the excessive use of accelerated and emergency legislation. The Venice Commission and the Organisation for Security and Cooperation in Europe (OSCE) have pointed out several times the importance of the parliamentary procedure as the fundamental essence of the democratic functioning and the excessive use of emergency legislation may undermine the checks and balances of the democratic regime. For instance, in Poland the accelerated process has been exploited to pass legislative measures aimed at the dismantle of the judiciary and in Romania emergency ordinances applied in the judicial reforms [260]. In this context of several structural problems in the rule of law institutional asset in some Member States, the use of the Rule of Law Report may be a valid basis for finding a solution to the crisis since it shows quantitative and qualitative data assessing the situation in every European country, the strengthened cooperation between European institutions, international stakeholders and Member States may be used a starting point for the implementation of contrasting measures aimed at the resolution of structural problems of the rule of law. In this context, the judgements delivered by the European Courts of Justice are crucial in targeting specific issues of non-compliance with EU law since the ECJ has clarified the principle of judicial protection and the right to an effective judicial remedy.

[258] Ibidem
[259] Ibidem
[260] Ibidem

4.1.2 The lack of diagonality

According to the scholar Nagy in its paper *The diagonality problem of EU rule of law and human rights: proposal for a an incorporation à l'européenne* [261], the European Union lacks the power of diagonality, that is the application of EU rule of law against Member States, since the European Union adopts a straight application that refers to the application of EU law requirements against the EU as well as the application of Member States requirements against Member States. In other words, the European Union possesses a comprehensive set of Rule of Law requirements that has effect on the European Union headquarters, offices and bodies but a very limited power on Member States since EU rule of law applies to them only when they implement EU law because they act as European agents. Moreover, another aspect of this straight approach is represented by the distance between the European institutional structure and Member States since the European Union's bodies and agencies are not present in every region of Member States as they rely on the local institutional authorities and local judicial bodies which have a predominant role in enforcing EU law by acting on behalf of the EU [262]. For this reason, the European Commission and other European institutions have serious problems in enforcing the rule of law set as they may be considered only when the Member State is infringing EU law. As previously said, the Rule of Law Framework entails the protection of human rights and, even in this case, the European institutional asset presents a blatant contradiction as fundamental rights are protected as universal human interests, but they are not directly enforceable among EU Member States[263]. In fact, the concerned rules are detailed for the European institutions but the requirements that European countries must respect are listed only in art.2 TEU and in the Charter of Fundamental Rights, which is compulsory for Member States but only when they implement EU law. Therefore, there is no effective enforcement for the violation of fundamental values, except for the already mentioned troublesome art. 7 TEU, and as long as no effective legal mechanism for the protection of fundamental values will be adopted the problem will continue to persist. In this context, the spill-over effects that originated from the increasing expansion of EU competences into the internal matters of Member States are not considered as an effective application of diagonality but rather as an apparent effect. For instance, in the case of the independence of the judicial system the decisions taken by the ECJ in *Associação Sindical dos Juízes Portugueses* and the consequential effects on illiberal States are not derived from a diagonal application of EU law but from the very effectiveness of EU law: national courts have the double role to apply both EU and national law and since individuals cannot refer directly before the CJEU,

[261] Csongor Istvàn Nagy, *The diagonality problem of EU Rule of Law and Human Rights: Proposal for an incorporation à l'Europeéenne,* German Law Journal, 21(5), 2020, pp. 836-866
[262]Ivi, p. 843
[263] Ibidem

national courts act as mediators but only in those case where EU law is allegedly violated . Even in this case, the European Commission acted alternatively in order to sanction Poland and Hungary for the dismantle of the judicial system by appealing to the Directive 2000/78/EC prohibiting discrimination at the workplace [264]. As previously stated, in the last judgement of the politically controlled Polish Constitutional Tribunal Case K 3/21 of October 2021, the judicial organ questioned the primacy of EU law over the national legal system thus stating the *ultra vires* nature of the EU treaties [265]. Following the reasoning of the Polish Constitutional Tribunal, the landmark judgement of *Associação Sindical dos Juízes Portugueses* has no effectiveness in the Polish territory since according to the Tribunal, CJEU case law based on art. 19(1) TEU should therefore not be understood as allowing Polish courts to overrule domestic laws that the CJEU considers incompatible with art 19(1) TEU [266]. The controversial judgement has certainly worsened the already compromised relationship between the European institutions and the PiS government. In a recent press release, the European Commission has upheld and reaffirmed the founding principles of the Union's legal order, namely the primacy of the EU law and the bindingness of the ECJ's rulings on all Member States' authorities and has then stated that the European Commission *"will not hesitate to make use of its powers under the Treaties to safeguard the uniform application and integrity of Union law"* [267]. To sum up, the Polish Constitutional Tribunal's historical judgement has surely worsened the relationship between European Commission and the Polish government since the beginning of the rule of law backsliding in the Eastern country. The situation will surely have serious consequences both in the case of the Polish citizens since, as the Commission stated *"the rights of the Europeans under the Treaties must be protected, no matter where they live in the European Union"*[268] , and even for the Polish institutions since it appears that the rule of law situation will worsen if no concrete action will be taken.

4.1.3 The weaknesses of the tools for monitoring and enforcing the rule of law deficiencies

The most criticized legal instrument to face and limit the rule of law backsliding in Europe has been the Rule of Law Framework which has been depicted as inadequate for the current challenge. The instrument launched in 2014 by the European Commission lacked and still lacks a means of

[264] Ivi, p. 850
[265] Jakub Jaraczewski, *The K 3/21 decision of the Polish Constitutional Tribunal,* in Verfassungsblog, accessed on 8th January 2022, verfassungsblog.de
[266] Ibidem
[267] European Commission Statement/21/5142, *European Commission reaffirms the primacy of EU law,* in European Commission official site, accessed on 8th January 2022, ec.europa.eu
[268] Ibidem

action other than other infringement procedures and even presents a more flexible method [269]. According to the concerned article, the European Commission missed several occasions to use the Rule of Law Framework, since it has used it once against Poland and nothing has been done for instance against Malta, when the journalist Daphne Caruana Galizia was murdered due to its reports concerning systematic failings of the Maltese judiciary or against Romania, where the ruling Social Democratic Party (SPD) legislated to try to protect its leader form corruption proceedings and increase its control over judges [270]. Moreover, the Rule of Law Framework has never activated against Hungary, despite the government's repeated breaches of EU values since 2010 and, in case of its activation by Poland, it displayed a long and thus inefficient timeframe for its proper enforcement and was not followed by the PiS government therefore it aroused several doubts concerning its effectiveness [271]. In this context, a first sensitive weakness of the tools for monitoring and enforcing the rule of law principle concern the definition of the notion of "*systemic threat"* against the rule of law, since there had been no consensus on a proper definition of Rule of Law for the European institutions even though recently the Commission provided some guidelines for defining the concerned theme and consequently the "systemic threat" to the Rule of Law, even if it remains vague since it may result *"from the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress"* [272]. According to the European Commission Communication the rule of law entails six legal principles that are:

I) legality, dealing with a transparent, accountable, democratic and pluralistic process for enacting laws
II) legal certainty
III) Prohibition of arbitrariness of the executive powers
IV) Independent and impartial courts
V) Effective judicial review including respect for human rights
VI) Equality before the law

However, the definition does not comprehend the principles of accessibility of the law, protection of legitimate expectations and the principle of proportionality and this lack may cause systemic

[269] Pascal Joannin, *Protecting the checks and balances to save the Rule of Law*, Fondation Robert Schuman, European Issue no. 590, in Robert-shuman site, accessed on 8th January 2022, Robert-shuman.eu
[270] Ibidem
[271] Ibidem
[272] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021, Rule of Law Report The rule of law situation in the European Union, in EURlex official site, accessed on 22nd December 2021, eur-lex.europa.eu

problems since it may not address some factors as systemic threat to the protection of the rule of law.

In general, the Rule of Law Framework shows some criticalities. First of all, it may be activated only in case of systemic threats or violations of the rule of law and does not comprehend minor or individual breaches [273]therefore since the definition of *systemic threat"* is general in its content, the Rule of Law Framework may be activated when the situation is already compromised, like in Poland, or may be not activated at all as it happened with the Hungarian case. The proposal is based on the assumption that a structured dialogue between the concerned Member States and the Commission may be useful for a preventive resolution of the problem but actually it is unlikely to work in a context where the process of democratic backsliding has been continuing for years and has been enacted by the same government who is supposed to engage in a structured dialogue for a *"preventive solution" [274]*. Moreover, the non-binding nature of the Rule of Law recommendation to be addressed to the authorities of the targeted Member State where systematic threats have been detected and the non-automatic recourse to Art.7 procedure in case of non-compliance of the State further increases the likelihood of protracted discussions and ineffective outcomes [275]. In addition, the new procedure applies equally to all Member States and does not differentiate between democratic regimes where the situation of the rule of law is good enough not be considered in danger and countries, such as Hungary and Poland, that are really compromised as previously said [276]. Another weak point may be considered the lack of a reasonable timeframe in the Rule of Law Framework: it is divided into three main phases but there is no reference to a timetable within the Commission may officially act. In the case of Poland, the Rule of Law Framework has been activated in 2016 and the Commission's reasoned opinion has been followed by a complementary one thus bypassing the activation of Art.7 even though its resort is not mandatory [277].

For these specific reasons, the Commission has thus provided another instrument to contrast the democratic backsliding and deals with the Rule of Law conditionality on the disbursement of European funds and its blockage in case of non-compliance with the Rule of Law elements provided by the Commission. The negotiating process on a proper description of the RoL conditionality on EU funds has been an intricate dialogue between the Commission, the Parliament,

[273] Rule of Law Framework, in European Commission official site, accessed on 8th January 2022, ec.europa.eu
[274] Ibidem
[275] [275] Pascal Joannin, *Protecting the checks and balances to save the Rule of Law*, Fondation Robert Schuman, European Issue no. 590, in Robert-shuman site, accessed on 8th January 2022, Robert-shuman.eu
[276] Csongor Istvàn Nagy, *The diagonality problem of EU Rule of Law and Human Rights: Proposal for an incorporation à l'Europeéenne,* German Law Journal, 21(5), 2020, pp. 836-866, p. 860
[277] Ibidem

the Council and the European Council too in the vests of the representative body of Member States and it will be thoroughly analysed in the following section.

4.2 The Rule of Law conditionality mechanism

In 2020, in the middle of the pandemic crisis, the European Parliament and the Council of the European Union adopted the European Commission's draft for a Regulation to establish a general regime of conditionality for the protection of the Union's budget. The new mechanism has been envisaged since 2017 and it has been approved after several frictions between the European institutional bodies concerning the real effectiveness of art. 7 procedure, the sole mechanism for the protection of the Rule of Law, and the worsening situation of the democratic institutions in Member States such as Poland and Hungary. The rule of law crisis has been threatening the very essence of the European Union and the values on which it was founded and has been perceived as a constitutional crisis that would undermine the European project and its perception outside the European continent itself. The new Rule of Law mechanism may be considered as a last resort to face the democratic backsliding in those states by curbing them the flux of money allocated in structural funds under shared management, which constitutes a large share of the Multiannual Financial Framework (MFF). In the following paragraph the new Rule of Law mechanism will be analysed in detail by also pointing out the weaknesses and strengths of the project and the negotiation process that led to the approval of the new Rule of Law conditionality.

4.2.1 The content of the Rule of Law conditionality mechanism

The official approval of the Rule of Law conditionality mechanism took place on December 2020 together with a new seven-year budget (MFF), the Next Generation EU (NGEU), an increase of the own resources of the EU [278] (The Own Resources Decision) and the aforementioned Conditionality Regulation concerning the Rule of Law. The Regulation lists in art.1 and art.2 the principles of the

[278] The current Own Resources system rests on three main categories of revenue: (i) so-called Traditional Own Resources (mainly customs duties); (ii) a Value Added Tax-based Own Resource; and (iii) the Gross National Income-based Own Resource. While Traditional Own Resources are a direct source of revenue to the EU budget and thus have been identified as a 'genuine' EU Own Resource, the latter two categories are in essence national contributions to be made available by the Member States to the EU budget. The Gross National Income-based Own Resource was established as a 'residual' keystone of the Own Resources system to ensure full funding of the agreed expenditure. However, over time it has become the system's predominant component. It accounts for more than 70% of EU revenue. It provides stability and sufficiency but its predominance perpetuates the perception that national contributions to the EU budget are a mere cost factor.

rule of law and a comprehensive definition of what can be understood as rule of law principles and clearly defines the scope of application of the Regulation: it must be strictly tied to the Union's budget. It means that if a breach of the rule of law is identified, in a second step, the Commission has to prove an effect of that breach on the Union's budget since the Regulation aims to protect the sound financial management of the EU budget and the protection of the Union's financial interest [279]. The regulation lists those areas where breaches of the principle of the rule of law can impair the functioning of institutions of procedures related to the use of EU funds like the proper functioning of the authorities carrying out the Union budget or financial control, the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud and the effective judicial review by independent courts of actions or omissions by the authorities referred to above [280]. In particular, the procedure is entailed in art.6 and comprises several procedural rules. First of all, if the Commission believes to have found a breach of the principles of the rule of law in a Member State which affects the Union's budget, it will send a reasoned letter to the concerned Member State; it follows that the Member State in question can address the findings of the Commission whether with a reply or with a proposal with remedial measures and, finally, the Commission shall take Member State's observations into account before deciding if it wants to submit an implementing act to the Council to halt funds to the concerned Member State or cease the case [281]. In this context, a caveat may be found since, as listed in art. 17 of the Regulation, if a Member State believes that the commission's proposal of an implementing act would violate the principle of objectivity, non-discrimination or equal treatment, it may exceptionally request that the matter be discussed at a European Council meeting, thus it may probably delay the process or raise it to the political level [282]. The rule of law conditionality mechanism also entails the sanctions that a Member State may experience in case of violation of the already mentioned conditions. In particular, the blockage of the funds may deal with both the funds which are implemented by the European Union itself and funds which are implemented under a regime of shared management (up to 80% of the Union's budgetary expenditures [283]) as well as it may be envisaged also the case of lifting measures after breaches on the principle of the rule of law have been remedied by the concerned Member State. In that case, according to art. 7 of the Regulation, the accused Member State may refute the findings of the Commission and prove that

[279] Niels Kirst, *Rule of Law conditionality: the long awaited step towards a solution of the Rule of Law crisis in the European Union?,* European Papers, Vol. 6(1), April 2021, pp. 101-110, p. 105
[280] Thu Nguyen, *The EU's new rule of law mechanism, How it works and why the "deal" did not weaken it,* Hertie School Jacques Delors Centre, December 2020, pp. 1 6, p.2
[281]Niels Kirst, *Rule of Law conditionality: the long awaited step towards a solution of the Rule of Law crisis in the European Union?,* European Papers, Vol. 6(1), April 2021, pp. 101-110, p. 105
[282] Ivi, p. 106
[283] EU budget management types, on European Commission official site, accessed on 4th December 2021, ec.europa.eu

the conditions are no longer fulfilled or, art. 7(3) foresees the possibility for a Member State to recoup funds from the budget that were withheld due to implementing acts [284].

However, the Rule of Law conditionality mechanism presents some weaknesses that have been pointed out by statements from the European Council. First of all, in paragraph I.1(c), the European Council states the Commission shall develop guidelines for the application of the Regulation but, in the following section it states that those guidelines shall only be developed after a legal challenge against the Regulation based on art. 263 TFEU [285] as well as the same article states the Commission shall not apply the Regulation until the guidelines are finalised. Therefore, according to the reasoning, the Commission would have to wait for a court case to develop guidelines before it is entitled to apply the Regulation and thus the whole process may take years [286]. In fact, according to the Judicial Statistics of the Court 2019, a Court proceeding lasts approximately 14,4 months while the process of adopting guidelines by the Commission takes additional time [287]. Thus, following the European Council reasoning, the rule of law conditionality guidelines in order to be developed would have to wait a CJEU's judgement on a legal challenge based on art. 263 TFEU; the process may take up to 14 months to be effective thus being ineffective in the meantime. Then, the same Regulation states that it may be applied only when there are no other more efficient means to protect the Union's budget, thus before the effective application of the new mechanism, other means such as the Common Provisions Regulation [288], the Financial Regulation [289] and an infringement procedure under art, 325 TFEU [290] have to be exhausted. In this context, it must be highlighted that the European Council's statements do not have legal binding force thus it may arise

[284] Niels Kirst, *Rule of Law conditionality: the long awaited step towards a solution of the Rule of Law crisis in the European Union?*, European Papers, Vol. 6(1), April 2021, pp. 101-110, p. 107

[285] The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

[286] Niels Kirst, *Rule of Law conditionality: the long awaited step towards a solution of the Rule of Law crisis in the European Union?*, European Papers, Vol. 6(1), April 2021, pp. 101-110, p. 108

[287] CJEU, The Year in Review – Annual report 2019, in Court of Justice of the European Union official site, accessed on 10th January 2022, in curia.europa.eu

[288] Regulation No 1303/2013 of the European Parliament and of the Council of the 17 December 2013 laying down common provisions of the European Regional Development Funds, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions of the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006.

[289] The Financial Regulation (FR) is the main point of reference for the principles and procedures governing the establishment, implementation and control of the EU budget.

[290] 1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

only political problems since the statements may be read as the European Council telling the Commission how to apply a regulation, which is not its job under the Treaties because the European Commission is an independent authority. If the Commission therefore were to decide of its own accord to refrain from proposing measures before a certain date, like the CJEU's ruling, the action would fall within its rights [291]. Dealing with its effectiveness, if the aim of the new Rule of Law conditionality mechanism is to prevent Member States from breaching the rule of law through the credible threat of sanctions, any delay in proposing these would affect the regulation's effectiveness far less since the new mechanism in office presents more credible deterrent effects than under the procedure available under art. 7 TEU [292].

4.2.2 The negotiation process

The negotiation process concerning the approval of a proper Rule of Law conditionality mechanism engaged the two legislative bodies of the European Union, that are the European Parliament and the Council of the European Union. The trilogue [293] meetings between the two institutions started off with many contradictory positions on two main issues: the scope and aim of the regulation and the procedure for the adoption of measures, in particular with regard to the so-called emergency brake [294]. The Commission's original proposal concerned a bold decision-making procedure for the adoption of measures in which the Commission itself was at the centre of the system with two key powers: monitoring Member States' rule of law performances and then proposing to the Council to suspend EU funds when it identified a generalised deficiency [295]. During the trilogues, the European Parliament stood for an expansion of the scope of the regulation with the aim to bolster its own role in the mechanism and introducing a Panel of independent experts whereas the Council pressed for a more restrictive approach. In sum, the main problem was whether the aim of the regulation was to protect the rule of law principle through the protection of the EU budget, as the European Parliament asked, or according to the Council, to protect the EU budget through the protection of

[291] Thu Nguyen, *The EU's new rule of law mechanism, How it works and why the "deal" did not weaken it,* Hertie School Jacques Delors Centre, December 2020, pp. 1 6, p.5
[292] Ibidem
[293] Trilogues are informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission. Their purpose is to reach a provisional agreement on a text acceptable to both the Council and the Parliament. They may be organised at any stage of the legislative procedure and can lead to what are known as 'first reading','early second reading' or 'second reading' agreements, or to a 'joint text' during conciliation.
[294] Aleksejs Dimitrovs and Hubertos Droste, *Conditionality mechanism: what's in it?,* in Verfassungsblog, accessed on 5th December 2021, verfassungsblog.de
[295] Antonia Baraggia and Matteo Bonelli, *Linking Money to Values: the new Rule of Law Conditionality Regulation and its constitutional challenges*, forthcoming on German Law Journal (2021/2022).

the rule of law [296]. The Council based its position on the opinion of its Legal Service (LS) that argued that the regulation on the conditionality mechanism must not pursue the same aim as the procedure envisaged on art. 7 TEU therefore the Legal Service claimed that the final text of the regulation would need to make sure that infringements of the principle of the Rule of Law can be clearly identified and have a concrete and traceable impact on the implementation of the Union budget, allowing the Commission to find a clear link between the violation of the Rule of Law and the effect on the EU budget[297]. On the other side, the European Parliament criticised the reasoning of the Council Legal Service, in particular with regard to the *lex specialis* doctrine of art. 7 TEU. In particular, it relied on the fact that the Commission in the case of Poland addressed the same facts by appealing to art. 7 and infringement procedure, thus pointing out the non-exclusive nature of Art. 7; consequently, the European Parliament opted for a wider approach, focusing on a broad understating of the protection of the Rule of Law principle [298].

Eventually, the compromise between the two parts was found by combining the opinions of both the Parliament and the Council. In particular, the regulation is now entitled "Regulation on a general regime of conditionality for the protection of Union budget and it does not mention *"generalised deficiencies"* anymore but a detailed list of the violations of the rule of law in the case of the direct link between the infringement of rule of law standards and the EU budget. Furthermore, the final text of the Regulation made clear that measures must be proportionate to the impact on the EU budget, as Art. 5(3) of the Regulation explicitly states, and not to the "nature, gravity and scope of generalised deficiency" as originally proposed by the Commission [299]The case concerning the procedure dealt mainly with the timeframe within the procedure itself could take place. The European Parliament called for a short procedure while the Council stood for a longer timeframe. The compromise resulted in the addition of two special features: the two-step approach at the initial stage of the regulation, which it allows a concerned Member State to comment both on the findings and the proportionality of the measures proposed by the Commission, and the emergency brake and thus the possibility for a Member State to ask the President of the European Council to refer to the next meeting of the European Council in order to discuss the measures proposed by the Commission.

[296]Aleksejs Dimitrovs and Hubertos Droste, *Conditionality mechanism: what's in it?,* in Verfassungsblog, accessed on 5th December 2021, verfassungsblog.de
[297] Ibidem
[298] Ibidem
[299] Antonia Baraggia and Matteo Bonelli, *Linking Money to Values: the new Rule of Law Conditionality Regulation and its constitutional challenges*, forthcoming on German Law Journal (2021/2022).

4.2.3 The ambiguous position of the Council Legal Service

The opinions delivered by the Council Legal Service (CLS) have aroused several doubts and criticisms by legal experts, in particular the CLS put forward unpersuasive legal arguments to claim that the Commission's proposal could not be regarded as *"independent or autonomous from the procedure laid down in art. 7 TEU"* [300]. The Commission's proposal would allow to suspend or redirect funds to a Member State on the grounds that it has a *"generalised deficiency as regards the rule of law"* but, according to the CLS, the Commission is not in principle to attach conditionalities to the distribution of EU funds since such conditionalities already exists in different legal authorities established as EU secondary law and hence the Commission's proposal was not compatible with the Treaties because it would tread on the territory covered by art. 7 TEU [301]. Moreover, the CLS added that art. 7 is the only remedy to enforce the values enshrined in art. 2 TEU and no other legal authority can cover the same ground. In this case, according to Scheppele, Pech and Kelemen the CLS is mistaken about the nature of art. 7 since it does not represent the only way to enforce the values of art. 2 TEU. In fact, the Commission may also rely on art. 258 and art. 259 TFEU and, due to the last CJEU's judgment delivered in *Associação Sindical dos Juízes Portugueses,* art. 19 TEU gives concrete expression to the value of the rule of law stated in art. 2 TEU, and entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. Moreover, the presence of the Rule of Law Framework as a preventive action for warning a Member State about the allegedly violations of the Rule of Law within the country itself may be viewed as another instrument, even though a preventive one, to preserve and to enforce allegedly breaches of the democratic structure. Then, the Council Legal Service objected that the Commission had not explained precisely what would count as a violation of the rule of law but, as the Commission explained at the launching of the Rule of Law Framework and as it prescribed in the final outcome of the Regulation, the rule of law already has a principled minimum core that comprehends legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, an effective judicial review and the equality before the law. Moreover, even the Venice Commission has been mentioning, since the first opinions delivered to Poland in the last decade, a helpful checklist that explains in more detail the essence core of the Rule of Law and an explanation of each component [302]. Differently, the CLS criticised

[300] Kim Lane Scheppele, Laurent Pech and R. Daniel Kelemen, *Never missing an opportunity to miss an opportunity, the Council Legal Service opinion on the Commission's EU budget-related rule of law mechanism,* in Verfassungsblog, accessed on 5th December 2021, in Verfassungsblog.de
[301] Ivi, p. 2
[302] Ivi, p. 3

the notion of "*generalised deficiency"* as envisaged in the Commission's original proposal since it was vague as it identified it as a "*widespread or recurrent practice or omission, or measures … by public authorities … affects the rule of law "*[303] and thus the CLS criticised it because the use of such a vague clause left the Commission both in identifying the relevant national practices, omissions, and measures, and in determining whether they may affect the rule of law [304]. For this reason, in the final version of the Regulation the concept of generalised deficiencies was replaced with that of "breaches" of the rule of law, and in doing so the Regulation illustrates three situations that may indicate the existence of a breach such as the endangerment of the independence of the judiciary, the failure in preventing, correcting or sanctioning arbitrary or unlawful decisions by public authorities as weel as the availability and effectiveness of legal remedies[305] In sum, the opinions of the Council Legal Service aroused several doubts and criticisms mainly because they showed a hostile behaviour towards both the Commission and a useful and maybe more effective instrument to face the democratic backsliding in some Member States. Moreover, the opinions contained several mistakes concerning the effectiveness of this procedure, art. 7 procedure as the only legal instrument to enforce the values in art. 2 TEU and the role of the Commission itself. The compromise reached on the approval of the rule of law conditionality mechanism and the instrument of the NextGenerationEU was not an easy agreement among the several political streams within the European Union itself and the European institutions. They represent a reflection of what the European Union is today, a *sui generis* supranational organization that has been moving towards a quasi-federal entity on concerned matters, thanks to its normative homogenization on these fields, while still showing its divided nature on sensitive themes that mainly regards national affairs, as previously analysed.

4.2.4 The EUCO negative impressions on the Rule of Law conditionality mechanism

In this context, at the end of the 2020, the European Council (EUCO) adopted some conclusions that undermined the stability on the compromise reached some months before between the legislative and the executive arms of the European Union. As previously said, the conclusions of the European Council aimed to weaken the compromise since they stated the necessity for the Commission to wait for a new ECJ's judgement in order to step forward with the conditionality

[303] Article 2(b) of the draft regulation
[304] Courts of Auditors, Opinion 1/2018 concerning the proposal of 2 May 2018 for a Regulation of the European Parliament and of the Council on the Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, 17 July 2018, Doc. 2018/C 291/01.
[305] See Article 3, letters (a) (b) and (c) of the Regulation

mechanism and, moreover, the addition of the "emergency brake" in the Regulation was explicitly demanded by the European Council, despite the refusal of the European Parliament since the "emergency brake" would undermine the proper effectiveness of the Regulation [306]. The original purpose of the Conditionality Regulation was to connect the distribution of EU money to the compliance with the rule of law so that EU money no longer funded national autocrats [307] but now it appears to be designed to protect the budget because it can only be triggered when funds have already been misspent. Moreover, considering the fact that Poland and Hungary are the two recipient countries that spends more efficiently the EU funds, and that the conditionality mechanism will work after the improper implementation of the EU funds, the Regulation seems to be inefficient in preventing the worsening of the democratic backsliding in such countries. In addition, the Regulation states that while the Member State may be docked funds for violating the rule of law, the final recipients of the money should not be prevented from accessing the funds itself. The reasoning may be correct since one of the aims of the EU funds is to support the development of regional territories but, in a country such as Hungary where Orban has appointed his friends in apical positions and has created a fully-fledged system of patronage, the autocrats will be still paid even if Hungary would be halted from using the EU funds [308].

The other most criticised and critical point of the Regulation is the emergency brake that, as originally formulated by the Council, would have permitted an affected Member State to move its case from the Council to the European Council for review and decision. Now, the European Council stated in its conclusion that will put any such appeal on its agenda and will strive to formulate a common position should it be seized exceptionally by a Member State that might be subject to measures under this Regulation; thus, the European Council has turned the emergency brake into a parallel procedure that looks like a last chance for the targeted country to be "saved" from the Commission's sanctions and blockage of the EU funds. In this context, as Alberto Alemanno and Merijn Chamon have argued in *Verfassungsblog*, the European Council's conclusions do not comply with European Law for several reasons. First of all, the conclusions seem to instruct the European Commission to comply with the statements, which is in complete contradiction with the European Commission's independence; then, by giving guidelines, the European Council seems to exercise and draft a legislative procedure, which is not a power it can exercise. In detail, under Art.

[306] Thu Nguyen, *The EU's new rule of law mechanism, How it works and why the "deal" did not weaken it*, Hertie School Jacques Delors Centre, December 2020, pp. 1- 6, p 4

[307] Kim Lane Scheppele, Laurent Pech and R. Daniel Kelemen, *Never missing an opportunity to miss an opportunity, the Council Legal Service opinion on the Commission's EU budget-related rule of law mechanism*, in Verfassungsblog, accessed on 5th December 2021, in Verfassungsblog.de

[308] Ibidem

15(1) TEU [309] the European Council shall not exercise legislative functions and it must act within the limits of power conferred upon the Treaties since the legislative function is a prerogative of the European Parliament and the Council in vests of the two legislative arms of the European institutional asset. By requiring the Commission to adopt guidelines the European Council has *de facto* amended a legislative act without the power to do so [310]. Then, the European Council conclusions containing the interpretative declarations give suspensory effect to an action for annulment even though under art. 258 TFEU "*actions brought before the Court of Justice of the European Union shall not have suspensory effect"*, even in this case the EUCO conclusions seem inconsistent with the European law. Lastly, one of the tasks of the European Council is to give impetus to the European Commission in order to address it with proposals or to trigger initiatives but it cannot give any instructions since, as previously said, it may undermine the independence of an organ of the European Union thus clearly violating the principle of institutional balance. Otherwise, the EUCO negative and controversial impressions as well as the CLS opinions reflected the tension in the Regulation as proposed by the Commission since, according to the two institutions, it aimed to provide a system for protecting the rule of law implicitly meant to address crises such as the Polish and the Hungarian ones instead of referring to the principled of sound financial management and the protection of the Union's financial interests as finally approved [311]. In this context, the introduction of the "direct link" criterion was meant to ensure a "sufficient link" between the compliance failure, that it the rule of law breach, and the loss of entitlement, that is the suspension of EU funding; this outcome represents the creation of a genuine spending conditionality as envisaged by the ECJ in some of its judgements concerning same-sectors conditionalities in the Common Agricultural Policy [312].

[309] Art 15(1) TEU states that "The European Council shall provide the Union with the necessary impetus for its development
and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."

[310] Alberto Alemanno and Merijn Chamon, *To save the Rule of Law you must apparently break it,* , in Verfassungsblog, accessed on 5th December 2021, Verfassungsblog.de

[311] Antonia Baraggia and Matteo Bonelli, *Linking Money to Values: the new Rule of Law Conditionality Regulation and its constitutional challenges,* forthcoming on German Law Journal (2021/2022).

[312] Ibidem

4.3 The analysis of the rule of law conditionality mechanism

The model elaborated by Schimmelfennig and Sedelmeier [313] has proved to be effective in assessing the compliance of acceding countries to the European Union in the 2004 Eastern enlargement and, in general, it may be applied also to the rule of law conditionality mechanism in order to assess its effectiveness based on the determinacy of conditions, the size and speed of sanctions, the context of application, the domestic adaptation costs and the perceived legitimacy of the conditionality mechanism itself [314]. Starting with the context of application, the proposed mechanism will affect with a stronger impetus those countries that are facing democratic backsliding since it has been designed appositely for facing the rule of law crisis in concerned Member States. In this context, the dismantle of the checks and balances in Hungary and Poland was not meant as a mistake but is the result of deliberate government policies designed to maintain and strengthen the political power of ruling elites. The EU's attempt at protecting the rule of law goes against the interests of ruling elites, making compliance costly with regard to their *"grip on power"* [315]. The main task for the European institutions will be to engage in a structured dialogue with the pro-European forces in concerned countries in order to place the government in office under pressure through political opposition and popular opposition; the same task may be enhanced through an increased share of the European identity and a more capillary resonance of European projects and initiatives in targeted countries. However, the process is challenging but not impossible.

The likelihood of application concerns the probability that the conditionality mechanism would be applied to targeted countries and, obviously, is mainly determined by the procedural steps of the mechanism itself. In this case, compared to the application and the procedure of art. 7 TEU, it seems more probable that the effectiveness of the conditionality mechanism is higher than art. 7 procedure and the Rule of Law Framework. In fact, art. 7 procedure and the Rule of Law framework have been applied unevenly with regard to Poland and Hungary whereas the new mechanism presents a standard procedure to be followed and a qualified majority that may ease the application of it. Moreover, art. 4 of the procedure lists the set of measures that may be applied and art. 6 would allow lifting sanctions in full or just in parts, depending on Member State remedies of rule of law violations [316]. The size and speed of sanctions are well defined in the conditionality

[313] Steunenberg Bernard, Dimitrova Antoaneta, *Compliance in the EU enlargement process: the limits of conditionality*, European Integration Online Papers (2007), vol. 11, p. 10
[314] Ibidem
[315] Michael Blauberger and Vera von Hullen, *Conditionality of EU funds: an instrument to enforce EU fundamental values?*, Journal of European Integration, 43(1), pp. 1-16, p. 8
[316] Ivi, p. 9

mechanism since the Regulation will apply to large parts of the EU budget, especially those under "shared management" which represent the 80% of the EU budget. Moreover, the Regulation will affect not only those specific countries that are facing the democratic backsliding but also the net beneficiaries of European funds which, actually, correspond to the backsliding countries. In fact, according to the Commission's financial report of 2017, EU expenditure in Poland and Hungary was spent almost to 100% under shared management for agriculture and cohesion; therefore, the sanctioning power of the Regulation is powerful and it will depend on the Commission's choice of measures which will be "*proportioned to the nature, gravity and scope of the generalised deficiency as regard to the Rule of Law"* [317].

Lastly, the perceived legitimacy of the Regulation may have different outcomes due to its nature and procedure which consists mainly of a non-public, exclusive dialogue between the Commission and Member State governments [318]. On one side, the European Commission will enjoy a great discretionary power in imposing both the sanctions and their size in a proportioned way but the lack of a systematic monitoring procedure may undermine the democratic accountability of the Commission. In fact, the development of guidelines for the assessment of the size of economic sanctions to impose on the recalcitrant Member States, is a duty fulfilled by the Commission itself in virtue of its discretionary powers; the assessment must be objective, impartial, fair and conducted with respect to the principle of non-discrimination and equal treatment of Member States [319]. In order to avoid a possible democratic deficit, the European Parliament had proposed the establishment of an advisory panel of independent experts that would assist the Commission with the assessment of the rule of law situations in the Member States even though the proposal was not included in the Regulation 202072092 [320] so that the rejection of the proposal may undermine the democratic accountability of the European Commission once the mechanism will be implemented for the first time. On the other side, the conditionality mechanism may have a positive and more efficient outcome with regard to the previous legal tools for the protection of the rule of law principles, since Regulation 2020/2092 provides for an adversarial procedure in which the legal dispute is conducted between the Commission and the Member State concerned so that the involvement of only two actors in the first stage of the process may speed up the process and thus the efficiency of the procedure [321]. In sum, the rule of law conditionality mechanism, assessed

[317] Ivi, p. 11
[318] Ibidem
[319] Recital 26 preamble of Regulation 2020/2092
[320] Justina Lacny, *The rule of law conditionality under Regulation No 2092/2020 – Is it all about money?,* Hague Journal on the Rule of Law, 13(79), 2021, pp. 79 – 105, p. 93
[321] Michael Blauberger and Vera von Hullen, *Conditionality of EU funds: an instrument to enforce EU fundamental values?,* Journal of European Integration, 43(1), pp. 1-16, p. 11

according to the parameters of the Schimmelfennig and Sedelmeier's model, presents some positive elements if compared to the previous tools for enforcing the democratic backsliding and some ambiguous aspects that could be improved. The determinacy of the conditions is defined since the aforementioned Regulation may be applied only when the rule of law violations directly affects the Union's budget thus pointing out a clear connection between the two elements. With regard to the size and speed of sanctions, the conditionality mechanism will be surely more efficient if compared to art. 7 procedure and the Rule of Law framework because it entails a clear timeframe and will affect a considerable share of European funds. In this context, even the likelihood of the application presents a positive assessment since it has a lower threshold, a lower number of actors involved and thus a less probability of finding veto-players and because it also presents an increased responsiveness towards the rule of law crisis. The context of application and the perceived legitimacy are the weakest points of the Regulation due to a lack of systematic monitoring procedures and thus a problem of democratic deficit with regard to the perceived legitimacy whereas for context of application the situation will be challenging because it will depend on the ability of the European institutions to detect the pro-EU and democratic forces for facing the anti-democratic and authoritarian governments that are in office in the targeted countries [322].

4.3.1 The impact of the conditionality mechanism on Member States

The impact of the conditionality mechanism on Member States depends on the type of measures that will be applied in the concerned countries. The Regulation 2020/2092 provides the suspension of the approval of programmes or their amendments and the suspension of commitments, both in the case where the funds are under shared management. In the first scenario, the Commission regulates the approval of programmes presented by the Member States or the amendments of programmes that have been already approved and in case of a negative response by the European Commission itself, the programmes and the connected funds would be blocked. The second scenario deals with the suspension of budgetary commitments, that represents the reservations of budgetary appropriations to cover subsequent expenses from the budget and, if such commitments are not reserved, there will be no financial resource available to cover the budgetary appropriations [323]. The Regulation states that the commitments suspended may return to the Union budget but with a particular condition: the commitments suspended within a year "n" may not be entered into the

[322] Justina Lacny, *The rule of law conditionality under Regulation No 2092/2020 – Is it all about money?*, Hague Journal on the Rule of Law, 13(79), 2021, pp. 79 – 105, p. 93
[323] Ivi, p. 97

Union budget beyond year "n + 2" [324]. Therefore, the suspension is only temporary since the concerned Member State may try to solve the breaches of the rule of law in a defined timeframe before losing permanently the blocked funds; if the situation does not improve, the suspended funds are re-injected in the Union's budget by the Commission within two years and they will be at the disposal of the other Member States. However, it must be highlighted that it would be difficult to eliminate such breaches of the rule of law within two years since they may concern systemic and time- consuming measures that requires more than two years to be solved; therefore, the short timeframe of action may result in a permanent loss of funds for the Member States [325].

A special focus is required to the beneficiaries of the suspended European funds due to the breaches of the rule of law made by the Member State. In fact, during the legislative works on the Regulation it was highlighted the problem that the suspension of the funds to the recalcitrant Member State would penalize the beneficiaries rather than the concerned Member State itself; for this reason the measure should not affect in any way the beneficiaries of the suspended funds thus they the right to obtain the funds [326]. Specifically, the imposition of the measure should not affect the obligation of the concerned Member State to implement the targeted programmes or funds. The Regulation states that in case of application of conditional measures, the Member State must from its own revenue finance the costs of implementing the Union programmes financed until then by Union funds and make payments to beneficiaries but when the Union funds regards programmes under direct management, the Commission itself makes the payments to beneficiaries and undertakes other management tasks [327]. In this context, the Member State must report to the Commission on its compliance with the above obligations and, on the other side, the Commission should provide information and guidance to the beneficiaries on the obligations by a Member State on a website [328].

A novelty of the Regulation is that if the Commission discovers that Member State has stopped making payments to the beneficiaries it may take appropriate measures by recovering payments made or make a financial correction by reducing Union support to programmes in line [329]. In this particular case, EU funds are not transferred to the Member State if the situation does not improve and, if there is a serious deficiency in the effective functioning of the management and control

[324] Ibidem
[325] Ivi, p. 98
[326] Ivi, p. 99
[327] Ibidem
[328] Ibidem
[329] Article 63 (b), Article 68 (1) and Article 98 of Proposal for a Regulation of the European Parliament and of the Council laying down common provision on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM (2018) 375 final.

system including also the undermining of the judicial independence, the Commission imposes these financial corrections that may correspond to a reduction of EU funds to this state [330].

4.3.2 Mentions about the Next Generation Europe

The outbreak of Covid-19 pandemic has deeply undermined the stability and prosperity of the European Union and the entire world economy by causing far-reaching consequences not only at the economic level but also in the social and public health fields. The European Union has encountered several difficulties in tackling with economic crises and in the ability to act in the common interest of Member States but the Covid-19 pandemic has been the opportunity to develop a new frame of mind to deal with challenges at both the European and the national level. In fact, on 21st July 2020, the European Commission and the other European institutions converged on the creation of a new financial instrument, the Next Generation Europe (NGEU), that will use common resources to foster recovery in all Member States and to strengthen the cohesion, resilience and transformation of all Europe [331]. Specifically, it will be funded thanks to a common pool of financial resources that will be financed by borrowing funds called Eurobonds from financial markets on behalf of the European Union and it will raise up to €750 billion euro dedicated to supporting Member States recovery via new investments and reforms. The NGEU is part of the EU's 2021-207 long term budget of €1.8 trillion, made up of €1.074 trillion of the EU's long term budget and €750 billion of the NGEU [332] . In this context, the NGEU is divided into the Recovery and Resilience Facility, the common pool of resources funded thanks to the emission of a common debt, divided into €338 billion corresponded to Member States in the form of grants and other €385,8 billion will be given in the form of loans to be repaid by Member States starting in 2028 and ending in 2058 [333]. The remaining sum of €83.1 billion is dedicated to the funding of other useful programmes for the recovery of Member States and in particular React-Eu will receive €50.6 billion then €10.9 billion are dedicated to the Justice Transition Fund (JFT) and for the rural development, investments and R&D the NGEU corresponds €21.6 billion (€8.1 for Rural Development, €6,1 for InvestEU, €5.4 for Horizon Europe and €2.1 for RescEU) [334].

The new EU 2021-2027 budget differs from the previous ones principally because the main focus is

[330] Articl 144 CP Regulation and Article 98 of draft CP Regulation
[331] NextGenerationEU, in European Commission official site, accessed on 20th December 2021, ec.europa.eu
[332] NextGenerationEU, in European Commission official site, accessed on 10th January 2022, ec.europa.eu
[333] Ibidem
[334] The EU'S 2021-2027 long-term budget and NextGenerationEU facts and figures, in Publications Office of the European Union, accessed on 15th January 2022, op.europa.eu

on digital, green and sustainable transition with the Common and Agricultural Policy (CAP) that represents only 30.9% of the total budget, showing an important decrease that has been taking place since the EU budget 1988-1992, when it represented almost 60% of the total sum [335]. The historical significance of the NGEU is represented, as stated before, by the new funding system since the European Union will borrow funds from on the capital market for the first time in its history; to guarantee the borrowing under NextGenerationEU, the EU will have a headroom [336] that is 0.6 percentage points higher than the standard one, for the period until 2058. This will help the EU guarantee the borrowing, retain its high credit rating and raise funds under more favourable market conditions than many individual Member States [337].

Moreover, the NGEU is subject to a clear logic of surveillance and monitoring of the disbursement of the grants and loans and the implementation of them by Member States. Specifically, the allocation of financial resources has been made by firstly facilitating those Member States that have been severely hit by the socio-economic consequences of the Covid-19 pandemic and then those that can easily afford the costs of crisis due to the unequal flow of capital within the single market since their safe status allows them to draw in funds from other EU and euro area countries [338]. Secondly, the NGEU investments must align with EU priorities of green and digital transition which have been identified as central to Europe's future prosperity and resilience by the European Green Deal [339] and in the "Shaping Europe's digital future" plan [340]. These plans have to be considered as principles and milestones for the Member States' "Recovery and Resilience Plans" that have been submitted in April 2021. In this context, Member States are expected to autonomously allocate NGEU funds by operationalizing the climate, environmental, social and digital priorities of the Union into concrete projects [341]. The NextGeneration Europe programme is based on a model of multilevel governance, which means that the policy is implemented through the involvement of a multiplicity of actors and each level of the implementation programme presents its timeline and operational method since a single project may be implemented by European,

[335] Ibidem

[336] The headroom is the difference between the maximum amount of revenue that the EU can raise for the EU budget and the actual spending from the EU budget. It therefore guarantees that the EU can always deliver on its commitments.

[337] The EU'S 2021-2027 long-term budget and NextGenerationEU facts and figures, in Publications Office of the European Union, accessed on 15th January 2022, op.europa.eu

[338] Oliver Picek, *Spillover effects from the Next Generation Eu,* Leibniz Information Centre for Economics, 2020, pp. 1-7, p. 1

[339] The European Green Deal is an ambitious package of measures ranging from ambitiously cutting greenhouse gas emissions, to investing in cutting-edge research and innovation, to preserving Europe's natural environment that includes the objectives of reaching EU climate neutrality within 2050 and to further reduce net greenhouse gas emissions by at least 55% by 2030.

[340] Riccardo Crescenzi, Mara Giua and Giulia Valeria Sonzogno, *Mind the Covid-19 crisis: An evidence based implementation of Next Generation EU,* Journal of Policy Modeling, March 2021, pp. 1-20, p. 4

[341] Ivi, p. 5

national and regional authorities or only by one or two of the concerned actors [342]. In this context, it is important to highlight that the NGEU as well as the new 2021-207 EU budget are subject to the rule of law conditionality mechanism and thus even in the implementation of their national Recovery and Resiliency Plans the Member State have to respect the rule of law principle otherwise the disbursement of the funds may be blocked by the European Commission [343].

However, the implementation process of the disbursements of funds to Member States includes several procedures and conditionalities. First of all, within April 2021 Member States presented their national recovery plans which then have been under the assessment of the Commission [344]. As far as the financing is concerned, the crucial role is played by the Member States and the European Commission. First, the Member States had to ratify the Own Resources Decision (ORD) enabling the borrowing operations necessary to finance NGEU, a process that was completed in May 2021, and then pre-financing takes place within two months of the adoption of the agreement and is set at maximum 13% of the financial contribution (grants) and maximum 13% of the loan [345]. The Member States will implement their NRRPs and send the Commission requests for payment twice a year. The disbursements will be made providing the relevant milestones and targets set out in the implementing decision have been reached.

In this context the fact that, for the first time from its foundation, the European Union has mobilized common resources in the financial markets in order to fund the recovery package and this action may put the EU on the path toward a genuinely constitutional transformation since the NGEU programme entails mechanisms to extract and redirect human and fiscal resources in a legitimate and compulsory fashion [346]. The massive borrowing operation of NGEU in the financial markets will make the European Union one of the very largest bond issuers in the financial markets and the Eurobonds could surely boost integration between national financial systems [347]. However, the development of a common fiscal area in the European Union is far to be reached even though the NGEU recovery package may be considered as a starting point since the recovery package will create tangible incentives to ensure debt sustainability through greater coordination of national tax

[342] NextGenerationEU, in European Commission official site, accessed on 20th December 2021, ec.europa.eu

[343] Riccardo Crescenzi, *Mara Giua and Giulia Valeria Sonzogno, Mind the Covid-19 crisis: An evidence based implementation of Next Generation EU*, Journal of Policy Modeling, March 2021, pp. 1-20, p. 8

[344] Briefing of the European Parliament September 2021 concerning the Recovery Plan for Europe: State of Play, in European Parliament official site, accessed on 16th January 2022, europarl.europa.eu

[345] Ibidem

[346] Peter Lindseth and Cristina Fasone, *Rule-of-Law conditionality mechanism and resource mobilization – The foundations of a genuinely constitutional EU?*, in Verfassungsblog, accessed on 20th December 2021, verfassungsblog.de

[347] Ibidem

legislation under Art 311 TFEU [348]. However, as Lindseth and Fasone highlighted in *Rule-of-Law conditionality mechanism and resource mobilization – The foundations of a genuinely constitutional EU?,* there are several obstacles to a genuinely European integration in this field. As stated before in the opinion of the Council Legal Service supported also by Poland and Hungary, any effort to enforce rule of law conditionality by way of a regulation adopted under Art. 322(1)(a) TFEU would violate Art. 7 TEU and thus any effort to act differently would require a treaty change.

4.3.3 Concluding remarks

To sum up, the following chapter has pointed out and explained specifically the mechanism of the rule of law conditionality on the disbursement of the European funds and the Next Generation Europe recovery package too. In particular, the first paragraph dealt with a peculiar description of the structural problems of the European legal framework that still today affects the European Union and prevent the country from possessing an adequate instrument to face the rule of law backsliding. However, some new tools have been elaborated such as the new Rule of Law Report which will help the European institutions, in particular the European Commission, to analyse in a quantitative and qualitative manner the deficiencies that are present in every Member State. Then, the second structural problem analysed has been the so-called lack of diagonality in the European legal framework, a new approach that explains what may not work in the enforcement of the European law and in the rule of law principles. After this focus, the analyses mainly concentrated on the description of the new rule of law conditionality mechanism and in particular how it works the blockage of the European funds to those Member State that do not respect the rule of law principles and the negotiation process, which showed both how difficult is to reach an agreement between the European institutions and the divided nature of the supranational organization. Finally, the last part of the chapter dealt with the different reactions of the European institutions and a first analysis of the rule of law conditionality mechanism on Member States.

It has been taken into consideration the Schimmelfennig and Sedelmeier's model to analyse the applicability of economic sanctions towards the illiberal states that led to the conclusion that, in imposing its coercive conditional measures, the European Union must also rely on the participation and the engagement of the pro-EU democratic and political forces within the concerned Member

[348] Art. 311 TFEU states that "The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements."

State in order to have some positive effect and assure the compliance with the conditional mechanism. The last paragraph has given some important mentions to the new recovery package that the European Commission has recently launched for strengthening the recovery of the European economies after the Covid-29 pandemic and the subsequent shutdowns of the economic activities. In particular, the Next Generation Europe will also be subject to the conditionality mechanism and will present a disbursement of €750 billion in the following years and may trigger the process of a more integrated European Union thanks to a first historical common pool of financial resources on financial markets, the Eurobonds, on behalf of the European Union itself.

CHAPTER 5

FINAL CONSIDERATIONS

5.1 Concluding reflections

This thesis has the main purpose of describing the new rule of law conditionality mechanism concerning the disbursement of European funds to Member States. Since it represents a peculiar topic which is difficult to understand without a proper context, the thesis has firstly analysed the elements around which the rule of law conditionality mechanism works, namely the concept of *"conditionality"* and *"rule of law".*

Hence, the I chapter began with the literal definition of conditionality as "*The quality of being subject to one or more conditions or requirements to be met"*[349] and then debated on a proper definition of it in the context of international relations with an analysis of both Cesare Pinelli and Steunenberg and Dimitrova's definitions. It has been showed that the abovementioned concept is so vast and vague that the theoretical analysis of conditionality started by making a differentiation between positive and negative conditionality, two facets of the same concept that have been implemented since the first appearance of conditional measures in the international organizations and in particular the reference to the official body of conditionalities adopted by the Executive Board of the International Monetary Fund in 1979 [350]. The analysis of the context of application of conditionality narrowed, for the purposes of this thesis, to the European Union which is by far the supranational organization that has implemented on a large scale some types of conditional measures which, in this particular case, it entails a relation between the national sovereignty of Member States and the European Union. In fact, the accession to the European membership presupposes the partial loss of national sovereignty by Member States in favour of the European institutions thus highlighting the peculiar nature of the European Union. For this reason an entire section of the I chapter is dedicated to the description of the *sui generis* nature of the supranational organization and the repartition of competences between the European institutions and Member States, in order to further point out the relation between national sovereignty and the European Union and highlight what were and what are nowadays the main sensitive fields where this relation is still uptight.

[349] Oxford Dictionary
[350] *Staff Papers (International Monetary Fund)*, Dec. 1995, Vol. 42, No. 4 (Dec. 1995), pp. 792-835

In this context, the main focus of the chapter relies on the application of conditional measures by the European institutions during the years and in particular during the Eastern enlargement of 2004 and in the European debt crisis of 2011. They represented two different implementations of conditional measures since, in the Eastern enlargement, the method of the *carrot and stick* [351] was used since the CEE countries were asked to implement the *Acquis Communautaire,* namely the entire European legal system, into their national legal systems otherwise the status of Member State of the European Union would be undermined. The analysis thoroughly described the process of accession to the European Union of the Eastern countries by highlighting both the sensitive theme of national sovereignty and conditional measures, as happened in the Baltic countries with the problem of the Russophone minority, and the different difficulties and paths that the new Member States undertook from the accession phase started after the dissolution of the Soviet bloc. The description of the Eastern enlargement and the elements that occur in the relation between national sovereignty and conditional measure has been useful to introduce the theme of compliance in the Eastern enlargement and in general in the Schimmelfennig and Sedelmeier's model. The model describes the different outcomes that may be triggered from a *carrot and stick* method where two players interact in the game, and it has been taken into consideration in this thesis for the description of other dynamics in the following chapter. Otherwise, the context of the debt crisis that affected the Eurozone from 2011 concerned an unexpected situation where the European Union showed its *sui generis* nature since of its lack of an instrument or procedure to face the crisis. The crisis was handled by creating an intergovernmental organisation, that is the European Financial Stability Facility (EFSF), and by imposing strict economic conditional measures to solve the crisis under the management of the *Troika,* the nickname of the governance made up by the European Commission, the European Central Bank and the International Monetary Fund. Hence, if the Eastern enlargement provided for a precise acceding procedure that had been prepared since the establishment of the Copenhagen Criteria in 1997, enshrined in the Maastricht Treaty and characterised by a multi-stage mechanism, the Eurozone debt crisis hit suddenly the Eurozone and a different system of imposition of economic conditionality was implemented on the high-risk Member States. Moreover, the analysis continued with the description of the critical points that characterized the European debt crisis, from the problems emerged from the governance of the EFSF and the subsequent creation of the European Stability Mechanism to the allegedly democratic deficit that marked the management of the crisis and the subsequent effects that it created such as the rise of populist parties in Europe and the increasing euro-scepticism.

[351] According to the Cambridge dictionary, the carrot and stick system is a system in which a subject is rewarded for some actions and threatened with punishment for others

It is precisely the theme of democracy and the rise of populist parties that characterise the second important topic of the entire work: the concept of the rule of law and its implications. The rule of law is an essential component of every fully-fledged democratic regime but nowadays the democracies are facing a deepening crisis since they are turning into autocracies, dictatorships or hybrid regimes worldwide. The current situation affects even Europe and in particular some criticalities have been emerging since the last decade in some of the Eastern Member States. The analysis of the democratic backsliding in Europe started with a theoretical focus on the definition of the concept of rule of law and the fundamental aspect of the protection of human rights. It has been explained the difficulty in giving a proper definition of the rule of law since it entails several and vague elements so that, for this reason, Tom Bingham's definition of rule of law has been adopted as model by pointing out what are the main components and features and how the concept itself developed throughout the centuries. Then, Tom Bingham's definition has been applied in the European context and, particularly, on the references to the rule of law concept in the European treaties. For this reason, an historical excursus described the increasing importance of human rights by highlighting historical ECJ judgements, such as case 11/70 *Internationale Handelsgesellschaft* and case 4/73 *Nold,* that marked the norms of protection of human rights as the main component of the rule of law in the European legal framework. In this context, it becomes clearer why the European Union is founded and relies on the values of respect of human dignity, freedom and rule of law as article 2 TEU explicitly states. The analysis then shifted to the description of the current legal instruments that the European Union possesses to protect and enforce the allegedly violations of the rule of law principles. The focus started with the assumption that art. 7 TUE, the main legal tool at the disposal of the European institutions for enforcing the violations of the rule of law, presents some criticalities in its application and for this reason the analysis immediately concentrated on the description of art. 258, 259 and 260 TFEU as the main instruments to indirectly face the rule of law backsliding in Poland and Hungary. The ineffectiveness of art. 7 procedure has been thoroughly explained in the next section by pointing out the main weaknesses that characterise the procedure. In fact, art.7(1) is difficult to activate since it requires a two-thirds majority of the European Parliament and four-fifths of the Member States in the Council, thus it entails a political accord to be implemented. This explains why it has been used only recently against Poland, whose government is part of the far-right ECR European party, and never triggered against Hungary since the biggest and moderate right EEP party defended for years the Fidesz government and thus prevented the European Parliament from reaching a majority to trigger art. 7(1) procedure. Regarding art. 7(2), also known as the *sanctioning arm* since in case of serious and persistent breaches of the concerned values the European Council in its unanimity may suspend the voting

right to the targeted Member State, it has never been activated because it is very difficult to reach the unanimity in the European Council as Poland and Hungary back up each other. To solve this problem, the European Commission presented in 2014 the Rule of Law Framework as a preventive tool to avoid possible criticalities of the rule of law in its Member State but, even in this case, the analysis provided for an exhaustive outlook of the pros and cons of the abovementioned mechanism. The case study of the activation of the Rule of Law Framework against Poland showed that, in accordance with the Schimmelfennig and Sedelmeier's model, the compliance of the concerned Member State in a context of adoption of non-binding reasoned opinions decreases and thus it denotes a signal of ineffectiveness in preventing the rule of law backsliding. Finally, the chapter even mentioned the stakeholders that are engaged in the process of delivery of opinions on states that may show criticalities in the rule of law context. This is the case of the Venice Commission and its delivered opinions on Poland and Hungary; the institution of the Council of Europe represents a reference point both for the European Institution for consulting and drafting reasoned opinions and even for the Member State that may ask the Commission to deliver opinions on constitutional matters. It is for this reason that this work emphasized its role in the assessment of the democratic backsliding of the concerned countries.

The analysis of the rule of law backsliding in Poland and Hungary has been the focus of the III chapter. In fact, the section provided for a chronological description of the political events that transformed Poland and Hungary from the frontrunners of the implementation of the *Acquis Communautaire* during the Eastern enlargement to the most compromised countries in the rule of law field. Both Poland and Hungary presented some common grounds and similarities in the process of the dismantle of democratic structure since they entailed the presence of a far-right populist party that, after the winning of free and fair democratic elections with high percentages of support due to the increasing Euro-scepticism, aimed to the dismantle of the independence of the judiciary. Hence, to justify the attacks against the judicial systems, both the PiS and Fidesz governments appealed to their mandates given by the ordinary people since "*the selection of a judge should be subject to some actual influence of the representatives of other branches of government, in particular the legislative power holding the mandate from democratic elections"*[352] . Another common ground in the Hungarian and Polish situations is the attack against the rights of particular segments of the population that, in virtue of the catholic roots of the two populist parties, mainly concentrated against the LGBT community (with the establishment of LGBT – free zones in Poland and the censure of the "*homo-propaganda"* in Hungary) or with the right of abortion , whose recently illegitimate Constitutional Tribunal's ruling of 22 October 2020 imposed a near-total ban

[352] See POLITYCE article of April 27, 2017.

in Poland [353] and triggered the crowded protests of thousands of people in the Polish country.

However, the III chapter even provided for an analysis of the differences in the democratic backsliding in Poland and Hungary and the ECJ jurisprudence in enforcing the rule of law principles in the European legal framework. In the first case, the main difference between the two situations is the method of implementation of the anti-democratic reforms. The Hungarian case may be considered more constitutionally compromised than the Polish one, since once the Fidesz government took office with a super-majority of 64% of the total seats [354], it started a constitutional reform that led to the adoption of a new constitution, arousing the concerns of the Venice Commission; thus, the Fidesz government in implementing the reforms aimed to the dismantle of the judiciary acted within the Hungarian constitution. On the other hand, in Poland the situation worsened later in a context where the attacks against the Polish Constitutional Tribunal were enforced by the PiS government without a previous adoption of a new constitution thus it acted illegally with the open support of the Polish President Duda.

Given the inefficiency of the current legal instruments to enforce the rule of law violations at the European level, the European Court of Justice intervened with the historical judgement *Associação Sindical dos Juízes Portugueses* developed in Portugal in 2014 when, following the EU macroeconomic adjustment package, the Portuguese government decided to introduce a temporary reduction in the remuneration paid to the administrative personnel and judges so that the *Associação Sindical dos Juízes Portugueses*, acting on behalf of the Court of Auditors, challenged the governmental measures on the main ground that these measures would infringe "the principle of judicial independence" enshrined in the Portuguese constitution, in the EU law in Art. 19(1) TEU and Art. 47 of the ECHR which provides for a right to an effective remedy and to a fair trial [355]. The judgement became a benchmark in the protection of the rule of law principles since the European Court of Justice relied directly on art. 19(1) TEU in connection with art 2 TEU and the principle of sincere cooperation so that the Court transformed the rule of law into a legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries [356]. Hence, it is a duty for a Member State to establish and provide an effective system of legal remedies since the very essence of the rule of law is an effective judicial review which can only be assured by courts or tribunals. However, the legal quarrel between Poland and Hungary and the European institutions is still continuing while the situation continues to worsen and, for this reason, the

[353] Press Release of the Plenary Session of the European Parliament of 11th November 2021, in European Parliament official site, accessed on 19th January 2021, europarl.europa.eu

[354] Election Watch Hungary, in IRI official site, accessed on 19th January 2022, iri.org

[355] Ivi, p.2

[356] Laurent Pech and Sebastien Platon, *Judicial independence under threat: The Court of Justice to the rescue*, Common Market Law Review, Middlesex University London, 2018, pp. 1-20, p. 7

European Commission recently established the new conditionality mechanism that connect the disbursement of the European funds to the respect of the rule of law principles.

Thus, the IV chapter has entirely focused on the description and the analysis of the rule of law conditionality mechanism in order to provide the reader a comprehensive and exhaustive outlook of the topic. The structural problems of the European legal framework have been remarked and deepened as the last Rule of Law report demonstrates. In fact, the report made by the European Commission points out what are the main problems that still affects the European legal framework and recently the President Ursula von der Leyen stated that the new Rule of Law Report will be designed as a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening by focusing on the identification of challenges in fundamental fields such as the justice system, corruption, media pluralism and freedom in cooperation with Member States and important stakeholders like the Venice Commission. In this context, the discussion then shifted to the detailed analysis of the new rule of law conditionality mechanism by highlighting the entire process of formulation of the Regulation, from the negotiation process to the final outcome. The new tool will provide for a blockage of the disbursement of the European funds to those Member States that presents criticalities in the rule of law context. The scope of application of the Regulation is clearly defined since it must be strictly tied to the Union's budget. It means that if a breach of the rule of law is identified, in a second step, the Commission has to prove an effect of that breach on the Union's budget since the Regulation aims to protect the sound financial management of the EU budget and the protection of the Union's financial interest. This precise scope of application is the outcome of difficult negotiations between the different European institutions, from the European Parliament that stood for an ampler scope of application to the European Council which complicated the adoption of the conditionality mechanism since the Council Legal Service stated that the Commission is not in principle to attach conditionalities to the distribution of EU funds since such conditionalities already exists in different legal authorities established as EU secondary law and hence the Commission's proposal was not compatible with the Treaties because it would tread on the territory covered by art. 7 TEU. In this context, the new Rule of Law Regulation has expanded the EU "rule of law toolbox" as it increased the possible remedies that the European institutions may follow to enforce the rule of law infringements in the Member States even though the European Court of Justice is expected to deliver a judgement on the actions of annulment brought by Poland and Hungary on 11th March 2021 concerning the implementation of the Regulation. At the beginning of December 2021, the Advocate General (AG) Manuel Campos Sánchez-Bordona delivered his Opinions on the actions of annulment, which focused on four main arguments that are: (I) Legal basis of the Regulation; (II) Compatibility with art. 7 TEU and 269

TFEU; (III) Compatibility with art. 4(2) TEU and (IV) Legal certainty objections [357] . The Advocate General contravened the objections of Poland and Hungary concerning the Legal basis for the Regulation, since the Regulation serves not as an additional rule of law sanction mechanism, but rather as a tool for the protection of the budget from the specific threat of rule of law breaches jeopardising the usage of EU funds (C-156/21, paras. 138-139) thus establishing a conditionality mechanism; for this reason art. 322(1)(a) serves as an appropriate legal basis for the Regulation [358]. The second argument stated that the new conditionality mechanism would establish a more accessible rule of law sanction mechanism that would undermine the correct functioning of art. 7 TEU but, even in this case, the argument was rejected by the Advocate General, who stated that the new conditionality mechanism is different in its purpose as well as in its implementation from art. 7 TEU and thus he found no violation of art. 7 TEU or art. 269 TFEU[359]. In the third argument Poland feared that the usage of a qualitative majority voting system (QMV) would penalise the smaller Member States and thus it contravened art. 4(2) concerning the equal treatment of Member States but, again, the Advocate General rejected the argument by referring to art. (16)3 TEU which makes the QMV the regular voting procedure in the Council [360]. Even the last argument was rejected by the Advocate General since the rule of law, even though is a vast concept, can be sufficiently concretized for the purpose of the Regulation. In this context, the Advocate General has dismissed all the four arguments brought by Poland and Hungary and the ECJ itself is supposed to follow the reasoning of the AG by stating that the new rule of law conditionality mechanism is another legal, useful and parallel instrument against rule of law breaches by Member States that will expand the Rule of Law toolbox at the disposal of the European Institutions. Moreover, it appears very likely that the Commission would begin shortly after a judgement to initiate action under the Regulation. In this particular context, the analysis of the rule of law conditionality mechanism focused also on what may be the possible consequences for the Member States in case of the activation of the Regulation. In fact, the suspension is only temporary since Member States have the possibility to solve the rule of law criticalities in a defined timeframe and, if the concerned country does not solve the problem in the given time, the funds allocated for the concerned Member States will be re-injected in the Union's budget by the Commission within two years and they will be at the disposal of the other countries. Finally, a concluding section is dedicated to the Next Generation Europe, the recovery package approved by the European Commission in 2020 for facing the economic crisis

[357] Benedikt Gremminger, *The New Rule of Law Conditionality Mechanism clears its first hurdle –Analysis of AG Campos Sánchez-Bordona Opinions in Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21*), in European Law blog, accessed on 28th January 2022, europeanlawblog.eu
[358] Ibidem
[359] Ibidem
[360] Ibidem

triggered by the Covid-19 pandemic. The instrument will be also subject to the rule of law conditionality mechanism, but it is revolutionary in its nature since, for the first time in the European history, it will be financed by borrowing funds called Eurobonds on financial markets on behalf of the European Union thus creating a common European debt. Moreover, it will provide an amount of €750 billion to be distributed in the form of grants and loans proportional to the magnitude of the economic crisis that affected every Member State. In this context, each Member State presented a national recovery plan to the European Commission following its directives and the objectives enshrined in the European Green Deal and the priority of a green and digital transition.

To conclude, my final work centred on the description of this peculiar instrument that comprehend the two main concept around which the work developed: conditionality and rule of law. It may represent a chance for the European Union to strengthen its economic influence in the global context and a starting point for a possible further integration of the Member States even in the fiscal field. Moreover, the mechanism may constitute a turning point for the European institutions in the "fight" against the recalcitrant Member States, which have been undermining the reputation of the European Union has the last soldier standing for the protection of the rule of law in a global context marked by the decline of the democracies and the rise of hybrid regimes or dictatorships.

BIBLIOGRAPHY

Aerts Jasper and Bizarro Pedro, *The reform of the European Stability Mechanism*, Discussion Paper Series/14, pp.2-24, September 2020

Arena Amedeo, *From un Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa vs ENEL*, European Journal of International Law, 30(3), 1017-1037, 2019

Bakardijieva Engelbrekt Antonina, Moberg Andreas and Nergelius Joakim, *Rule of law in the EU: 30 years after the fall of the Berlin Wall,* Swedish Studies of European Law, Volume 15, Hart, 2021

Baraggia Antonia, *Conditionality measures within the Euro Area Crisis: A challenge to democratic principle*, Cambridge Journal of International and Comparative Law, 4(2), 268-288, 2015

Baraggia Antonia and Bonelli Matteo, *Linking Money to Values: the new Rule of Law Conditionality Regulation and its constitutional challenges,* forthcoming on German Law Journal (2021/2022).

Bard Petra and van Ballegooij Wouter, *Judicial independence as a precondition for mutual trust?*, New Journal of European Criminal Law, 9(3), pp. 353-365, 2018

Beimbridge Mark, Burkitt Brian & Whyman Philip, *Convergence criteria and EMU membership: Theory and evidence*, Journal of European Integration, 21(4), 281-305, 1999

Bifulco R., Nato A., *The concept of sovereignty in the EU – past, present and the future*, Reconnect Europe, April 2020,

Bingham Tom, *The Rule of Law,* Penguin Book, London, 2010.

Blauberger Michael and van Hullen Vera, *Conditionality on EU funds: an instrument to enforce EU fundamental values?*, Journal of European Integration, 43(1), pp.1-16, 2021

Blavoukos Spyros and Pagoulatos George, *The Limits of EMU Conditionality: Fiscal Adjustment in Southern Europe*, Journal of Public Policy, No 12, pp.1-35, March 2008

Botta Marco and Schwellnus Guido, *Enforcing state aid rules in EU candidate countries: a qualitative comparative analysis of the direct and indirect effects of conditionality*, Journal of European Public Policy, 22(3), 335-352, 2015

Condinanzi Massimo and Amalfitano Chiara, *La procedura d'infrazione dieci anni dopo Lisbona,* in Federalismi.it, n. 19/2020, pp. 217-300, 2020

Crescenzi Riccardo, Giua Mara and Sonzogno Giulia Valeria, *Mind the Covid-19 crisis: An evidence based implementation of Next Generation EU,* Journal of Policy Modeling, pp. 1-20, March 2021

De Visser Maartje, *A critical assessment of the role of the Venice Commission in processes of domestic constitutional reform,* American Journal of Comparative Law, 63(4), pp. 963-1008, 2015

Enderlein Henrik, *The euro and political union: do economic spillovers from monetary integration affect the legitimacy of EMU?*, Journal of European Public Policy, 13(7), 1133-1146, 2006

Faraguna Pietro, *Alla ricerca dell'identità costituzionale tra conflitti giurisdizionali e negoziazione politica, Crisi e conflitti nell'Unione Europea*, Fascicolo n. 3(1), 2016

Fierro Elena*, The EU's approach to human rights conditionality in practice*, Martinus Nijhoff Publishers, London, 2003

Giusti Serena & Fossi Enrico, *The European Endowment for Democracy and Democracy promotion in the EU Neighbourhood,* The International Spectator, 49(4), 112-129, 2014

Grabbe Heather, *European Union Conditionality and the Acquis Communautaire*, International Political Science Review, 23(3), 249-268, 2002

Grabbe Heather*, The EU's Transformative Power: Europeanization through conditionality in Central and Eastern Europe*, Palgrave Macmillan, Great Britain, 2006

Hoffmann-Riem Wolfgang, *The Venice Commission of the Council of Europe – Standards and Impact,* European Journal of International Law, 25(2), pp. 579-597, 2014

Jaremba, U., *The rule of the majority vs the rule of law: how Poland has become the new enfant terrible of the European Union,* Tijdschrift voor Constitutioneel Reecht, 2016(3), pp. 262-274, 2016

Kelemen Katalin, *The new Hungarian constitution: legal critiques from Europe,* Review of Central and East European Law, 42(1), pp.1-49, 2017

Kirst Niels, *Rule of Law conditionality: the long awaited step towards a solution of the Rule of Law crisis in the European Union?,* European Papers, Vol. 6(1), pp. 101-110, April 2021

Kochenov Dimitry, *The Acquis and its principles: the enforcement of the "law" versus the enforcement of "values in the European Union,* University of Groningen Faculty of Law Research Paper Series, No. 28/2016, pp.1-24, 2016

Kochenov Dimitry and Bard Petra, *The last soldier standing? Courts vs. politicians and the Rule of Law crisis in the new Member States of the EU,* University of Groningen Faculty of Law Research Paper Series, 5, pp.1-40, 2019

Lacny Justina, *The rule of law conditionality under Regulation No 2092/2020 – Is it all about money?,* Hague Journal on the Rule of Law, 13(79), pp. 79 – 105, 2021

Lahav Gallya and Luedtke Adam, *Immigration Policy, The Europeanization of European Politics*, Chapter 8, p. 109-122, 2013

Ludger Schuknecht, Moutot Philippe, Rother Philipp, Stark Jürgen, *The Stability and Growth Pact - crisis and reform*, ECB Occasional Paper, No. 129, pp.1-20, 2011

Manko Rafal, *EU accession to the European Convention on Human Rights (ECHR),* European Parliamentary Research Service, pp. 2-8, July 2017

Meunier Sophie, *Time will tell: The EFSF, the ESM, and the Euro crisis*, Journal of European Integration, 35(3), pp. 239-253, April 2013

Mori Paola, *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi,* Federalismi.it, n. 8/2020, pp. 196-210, 2020

Morlino Leonardo, *Changes for democracy: Actors, Structures, Processes*, Oxford Scholarship Online, January 2012

Mostacci Edmondo and Somma Alessandro, *Dopo le crisi, dialoghi sul futuro dell'Europa*, pp. 229-241, 2020

Nagy Istvàn Csongor, *The diagonality problem of EU Rule of Law and Human Rights: Proposal for an incorporation à l'Europeéenne,* German Law Journal, 21(5), pp. 836-866, 2020

Nguyen Thu, *The EU's new rule of law mechanism, How it works and why the "deal" did not weaken it,* Hertie School Jacques Delors Centre, December 2020

Pech Laurent and Scheppele Lane Kim, *Illiberalism within: rule of law backsliding in the EU,* Cambridge Yearbook of European Legal Studies, No. 19, pp. 3-47, 2017

Pech Laurent and Platon Sebastien, *Judicial independence under threat: The Court of Justice to the rescue,* Common Market Law Review, Middlesex University London, pp. 1-20, 2018

Picek Oliver, *Spillover effects from the Next Generation Eu,* Leibniz Information Centre for Economics, pp. 1-7, 2020

Pinelli Cesare, *Conditionality and Economic Constitutionalism in the Eurozone*, Italian Journal of Public Law, 11(1), 22-42, 2019

Raiser Raiser, Kornek Ulrike, Flachsland Christian and Lamb F. William, *Is the Paris Agreement effective? A systematic map of the evidence*, Environmental Research Letters, August 2020

Rasmussen Morten, *Revolutionizing European Law: A history of the Van Gend en Loos judgement*, Oxford University Press and New York University School of Law, 136- 163, 2014

Rech Walter, *Some remarks on the EU's action on the erosion of the rule of law in Poland and Hungary,* Journal of Contemporary European Studies, 26(3), pp. 334-345, 2018

Rodriguez B. Daniel, McCubbings D. Mathew and Weingast R. Barry, *The Rule of Law unplugged,* Emory Law Journal, Vol. 59, pp. 1455-1494, 2010

Salmoni Fiammetta, *Le politiche di austerity e diritti sociali nel processo di integrazione europea*, Costituzionalismo.it, Fascicolo n. 3 2019- Saggi e Articoli – Parte II, pp.153-208, 2019

Sanders Anne and von Danwitz Luc, *Selecting judges in Poland and Germany: challenges to the Rule of Law in Europe and proposition for a new approach to judicial legitimacy*, German Law Journal, 19(4), July 2018, pp. 769-816, 2018

Sasse Gwendolyn, *The politics of EU conditionality: the norm of minority protection during and beyond EU accession,* Journal of European Public Policy, 15(6), 842-860, 2008

Schutze Robert, *European Union Law*, Oxford University Press, 2021

Sedelmeier Ulrich, *After conditionality: post-accession compliance with EU law in East Central Europe*, Journal of European Public Policy, 15(6), 2008

Somma Alessandro, *Inasprire il vincolo esterno. Il Meccanismo Europeo di Stabilità e il mercato delle riforme*, Economia e Politica, pp. 1-18, January 2020

Staff Papers (International Monetary Fund), Dec. 1995, Vol. 42, No. 4 (Dec. 1995), pp. 792-835

Steunenberg Bernard and Dimitrova Antoaneta, *Compliance in the EU enlargement process: The limits of conditionality*, European Integration Online Papers, 11(5), 1-22, June 2007

Tworzecki Hubert, *Poland a case of Top-Down Polarization*, The Annals of the American Academy, January 2019, pp. 97-119, 2019

Varga Zs. Andras, *Rule of Law in the 21st century,* Pazmany Peter Catholic University, Budapest, 2019

Veebel Viljar, *European Union's positive conditionality model in pre-accession process*, Trames, 13(63/58), 3, 207-231, 2009

White J., *Authority under Emergency Rule*, 78 The Modern Law Review 4, 585-610, 2015

ONLINE ARTICLES

Benedikt Gremminger, The New Rule of Law Conditionality Mechanism clears its first hurdle – Analysis of AG Campos Sánchez-Bordona Opinions in Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21), in European Law blog, accessed on 28th January 2022, europeanlawblog.eu

Bill Davies, Internationale Handelsegesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence, published on Academia.edu

Guillermo Iniguez, The enemy within? Article 259 and the Union intergovernmentalism, published on The New Federalist.

Simon Machalek, 2nd May 2019, Democratic Backsliding in the Visegrad Group Threatens European's Union Future, published on Democratic Erosion.

Katharina Buchholz, 13th January 2020, Which Countries are EU contributors and Beneficiaries?, published on Statista.com

Adam Easton, 23rd October 2020, What Court's decision means for Poland, published on BBC official site,

Pech and Scheppele, "Is the organisation of National Judiciaries a Purely internal competence?, published on VerfassungsBlog

Maciej Taborowski, CJEU Opens the door for the Commission to reconsider charges against Poland, published on Verfassungsblog

Jakub Jaraczewski, The K 3/21 decision of the Polish Constitutional Tribunal, published on Verfassungsblog

Statement of retired judges of the Polish Constitutional Tribunal, published on Verfassungsblog

Ewa Łętowska, The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal, published on Verfassungsblog

Aleksejs Dimitrovs and Hubertos Droste, Conditionality mechanism: what's in it?, published on Verfassungsblog

Kim Lane Scheppele, Laurent Pech and R. Daniel Kelemen, Never missing an opportunity to miss an opportunity, the Council Legal Service opinion on the Commission's EU budget-related rule of law mechanism, published on Verfassungsblog

Alberto Alemanno and Merijn Chamon, To save the Rule of Law you must apparently break it, , published on Verfassungsblog

Peter Lindseth and Cristina Fasone, Rule-of-Law conditionality mechanism and resource mobilization – The foundations of a genuinely constitutional EU?, published on Verfassungsblog

WEBSITES

United Nations, https://www.ungeneva.org/en/history/league-of-nations

United Nations Security Council, https://www.un.org/securitycouncil/

European law, https://eur-lex.europa.eu/homepage.html?locale=it

Hungarian Constitutional Court, https://hunconcourt.hu/

European Commission, https://ec.europa.eu/info/index_it

Schengen Visa, https://www.schengenvisainfo.com/

European Parliament, https://www.europarl.europa.eu/portal/en

European Council, https://www.consilium.europa.eu/

European Stability Mechanism, https://www.esm.europa.eu/

European Court of Human Rights, https://www.echr.coe.int/Pages/home.aspx?p=home&c=

Venice Commission, https://venice.coe.int/webforms/events/

European Court of Justice, https://curia.europa.eu/jcms/jcms/j_6/it/

LEGAL SOURCES

Charter of the United Nations, Art. 2

Council Decision 92/535/CEE concerning the conclusion of the Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation.

Council Decision 92/601/ CEE concerning the conclusion of the Agreement between the European Economic Community and the Republic of Estonia, on trade and commercial and economic cooperation.

Council Decision 92/602/ CEE concerning the conclusion of the Agreement between the European Economic Community and the Republic of Latvia, on trade and commercial and economic cooperation.

Council Decision 92/603/CEE-EURATOM concerning the conclusion of the Agreement between the European Economic Community and the European Atomic Energy Community and the Republic of Lithuania, on trade and commercial and economic cooperation.

Courts of Auditors, Opinion 1/2018 concerning the proposal of 2 May 2018 for a Regulation of the European Parliament and of the Council on the Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, 17 July 2018, Doc. 2018/C 291/01.

Treaty on the Functioning of the European Union

Treaty on the European Union

Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21st May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

Charter of Fundamental Rights of the European Union

European Convention on Human Rights

European Commission for Democracy Through Law, opinion No. 947/2019

The Constitution of the Republic of Poland

European Commission for Democracy Through Law, opinion No. 977/2020

European Commission for Democracy Through Law, opinion No. 904/2017

European Commission for Democracy Through Law, opinion No. 892/2017

European Commission for Democracy Through Law, opinion No. 860/2016

European Commission for Democracy Through Law, opinion No. 839/2016

European Commission for Democracy Through Law, opinion No. 833/2015

European Commission for Democracy Through Law, opinion No. 904/2017

European Commission for Democracy Through Law, opinion No. 614/2011

European Commission for Democracy Through Law, opinion No. 621/2011

European Commission for Democracy Through Law, opinion No. 663/2012

European Commission for Democracy Through Law, opinion No. 668/2012

European Commission for Democracy Through Law, opinion No. 665/2012

European Commission for Democracy Through Law, opinion No. 683/2012

European Commission for Democracy Through Law, opinion No. 720/2013

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

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report: The Rule of law situation in the European Union

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021, Rule of Law Report The rule of law situation in the European Union

Regulation No 1303/2013 of the European Parliament and of the Council of the 17 December 2013 laying down common provisions of the European Regional Development Funds, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions of the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006.

Article 63 (b), Article 68 (1) and Article 98 of Proposal for a Regulation of the European Parliament and of the Council laying down common provision on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM (2018) 375 final.

CASE LAW

Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming *van Gend & Loos v Netherlands* Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62.

Judgment of the Court of 15 July 1964. - *Flaminio Costa v E.N.E.L.*. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64.

Hungarian Constitutional Court, decision no. 22/2016 (XII. 5.) AB of 16th December 2016

Judgment of the Court (Full Court), 27 November 2012, *Thomas Pringle v Government of Ireland and Others.* Case C-370/12.

The Sunday Times v United Kingdom (Series A No 30), European Court of Human Rights (1979-80) 2 ehrr 245, 26 april 1979

Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany, Case 11-70.

Judgment of the Court of 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities,* Case 4-73.

Judgment of the Court (Grand Chamber) of 16 November 2021, *Criminal proceedings against WB and Others,* Requests for a preliminary ruling from the Sąd Okręgowy w Warszawie, Joined Cases C-748/19 to C-754/19.

Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo, C-64/16

Judgement of the Polish Constitutional Tribunal Ref. No. K6/21

THE NEW RULE OF LAW CONDITIONALITY MECHANISM AND ITS IMPLICATIONS ON THE DEMOCRATIC BACKSLIDING IN EASTERN EUROPE

ABSTRACT

CHAPTER I

The I chapter deals with a theoretical analysis of the concept of conditionality in order to provide a clear perspective of the term, its origins and how it developed throughout the centuries. In particular, the analysis has begun with the literal definition of conditionality as "*The quality of being subject to one or more conditions or requirements to be met"* and the subsequent debate on a proper definition of it in the context of international relations, by mentioning both Cesare Pinelli and Steunenberg and Dimitrova's works. Hence, it has been showed that the abovementioned concept is so vast and vague that the theoretical analysis of conditionality requires an initial differentiation between positive and negative conditionality, by highlighting the main features of each type and providing examples in order to understand this fundamental differentiation. The abovementioned terms refers to two facets of the same concept that have been implemented since the first appearance of conditional measures in the international organizations and in particular the reference to the official body of conditionalities adopted by the Executive Board of the International Monetary Fund in 1979. The distinction between positive and negative conditionality focuses on the behaviour of the donor institution towards the recipient state based on the purpose of the conditional measures and may appear both in the form of an *ex ante* measure that applies prior to the confirmation of the country to the conditions or as a *reinforcement by reward* conditionality, where the *carrot and stick* method is applied so that the reward is given step by step according to the fulfilment of intermediate objectives or its withdrawment in case of failure.

After the essential differentiation between the two types of conditional measures, the theoretical analysis has concerned the context of application of conditionality and, for the purposes of this thesis, the analysis narrowed to the European Union which is by far the international organization that has implemented on a large scale some types of conditional measures which, in this particular case, entails a relation between the national sovereignty of Member States and the European Union. The topic of the strict link between national sovereignty and the conditional measures imposed by the European Union is the main argument of the third paragraph since it acquires a crucial role in the

European legal framework and in the division of competences between Member States and the European institutions. In this context, an historical excursus has been added to the analysis because it is useful to understand how the correlation between national sovereignty and conditional measures imposed by supranational or international organizations changed during the decades, in particular in the context of the environmental protection which represents the practical example that this thesis reports. As mentioned before, the strict correlation becomes more uptight in the context of the European Union and in particular in the accession phase and in the repartition of competences between European institutions and Member States, a topic that makes the European Union a *sui generis* type of supranational organization. In fact, the accession to the European membership presupposes the partial loss of national sovereignty by Member States in favour of the European institutions thus highlighting the peculiar nature of the European Union. For this reason, an entire section has been dedicated to the accession phase of the Central Eastern European (CEE) countries in 2004 and 2007, the biggest enlargement in the European history which welcomed twelve new Member States in only three years.

It represented by far the amplest application of conditional measures since the acceding countries were asked to implement the entire *Acquis Communautaire* into their national legal systems, bringing enormous and historical changes in countries that were still suffering from the effects of decades of communist ideology. The *Acquis Communautaire* presupposed several conditional measures that the new countries had to implement in order to acquire the membership: the radical change from a planned economy with a strong statal intervention into the economic system to a neo-liberal approach that entails by its very essence a very limited statal role in the economy, the sensitive theme of the minority protection in states that presented criticalities and, most of all, the redefinition of a more efficient bureaucratic system in States where it represented only a burden. The case study of the Eastern enlargement represents a clear application of the *carrot and stick* method since the acceding phase was clearly defined from the convergence criteria enshrined in the Maastricht Treaty and also presented a well-defined timeframe by which the acceding Member States had to implement the reforms otherwise the European membership would be undermined. In this context, the description of the Eastern enlargement and the elements that occur in the relation between national sovereignty and conditional measures has been useful to introduce the theme of compliance in the Eastern enlargement and in general in the Schimmelfennig and Sedelmeier's model. The model describes the different outcomes that may be triggered from a *carrot and stick* method where two players interact in the game, and it has been taken into consideration in this thesis for the description of other dynamics in the following chapter. The model into question emphasises the role that plays compliance in the context of application of conditional measures since it represents the main element around

which the game is played; different factors may affect the outcomes but, if compliance does not subsist, the entire game results into a zero-sum outcome.

The last paragraph of the I chapter has been dedicated to the other practical example where conditionality has been applied by the European institutions, that is the Eurozone debt crisis in 2011, that completely differs from the context of application of the conditional measures during the Eastern enlargement. In fact, the context of the debt crisis that affected the Eurozone from 2011 concerned an unexpected situation where the European Union showed its *sui generis* nature since of its lack of an instrument or procedure to face the crisis. The explanation of the crisis has been preceded by an historical excursus concerning the creation of the European Monetary Union (EMU) in order to better understand what were the factors that prevented the European Union in 2011 from managing in a proper way the crisis. In particular some problems aroused in the application of the so-called *soft conditionality* towards those Member States that did not fulfil the EMU convergence criteria and even the politicized role of important stakeholders such as the ECOFIN, which played a crucial role in the creation of the troubling factors. When the crisis hit Europe, and in particular Greece, in 2011 it suddenly unveiled the limits of the EU projects and provoked a change in conception of economic conditionality. It was handled by creating an intergovernmental organisation, that is the European Financial Stability Facility (EFSF), and by imposing strict economic conditional measures to solve the crisis under the management of the *Troika*, the nickname of the governance made up by the European Commission, the European Central Bank and the International Monetary Fund. The plan of assistance called for systemic reforms in delicate sectors such as the pension system and the fiscal framework and it triggered an increasing wave of Euro-scepticism in Greece and then in all Europe. The analysis of this economic conditional measures even entailed the subsequent reform of the EFSF into the European Stability Mechanism (ESM) and, overall, the allegedly democratic deficit around the management of the crisis. Concerning this topic, the European institutions and in particular the European Commission and the European Central Bank, have been accused of not being transparent in the imposition of conditional measures.

Therefore, if the Eastern enlargement provided for a precise acceding procedure that had been prepared since the establishment of the Copenhagen Criteria in 1997, enshrined in the Maastricht Treaty and characterised by a multi-stage mechanism, the Eurozone debt crisis hit suddenly the Eurozone and a different system of imposition of economic conditionality was implemented on the high-risk Member States. The analysis of the different types of conditionality in different context of application denotes the high, complex and vast meaning the terms entails but even its versatile nature and the several outcomes that may result from the imposition of conditional measures: from the

acquisition of a membership to the activation of mechanisms that may undermine the reputation of the donor institution itself, as it happened in the context of the European debt crisis.

CHAPTER 2

The II chapter deals with the second main topic around which this thesis focuses, which is the concept of the rule of law and, even in this case, the topic is vast and ample and not well-defined since it does not exist a univocal definition of the term. For this specific reason, the main aim of the chapter is to provide an exhaustive definition and outlook of the concept of the rule of law, by clarifying the most troubling elements. The rule of law is an essential component of every fully-fledged democratic regime but nowadays the democracies are facing a deepening crisis since they are turning into autocracies, dictatorships or hybrid regimes worldwide. The current situation affects even Europe and in particular some criticalities have been emerging since the last decade in some of the Eastern Member States and the European Union seems powerless against the democratic backsliding that some countries are experiencing.

The first section is entirely dedicated to the theoretical analysis of the term in order to provide a final definition to adopt as a guideline. Therefore, Tom Bingham's definition of rule of law has been adopted as model by pointing out what are the main components and features and how the concept itself developed throughout the centuries. In particular, Tom Bingham focuses on eight principles that constitute the core of the Rule of law that are: (I) the accessibility, intelligibility, predictability and clarity of the law; (II) The ban of the exercise of discretion as a means to solve question of legal right and liability and the undiscussed primary role of law as the only legal tool; (III) The laws should be applied equally to all; (IV) the principle of good faith that all the public officers and ministers must respect within the limits conferred by the law itself; (V) the law must afford adequate protection of fundamental human rights; (VI) means must be provided for resolving, without prohibitive cost or inordinate delay; (VII) Adjudicative procedures provided by the state should be fair and (VIII) the Rule of law requires compliance by the state with its obligations in international law as in national law.

From this definition, it emerges that the concept of the protection of human rights represents the essential core of the rule of law itself and, in the context of the European Union, the European Treaties have always given emphasis to the topic. Despite the absence of any reference to the protection of human rights in the Treaty of Paris in 1951 and the Treaty of Rome in 1957, the European Court of Justice (ECJ) played during those years the crucial role of developing a

jurisprudence entirely centred on this argument and thus creating an effective system of protection of human rights in the European legal framework. From the treatment of such rights as unwritten general principle of Community law, during the decades the ECJ stated several times the importance of such rights as case 11/70 *Internationale Handelsgesellschaft* and case 4/73 *Nold* remarked the norms of protection of human rights as the main component of the rule of law in the European legal framework. In particular, in *Internationale Handelsgesellschaft* the European Court of Justice pointed out that the protection of such rights must be ensured within the framework of the structure and objectives of the Community and, moreover, the judgement highlighted the primacy of Community law even in the field of the protection of human rights. In the *Nold* judgement the ECJ indicated that legal source concerning the protection of human rights may be found both in the constitutional traditions common to Member States as well as in the dedicated international treaties. Nevertheless, the European Union strengthened its legal framework in this field by enshrining the protection of human rights in the Maastricht Treaty and by approving the EU Charter of Fundamental Rights (CFR) in 2000, which would then be binding for Member States only with the signature of the Lisbon Treaty in 2009. In this context, it becomes clearer why the European Union is founded and relies on the values of respect of human dignity, freedom and rule of law as article 2 TEU explicitly states.

The analysis then shifted to the description of the European legal framework concerning the protection and enforcement of the rule of law principles, by pointing out the legal sources of the rule of law principles, the legal instruments that the European Union has at its disposal to face the democratic backsliding in the Eastern countries and the weaknesses that they present. In this context, the values that embody the rule of law are enshrined in art. 2 TEU while art. 7 TEU is the legal instrument to enforce a violation of the abovementioned values even though, due to its peculiar nature, the activation of art. 7 TEU is particular difficult to trigger.

For this reason, the analysis immediately concentrated on the description of art. 258, 259 and 260 TFEU as the main instruments to indirectly face the rule of law backsliding in Poland and Hungary. Art. 258 TFEU allows the Commission, in the vests of the Guardian of the Treaties, to deliver a reasoned opinion to a Member State concerning alleged violations of the Community law and, in case of no response within the period laid down by the Commission, the Commission itself may bring the Member State before the European Court of Justice which then may apply financial penalties in case of concrete violations. Art 260 TFEU is directly connected to art. 258 since represents the direct consequence of the no response of the Member State as the European Commission may bring the concerned country before the ECJ and may decide the sum of the penalty that the country into question would be asked to pay. Art. 259 does not comprehend the European Commission as the main actor engaged in the process since it entails the possibility that a Member State may be brought before

the ECJ by another Member State for allegedly violations but, the procedures under Art. 259 TFEU are very rare given the fact that the Member State must firstly ask the Commission an opinion and at this point the procedure is often halted and the led by the Commission itself.

The analysis on the main tool at the disposal of the European institution to face the democratic backsliding in Eastern Europe started with the assumption that art. 7 TUE presents some criticalities in its application. In fact, art.7(1) is difficult to activate since it requires a two-thirds majority of the European Parliament and four-fifths of the Member States in the Council, thus it entails a political accord to be implemented. This explains why it has been used only recently against Poland, whose government is part of the far-right ECR European party, and never triggered against Hungary since the biggest and moderate right EEP party defended for years the Fidesz government and thus prevented the European Parliament from reaching a majority to trigger art. 7(1) procedure. Regarding art. 7(2), also known as the *sanctioning arm* since in case of serious and persistent breaches of the concerned values the European Council in its unanimity may suspend the voting right to the targeted Member State, it has never been activated because it is very difficult to reach the unanimity in the European Council as Poland and Hungary back up each other. This is the reason why the infringement proceedings towards Poland and Hungary indirectly targeted some domestic reforms that undermined the rule of law but officially concerned topics related to the violation of EU law.

The last paragraph of the chapter presents a focus on the analysis of the Rule of Law Framework, the "new" legal instrument launched by the European Commission in 2014 to contrast the criticalities that started to emerge in that period in Hungary, and the pros and cons that derived from the application of this new legal instrument. The system has been conceived as an early warning mechanism consisting both in the establishment of a structured dialogue with any concerned Member State and as a tool able to detect any possible action aimed to the dismantle of the rule of law or other values enshrined in art.2 TEU. It has been activated against Poland only in 2016, due to the continuing attacks of the PiS government towards the independence of the Polish Constitutional Tribunal but, due to the fact the Rule of Law Framework only presents the possibility to deliver non-binding reasoned opinions, it did not work in preventing the deterioration of the rule of law situation in Poland and thus showed that, in accordance with the Schimmelfennig and Sedelmeier's model, the compliance of the concerned Member State in a context of adoption of non-binding reasoned opinions decreases and denotes a signal of ineffectiveness in preventing the rule of law backsliding.

Finally, the chapter even mentioned the stakeholders that are engaged in the process of delivery of opinions on states that may show criticalities in the rule of law context. This is the case of the Venice Commission and its delivered opinions on Poland and Hungary; the institution of the Council of Europe represents a reference point both for the European Institution for consulting and drafting

reasoned opinions and even for the Member State that may ask the Commission to deliver opinions on constitutional matters. It is for this reason that this work emphasized its role in the assessment of the democratic backsliding of the concerned countries.

CHAPTER 3

The analysis of the rule of law backsliding in Poland and Hungary has been the focus of the III chapter since they represent the two Member States where the governments in office have been reforming the democratic regime in order to undermine the fundamental checks and balances. Even in this case, the first section of the chapter provided an historical analysis of the two Member States from the beginning of the accession phase, when they represented the frontrunners in the implementation of the *Acquis Communautaire*, to the recent times by analysing the common grounds and the different features in the democratic backsliding of the Member States into question.

In fact, the PiS and Fidesz governments are both far-right, populist and ultra-catholic parties that won free and fair elections by appealing to the discontent of the population towards the ruling elites and that, once in office, implemented some reforms aimed to the dismantle of the judicial independence thus unbalancing the golden rule of the independence of the three powers. Hence, to justify the attacks against the judicial systems, both the PiS and Fidesz governments appealed to their mandates given by the ordinary people since "*the selection of a judge should be subject to some actual influence of the representatives of other branches of government, in particular the legislative power holding the mandate from democratic elections"* . Another common ground in the Hungarian and Polish situations is the attack against the rights of particular segments of the population that, in virtue of the catholic roots of the two populist parties, mainly concentrated against the LGBT community (with the establishment of LGBT – free zones in Poland and the censure of the "*homo-propaganda"* in Hungary) or with the right of abortion , whose recently illegitimate Constitutional Tribunal's ruling of 22 October 2020 imposed a near-total ban in Poland and triggered the crowded protests of thousands of people in the Polish country. Otherwise, the main difference between the two situations is the method of implementation of the anti-democratic reforms. The Hungarian case may be considered more constitutionally compromised than the Polish one, since once the Fidesz government took office with a super-majority of 64% of the total seats, it started a constitutional reform that led to the adoption of a new constitution, arousing the concerns of the Venice Commission; thus, the Fidesz government in implementing the reforms aimed to the dismantle of the judiciary acted within the Hungarian constitution. On the other hand, in Poland the situation worsened later in a context where the attacks against the Polish Constitutional Tribunal were enforced by the PiS government

without a previous adoption of a new constitution thus it acted illegally with the open support of the Polish President Duda.

In the context of the ineffectiveness of art. 7 TEU procedures and the limitation of the scope of application of art. 258 TFEU, the European Court of Justice has been playing a fundamental role as it is trying to contrast and to prevent a further democratic delay by delivering historical judgements that will have several consequences both at the European level and even for the concerned Member States. The forerunner case was the *Minister for Justice and Equality v. LM* delivered on June 2018 which referred to a series of European Arrest Warrants (EAWs) that the Polish courts issued between 2012 and 2013 against Mr Celmer for him to be arrested and surrendered for the purpose of conducting criminal prosecutions. He was then arrested in 2017 in Ireland and brough before the High Court where he appealed to Art. 6 ECHR since the recent legislative changes to the system of justice in Poland denied him his right to a fair trial; the same approach was effectively followed by the Irish High Court that referred to the ECJ, which then stated that the national court would be responsible for refusal or approval of the European Arrest Warrants based on a preventive check in order to assess whether a real risk of a breach of art. 6 ECHR would subsist due to the ineffectiveness of the Polish judicial system.

The *Minister for Justice and Equality v. LM* judgement is strictly correlated to the European Court of Justice's case *Associação Sindical dos Juízes Portugueses* developed in Portugal in 2014 when, following the EU macroeconomic adjustment package, the Portuguese government decided to introduce a temporary reduction in the remuneration paid to the administrative personnel and judges so that the *Associação Sindical dos Juízes Portugueses,* acting on behalf of the Court of Auditors, challenged the governmental measures on the main ground that these measures would infringe "the principle of judicial independence" enshrined in the Portuguese constitution, in the EU law in Art. 19(1) TEU and Art. 47 of the ECHR which provides for a right to an effective remedy and to a fair trial. The judgement became a benchmark in the protection of the rule of law principles since the European Court of Justice relied directly on art. 19(1) TEU in connection with art 2 TEU and the principle of sincere cooperation so that the Court transformed the rule of law into a legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries. Hence, it is a duty for a Member State to establish and provide an effective system of legal remedies since the very essence of the rule of law is an effective judicial review which can only be assured by courts or tribunals.

The judgement opens new perspectives for the Commission and its infringement proceedings under art. 258 TFEU concerning some recent developments in Poland, in particular the Polish law that empowers the Ministry of Justice with the discretionary power to exert influence over the judiciary

since the CJEU now sufficiently justify examining it under EU standards in a more comprehensive way. However, the last judgement case K 3/21 of the Polish Constitutional Tribunal of 7th October 2021 triggered a legal bomb in the context of the application of the EU law since, according to the Tribunal, Art. 1(1) and (2) in conjunction with art. 4(3) TEU are no longer compatible with the Polish constitution and even the consequences of *Associação Sindical dos Juízes Portugueses* such as the obligation of national courts to apply the principle of primacy of EU law have been rejected by the Polish Constitutional Tribunal. For the first time in the history of the European Union, a Member State has rejected the principle of primacy of EU law over national law. The judgement has surely worsened the legal quarrel between the European Institutions and the recalcitrant Member States, and it is for this reason that the possible chance for the European Union to halt the democratic decay in Poland and Hungary may be the activation of the Regulation that links the disbursement of the European funds to the respect of the rule of law principles enshrined in art. 2 TEU.

CHAPTER 4

The IV chapter is entirely dedicated to the description of the functioning of the new rule of law conditionality mechanism, contained in the new Multiannual Financial Framework (MFF), and it has the main purpose of providing an exhaustive outlook about this new legal instrument at the disposal of the European institutions in order to face the democratic decay in Eastern Europe. The first paragraph identifies what are the main the structural problems that affects the European legal framework in contrasting the democratic backsliding. In this context, the analysis of Nagy's paper *The diagonality problem of EU rule of law and human rights: proposal for an incorporation à l'européenne* is fundamental to understand a criticality that affects the European legal framework: the lack of diagonality. In fact, even though the European Union possesses a comprehensive set of Rule of Law requirements that has effect on the European Union headquarters, offices and bodies it lacks the possibility to directly affect the action of Member States since EU rule of law applies to them only when they implement EU law. Therefore, there is no effective enforcement for the violation of fundamental values and as long as no effective legal mechanism for the protection of fundamental values will be adopted, the problem will continue to persist. The other weakness analysed concerns the already mentioned Rule of Law mechanism that can be activated only in case of systemic threats or violations of the rule of law and does not comprehend minor or individual breaches.

This is the reason why the Commission provided for another instrument to face the rule of law crisis in Eastern Europe: the Rule of Law conditionality mechanism. This new instrument of conditionality represents a compromise between the different European institutions since in the negotiation process

the European Commission and the European Council had different visions on the implementation of the mechanism. This new tool will provide for a blockage of the disbursement of the European funds to those Member States that presents criticalities in the rule of law context. The scope of application of the Regulation is clearly defined since it must be strictly tied to the Union's budget. It means that if a breach of the rule of law is identified, in a second step, the Commission has to prove an effect of that breach on the Union's budget since the Regulation aims to protect the sound financial management of the EU budget and the protection of the Union's financial interest. The Rule of Law conditionality mechanism is the outcome of the negotiations between the different European institutions that differed in the scope of application of the Regulation itself. In this context, the second paragraph provided an exhaustive outlook of the different objectives pursued by the European institutions in the context of the scope of application of the conditionality mechanism; if the European Parliament stood for an ampler context of application of the Regulation, the Council and in particular its Legal Service argued that the regulation on the conditionality mechanism had not to pursue the same aim as the procedure envisaged in art. 7 TEU. This is the main reason why the scope of the application of the new rule of law conditionality mechanism is directly connected to the financial management of the EU budget since the infringement of the principles of the Rule of Law must be clearly detected and must demonstrate a concrete and traceable impact on the implementation of the Union budget.

In particular, the Regulation lists in art. 1 and art. 2 the principles of the rule of law and a comprehensive definition of it. Then, if an allegedly breach of the rule of law is identified, in a second step, the Commission has to prove an effect of that breach on the Union's budget; in the context of the sound management it is entailed also the proper functioning of investigation and public prosecution services as well as the effective judicial review by independent courts of actions of omission of the abovementioned public authorities. Regarding the sanctions that may be imposed, they deal with the possible total or partial blockage of the funds directly disbursed by the European Union as well as the funds under the regime of shared management, which represents up to 80% of the Union's budgetary expenditures. However, on 11th March 2021, Poland and Hungary brought an action of annulment of the implementation of the Regulation before the European Court of Justice, which is expected to deliver a judgement on it. At the beginning of December 2021, the Advocate General (AG) Manuel Campos Sánchez-Bordona delivered his Opinions on the actions of annulment, which focused on four main arguments that are: (I) Legal basis of the Regulation; (II) Compatibility with art. 7 TEU and 269 TFEU; (III) Compatibility with art. 4(2) TEU and (IV) Legal certainty objections . The Advocate General contravened the objections of Poland and Hungary concerning the Legal basis for the Regulation, since the Regulation serves not as an additional rule of law sanction

mechanism, but rather as a tool for the protection of the budget from the specific threat of rule of law breaches jeopardising the usage of EU funds (C-156/21, paras. 138-139) thus establishing a conditionality mechanism; for this reason art. 322(1)(a) serves as an appropriate legal basis for the Regulation. The second argument stated that the new conditionality mechanism would establish a more accessible rule of law sanction mechanism that would undermine the correct functioning of art. 7 TEU but, even in this case, the argument was rejected by the Advocate General, who stated that the new conditionality mechanism is different in its purpose as well as in its implementation from art. 7 TEU and thus he found no violation of art. 7 TEU or art. 269 TFEU. In the third argument Poland feared that the usage of a qualitative majority voting system (QMV) would penalise the smaller Member States and thus it contravened art. 4(2) concerning the equal treatment of Member States but, again, the Advocate General rejected the argument by referring to art. (16)3 TEU which makes the QMV the regular voting procedure in the Council. Even the last argument was rejected by the Advocate General since the rule of law, even though is a vast concept, can be sufficiently concretized for the purpose of the Regulation. In this context, the Advocate General has dismissed all the four arguments brought by Poland and Hungary and the ECJ itself is supposed to follow the reasoning of the AG by stating that the new rule of law conditionality mechanism is another legal, useful and parallel instrument against rule of law breaches by Member States that will expand the Rule of Law toolbox at the disposal of the European Institutions.

In this particular context, the analysis of the rule of law conditionality mechanism focused also on the possible consequences for the Member States in case of the activation of the Regulation. In fact, the suspension of the European funds may be only temporary since Member States have the chance to solve the rule of law criticalities in a defined timeframe and, if the concerned country does not solve the problem in the given time, the funds allocated for the concerned Member States will be re-injected in the Union's budget by the Commission within two years and they will be at the disposal of the other countries.

The concluding section of the chapter is dedicated to the new recovery package approved by the European institutions at the end of 2020 to face the economic crisis triggered by the Covid-19 pandemic: the NextGenerationEU. It is revolutionary in its nature since it will be funded thanks to a common pool of financial resources that will be financed by borrowing funds called Eurobonds from financial markets on behalf of the European Union itself. It will raise up to €750 billion euro dedicated to the support of Member States recovery via new investments and reforms. The instrument will be also subject to the rule of law conditionality mechanism and, in this context, each Member State presented a national recovery plan to the European Commission following its directives and the objectives enshrined in the European Green Deal and the priority of a green and digital transition.

To conclude, this thesis has the main purpose of describing the new rule of law conditionality mechanism concerning the disbursement of European funds to Member States. Since it represents a peculiar topic which is difficult to understand without a proper context, the thesis has firstly analysed the elements around which the rule of law conditionality mechanism works, namely the concept of *"conditionality"* and *"rule of law"* and then focused on both the context of application of the conditional measures and the analysis of the rule of law backsliding in the Eastern Member States. The last chapter merged the two concepts into the description of the new rule of law conditionality mechanism, by describing the main components of the Regulation as well as the possible effects that it may have on the recalcitrant Member States. The description of the peculiar nature of the European Union in the first chapter provided a solid basis for the analysis of the negotiation process of the Regulation and the subsequent outcome. Finally, the work emphasised the role that the European Union plays in the world stage as the last soldier standing in facing the rule of law backsliding in some of its Member States and even the strong emphasis the supranational organization gives to the protection of human rights and the development of a proper legal framework in a global context where such rights are often violated.