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The European Union (EU) has faced a series of crises in the past decades, one of the recent ones being the rule of law crisis in Hungary and Poland. Rule of law is one of the fundamental values of the EU and is enshrined in Art. 2 Treaty on European Union (TEU). Art. 2 TEU sets out to ensure that Member States uphold independent and impartial courts and seeks to protect democracy and fundamental rights. If Member States' governments, such as those in Hungary and Poland, are able to suspend the rule of law by violating Art. 2 TEU, EU governance will ultimately break down (Kelemen, 2019). Given the limitations of fiscal resources and the administrative apparatus' weaknesses, the EU relies on laws and courts to govern and pursue policy objectives (Kelemen, 2019). The role of the Court of Justice of the European Union (CJEU), however, has been unclear and underutilized in helping resolve the rule of law crisis the EU is facing, while it could play an important role. One option to deal with the crisis that utilizes the CJEU is infringement procedures initiated by the Commission against a Member State.

Overall, it can be observed that studies regarding the mitigation of the rule of law crisis in the EU have mainly focused on the political Art. 7 TEU-procedure. There has been less emphasis on judicial review and the role of the CJEU through Art. 258 Treaty on the Functioning of the European Union (TFEU) infringement procedures against Hungary and Poland, Member States that have systematically breached Art. 2 TEU. These infringement procedures proved to have various levels of success (Kovács & Scheppele, 2019). The problem with the effectiveness of infringement procedures may not always lie in the fact that the CJEU did not take a helpful decision or in lack of CJEU involvement. Application of CJEU judgements by Member States also constitutes a problem. Falkner (2018) suggests that the effectiveness of CJEU judgements may also be determined by the policy environment. It is therefore important that in addition to the political route, the judicial route in mitigating the rule of law crisis is assessed on effectiveness. This will provide insight into the tools the EU can effectively use in the rule of law crisis and provide perspective into whether CJEU judgements are implemented by Member States.

The thesis will seek to answer the question: *to what extent are infringement procedures effective in mitigating the rule of law crisis in Hungary and Poland?* It will look into what constitutes 'effectiveness' in the context of the CJEU, as well as the competences of the CJEU in mitigating the rule of law crisis. Further, it seeks to apply these findings to the infringement procedures decided on by the CJEU regarding Hungary and Poland.

This thesis will use an analyticist research design to analyze six cases against Hungary and Poland to establish if these helped mitigate the crisis. This will be done through the use of indicators borrowed from Radaelli (2003), which allows the cases to be placed on a scale ranging from least to most effective. The main argument presented is that the reaction and the implementation of the judgement by the Member State government has a large effect on the effectiveness of a CJEU judgement and that if implementation is not done consequently, the effectiveness in mitigating the rule of law crisis can be limited.

The thesis will be structured as followed; the first section will give an overview of the rule of law crisis in general and in Hungary and Poland specifically. In addition, it will offer a discussion of the EU response, political and judicial, as it is discussed in the literature, as well as the disputed role of the CJEU. The second section stipulates the theoretical framework, providing a definition of effectiveness. The third section presents an operationalization of effectiveness that will allow for its application to the cases against Hungary and Poland. The fourth section focusses on the application of the theoretical framework and research design to the infringement procedures and analyzes to what extent these judgements were effective in mitigating the rule of law crisis in Hungary and Poland. Ultimately, the conclusion will show how the infringement procedures were moderately effective in mitigating the rule of law crisis but could be optimized for a more successful mitigation of past breaches and prevention of future breaches.

Background

The Rule of Law Crisis: From General Features to the Cases of Hungary and Poland

The issue at heart of the rule of law crisis is that Member States fail to uphold the values enshrined in Art. 2. TEU, which states that the EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." It is therefore a Member State's obligation to uphold the rule of law as it protects EU citizens from the rule of the powerful (Leyen, 2019; 2020). When Member States fail to uphold the rule of law, the legal system collapses and the Union can no longer guarantee its basic principles, thus breaking the mutual trust among Member States (Scheppele et al., 2021).

Since 2012, a process of democratic backsliding can be observed in Hungary, which is seemingly evolving into an autocratic state. Since the Fidesz party's accession to power in 2010, the Constitution has been replaced by the Fundamental Law, which is the root of the problem as it reflects the conservative Hungarian values advocated by Fidesz (Neuwahl & Kovacs, 2021, p. 18). The Fundamental Law weakened the checks and balances preserved by the prior constitution by restricting the Constitutional Court, the independence of the judiciary, and by facilitating the appointment of party sympathizers amongst other measures. In addition, with a two-thirds majority in Parliament, Constitutional Court decisions can now be overruled (Neuwahl & Kovacs, 2021, p. 18). This means that Hungary's governance, policies, and structure are no longer in compliance with Art. 2 TEU (Neuwahl & Kovacs, 2021, p. 19)

In 2016, a similar situation took place in Poland when the Law and Justice Party came to power and launched severe attacks on the Polish judiciary. This led to the impairment of the Constitutional Tribunal, the Supreme Court, and the ordinary courts, thus failing to uphold Art. 2 TEU-obligations (Schmidt & Bogdanowicz, 2018). Additionally, the new constitutional justice system put in place in Poland caused separation of judicial review powers from legislative powers, resulting in incomplete regulations and a legal gap that results in the inability to protect individual rights and liberties (Radziewicz, 2019).

The EU Response

The EU has three main ways through which to respond to the rule of law crisis: one political, the Art. 7 TEU-procedure, two judicial, the Art. 259 and the Art. 258 TFEU-procedures. All three are discussed, but it will be demonstrated why the Art. 258 TFEU-procedure will be the focus of this thesis.

Political: Art. 7-Procedure

The Art. 7 TEU-procedure is designed to establish political proceedings on the basis that a Member State has breached EU values or law, as opposed to court proceeding. It has politically become seen as a 'nuclear option' as it results in the suspension of rights of Member States (Kochenov, 2017). The procedure has to be jointly initiated by the Commission or the European Parliament, and the Council, which often makes it difficult to initiate (Raube & Reis, 2021, p. 632). Due to its political nature, the Art. 7. TEU-procedure has not been widely used, also shown by the fact that the Council is very cautious in its approach to the rule of law crisis, barely putting the issue on the agenda (Raube & Reis, 2021, p. 639). Because of its limited use and effectiveness, this thesis will not focus on the Art. 7 TEU-procedures in terms of mitigating the rule of law crisis.

Judicial: Art. 259 TFEU and 258 TFEU-Procedure

Actions based on Art. 259 TFEU are brought to the CJEU by Member States against other Member States. This procedure is relatively rare since Member States are hesitant to start a procedure against another Member State, especially when their rights are not directly impeded (Raube & Reis, 2021). The preliminary ruling, as it is also referred to, allows Member States to initiate action when the Commission does not (Pech & Kochenov, 2019). Art. 259 TFEU is, according to Schmidt and Bogdanowicz (2018), an important and independent remedy vital to the development of EU law. It is, however, not regarded as being part of the EU's "rule of law toolkit" (Sledzińska-Simon & Bárd, 2019, p. 441). This makes it lack practical relevance in mitigating the rule of law crisis (Schmidt & Bogdanowicz, 2018, p. 1067). This is why this legal procedure is not a focus of this thesis and will further focus on infringement procedures.

In addition to Art. 259 TFEU, the Commission can opt to address a rule of law crisis by bringing cases to the CJEU through the Art. 259 TFEU infringement procedures, but the Commission generally treads lightly in this area. Beneficial to infringement procedures is that they can address any issue related to EU law, whereas Art. 7 TEU can only be applied when there is a "serious breach" of Art. 2 TEU (Sledzińska-Simon & Bárd, 2019, p. 441). This procedure has been most widely used in the rule of law crisis in comparison to the others, making it the most useful tool for assessing the effectiveness of CJEU mitigation of the crisis.

The Disputed Role of the CJEU

The general role of the CJEU is to uphold the rule of law and the institution has therefore been observing the rise of illiberal democracies with concern (Raube & Reis, 2021). The Art. 259 and the Art. 258 TFEU-procedures are used by Member States and EU institutions to invoke the CJEU's role and to ensure adherence to EU law and policy (Smith, 2019).

The jurisdiction of the CJEU has been expanded by *Associação Sindical dos Juízes Portugueses* (Case C-64/16), also referred to as the Portugal case. Here the Court made an important ruling about the use of Art. 19(1) TEU to combat problems regarding rule of law (Case C-64/16, para. 52). Prior, the CJEU could only look at the specific procedural rules to ensure effective judicial protection, but the CJEU can now also look at the organization and structure of the judiciary (Perez, 2019). Bonelli and Claes (2018) even argue that through this judgement, the CJEU increased its effectiveness in the rule of law crisis. The Commission has now been given a way to save the independence of judiciaries that does not rely on Member States' willingness to challenge each other before the CJEU.

However, the effectiveness of the CJEU has been disputed in the literature. Blauberger and Kelemen (2017) mainly regard the role of the CJEU to be effective in addressing minor rule of law issues, but less effective regarding the issue as a whole. They even argue that the judiciary is insufficient, and that political back-up is needed, but that CJEU effectiveness can be increased by establishing additional judicial mechanisms (Blauberger & Kelemen, 2017). However, the politicization of the CJEU could undermine its legitimacy and authority (Blauberger & Kelemen, 2017). Raube and Reis (2021) are more optimistic about CJEU actions because infringement procedures might provide a useful tool for getting around the highly political nature of the Art. 7 TEU-procedure. In terms of infringement procedures' capability in addressing the rule of law crisis, Schmidt and Bogdanowicz (2018) conclude that they may provide a more effective method for addressing specific and episodic violations of EU law than Art. 7 TEU alone and would be effective in addressing systematic deficiencies in the rule of law. Scheppele (2016), however, suggests that the effect of infringement cases has been limited and thus suggests the "bundling of cases" by combining separate actions against violations of EU law into one larger case (p. 108). This would increase effectivity because it "would allow the Commission to capture a whole concerning practice and not just a component part of that practice" (Scheppele, 2016, p. 112). Since there is no real agreement in the literature on what precisely constitutes as

effectiveness and how it can be measured, the term needs to be further conceptualized in order to create a better understanding of how CJEU judgements impact the rule of law crisis.

Theoretical Framework

Conceptualization of Effectiveness

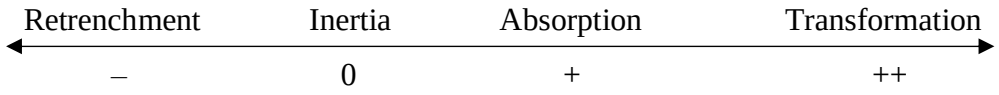
Although the role of the CJEU in mitigating the rule of law crisis is discussed in the literature, there is a limited focus on the effectiveness of its judgements and on what constitutes 'effectiveness'. Schmidt and Bogdanowicz (2018) shed some light on the issue as they argue that effectiveness can be measured by assessing what the best available legal method is for arriving at the explicit obligation for Member States to act. Effectiveness is an important way to address the role of the CJEU, because the Commission also examines the role of the CJEU in this manner (Schmidt & Bogdanowicz, 2018). The effectiveness of infringement procedures can be assessed in two ways: in relation to other remedies presented by the EU Treaties (also referred to as relative effectiveness) and from an absolute perspective (Schmidt & Bogdanowicz, 2018, p. 1065). In order to identify the effect CJEU judgements have on the rule of law crisis, the role of relative effectiveness is limited. The relative perspective only looks at whether infringement procedures were the right instrument in mitigating the rule of law crisis, which is not the purpose of this thesis. The absolute perspective proves to be more useful as it constitutes judgements to be effective if they have an immediate impact and if the CJEU was the ultimate decision-maker. However, this idea has to be made more concrete.

In order to conceptualize the effectiveness of CJEU judgements, Europeanization literature can be useful. Europeanization literature seeks to investigate what the impact of the EU is on the domestic level, in terms of policy, institutional change, and party politics that result because of EU integration (Exadaktylos & Radaelli, 2009). Therefore, important indicators regarding the effect of EU legislation on domestic policy can be derived from Europeanization literature and adapted to the CJEU. The Europeanization literature is extremely rich and seeks to go beyond the identification of EU-isation and thus has many sub-fields, as shown by Featherstone (2003). Sub-fields can include studies that look into EU enlargement, but also studies that look into public policy changes (Grabbe, 2003). The latter is the field of interest for this thesis as it seeks to understand the domestic assimilation of EU policy and politics, which is a process of institutionalization (Radaelli, 2003). The application of Europeanization literature to the CJEU could be valuable in order to create an understanding of how CJEU judgements transpose and translate into domestic action and policy change. Although the literature is dense, this thesis will focus on the application of the typologies of domestic change as suggested by Radaelli (2003) due to their potential relevance for classifying the effectiveness of CJEU judgements.

In order to establish what the effects of Europeanization are, Radaelli (2003) distinguishes between four types of policy change. The spectrum of categories that Radaelli (2003) proposes are: retrenchment, inertia, absorption, and transformation (p. 35). Even though Radaelli (2003) only applies the categories to policy change, they could also be applied to CJEU judgements to indicate that there are different levels of effectiveness, creating a more precise distinction than merely 'effective' or 'ineffective'. According to Radaelli (2003), retrenchment means that that national policy becomes less in line with EU policies. The Member State thus have an incentive to retreat away from the European rule of law and actually further the rule of law crisis (Radaelli, 2003, p. 38). If this definition is applied to CJEU judgements, it would show that it propelled the Member State government not to implement the CJEU judgements and instead implement policies that cause further deviation from the EU rule of law. Radaelli (2003) explains that inertia means that a lack of change can be constituted as the Member State finds the policy change to be incompatible with domestic practices (Radaelli, 2003, p. 37). When applied to the CJEU judgements, it means that no action is taken by Member States at the domestic level. On the positive side of the scale are absorption and transformation. Radaelli (2003) characterizes absorption as the presence of an adaptation to the EU rule of law, but only to the extent of non-fundamental policy changes. This means that essential modification to policy, law, and institutions is not constructed (Radaelli, 2003, p. 37). In terms of the CJEU it means that the judgement is transposed into national legislation, but that no practical effects can be observed. Radaelli (2003) describes transformation as showing a true change in policy, institutions, or law in accordance with EU rule of law, which demonstrate a fundamental change in the ways of the Member State, causing the rule of law crisis to recede (Radaelli, 2003, pp. 37-38). Applied to the CJEU judgement, this means that it is fully implemented and adhered to by the Member State, showing a true change in behavior and practice, demonstrating that the situation is reversed and the breach will not be repeated. Radaelli (2003) thus proposes that effectiveness can be conceptualized to show the magnitude of change as well as its direction (p. 37). A visualization of the criteria is presented in Figure 1.

Figure 1

Illustration of the Spectrum of Categories of Change



(Radaelli, 2003, p. 35)

The categories of effectiveness proposed by Radaelli (2003) can be assessed through an additional framework created by Putnam (1993). From his work, the importance of the presence of domestic policy pronouncements and policy implementation that are a result of CJEU judgements emerge, as well as whether these actually altered the current rule of law status to increase democracy. If applied to the categories of effectiveness, it can demonstrate whether policy pronouncements and policy implementation resulted in retrenchment, inertia, absorption, or transformation and thus altered the current rule of law status.

Expectation

From the theoretical framework presented above, certain expectations can be deduced. *The expectation is that the more national governments respond to CJEU judgements through policy pronouncements and policy implementation that comply with the CJEU's judgements, the more effective CJEU action is in defending the EU rule of law.* Conversely, the less national governments respond to CJEU judgements through policy pronouncements and implementation, or if only negative responses are produced showing noncompliance with the CJEU, the CJEU action will be less effective in defending EU rule of law.

Research Design

This thesis will use an analyticist research design, drawing on Jackson (2016). This means that knowledge is generated through the creation of 'ideal-types' that are used to explain the outcome (Jackson, 2016, p. 142). To analyze these ideal-types, expectations are created to help formalize the rules as a guide for action, resulting in observable manifestations that a conclusion can be drawn from (Jackson, 2016, p. 133). In order to examine effectiveness as it is defined in the theoretical framework, the term needs to be operationalized. Following Radaelli's (2003) research, four indicators for the empirical analysis of effectiveness can be deduced: interaction, robustness, equilibration, and discourse (p. 39). Interaction identifies how institutions do or do not become stronger in relation to other institutions through their interactions (Radaelli, 2003, p. 39). With regard to the CJEU, how Hungarian and Polish authorities reacted to the CJEU judgement and if domestic institutions have become stronger or deteriorated in terms of democracy through this interaction with the CJEU. Robustness looks at to what extent Europeanization, and in this case CJEU judgements, brought about a change in laws or improved institutional structures (Radaelli, 2003, p. 39). Equilibration assumes that there is a discontinuity with the past and, in the case of the CJEU, allows for a closer look at whether or not proposed laws mark a change from previous rule of law breaches. Discourse looks at how national political leaders respond to EU action against them and whether they accept or reject the merit of these actions (Radaelli, 2003, pp. 39-40). The category of discourse, however, will not be applied because it is outside of the scope of the analysis. Discourse examines how government authorities talk about the CJEU judgement instead of investigating the actual change triggered – which is the subject of investigation of this thesis. It thus seeks to look into policy implementation and policy pronouncements that actually lead to change. In terms of the rule of law crisis in Hungary and Poland, the operationalization of the categories of effectiveness are provided in Table 1.

Operationalization of Effectiveness

Table 1

Operationalization of Effectiveness

Scale	Category	Operationalization
Least Effective	Retrenchment	Evidence of the rule of law crisis worsening as a result of CJEU judgements. There is no interaction or only negative interaction between the CJEU and the domestic government to implement the ruling. Negative robustness can be observed as institutions and laws are changed for the worse. In the case of retrenchment, it can be observed that more anti-democratic reforms were made. There is also no observed equilibration as the practices as they were before the ruling are continued and even more robustly applied.
	Inertia	Evidence that the CJEU did not change the rule of law crisis in any way. There is no interaction between the CJEU and domestic government and the Court's judgement is not implemented. This means there is no robustness as institutions are not reformed and no laws are introduced. There is also no equilibration as the practices that originated from before the ruling are continued.
	Absorption	Evidence that the CJEU changed the domestic situation on paper but not in reality. There is limited interaction between the CJEU and domestic government, the Court's judgement might be implemented but the implementation may have no real effect on the situation. This means there may be some, albeit limited, robustness as laws are introduced, but institutions are not practically reformed. There is also no equilibration as the practices that originated from before the ruling are continued.
Most Effective	Transformation	Evidence that the CJEU bettered the rule of law situation significantly. There is a large amount of interaction between the CJEU and the domestic government to implement the Court's judgement, which results in observable robustness as institutions and laws are (clearly) reformed. Equilibration is present as practices from before the ruling are discontinued.

Case Selection

The thesis will focus on Hungary and Poland since these are the EU-countries that have shown the most prevalent failures in compliance with the rule of law of the EU (Kovács & Scheppele, 2019). Furthermore, both countries will be taken into account because the literature shows that infringement procedures have been more successful in Poland than they

have been in Hungary. Therefore, examining both countries in comparison might provide a clearer explanation of the effectiveness of CJEU decision-making.

Only infringement procedures that the CJEU has already decided on will be examined since effectiveness can only be deduced in relation to its implementation or non-implementation. For the purpose of this thesis the six (out of eleven) infringement procedures the CJEU has decided on with regard to the rule of law in Hungary and Poland that are regarded as most important and discussed most fervently in the literature are analyzed. These procedures are, in Hungary, *Commission v. Hungary* (Case C-286/12) about the retirement age of judges, *Commission v. Hungary* (Case C-288/12) about the infringement of data protection, and *Commission v. Hungary* (Case C-66/18) about the violation of the right to academic freedom. In Poland it will look at *Commission v. Poland (Białowieża Forest)* (Case C-441/17), also known as the *Polish Forest* case, *Commission v. Poland* (Independence of the Supreme Court) (Case C-619/18) and *Commission v. Poland (Independence of the Ordinary Courts)* (Case C-192/18), about the retirement age of judges at the Supreme Court and ordinary courts.

Data Sources

In order to examine whether or not an infringement procedure had an effect on the rule of law crisis, it is important to look at whether or not the judgement was implemented. It is therefore essential to look at the CJEU's judgement to see what the decision was and in which ways EU law was violated. In addition, separate opinions to these judgements will be observed as they can specify the requirements for implementation or can give a critical review. In order to examine national implementation, policy documents as well as national and international news sources will be examined to judge whether the state has changed legislation to comply with the judgement. Additionally, reports by independent agencies, as well as EU-institutions, regarding the CJEU judgements will be used.

The Cases: Observable Manifestations of CJEU Action

CJEU Judgements and Their Effect on the Rule of Law Crisis in Hungary

This section will provide a case-by-case overview of the infringement procedures regarding Art. 2 TEU breaches by Hungary. In order to constitute whether the infringement procedures were effective in mitigating the rule of law crisis, the framework derived from Radaelli (2003) as operationalized in the research design will be applied.

Commission v. Hungary (Case C-286/12)

It has been argued that the first infringement procedures pursued against Hungary demonstrated the limits of the EU Treaties and the CJEU in protecting and enforcing fundamental EU values (Kovács & Scheppele, 2019). In this case the CJEU ruled that the decrease in the retirement age of Hungarian judges was age discrimination under Directive 2000/78/EC (Case C-286/12, para. 81). Since it was the first rule of law case, the Commission was very hesitant to label it as such and there is therefore no mention of Art. 2 TEU or the 'rule of law'. This means that the judgement ultimately did not incorporate the requirements for judicial independence that Hungary was not meeting and instead sought to tackle the issue using more careful language (Bakó, 2021). Albeit limited in scope, this case was still significant in kicking off what would be a series of infringement procedures on the rule of law. The relation to the rule of law can, however, certainly be observed. This is because the lowering of the retirement age from 70 to 62 was in effect seen by the Commission as a scheme to increase the number of party loyalist of the new Orbán government in high judicial offices (Case C-286/12, para. 24). This allowed the Hungarian government to effectively diminish the ability to provide impartial judgements in court cases (Kovács & Scheppele, 2019).

In the context of the indicator Radaelli (2003) defines as interaction, how the Hungarian authorities responded to the CJEU judgement cannot be regarded as very positive. The Hungarian government delayed the enforcement and by the time the judgement was implemented, 275 judges had been replaced by party loyalists (Scheppele, 2014; Kovács & Scheppele, 2019) (Kovács & Scheppele, 2019). Formally, the Hungarian government complied with the judgment by presenting the option of compensation or reinstatement to retired judges. However, since most opted for compensation and also renounced the claims on their jobs in exchange, it allowed Orbán to comply with the CJEU ruling and still achieve his initial goal.

In terms of robustness, the Hungarian government passed Act 20 of 2013 in March 2013 in order to comply with the CJEU's judgement. This act would gradually reduce the retirement age to from 70 to 65 over the next 10 years. In the meantime, the general statutory retirement age would be increased to 65. This act also allowed the wrongfully retired judges to choose for compensation or reinstatement (Halmai, 2017, p. 482).

Equilibration can only be observed limitedly as discontinuity with the past is not evident. Out of the effected judges, 164 launched court procedures against their employers, in which was decided that the termination of employment was unlawful (Andreeva & Bertaud, 2013). This forced courts to reinstate the judges in their former employment if they asked for reinstatement. Although this looked promising in terms of compliance with the judgement, those who started court cases were often not given their previously high-held positions as these had already been filled by party-loyalists (Halmai, 2017). This means that although the CJEU judgement was being implemented, the practical effects were limited, and party-loyalists remained in office.

Overall, a change in legislation can be observed, but no practical effect can be seen as institutions and practices were not fully reformed. Because the positions of forcibly retired judges had already been filled by party loyalists, retired judges had to go through a lot of effort to get their positions back and thus opted for compensation. Although the ruling was accepted and legislation was changed to improve democracy, no short-term rule of law improvements can be observed. There was limited interaction between the CJEU and the Hungarian government and as a result, the judgement, although implemented, had no real effect on the situation. There is limited robustness, since the law was changed but the Orbán government was still able to reorganize the judiciary with its preferred party loyalist judges despite having lost the case. In addition, there is also no equilibration as the practices that originated from before the ruling factually continued. This means that the situation of absorption is the most fitting assessment here, meaning that the CJEU judgement had some effect in mitigating the rule of law crisis.

Commission v. Hungary (Case C-288/12)

Another example is *Commission v. Hungary* (Case C-288/12) about the lack of independence of the head of the Hungarian Personal Data Protection Authority. The CJEU declared non-conformity with Directive 95/46/CE on data protection, when a new data protection office was established (Case C-288/12, para 62). Andras Jóri was in the middle of his term as head of the data protection office, when the new Data Protection Authority was

established with a different head, appointed by the Fidesz party (Scheppele, 2014). Supervisory authorities responsible for personal data protection, must act free from external influence that may affect their decisions in balancing the right to private life and the free movement of personal data (Case C-288/12, para. 51). This means that the risk that a Member State that inspects these authorities could exercise political influence, is enough to establish the hindering of independence. With regard to the premature termination of office and the appointment of a new director, impartiality cannot, according to the CJEU, be guaranteed (Case C-288/12, para. 53). However, since the existing office was abolished and a new office was established, reversal of the situation was not possible without starting another infringement procedure.

In terms of the interaction indicator, some interaction between Hungary and the CJEU can be observed. Hungary argued fervently during the case that the only remedy would be to reinstate Jóri (Scheppele, 2014). However, since he had already been replaced, the independence of the new Data Protection Officer would be further compromised if to be replaced again, forming a second breach of EU law. Already early on in the process, the Hungarian government showed an unwillingness to change (Scheppele, 2014).

The case also shows no presence of robustness. The infringement procedure could not accomplish the reversal of the situation, meaning that in the end the institution was not reformed in comparison with the institution prior to the CJEU judgement. The Hungarian government was able to fill the position with a party-loyalist before the EU could intervene, making reversal of the situation impossible, similar to Case C-286/12 (Scheppele, 2014).

In terms of equilibration, since the existing office was abolished, reversal of the situation was not possible without another infringement procedure. Since Hungary settled with the complaining party, the country formally complied with the CJEU judgement, without improving the rule of law situation (Scheppele, 2014). The new Hungarian government was able to rid itself of the people whom it had not appointed and to replace them before the end of their lawful terms with people whom the government preferred (Neuwahl & Kovacs, 2021).

Overall, there is evidence that the rule of law situation did not change. Although there is interaction between the CJEU and the government, it is negatively oriented, showing that Hungary defies the CJEU's demands for change. In addition, the judgement is not implemented in national legislation and the Data Protection Office was not reformed. The practices from before the ruling thus continued and no equilibration can be observed. There is also no observable robustness as no new rules and practices are created. This means that the

situation of inertia can be constituted, meaning that although the judgement did not further deteriorate the rule of law situation, it also did not do anything to aid it, making the judgement of limited effectiveness.

Commission v. Hungary (Enseignement supérieur) (Case C-66/18)

In 2017, the Hungarian government made an amendment to the National Higher Education Act that prohibited educational institutions from establishing themselves in Hungary and countered the right to academic freedom and education, and the freedom to conduct business (General Secretariat of the Council of the European Union, 2018). This amendment was therefore found to be contrary to the General Agreement on Trade in Services, the Lisbon Treaty, the Services Directive 2006/123, and the Charter of Fundamental Rights (Case C-66/18, para. 243). The amendment introduced strong requirements for a license of operation that were at the full discretion of the Hungarian government (Bárd, 2020). The amendment was an attempt to force out the Central European University (CEU) established in Budapest, due to the animosity between Fidesz and the university founder George Soros (Bárd, 2018).

Regarding the interaction indictor, the reaction by the Hungarian authorities showed how they, as was the case in the two previous infringement procedures, made use of the circumstances that court procedures are slow. It has been observed that their slower nature gives governments time to change laws in a way that renders the court proceedings almost irrelevant (Bárd, 2020). However, if judgements are still relevant by the time they are pronounced, the government can refuse to properly implement them and thus gain time to further realize its anti-EU agenda. The amendment that forced the CEU out of Hungary was weakly justified by classifying the CEU as fake and below Hungarian educational standards, of which both statements were untrue. By continuing attacks against the CEU instead of complying to the CJEU judgement, Hungary showed unwillingness to change. By the time the judgement was actually implemented, the situation could not be reversed, making the procedure irrelevant (Bárd, 2020).

Some robustness can be observed in this case as the Hungarian government has proposed new amendments to the National Higher Education Act. Even though this proposition has been made, it has yet to be implemented (Central European University, 2021). The judgement is however of recent nature, as the case was only decided on October 6th, 2020. A new law would enhance the situation for future educational institutions looking

to establish themselves in Hungary, but a legal change will not alter the situation for the CEU, since it already moved to Vienna, Austria (Central European University, 2021).

By the time the judgment was rendered (3,5 years later) the case had become moot, making equilibration difficult to spot (Bárd, 2020). The practice that was not in compliance with the rule of law, the amendment that forced certain universities out, cannot be reversed to allow them back in since, as in the case of the CEU, they have already moved. The promising point to come out of the infringement procedure is that Hungary, if it indeed does change the law, cannot repeat its behavior. For this institutional change, and thus equilibration, to be observed, it is too soon to tell.

Overall, Hungary tried to block the effectiveness of the CJEU action beforehand by changing the higher education situation to such an extent that reversal was not possible, thus resembling its plan of action from Case C-286/12. In addition, although amendments to the law have been proposed, it is still too soon to tell if this will actually happen. If it does, it might have a positive impact on mitigating the rule of law crisis. Since the breach is not yet remedied, the current status of the effect of the judgement is that of inertia, meaning that only limited effectiveness can be observed.

CJEU Judgements and Their Effect on the Rule of Law Crisis in Poland

This section will look at the effectiveness of infringement procedures in mitigating the rule of law crisis in Poland by applying the operationalization of effectiveness developed in the research design. What is important to note in the Polish context is that the CJEU started ruling on interim measures proposed by the Commission in order to halt Polish practices earlier on in the procedure. This is because the Commission and CJEU learned from the Hungarian cases in which rulings came too late to repair damages done by breaching EU laws (Pech, et al., 2021). Due to the interim orders, compliance with the CJEU can be observed from an earlier stage.

Commission v. Poland (Białowieża Forest) (Case C-441/17)

The Białowieża Forest in Poland is one of the most environmentally unique places in Europe and labelled an UNESCO world heritage site. In 2016, it was invaded by the Spruce Bark Beetle and in an effort to save the forest, the Polish Minister for the Environment authorized the increase of logging activities and forest management operations, which were previously not allowed in certain areas (Koncewicz, 2020). However, this practice led to logging campaigns destroying large parts of the forest, presenting irreparable dangers to the

integrity of the forest (Lazowski, 2017). Although the focus of the case was the Białowieża Forest, the case demonstrated the destructive nature of populist methods in undermining the rule of law and judicial independence as the Polish stance in the case demonstrated anti-European rhetoric (Tacik, 2019, p. 68). In this case, the CJEU established interim measures against Poland to ensure no further damage until a final CJEU judgement had been reached. Eventually, the Court ruled that Poland had failed to fulfil its obligations under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora by approving the amendment (C-441/17, para. 155). Thus, for the first time announcing financial penalties (Smith, 2019).

In terms of interaction, Minister of the Environment Szyszko stated that Poland was complying with the interim order's 'suggestions' and claimed that no penalty had been imposed (Tacik, 2019). By claiming this, the Minister's words diminished the Court's order because it allegedly proved Polish compliance with EU law (Tacik, 2019). Contrarily, the Director General of the Forestry Office admitted to Polish breaches of EU law by stating all logging activities would stop. On the one hand, Poland admitted to breaches and on the other they claimed to be in compliance with the interim order. This contradiction made it hard to establish what the Polish authorities claimed and made interaction difficult (Tacik, 2019).

For the indicator of robustness, some changes in laws were adopted in response to the judgement. This was partially due to the newly elected Minister of the Environment, who reformed the logging amendment. On May 15th, 2018, one legal logging permit, Decision Nr. 51, of the two adopted in February 2017, was repealed (Hildt, 2019). However, compliance to this was regarded to be a result of political circumstances, so the actual implication of the amendment is unstable. In addition, the second permit is still not withdrawn, although it is currently not being executed (Hildt, 2019). Therefore, it can be said that some robustness can be observed as the logging has been largely discontinued.

On the dimension of equilibration, the Polish government fully ignored the interim order to stop logging (Order of the Court Case C-441/17, para. 17-20). The Polish government justified these actions by invoking the public safety clause (Bohdan, et al., 2017). Therefore, despite the interim order, the logging became even more intense and is referred to as an "unprecedented act of European defiance" (Koncewicz, 2020, p. 467). This means that discontinuity with the past, did initially not look promising as Poland repeatedly claimed there were no wrongdoings, but eventually the logging ceased.

Overall, although in the first instance the Polish government showed a lack of compliance with the interim order, the amendments that damaged the forest were partially

repealed after the CJEU judgement. Therefore, the harmful risk was partially terminated but there are risks for further deterioration. In terms of what Radaelli (2003) refers to as interaction, the Polish authorities did react to the CJEU's judgement, however; they initially did not show signs of compliance. On the dimension of robustness, the amendment of the law was made, showing that the government did end up implementing the judgement. Even though, the second amendment has not been repealed, it was rendered inactive due to the CJEU's judgement. In terms of equilibration, eventually discontinuity with the rule of law breach can be constituted. Although there are numerous limitations to the implementation, the situation most closely resembles transformation. Even though there are future risks for breaches, the CJEU judgement is currently fully implemented and the legislation is at least partially repealed.

Commission v. Poland (Independence of the Supreme Court) (Case C-619/18) and Commission v. Poland (Independence of Ordinary Courts) (Case C-192/18)

In these cases, the CJEU demonstrated it had learned from its failures in *Commission v. Hungary* (Case C-286/18) and actually framed these retirement age cases as rule of law issues (Case C-169/18, para. 58). These cases will be discussed jointly as the reaction prompted by the Polish government and implementation of the judgements was vastly the same. Both cases look into the retirement age for judges, Case C-169/18 regards the Supreme Court, while Case C-192/18 regards the ordinary courts. The cases concerned the lowering of the retirement age of the Supreme Court judges from 65 for men and 60 for women and giving the Minister of Justice the right to extend the period of active service at ordinary courts upon request (Schneider, 2020, p. 9). Case C-619/18 was the first ruling in which the CJEU held that a Member State breached judicial independence under Art. 19(1)(2) TEU, a route made possible through the Portugal case, with a particular focus on the "irremovability" of judges (Case C-169/18, para. 124; Pech, et al., 2021, p. 9). The judgement on ordinary courts followed suit (Case C-192/18, para. 136).

On the indicator of interaction, as a result of the interim measures a number of judges previously forcibly retired, immediately returned to work (Pech, et al., 2021). With this the Polish government felt it had reacted competently to the interim order and remedied the situation (Separate Opinion Secretary General Tanchev Case C-619/18, para. 78). Because of this Poland reacted little to the actual judgements (Podstawa, 2019). This demonstrated that the judgement had declaratory relevance, but no constitutional relevance. The position of the Polish government and the reform of legislation are problematic (Podstawa, 2019).

In terms of the indicator ‘robustness’, Poland amended the relevant legislation, introducing a new retirement age of 67 (Granat & Granat, 2019, p. 232). According to Justice Minister Ziobro, by changing the retirement age for newly appointed Supreme Court judges, Poland was fulfilling its obligations (Easton, 2018). Despite the proceedings before the CJEU, the Polish parliament passed a law on December 20th, 2019, completing its judicial reforms regarding ordinary courts (Schneider, 2020, p. 13).

In terms of equilibration, the Polish government believes it responded efficiently to the interim order (Podstawa, 2019). However, it has been argued it has not (Separate Opinion Secretary General Tanchev Case C-619/18, 2020). This makes the judgement of little constitutional relevance. The National Council of the Judiciary (NCJ) determines the judges of the Supreme Court and this body has not been substantially modified. The NCJ judges are approved by the government and in turn will only seek election of party loyalists for the Supreme Court. The ruling party has already managed appointment of the majority of judges to the Constitutional Tribunal, which has the power to veto legislation. The Minister of Justice, who serves as prosecutor general, now has the power to appoint and dismiss the deputies and heads of ordinary courts (Easton, 2018). By reinstating the Supreme Court judges, the government avoided fines for non-compliance with the interim order. When these judges soon retire, new judges for two new Supreme Court chambers created by the ruling Party will need to be appointed and they will be nominated by the newly politicized NCJ (Easton, 2018).

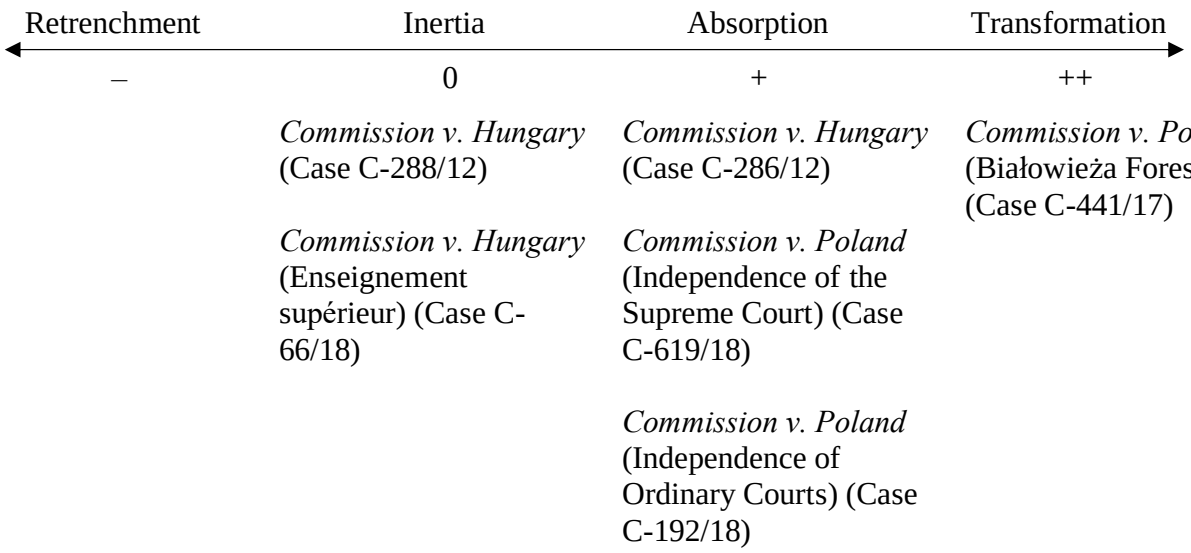
Overall, the ruling by the CJEU is seen to have a limited influence as Poland is in the process of changing its laws. However, the ruling on the retirement age of judges did not deal with the larger underlying problems, mainly the politicization of the NCJ. In terms of interaction, some can be observed as the Polish government allowed retired judges to be reinstated due to the interim order. In addition, some robustness can be observed as the retirement age law has been changed. There is, however, limited equilibration since there has been some discontinuity with the past as the retirement age is raised but new infringements of the rule of law regarding the retirement age and the independence of the courts have been made. Ultimately, the effectiveness of this infringement procedures can be best described as absorption, the situation changed on paper but not in practice.

To summarize, it can be observed that the CJEU judgements did not have a negative effect on the rule of law crisis, as can be seen in Figure 2. The effectiveness thus ranges from there being no observable change to the presence of large reforms in laws and institutions.

The most common category is however the category of absorption, as it contains three out of six cases. CJEU judgements thus did have a positive effect in mitigating the rule of law crisis in Hungary and Poland, however, mostly to the extent of absorption as laws were changed to prevent future violations, but past violations were not necessarily mitigated. This means that a practical effect is yet to be observed. Most of the CJEU judgements thus had at least to a degree a positive effect on the rule of law situation and in no cases the rule of law crisis worsened. In addition, regarding the Member States separately, the infringement procedures were more effective in Poland than they were in Hungary, as they triggered either absorption or transformation and in no cases inertia, as happened with regard to Hungary twice.

Figure 2

The Cases Placed on the Spectrum of Categories of Change



Conclusion

The thesis sought to answer the question: *to what extent are infringement procedures effective in mitigating the rule of law crisis in Poland and Hungary?* It looked into what constitutes 'effectiveness' in the context of the CJEU, as well as the competences of the CJEU in mitigating the rule of law crisis through the infringement procedure of Art. 258 TFEU. Further, it sought to apply these findings to the infringement procedures started against Poland and Hungary.

Ultimately, it can be observed that CJEU judgements have had a positive effect on the rule of law crisis in Hungary and Poland. In four out of the six cases studied, the CJEU judgement impacted the rule of law crisis positively and in no cases did it lead to the worsening of the rule of law crisis, as can be observed in Figure 2. This shows that ultimately, these Member States chose to absorb or abide by CJEU jurisprudence. The extent of the effectiveness is, however, still limited, as in three out of the six cases, only absorption was achieved as a result of the judgements. This means that although the role of the CJEU can be regarded as effective overall, since none of the judgements led to retrenchment, the effectiveness is still limited in correcting prior wrongdoings. From these findings, it can thus be concluded, that when the Commission analyzes there to be too many political difficulties or obstacles in order to engage the art. 7 TEU-procedure, it should make use of the judicial option of Art. 258 TFEU infringement procedures, as they generally have a positive effect on mitigating the rule of law crisis, shown by Figure 2. In the worst-case scenario, the decision will not have impacted the crisis, but the crisis will most likely not worsen as a result of CJEU judgements.

Some limitations to this thesis have to be taken into account. Methodologically speaking, the sample size could be broadened to include all the infringement procedures and interim orders the CJEU has judged on to generate more inclusivity of cases. In addition, sources in Hungarian and Polish could in some cases not be taken into evaluation due to language restrictions. This may especially be an important consideration with regards to the interaction indicator, as reaction to CJEU judgements is often done in the national language and in this case, there had to be mostly relied on secondary sources.

With regard to the optimal usage of infringement procedures, reforms can be considered for future research. This includes the suggestion made by Scheppele (2016) to start with the 'bundling of cases' by the Commission to be able to intervene in systematic breaches of the rule of law and increasing the decision speed of CJEU judgements, which in some cases led to judgements becoming moot. In terms of policy implications, this thesis

demonstrates that although CJEU judgements do not always result in complete transformation of the rule of law, they have had a positive effect on the rule of law crisis in Hungary and Poland. Meaning that CJEU judgements, by bringing about some change in legislation and institutions, did help to mitigate the rule of law crisis. Though, it is still uncertain if the national governments will continue to abide by the new rule of law standard or seek further violations. However, if the infringement procedures are optimized, they do have the potential to both correct past wrongdoings as well as prevent future ones.

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