



# Rule of law – Is the EU's foundation eroding?

*Conference, 8 November 2021, 9.30-11.00 am*



Gorrissen Federspiel



TANKETANKEN  
**EUROPA**

# Why has the EU been so paralysed over the Rule of Law crisis – and whats at stake?

Professor Marlene Wind, Department of Political Science and iCourts, University of Copenhagen

KØBENHAVNS UNIVERSITET



Poland and Hungary refer to 'illiberal democracy' and constitutional identity to legitimize their challenge to the European legal order

---

But does a 'illiberal' democracy exist? And can 'constitutional identity be used as an 'excuse' to undermine judicial independence'?

---

First we need to ask – what is liberal democracy in an EU context?

---

Liberal democracy is normally defined by free, fair and competitive elections, freedom of speech and the values we find in Article 2 TEU

All members – joining the EU - have signed and accepted to respect these principles and values together with the EU's *acquis communautaire*:

- **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.**

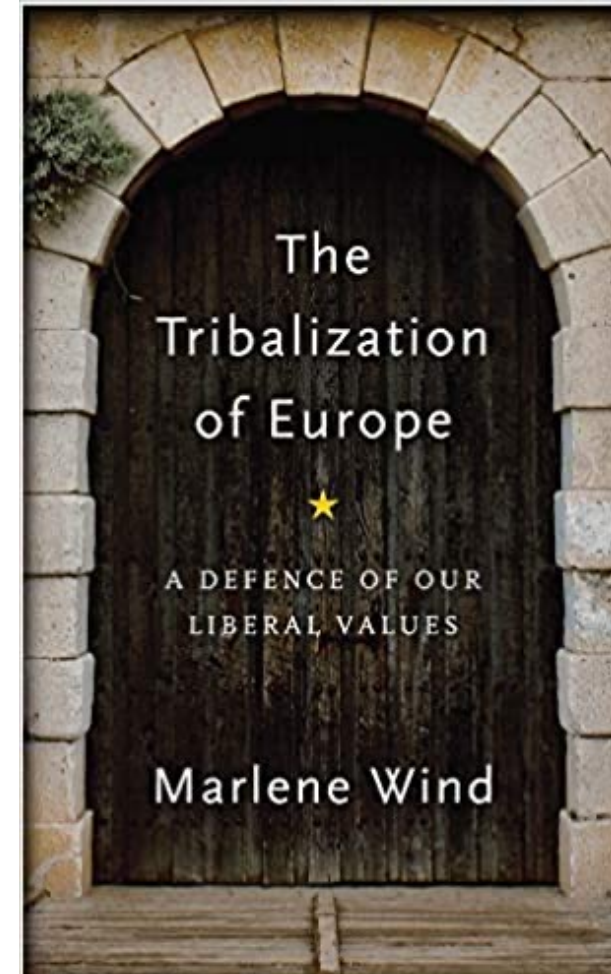
## This includes judicial independence at the MS level

- If there is no judicial independence national courts will not be able to uphold European law (sometimes against the will their own MS)
- Or enter into a dialogue with the CJEU via art.267
- Currently judges in Poland are prosecuted by the illegal disciplinary chamber in the Supreme Court for upholding EU law and referring cases
- Similar things have happened in Hungary



## What has happened?

- In Hungary since 2010 in Poland since 2015
- Forced judges into retirement/fired judges and packed the courts with their own loyalists
- Bought up critical media amended media laws and laws for universities
- Exploited the majority to change the constitution and the electoral rules (Hungary)
- When courts and prosecutors are taken over, corruption can flourish without consequences



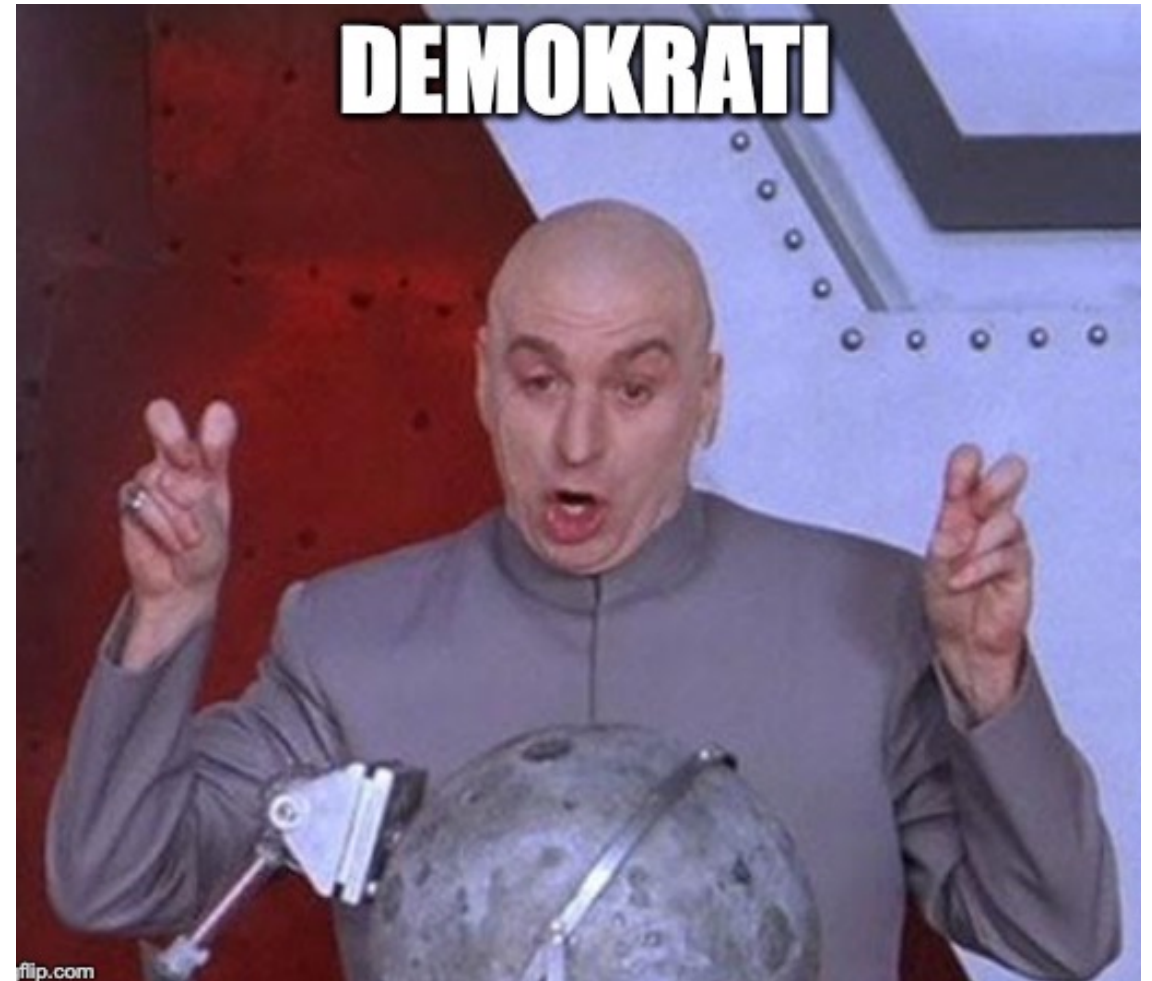


When I mention the European Union, I am not doing this because I think it is impossible to build an illiberal nation state within the EU. I think this is possible. Our EU membership does not rule out this option.

Viktor Orban juli 2014

## But what is an illiberal 'democracy' and does it make sense?

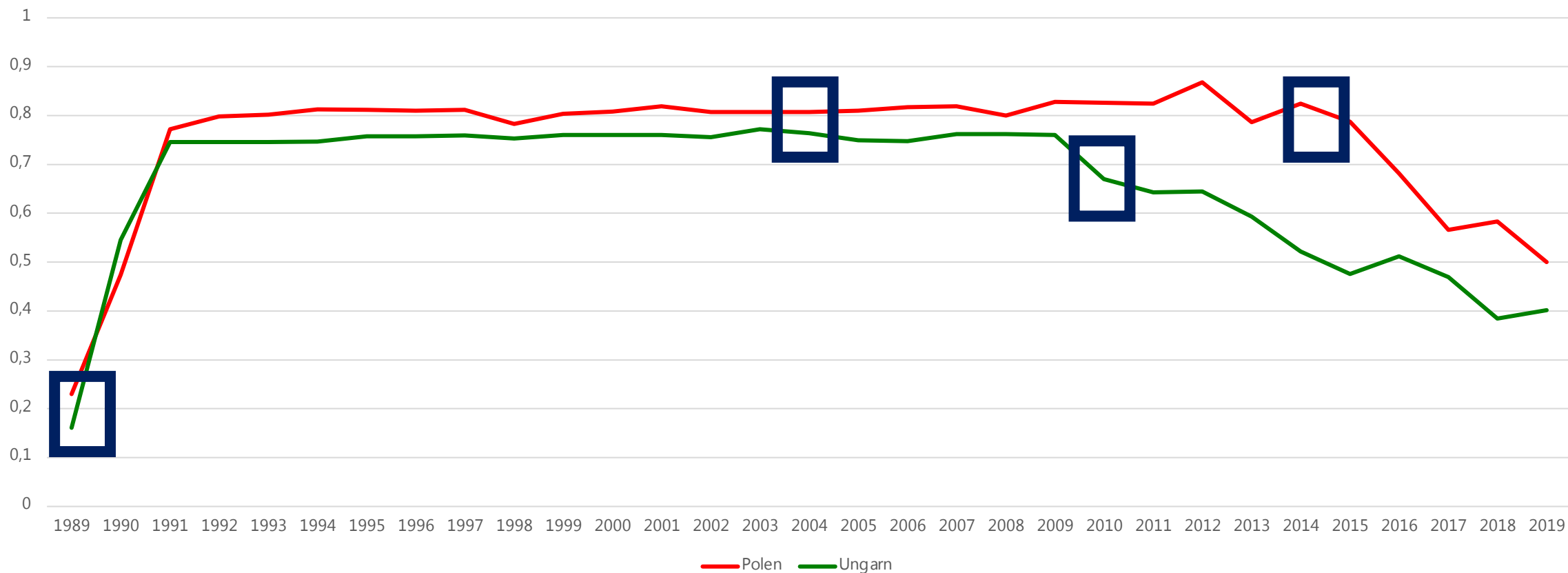
- Abuse of constitutional identity to undermine democracy but not eliminate all rights
- **Autocratic legalism** - >
- Where the law and the majority/constitution is used to gradually destroy democracy (Kim Lane Scheppele)
- This cannot be captured by ordinary indicies of democracy





# The democratic development in Hungary and Poland (Wind & Rohlfing, forthcoming)

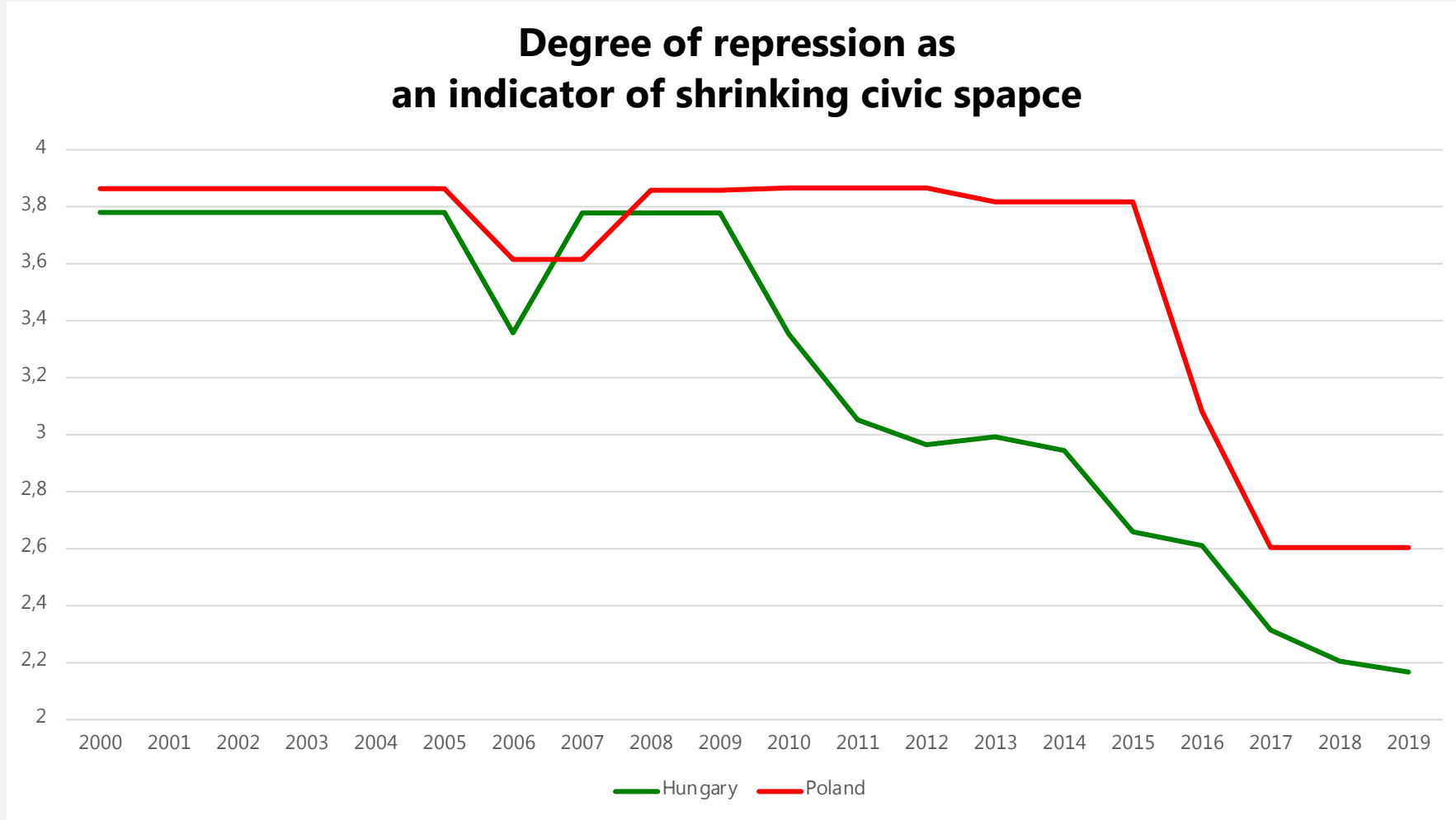
Liberal Democracy Index  
1989-2019



0 = lav grad af demokrati, 1 = høj grad af demokrati

Kilde: V-Dem, <https://www.v-dem.net/en/analysis/VariableGraph/>

# The state of civil society in Poland and Hungary



**Source:** Own elaboration based on Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, M. Steven Fish, Adam Glynn, Allen Hicken, Anna Lührmann, Kyle L. Marquardt, Kelly McMann, Pamela Paxton, Daniel Pemstein, Brigitte Seim, Rachel Sigman, Svend-Erik Skaaning, Jeffrey Staton, Agnes Cornell, Lisa Gastaldi, Haakon Gjerløw, Valeriya Mechkova, Johannes von Römer, Aksel Sundtröm, Eitan Tzelgov, Luca Uberti, Yi-ting Wang, Tore Wig, and Daniel Ziblatt. 2020. "V-Dem Codebook v10" Varieties of Democracy (V-Dem) Project.

# Will the internal market collapse if there are countries where courts aren't impartial?

- And there is no trust among national courts?
- EX. European Arrest Warrant
  
- (Picture from the series 'Rome' where Caesar asks: Is there any other law than Roman law? 50 BC)



# What can the EU do?

- Current tools:
- Infringement cases at the CJEU (and fines)
- Rule of Law framework (reports)
- Dialouge
- Article 7 procedure
  
- The EU can refuse to hand out money from the budget (plans not accepted)
- New rule of law mechanism (currently evaluated by the CJEU)



## Ordinary infringement cases at the CJEU

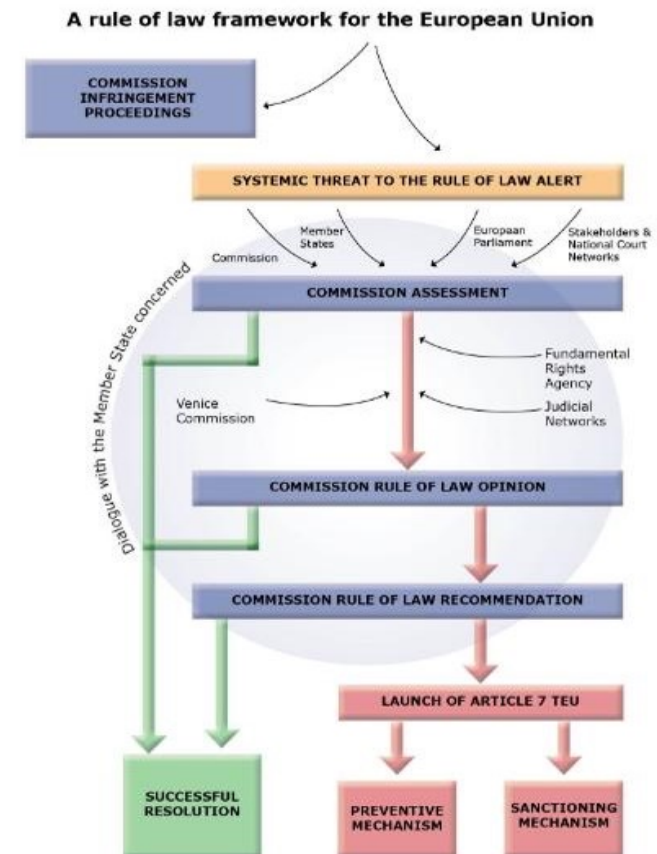
- The Court oversees that EU law is interpreted equally in all MS
- Infringement cases can be brought by the Commission or by MS
- (National courts can also refer cases -> art. 267)
- If a country has broken the law it can be fined
- Problem: often restricted cases - > doesn't solve big principled 'rule of law' problems



# Rule of Law Framework and Rule of law reports

- The Commissionen
  - 1) Assessment
  - 2) Opinion (Description of the rule of law situation)
  - 3) Recommendation (what to do)
  - 4) Now all countries receive a 'rule of law' report each year

## ROLF: Rule of Law Framework



## Article 7 – the bomb that never goes off

- Option after a failed ROLF-process:
- If there is a risk of a serious breach of the 'rule of law' principles (art. 2) and the ROLF and dialouge has not worked ->
- Can lead to a suspension of certain rights – i.e. voting rights in the Council
  - Problem: Unanimity required



## New budget mechanism

- Payment of EU funds shall be linked to MS's rule of law status
- Official aim: to protect the EU budget from financial risks due to rule of law deficiencies
- The Commission evaluates whether a MS compromises the rule of law principles and "protective measures are necessary" → no/reduced funding
- No unanimity needed
- The German EU Presidency tried in 2020 to dilute the mechanism- > but the majority of MEP's said NO!
- Hungary and Poland were furious and brought the mechanism to the Court. In January 2022 the CJEU will decide whether it is in accordance with the treaties....!
- **WILL IT WORK???? How will it be implemented? Guidelines still lacking!**



# Rule of law in CEE & the legal case for cutting EU funding for Hungary

John Morijn (Prof.,  
University of Groningen;  
Commissioner, NL  
National Human Rights  
Institute)

# Outline

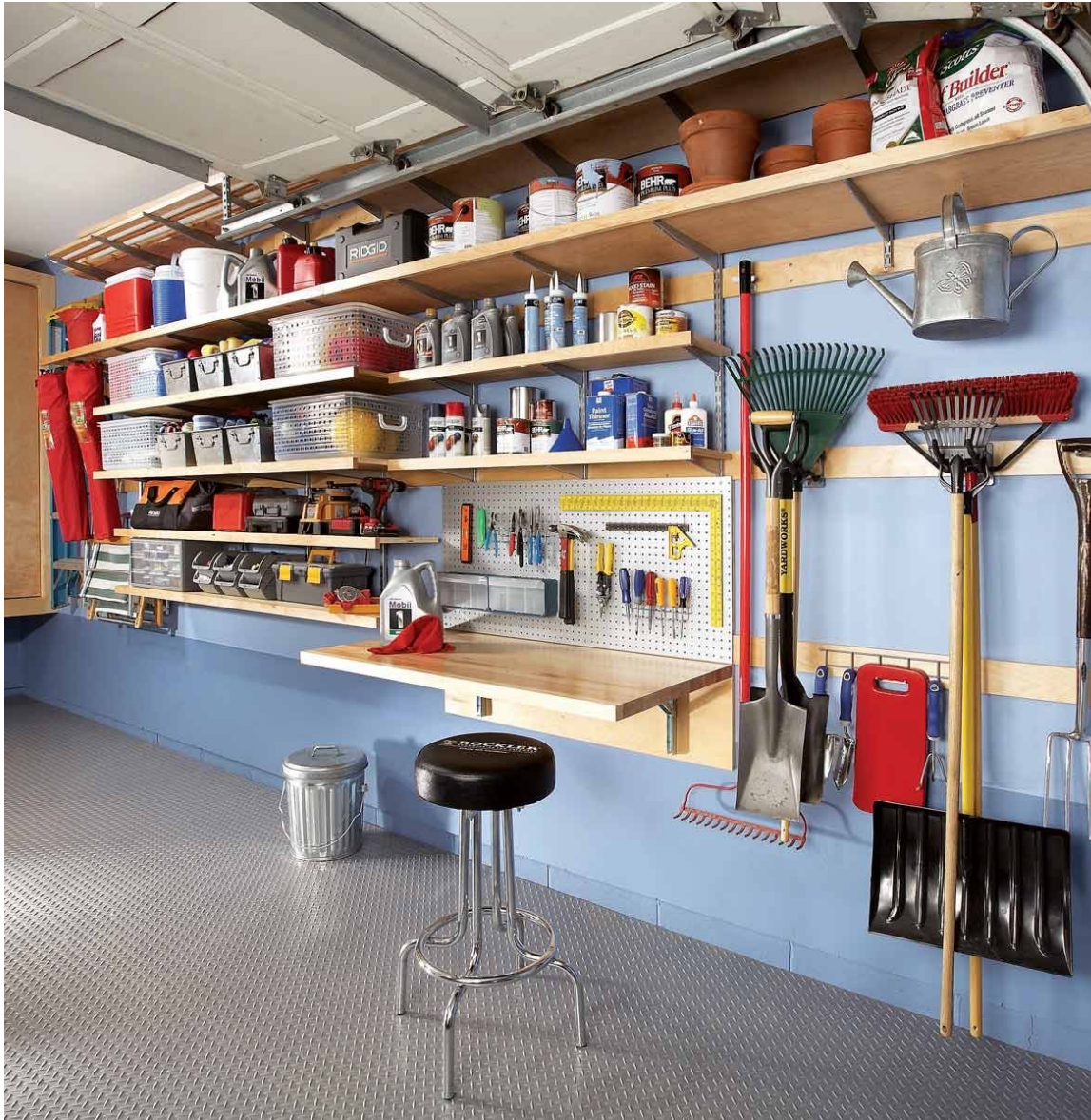
The (use of the) EU's Rule of Law Toolkit v. reality

Reg 2020/2092 (Rule of Law Conditionality)

Application to Hungary



Tools, when  
they are  
used



The  
Commission's  
tool-shelf



Live footage of  
EU rule of law  
protection  
efforts  
(excluding ECJ)



More detailed  
live footage  
of the EU RoL  
situation



(More) more detailed live footage of the EU RoL situation

I

*(Legislative acts)*

## REGULATIONS

**REGULATION (EU, Euratom) 2020/2092 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 16 December 2020**

**on a general regime of conditionality for the protection of the Union budget**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

A new tool with a  
new rationale:  
money talks



- (8) Sound financial management can **only** be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.

Key: interdependence SFM & Rule of law

A large yellow triangle is positioned in the bottom right corner of the slide, pointing towards the top right.

*Article 3*

**Breaches of the principles of the rule of law**

For the purposes of this Regulation, the following may be indicative of breaches of the principles of the rule of law:

- (a) endangering the independence of the judiciary;
- (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;
- (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

Tailored rule of law definition(s) (1/2)

2. For the purposes of this Regulation, breaches of the principles of the rule of law shall concern one or more of the following:

- (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures;
- (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;
- (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;
- (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c);
- (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;
- (f) the recovery of funds unduly paid;
- (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation;
- (h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

Tailored rule of  
law definition(s)  
(2/2)

## Article 4

### Conditions for the adoption of measures

1. Appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

“Sufficiently direct” “risk” to EU budget

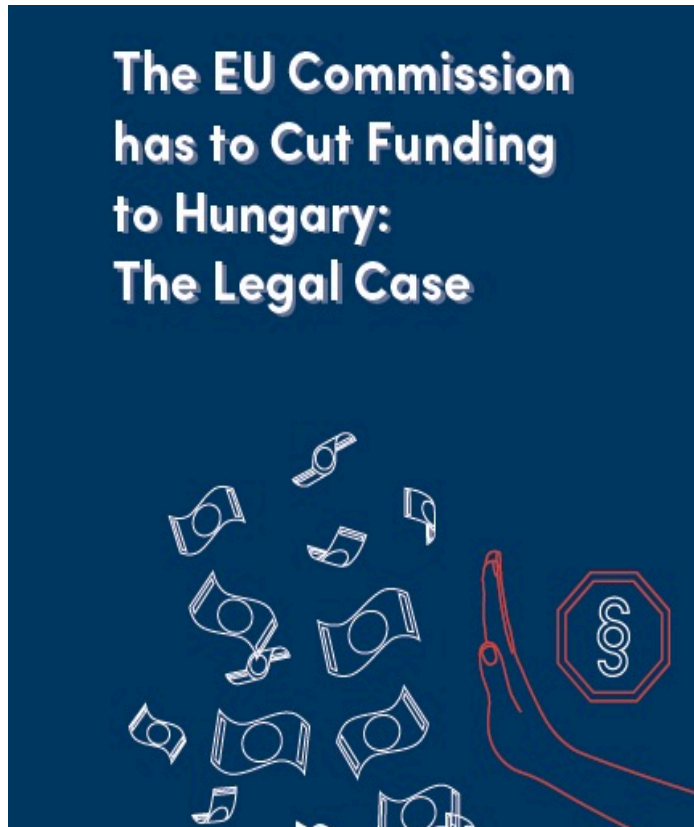
## Article 6

### Procedure

1. Where the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings. The Commission shall inform the European Parliament and the Council without delay of such notification and its contents.

Unless other measures are more effective,  
Commission *shall* trigger regulation

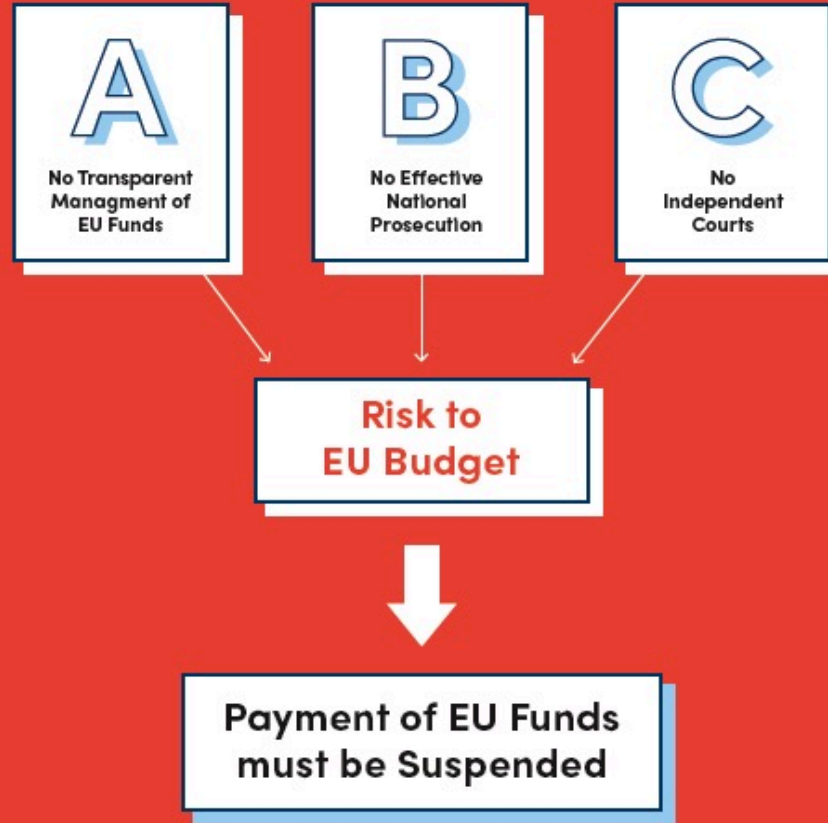
A large yellow triangle is positioned in the bottom right corner of the slide, pointing towards the top right.



# Application to Hungary

---

## The Legal Case for Activating the Rule of Law Conditionality Regulation Against Hungary



## Poland and Hungary play for time in 'symbolic' EU court case



Hearing at the European Court of Justice in Luxembourg (Photo: [Court of Justice of the European Union](#))

By **ESZTER ZALAN**  

BRUSSELS, TODAY, 07:06

# State of play

- (Unnecessary) inaction
- Promise to develop (unnecessary) guidelines
- ECJ hearing took place on 11/12 October (10 MS intervening in support); AG Opinion 2 December; ruling?
- Article 265 TFEU/failure to act action started by EP vis-à-vis COM (for not applying Reg 2020/2092)
- Connection to release of (pre-financing under) EU COVID funding (currently blocked for HU & PL v. 2021 deadline)
- Political will...



# What is the long term problem with the rule of law situation?

- Undermines the EU's legitimacy internally:
- Will the EU build on democracy in 10-20 years if we do not protect it now?
- The EU is more than a cash cow (Marc Rutte) - it also builds on democratic values
- Problem externally:
  - Why should those countries the EU try to influence or support financially fight corruption and protect human rights, democracy, rule of law if the EU cannot even protect these at home?





# The importance of the Rule of Law for the functioning of the internal market

*By partner at Gorrissen Federspiel, Henrik Saugmandsgaard Øe*

*Copenhagen, 8 November 2021*

# The ancient Greeks

- "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state"
  - (Plato, in John Cooper et al., *Complete Works by Plato*, p. 1402 (Hackett Publishing, 1997))
- "It is more proper that law should govern than any one of the citizens"
  - (Aristotle, *Politics*, 3.16)

# Later references to the Rule of Law

- Cicero during the Roman Republic:
  - "We are all servants of the laws in order to be free"
- Magna Carta, 1215
- Petition to James I of England in 1610 from the House of Commons:
  - "Amongst many other points of happiness and freedom which your majesty's subjects ... have enjoyed under your royal progenitors ... , there is non which they have accounted more dear and precious than this, to be guided by the certain *rule of the law*..."
- Montesquieu, *De l'esprit des loix* (1748)

# Why is the independence of the judiciary so important?

- **Hypothetical example:** Polish migrant workers in Belgium being discriminated against by a new (extreme) anti-immigrant Belgian government
- *Minister for Justice and Equality (deficiencies in the system of justice) (C-216/18 PPU)*
  - Could Ireland extradite a person to Poland for trial, if it would take place within a system no longer operating within the rule of law (Article 7-procedure pending)?
  - High Court: The threshold of amounting to a real risk that there will be a flagrant denial to a fair trial was not reached

# The approach of the Court of Justice

- "Effective judicial protection" as a *general principle* of Union law (*fundamental right*)
- *Johnson* (Case 222/84)
- *Heylens* (Case 222/86)
- *Kadi* (C-402/05 P and C-415/05 P)
- The principle of sincere cooperation in Article 4 (3) TEU
- *Rewe* (33/76): National procedures and remedies must satisfy the principles of equivalence and (minimum) effectiveness

# The interpretation of Article 19 (1) TEU

- "Member States shall provide remedies sufficient to ensure effective legal protection"
- "In the fields covered by Union law"
- A "Union based on the rule of law" (Les Verts, Case 294/83)
- Must be interpreted in the light of Article 47 of the Charter (right to an effective remedy and to a fair trial)

# *Portuguese Judges (C-64/16) a game changer*

- Article 19 TEU gives concrete expression to the common value of the rule of law in Article 2 TEU
- National courts and the ECJ *jointly* ensure the correct interpretation and application of EU law (protecting the rights of individuals and undertakings)
- Sincere cooperation in Article 4 (3) TEU
- Must provide sufficient remedies
- Independence (and impartiality) is *inherent* in the task of adjudication (Article 47 of the Charter)
- When having competence to *potentially* decide on EU law
- Importance of the preliminary ruling procedure



# Further development in case law

- Member States must prevent any regression of their laws on the organisation of justice and they may not adopt rules, which would undermine the independence of the judiciary
  - *Repubblica*, C-896/19
- Need for additional remedies if court decisions remain ineffective to protect EU rights
  - *Torubarov*, C-556/17
  - *Deutsche Umwelthilfe*, C-752/18

# Several cases concerning the independence of the Polish judiciary

- C-619/17, Commission v. Poland (Supreme Court)
- C-192/18, Commission v. Poland (ordinary courts)
- C-585/18, A.K. and others (Independence of the Disciplinary Chamber)
- C-824/18, A.B. and others (appointment of judges to the Supreme Court)
- The most recent cases
  - 15 July 2021, Commission v. Poland (disciplinary regime applicable to judges) (C-791/19)
    - Request for a preliminary ruling and the content of judicial decisions can be classified as a disciplinary offence
  - 6 October 2021, WZ, C-487/19
  - Order of the Vice-President of 27 October 2021, Commission v. Poland, C-204/21 R
- See also opinion of AG Bobek in C-132/20
- Judgment of the ECtHR of 7 May 2021, Xero Flor v. Poland (the Constitutional Court is not a ‘tribunal established by law’)

# The right (and obligation) to make a request for a preliminary ruling

- The national courts are often called upon to rule against the State (with potential significant financial implications)
- The *right* to ask the CJEU (“widest discretion” or “prerogative”)
- Criteria for the obligation to make a reference, now *Consorzio Italian Management* (C-561/19)
- Invited by AG Hogan to revise its *Francovich* case-law in order to make it easier to obtain compensation in case of judicial failures (*Randstad Italia*, C-497/20, pending)
  - “Manifest breach of the case-law of the Court” (*Köbler*, C-224/01)

# What impact do these issues have on the functioning of the internal market?

- **Against the Member State**
- Discriminatory measures and restrictions on the exercise of the four freedoms need to be justified and proportionate
- *New Walmar*, C-15/15 (free movement of goods)
- *Erzberger*, C-566/15 (free movement of persons)
- *Altun*, C-359/16 (migrant workers, E 101 certificates)
- *Segro and Horváth*, C-52/16 (free movement of capital)
- *Veronsaajien oikeudenvälvontayksikkö*, C-342/20 (pending)
- *Dyrektor Izby Administracji Skarbowej w Bydgoszczy*, C-855/19 (VAT)
- State aid cases (must order illegal aid to be repaid)
- Directive on public procurement (2014/24)

# Commercial disputes between private parties

- Jurisdiction in Poland?
- Normally the case (Brussels I bis regulation), if:
  - the goods were delivered or should have been delivered in Poland
  - the services were provided or should have been provided there
  - dispute arising out of the operations of a branch, agency or other establishment in Poland
  - in case of tort, when the damage occurs or may occur in Poland
  - online sale to consumers in Poland, or
  - in case of individual contracts of employment
- Can normally not be avoided in the last two situations
- Always in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property

# What about recognition and enforcement in Denmark (free movement of judgments)?

- Denmark applies Brussels I bis (JO 2013 L 79/4)
- A Polish judgment will normally be recognized and can be enforced
  - Unless ... ”manifestly contrary to public policy (*ordre public*)” (Article 45)
- No case law on the matter
- Is an Article 7-procedure sufficient?
  - See point 39 in Hungary v. Parliament (C-650/18): Hungarians can seek asylum in other Member States while the procedure is pending

# Should companies avoid jurisdiction in Poland?

- Depending on the circumstances
- Possibility to agree on jurisdiction outside Poland pursuant to Article 25
- Arbitration?
  - Still possible after *Achmea* (C-284/16), *Komstroy* (C-741/19) and judgment of 26 October 2012, *Poland v. PL Holdings* (C-109/20)?

Thank you for your attention