The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis

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INTRODUCTION

In this following chapter the focus is on the EU’s response and crisis management toward an emerging democracy and rule of law crisis in Europe. For a long time the consolidation and global successes of liberal democracy, including the European Union and its transformative enlargement processes, have been taken for granted. Enlargement processes were seen as a flagship policy of the EU, able to transform societies and economic policies in Central and Eastern Europe, however with limited success regarding ‘liberal democratic principles’ (Sedelmeier 2014a). Critical voices, seeing the transformation of Europe’s Eastern countries after the end of the Cold War as one of multiple streams and challenges—including democracy, human and minority rights, rule of law, economy and society—that would interrelate and eventually undermine a full liberal democratic transformation, were often underrepresented (Offe 1994).

Indeed, current events raise doubts as to whether democratization can be regarded as a one-way street. Freedom House (2020) paints a dark picture of democracy in crisis and sees, globally, a period of democratic retrenchment. The emergence of so-called illiberal democracies seems to have established itself as a new normal, presenting fundamental challenges to those who seek...
to uphold and protect the foundational principles and institutions of liberal democracies (Freedom House 2018; Polyakova et al. 2019). Separating what once had been seen as two complementary and synergetic notions, liberalism, and democracy, a new wave of regimes present themselves as illiberal democracies: although democratically elected, once in government they systematically “ignore constitutional limits on their power and depri[ve] their citizens of basic rights and freedoms” (Zakaria 1997: 22; see also Mounk 2018).

Strangely enough, the rise of illiberal tendencies and consolidation of “defective democracies” (Müller 2017: 58), such as Poland and Hungary, is often not regarded as part of the multidimensional “polycrisis” that the EU has faced since the beginning of the “age of crisis” in 2009–2010, often associated with the financial debt crisis, migration crisis, Brexit and challenges in the EU’s neighborhood (Dinan et al. 2017). However, given the normative character of the EU as a polity based on democracy and the rule of law, systematic challenges to these principles can be understood as a crisis of fundamental values which the EU as an “order” is based on,¹ in other words “an extraordinary moment when the existence and viability of the political order are called into question” (Ikenberry 2008: 3; see also Riddervold et al. 2020). Understanding democracy beyond polyarchic conditions of free and fair elections and accountable government (Dahl 1971) includes checks and balances and the independence of the judiciary. With this in mind, a liberal notion of democracy based on the rule of law as one of its essential pillars comes to the fore: “What makes a rule of law democratic […] is that the legal system defends the political rights and procedures of democracy, upholds everyone’s civil rights, and reinforces the authority of other agencies of horizontal accountability that ensure the legality and propriety of official actions” (Diamond and Morlino 2004: 23; see also O’Donnell 2004).

Along these lines, we understand that the EU as “order” is put into question by a democracy and rule of law crisis in its Member States in three different ways. First, it faces an identity crisis, as the EU could be seen as being changed from within in the direction of values which are contrary to its identity. Second, the EU is challenged by a compliance and implementation crisis, as serious breaches of the rule of law could be understood as undermining the ability of the EU to guarantee the implementation of secondary EU law and uphold the supremacy and direct effect of EU law at the level of Member States. Third, this could also trigger a perception crisis which can undermine the way how the EU is perceived both internally and externally in its efforts to portray itself as a community of values. Overall, considering the fact that the European Union’s integration process has resulted in an interconnectedness, based on mutual trust, in regulatory and judicial fields, the disrespect for fundamental values and principles such as democracy and the rule of law in

¹See Case 294/83 Partie Ecologiste ‘Les Verts’ v. Parliament [1986] ECR 1339, § 23. Cf. Opinion 1/91 EEA Agreement [1991] ECR 6097.
one Member State has the potential of negatively impacting its legitimacy and credibility in the international arena (Pech and Platon 2017).

Following a deeper understanding of why illiberal tendencies pose a crisis for the EU, the overarching aim of this chapter is to understand and assess EU actors’ responses with regard to emerging democracy and rule of law challenges. In explaining how and why EU actors have responded to the emergence and consolidation of illiberal tendencies in Member States within the territorial borders of the EU, this chapter seeks to look into the EU’s ability to face the democracy and rule of law crisis and how this shapes the future development of its integration project: The chapter opens with a reflection on the essence of the EU as a community of values and how this has been challenged by the rise of defective democracies, followed by a brief overview of the theoretical framework used to systematically discuss, understand, and explain the EU’s response to rule of law backsliding within its own borders. By integrating the three scenarios breaking down, muddling through and heading forward (Riddervold et al. 2020) into a theoretical discussion of how we would expect the EU to react to an unfolding democracy and rule of law crisis, we are able to hypothesize which crisis management direction the EU and its institutions would take. Against this conceptual background, our analysis proceeds with the assessment of EU actors’ responses to the crisis by looking at their disposal of instruments and procedures (section “The EU’s Institutional Responses and Crisis Management”). At the same time, we look into how the theoretical framework helps us understand and explain such responses against the conventional wisdom of integration and democracy theories. Last but not least, we attempt to situate this crisis by relating the findings of the previous section to three possible scenarios—breaking down, muddling through and heading forward—which offer different nuanced expectations about the extent to which, and how, crisis and the different actor responses affect the future of the European Union.

**Toward an Understanding of the EU’s Crisis Response and Management**

*The EU as a Community of Values and the Rise of Defective Democracies*

Over years, European integration has been linked to sectoral policy integration, which according to supranational and liberal intergovernmental theories, was a functional necessity for both Member States and supranational institutions in view of rising European and global interdependence (Schimmelfennig et al. 2015: 771). At the same time, the Union has also emerged as a “community of values” (Closa and Kochenov 2016: 174). Since the Maastricht Treaty on European Union (1992) the EU was anchored on the idea of a political project, which had to respect “the identity of the Member States, whose systems of government are founded on the principles of democracy” (Article F 1 TEU) and which continued to develop a Common Foreign and Security
Policy (CFSP) to internationally “develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms” (Article J.1 TEU). The identity of the political Union was further clarified with regard to future acceding states in the so-called Copenhagen criteria (1993), specifying that entering the Union required new Member States to recognize and live up to the principles of democracy, the rule of law and human rights. Subsequently, the Treaty of Amsterdam (1997) recognized the triad of principles in an amendment of Article F 1 TEU, which read from then on: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Rooted in these principles, now enshrined in Article 2 TEU (Treaty of Lisbon 2007), the European Union is seen as “a polity in its own right” (Eriksen 2009b: 13) and a “normative power” beyond its own territory, often (but not exclusively) inspired by its own constitutional principles when conducting its foreign policy (Manners 2002).

In a two-directional way, “the Union is founded” on values that become the parameter by which to judge Member States, both at the time of their admission into the Union (Article 49(1) TEU) and at the time of their possible sanction or suspension in view of a violation of those values. From early judgments of the European Court of Justice characterizing the then European Community as one based on the rule of law to subsequent references in the EU’s founding treaties, the rule of law was thus progressively recognized as one of the European Union’s constitutive pillars, both internally and externally (Pech 2012). Despite this ambitious promotion and sanctioning mechanisms to protect the values on which the EU order is based, the overall noncompliance of EU Member States with the basic principles and values set out in Article 2 of the Treaty on European Union (TEU) has shook the “very core of the constitutional system” of the EU, presenting it with new existential and acute challenges to its very foundation (Closa and Kochenov 2016: 1; Kochenov et al. 2016; Magen 2016; Pech and Schepple 2017).

Although coined decades ago, the term “illiberal democracy” (Zakaria 1997) has gained traction in the past years and the EU presents no exception to the malaise of an emerging “illiberal consensus” (Krastev 2018; see also Mounk 2018), as several of its Member States arguably participate in a broader assault on democratic institutions, curtailing judicial independence, upsetting checks and balances, cracking down on civil society, and tampering with electoral systems in view of consolidating the power of ruling parties (Kelemen and Orenstein 2016; Magen 2016; Polyakova et al. 2019; Plattner 2019).

Often linked to the rise of populism at large, illiberal tendencies are however not about establishing alternative forms of democracy, they aim at overcoming liberal democracy itself (Müller 2017). In this regard, “illiberal democracy” has been denounced as a misleading term, pointing to the impossibility of a merger between illiberal values and democracy (Müller 2017: 55–57). In the same vein, “authoritative populism” has been recently suggested as an appropriate
term to understand the underlying developments and movements that eventually aim to overcome liberal democracies (Norris and Inglehart 2019). Once hit by authoritative populism and its consequences, democracies are likely to turn into defective democracies, in which liberal dimensions of the democratic order are overcome and come to be “in need for serious repair” (Müller 2017: 58). More specifically, by means of rule of law backsliding, democratically elected governments and legislative majorities work toward a hollowing out of key mechanisms and instruments by which democratic leaders and governments could originally be held accountable in liberal democracies (Levitsky and Ziblatt 2018). By changing constitutions and legal acts through legislative majorities, the demise of democratic checks and balances regularly includes overcoming judicial oversight mechanisms and the impartiality of (constitutional) courts. These changes are deemed democratic, their consequences are clearly not. What emerges is a democratic and rule of law crisis in single European countries, which can spin a wider crisis of regional organizations, such as the EU, the Council of Europe or NATO.

In Hungary, since the Hungarian Civic Alliance (Fidesz) party came to power in 2010, what has become known as the blueprint of consolidation of illiberal democracies has unfolded in the country (Pech and Scheppele 2017). Enjoying a parliamentary majority since then, the Fidesz government has continuously committed sustained assaults against vital components and principles of liberal democracies, including the country’s media, judiciary, civil society, and many others (Sedelmeier 2014b). While the government’s systematic capture of the state has been achieved through legal and constitutional manipulation after a democratic election, Hungary has transformed into an illiberal constitutional order, proudly acknowledged by Prime Minister Viktor Orbán, which does in no way resemble the liberal democratic values and principles of the European Union (Pech and Scheppele 2017; Scheppele 2011).

Poland has also followed suit in this path of illiberalism, pursuing Hungary’s already tested recipe of constitutional capture. Since the election of candidates from the Law and Justice Party (PiS) to the presidency and majority of parliamentary seats in Poland, “PiS has embarked on a course of change that places it solidly in the illiberal camp” (Puddington 2017: 38). As in Hungary, PiS has targeted the freedom and pluralism of the media, clamped down on civil society, and sought to increase its political control over key institutions of Poland’s judiciary, ultimately undermining the functioning of liberal democracy and arguably turning Poland into a defective democracy (Freedom House 2018; Szuleka 2018). However, as opposed to Hungary’s consolidation of an illiberal constitutional order through the manipulation of legal means, the developments in Poland have been essentially characterized as a coup d'état being in blatant violation of the country’s existing constitution (Sadurski and Steinbeis 2016).
Illiberalism, however, is not a phenomenon confined to Hungary and Poland. Illiberal tendencies have also been observed in other European countries, including the Slovak Republic and Romania. Such illiberal tendencies and the actual appearance of defective democracies on the map pose a serious challenge for the EU, creating fragilities in various dimensions and fields of EU policies, threatening the stability of the European normative consensus and challenging the existence and viability of the political order. Such a crisis of democracy and rule of law that emerges in the EU Member States prompts the EU to respond collectively, using its own crisis “toolbox” (Closa and Kochenov 2016). To this end, the EU can compel Member States to respect its foundational values laid upon Article 2 TEU, most directly through Article 7 TEU, the so-called “nuclear option.”

The mechanism of Article 7 TEU has both a preventive and a coercive arm and foresees the participation of three main EU actors, the European Commission, the European Parliament (EP), and the Council (Kochenov 2017). Under the preventive arm (Article 7(1) TEU), the Commission, the EP or 1/3 of the Member States, can trigger a process whereby the Council, acting with a majority of 4/5 and the EP’s consent, may agree that there is “a clear risk of a serious breach by a Member State of the values referred to in Article 2” after hearing the Member State in question and possibly addressing recommendations to it. However, according to Article 7(2)-(4) TEU, only 1/3 of the Member States or the Commission can trigger the coercive arm of Article 7 TEU. After being triggered, the Council, acting by unanimity and with the EP’s consent, can determine a serious and persistent breach of the rule of law after the Member State in question submits its observations. If such a breach is in fact identified, the Council, acting by qualified majority, can sanction the Member State by suspending some of its rights, such as the right to vote in the Council (Article 7(3) TEU). Overall, commentators have been rather pessimistic with regard to how effective Article 7 TEU really is, concluding that it forms a rather “insufficient legal basis for a successful intervention” (Closa and Kochenov 2016: 179).

**Conceptualizing the European Union’s Crisis Response and Management**

How then and why does the EU respond to the emergence and consolidation of illiberal tendencies in Member States within the EU? The three scenarios *breaking down*, *muddling through*, and *heading forward* (Riddervold et al. 2020) provide us with an opportunity to think about how, alongside a wider theoretical discussion, we would expect the EU to react to an unfolding democracy and rule of law crisis. Paired with theoretical insights of various theories, such as neofunctionalist, liberal intergovernmental, new intergovernmental, post-functional theories as well as normative democratic theory, these scenarios help us conceptualize the EU’s crisis response and management regarding the looming democracy and rule of law crisis in Europe.
According to Riddervold et al. (2020), breaking down is one of the scenarios that allow us to make sense of how the EU treats or—rather—is treated by crisis. Heavily informed by realist, intergovernmental and liberal intergovernmental theories, Member States come to the fore in this scenario as they are (a) not able to agree on common interests or instruments to tackle the crisis with, and (b) challenging the EU project due to a fragmentation of their interests (unless they see a common need to further proceed with integration) (Riddervold et al. 2020). More specifically, we would expect Member States to rethink and re-shift their devotion to the common project, openly starting to think about alternative options, including dissolving treaty obligations, or incurring in treaty-changes and differentiated forms of integration.

However, according to some observers, intergovernmental theories would not necessarily fall into the breakdown scenario and project an overall negative crisis outlook (Schimmelfennig 2017: 320; this volume). Accordingly, we would rather expect that the ultimate “crisis outcome depends on the intergovernmental constellation of integration preferences and bargaining power” (Schimmelfennig 2017: 317). In the case of a looming democracy and rule of law crisis, we would, for example, expect Member States to carefully weigh their interests in maintaining ‘good relations’ on the European level and the negative impact that an ‘intervention’ in domestic matters of drifting Member States could have. In terms of the EU actors involved and measures taken, we expect a preference for intergovernmental collective actors, such as the Council, and measures that represent the lowest common denominator rather than far-reaching sanctions.

In the case of a democracy and rule of law crisis, illiberal tendencies are situated in the European Union (Pech and Scheppele 2017) and are likely to unfold as ‘burning down the house’ from within. Post-functionalist theories tend to share this pessimistic outlook and the negative expectations regarding European crises (Schimmelfennig 2017). Championed by Hooghe and Marks (2009; see also this volume), post-functionalist theory sees domestic Euroscepticism as an endogenous crisis origin. Rooted in the idea of an overall politicization of European integration (De Wilde 2011), Hooghe and Marks see a looming Euroscepticism within Member States which limits governments’ room for manoeuvre to take (necessary) integration steps. In other words, Hooghe and Marks expect a mismatch of functionally efficient and politically feasible solutions. In view of democracy and rule of law crises, we would accordingly expect the recognition of the need for appropriate responses, but may not see this materialize into practice due to the ongoing party competition at the national level (heavily affected by Euroscepticism) and an overall “constraining dissensus” in European integration (Webber 2019: 33). However, EU actors may prevent a “break down” and eventually fight the fire, if they prove to be autonomous and insulated enough from such downward spiral of integration (Hooghe and Marks 2019; Schimmelfennig 2017).
The latter argument is shared by neo-functionalists and supranationalists who arguably have their “feet” in two scenarios—*muddling through* and *heading forward*. By and large, neofunctionalist and supranationalists argue that every crisis of European integration can eventually be turned into an opportunity or will, at least, not necessarily have a negative effect (Webber 2019: 30). Their optimism is rooted in the institutionalization of supranational and autonomous actors, such as the European Commission or the Court of Justice of the European Union, the sheer endless stream of transnational interactions that recreates demands for supranational integration and, finally, path-dependency of institutional responses (Schimmelfennig 2017; Webber 2019). In other words, if the European Commission and the Court prove to be autonomous institutions, engines, and safeguards of integration, then democracy and rule of law crises can find effective responses at the European level, allowing the EU to *head forward* with integration. However, crisis response may rather follow a piecemeal approach, reactive rather than proactive in nature, with the consequence that the crisis is rather dealt with as a *muddling through* exercise: “Rather than breaking up, crisis may reinforce well-known organizational solutions and governing arrangements and thus have few profound effects on EU integration and governance. Institutional approaches suggest that governance systems and governance practices under stress may revert to or reinforce pre-existing organizational traditions, practices and formats, reinforcing institutional path-dependencies” (Riddervold et al. 2020). In the democracy and rule of law crisis context, such a path-dependency argument would be plausible if actors were to hit the beaten paths of previous examples and institutionalized responses. The case of Austria, for instance, would provide a useful example to which actors on the European level could revert to when activating the Article 7 mechanism.

According to Jones et al. (2017), however, *muddling through* may not occur due to path-dependencies but rather due to the incomplete bargaining solution of Member States following a crisis. “Failing forward” is described as the way how Member States try, but ultimately fail, to find lasting solutions to looming crises (ibid.). The reason is their inability to provide crisis responses above the lowest common denominator. Any response remains incomplete and necessarily leads to a range of new crises (Jones et al. 2017). In the context of the democracy and rule of law crisis such a “falling forward” may be recognizable in the Council’s and Commission’s attempt to look for alternative and incomplete measures next to the activation of Article 7 TEU, which would be rather deliberative in nature, aiming at persuading drifting governments of returning to the adherence of EU fundamental principles.

Such attempts, however, appear in a different light, if we take on board the ideas of new intergovernmentalism (Bickerton et al. 2015). Rather than *breaking down* and *muddling through*, they would see intergovernmentalism in the light of *heading forward*. For new intergovernmentalism, crisis is predominantly taken on by intergovernmental institutions, such as the European Council and the Council and so-called de novo agencies (Bickerton et al.
Not the European Commission, but intergovernmental actors are able to find solutions to crisis due to their ability to seek consensus and deliberate among Member States (Bickerton et al. 2015: 704). Interestingly in the context of the democracy and rule of law crisis the Council has indeed tried to play a key role in dealing with rule of law backsliding in Poland and Hungary, especially through its newly established rule of law dialogue, which tries to engage drifting countries in a deliberation about how to revert their backsliding tendencies.

Last but not least, normative democratic theorizing of the European Union, will give us clues how EU actors react or ought to react in democracy and rule of law crises by heading forward. According to normative democratic theory (Eriksen 2009a, b), the European Union is seen as “a polity in its own right,” based on the principles of democracy and the rule of law (Eriksen 2009b). Accordingly, any attempt to overcome this order calls for EU responses in order to avoid a deeper European identity and perception crisis. Deliberative democratic theory would argue that appropriate EU responses have to try to persuade governments and citizens by reasonable arguments and through an engaged public discourse. This could, for example, take place in a discursive, transparent, and free parliamentary environment like that of the EP or national parliaments. At the same time, given the matter at stake, responses may have to be less deliberative, but rather—following Loewenstein (1937)—militant in nature, sanctioning noncompliant actors, and reducing their rights in an effort to defend democracy overall. In other words, while normative democracy theorists may be divided over how to respond, their overall assessment is that the EU must go ahead and prevent the crisis from spreading and, ultimately, undermining the order of the EU.

The EU’s Institutional Responses and Crisis Management

The following section will trace back and analyze the responses of four selected EU actors—Commission, Parliament, Council, and the Court of Justice of the European Union—to the establishment of defective democracies within the EU by referring to the theories introduced above. As demonstrated in the following, while some theories would place hope on EU actors’ actions in the face of a crisis, more often than not it is the more skeptical intergovernmental and post-functional approaches that best describe their responses.

From Safeguarding Democracy to Politicization: Mixed Responses by the European Commission and European Parliament

As previously mentioned, according to both normative as well as neofunctionalist and supranationalist theorizing of the European Union and its integration processes, EU actors (supranational or not) would be expected to respond to
crises in such a way that would defend the Union’s democratic order, functioning as engines that safeguard its integration. While, overall, this might be an overly optimistic view, both the European Commission and the European Parliament exhibited, in their initial reactions, the potential to do so.

The Commission, undoubtedly one of the most engaged actors in relation to rule of law breaches and the establishment of defective democracies, launched infringement procedures with rule of law significance against Hungary and Poland, created and activated its “Framework to Strengthen the Rule of Law” and, finally, ultimately activated the preventive stage of Article 7 TEU against Poland (European Commission 2019). Confronted with the unfolding events threatening the rule of law in its Member States, the European Commission soon realized the shortcomings of the procedure laid out in Article 7 TEU: the provisions were seen as a last-resort option and subject to high decision-making thresholds which revealed to be challenging to achieve (Kochenov and Pech 2016). Faced with the necessity of an additional instrument to safeguard the integrity of the European Union, the Commission adopted the “Rule of Law Framework” in 2014, a tool meant to enable it to enter into dialogue with the concerned Member State so as to avoid the escalation of emerging systemic threats to the rule of law which could, eventually, result in the triggering of Article 7 TEU (European Commission, n.d.). Rather than sanctioning, the mechanism tries to solve emerging crises by engaging the respective Member States through the issuing of opinions and recommendations regarding possible measures to be taken to resolve the situation (Kochenov and Pech 2016). As neofunctionalism and supranationalism would have expected, the European Commission emerged as a forceful crisis manager handling the rise of defective democracies, as also visible in its ultimate decision to trigger Article 7(1) in December 2017.

In line with this behavior, the European Parliament, too, has often been characterized as the most active and vocal institution in terms of engaging with rule of law breaches in Member States and calling for action by other actors since the problem was first identified back in 2012 (European Parliament 2015; Pech and Scheppele 2017; Sargentini and Dimitrovs 2016; Wilms 2017). One of the first systematic analyses of the breakdown of the rule of law in Hungary, came from the Tavares Report adopted in the EP in July 2013. The report harshly criticized the state of fundamental rights in Hungary, recommending the setting up of an independent monitoring mechanism, a “Copenhagen Commission,” to follow the development of fundamental rights in the country (Committee on Civil Liberties, Justice and Home Affairs 2013). Moreover, it called on the Council to assess the necessity, or not, of resorting to Article 7(1) TEU in case of Hungary’s noncompliance with the requirements of Article 2 TEU. In a recent resolution on the ongoing Article 7 procedures (this time also including Poland), the European Parliament “expresses its regret that the hearings have not yet resulted in any significant progress [...]” (European Parliament 2020). Consequently, along the lines of
supranational and normative democratic accounts, expectations that the European Parliament would take an active role in the crisis were confirmed, even if these actions by the EP did not see any concrete follow-up by the Commission or Council (Pech and Scheppele 2017).

Despite what might seem a promising and proactive reaction by both the European Parliament and the Commission, a closer look into further developments as the rise of defective democracies ensued reveals a less positive picture, rather in line with post-functionalist theorizing and insights from comparative politics. While Poland was subjected to the Commission’s three tools for dealing with rule of law challenges, Hungary was only subjected to infringement procedures, a differentiated treatment not expected on democratic normative grounds. It has been suggested that, instead, a partisan explanation could help to understand this: whereas in the case of Hungary the Commission’s top leadership enjoys a cosiness with Victor Orbán and also a certain dependence on the EPP-majority of the European Parliament, Poland’s PiS belongs to the smaller Eurosceptic ECR group, which enjoys no backing by the EPP (Kelemen 2017). While part of the Commission’s unsuccessful response could be attributed to the inherent structural problems of Article 7 (once triggered against two Member States with similar normative agendas it could lead to ironically empowering those targeted by it to veto its further mechanisms), approaches including post-functionalism and “failing forward” help us understand the limited room for action and capacity in times of politicization, polarization, and contestation. In addition to the seeming differential treatment between both countries, the Commission has also been continuously criticized for an overall lack of decisive action (Mycielski and Pech 2020; Pech et al. 2020), particularly since the election of its new president, Ursula von der Leyen. Having been elected as the result of the failure of the lead-candidate (Spitzenkandidaten) system, which clearly illustrated the divisiveness created by ongoing rule of law challenges (see below), Von der Leyen enjoys a narrow support by the European Parliament that was mustered with the support of backsliding Member States like Poland, among others (Crum 2020). The president’s dependence on such fragile coalitional politics, the lack of a Commissioner specifically entrusted with rule of law issues and the Commission’s at best tacit reaction to the further destruction of the rule of law during the COVID-19 pandemic in Hungary all raise serious questions about its commitment to responding to the establishment of defective democracies decisively.

In the case of the European Parliament, too, post-functionalist theory helps us to understand the EU as embedded in contestation and Euroscepticism (Hooghe and Marks 2009). By 2015 the partisan dimension in the EP came fully to the fore and undermined a consistent response which we would otherwise have expected from an actor that has often been described as a frontrunner of promoting human rights and the rule of law (Rippoll-Servent 2018). The EPP group, time and again, embraced Fidesz, rather than sanctioning or excluding it by voting openly against any measures in light of rule
of law backsliding in Hungary and preventing the EP from launching the Rule of Law Framework against Hungary (Kelemen 2017; Newsome and Stenberg, this volume). In the case of Poland’s illiberal turn, however, the EP, particularly the EPP, as other EU actors, has had less difficulty in demanding decisive action as visible in the overwhelming support of the 2016 resolution on the developments in Poland (Gostyńska-Jakubowska 2016; Halmai 2018). Once more, partisan politics can also explain why Poland was the “easier case” to sanction as the governmental party PiS belongs to the small ECR group, thus making it an easier target for outspoken criticism (Kelemen 2017). It is noteworthy that the European Parliament eventually mustered the necessary supermajority to trigger Article 7(1) against Hungary faced with the country’s worsening situation (European Parliament 2017), as normative democratic theory would have expected. Yet the lack of unity of the EPP’s vote, the only partial expulsion of Fidesz from the group (Kelemen 2020)—even in light of Hungary’s passage of the Enabling Act during the COVID-19 pandemic, enabling the Prime Minister to essentially rule by decree and suspend elections—as well as the overall delay in triggering Article 7 find resonance in post-functionalist theory. These theories would expect such problems, given the reduced and limited room for pro-integration manoeuvres by traditional parties in times of Euroscepticism and European contestation.

These phenomena have been further intensified with the 2019 European elections, which saw the issue of the rule of law take center stage in the failure of the lead-candidate system. As De Wilde (2020) argues, both Weber’s tacit support for Hungary’s backsliding regime and Timmermans’ vocal criticism thereof, made the two candidacies unacceptable to a politicized European Parliament, paving the way for Von der Leyen’s presidency, which represents, to a certain extent, a victory for Hungary and Poland—and the preliminary end of the lead-candidate system (Raube 2020).

**Expectations and Reality Aligned: The Responses of the Council and Court of Justice of the EU**

When tracing back and analyzing the responses of two further EU actors, the Council and the Court of Justice of the EU (CJEU), to the rise of defective democracies theories of integration seem to provide quite an accurate picture with regard to expected actions.

Heavily informed by intergovernmental theories, expectations regarding the Council mirror the challenges faced by Member States when reaching agreements on common interests and instruments to deal with crises. Indeed, the role of governments and the Council, or rather its inaction, in relation to the protection of the rule of law and the EU’s values and principles has been widely criticized (Hegedus 2019; Kochenov et al. 2016; Pech and Scheppele 2017). While governments can play a role beyond Article 7, namely by bringing another, noncompliant, Member State to the European Court of Justice for violating an obligation under the Treaties (Article 259 TFEU) this
option has hardly ever been resorted to (Wilms 2017). Instead, faced with the consolidation of defective democracies and growing illiberal tendencies across the EU, the Council remained cautious in its approach, barely placing the issue on its agenda, and focusing mainly on rhetorical criticism through a dialogue mechanism recently developed to promote the rule of law (Kochenov et al. 2016). The lead up to the Council summit in February 2020 is a further clear indication of the divisiveness reigning in the Council in matters relating to the rule of law. As backed by the Commission and European Parliament, the linking of value compliance to the new EU budget, which has not yet been approved, was watered down even before the summit took place in order to make an agreement more plausible. According to reports, Council President Charles Michel presented a different proposal, which includes a qualified majority threshold in the Council in order to approve any decision by the Commission to cut funding in case of breach of values (Politico2020).

In line with new intergovernmental theorizing, emphasizing the consensus reaching essence of the Council (Bickerton et al. 2015), the latter has additionally focused its efforts on developing a mechanism with no political or legal consequences, exhibiting a careful approach rather than a strong commitment from governments to solve the crisis. While dialogue can be merited for its engaging function, arguably important in keeping the deviating Member States close to the chest, critics would argue that these deliberation efforts did not generate any effect, no revision of problematic domestic measures or—in the best case—“upslding” in some of the defect cases. Instead, the Council may even be seen as “falling forward,” trying to find a solution, like the Commission, but trapped in a situation where only lowest common denominator options find support.

Despite the overall inactivity of the Council, a closer look into the Court of Justice of the EU reveals its potential role in upholding the integration project and order of the European Union, as anticipated by supranational theories. Given the genesis of the EU as a community of values, one whose integrity depends on its Member States’ and institutions’ respect for these, it comes as no surprise that the CJEU has been observing the rise of defective democracies with great concern (Scheppele 2018). In light of the developments in Poland and Hungary, both the Commission and national courts have made use of the possibility of referring cases to the Court of Justice of the EU. While the first infringement actions launched by the Commission against Hungary illustrated the limitations of EU treaties and the CJEU in protecting and enforcing the EU’s fundamental values (Kovács and Scheppele 2018), recent developments have led to a potential breakthrough in the Court’s capacity to enforce the rule of law, unlike post-functional and intergovernmental theories would suppose. In its landmark-ruling “Commission v Poland,” the CJEU declared, for the first time, the incompatibility of national measures on the ground that they violated EU values, in particular Article 19 TEU on the judicial independence of national courts (see Case C-619/18 of June 2019). In doing so, the
court, acting as an autonomous body beyond politics and Member State interests (Webber 2019), took yet another important step in operationalizing the rule of law through Article 19.² Given the problems with the highly political Article 7 procedure and the difficulties faced by other EU actors with regard to responding to the rise of defective democracies, the CJEU’s role, as underlined by supranational integration theories, is likely to be quintessential in managing the ongoing crisis and protecting the European project. Its rulings, including subsequent judgments on further cases brought against Poland by the Commission (see Case C-192/18 of November 2019), have not only opened up strong avenues for enforcing and protecting values in Member States, they have also arguably emboldened the Commission in its quest to pursue solutions to the establishment of defective democracies, confirming the rationale and arguments it presents in the various launched infringement procedures. While such a supranational judicial power may put in question the Union’s ability to respond to the democracy and rule of law crisis politically, the CJEU may at the same time as a federal constitutional court of the European Union and by means of its judicial review and decision-making—not the least because of its difference with other European institutions and decision-making processes (see Landfried 2019: 4)—increase “the overall rationality of democratic governance” in the European Union (ibid.).

Concluding Remarks: The Future of European Integration and Defective Democracies

Theories of European integration, as we argued above, have developed different arguments on how they would expect European Union actors to react in times of crisis (see above section “Conceptualizing the European Union’s Crisis Response and Management”). At the same time, we argued that the different theories speak to the possible future scenarios developed by Riddervold et al. (2020) in multiple ways. Throughout the assessment of the European Union actors’ responses to lingering crises, we showed that various theories can be used to explain their actions. This, we argue, has implications on what to expect in terms of the applicability of future scenarios.

Overall, we see that EU actors have great difficulties in responding to the democracy and rule of law crisis which currently affects several of its Member States. The crises in Poland and Hungary show that the EU is not a state-like order with vested powers in certain actors, which would imply the ability to intervene to safeguard its constitutional order against inconsistent practice. Undoubtedly, the EU’s lack of response to increased executive powers in Hungary, most recently in response to the Corona crisis, as well as Poland’s continuously problematic judicial reforms seems to suggest that the EU is breaking down in its defense of democratic values. And yet, while the EU’s

²See Gremmelprez (2019) and Rosas (2019) for a more complete overview of the case law leading up to this decision.
capacity to act as a collective unit might be undermined by this crisis, we are not yet witnessing a complete Union-wide breakdown due to the rise of defective democracies. Rather, there are ongoing processes in the EU and by specific EU actors, which focus on these countries’ breaches of the EU’s core and treaty-based principles. These are indeed slow and not always efficient processes, over time suggesting the appropriateness of framing the EU’s response in line with the *muddling through* scenario. In this sense, the EU and individual EU actors search for ways and instruments that allow it to keep relations with the Member States in crisis, while—at the same time—trying to establish red lines of what can normatively no longer be accepted. This approach implies, nonetheless, that the EU is losing precious time in the fight against defective democracies and that its effects are likely to have an impact on how the EU operates internally and is perceived externally. The EU can no longer that easily persuade third countries on the principles of rule of law and democracy, as long as it is not able to keep its own house in order (Raube et al. 2016; Pech 2016).

At the same time, there is still room to believe that some actors within the European Union are invested in *heading forward*, particularly as evident in the Court of Justice’s decisive action. Yet, it may be questionable if affected Member States would accept and implement its rulings, as evidenced by the Polish government’s open questioning of the authority of the Court of Justice of the EU. At the same time, the Court needs to be careful in its interpretative approach, e.g. in the Polish case, as it will possibly not want to claim that Member States judicial systems are no longer representing a rule of law system, as this would certainly undermine the implementation of European law overall.

As much as the *muddling through* scenario might lend itself to reflecting on the different EU actors’ responses to the crisis in Poland and Hungary, returning to the *breaking down* scenario is important for some final reflections. As the latest developments as well as the EU’s current handling of the rule of law challenges exacerbated by the COVID-19 pandemic clearly show, the democratic and rule of law crisis is the “other democratic deficit” of the Union and it rests with the Member States (Kelemen 2017). In other words, if the European Union is no longer able to treat the Member States equally, as their democratic and rule of law institutions differ fundamentally, then a more differentiated integration approach may become an option. This may be the case, if the Union decides not to cooperate and finance respective states in the long run, or to integrate further without them. This *break down* in scope of the old order would ultimately lead to a problem of nonengagement. While the European integration project has been about bringing together in diversity, such a scenario would clearly set the limits of what the European Union would be able to accept as diversity; it would also raise the question of how it will be possible to reintegrate defecting democracies again under the umbrella of the EU. In any case, so far, the functionalist logic seems to prevail: Despite the democracy and rule of law crisis the European Union keeps hanging on to
its defective Member States, especially because of the deep economic interdependencies that have pushed integration and that have further grown because of it.

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