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Corresponding Author	Family Name	**Krunke**
	Particle	
	Given Name	**Helle**
	Suffix	
	Division	Centre for European and Comparative Legal Studies
	Organization/University	University of Copenhagen
	Address	Copenhagen, Denmark
	Email	helle.krunke@jur.ku.dk
Author	Family Name	**Tornøe**
	Particle	
	Given Name	**William Alexander**
	Suffix	
	Division	
	Organization/University	University of Copenhagen
	Address	Copenhagen, Denmark
Author	Family Name	**Wegener**
	Particle	
	Given Name	**Caroline Egestad**
	Suffix	
	Division	
	Organization/University	University of Copenhagen
	Address	Copenhagen, Denmark
	Email	caew@danskerhverv.dk
Abstract	This chapter has two purposes: first, to provide an overview of the effects of populism on the EU legal system, and to make the argument that the EU legal responses to populism may contribute to crystallising EU constitutional identity. Looking back at the history of the EU, we find a number of events, which are linked directly or indirectly to a crystallisation of EU values. One might call them "constituting moments" in defining an EU identity and maybe even an EU constitutional identity. The chapter argues that the EU's responses to the rule of law crisis form part of this evolution. The second purpose of this chapter is to turn the picture around and ask which effect the EU responses have had on populism, using Poland as a case study.	

The "EU Populist Crisis": The Effect of Populism on the EU Legal Order and Vice Versa: Populism, EU Responses and EU Constitutional Identity

Helle Krunke, William Alexander Tornøe, and Caroline Egestad Wegener

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H. Krunke (✉)
Centre for European and Comparative Legal Studies, University of Copenhagen, Copenhagen, Denmark
e-mail: helle.krunke@jur.ku.dk

W. A. Tornøe • C. E. Wegener
University of Copenhagen, Copenhagen, Denmark
e-mail: caew@danskerhverv.dk

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1 Introduction, Concepts and Methods

The EU has experienced many crises during the past 15 years including the "populist crisis" or the "rule of law crisis", as it is often referred to. However, no matter what the crisis is called, it seems to go beyond the scope of the EU legal principle of rule of law. In this chapter, we explore the interaction between populism and the EU legal order both ways. We ask how populism has affected the general features of the EU legal system, and how the EU responses to populism have affected populism using Poland as a case study. To answer these questions, we study empirics in the form of EU's responses to populism in Member States and in particular in Poland, general changes in the EU legal system linked to these responses, and actions taken by Poland as a response to the actions of the EU. In particular, the chapter focuses on the possible impact on EU constitutional identity, as this aspect has not been emphasised in legal literature. As a last point, the chapter uses the Polish constitutional crisis as a case study, as it offers a complete overview of all the instruments employed by the EU to fight populism.[1] In order to achieve these goals, the chapter will proceed along the following lines. The first section presents the EU toolbox of responses to populism. The second section analyses the general effects that populism has had on the EU legal order. The third section discusses whether populism has contributed to a crystallisation of EU constitutional identity. In the fourth section, we turn the picture around and ask which effect the EU responses have had on populism using Poland as a case study. The fifth section discusses the presumed effect of the rule of law Mechanism introduced by Regulation 2020/2092. Section 6 concludes.

Before embarking on this task, it is necessary to stipulate our working definition of populism. Defining populism is indeed an unforgiving task as it is an elusive concept. Unlike the major ideologies of socialism or liberalism, there is no "main work" defining the framework of populism as opposed to "The Capital" by Marx or the works of Locke or Smith. Instead, populism should be defined by the actions and functions of regimes being characterised as populist. When observing populism, several characteristics emerge.

Initially, populism is characterised by claiming to represent one true and homogenous "people" (the people or real people) often embodied in

[1] On the Polish case of "democratic backsliding", see for instance Koncewicz, *The Politics of Resentment and First Principles in the European Court of Justice*, 457-476.

one charismatic leader. The goal is to implement the people's will and in doing so not being limited or governed by anything but this same will. The people are positioned against the elite. Thus, populism seeks to implement what can be described as a rule of the majority, where the people's will is the only true point of orientation and limitation. Thus, politics and political power have no other limitation, for example, protecting minorities. This is of course a moral indicator and not a legal one. Populism is also inherently opposed to systems or institutions, for instance, checks and balances and constitutional guarantees that can slow or hinder the implementation of the people's will (Tornøe and Wegener 2020, 20).

Less commonly, but still frequent, populism is characterised by a general aversion to "outsiders". Populism latches on to pre-existing ideologies, for example, nationalism, as populism does not in itself entail a left- or right-wing policy. Populism may also, due to its "impatience" and antipathy towards hindrances to the implementation of the people's will, pose a danger to democracy and the rule of law. Finally, populism seeks direct forms of government and strives to remove layers between the government and the people.[2]

"EU constitutional identity" is still a contested term. In this article, we will rely on Gerhard van der Schyff's definition, which builds on the individuality of a constitutional order whether national or supranational:

As an analytical device, constitutional identity can aid the study of a particular constitutional order and the comparison of orders by focussing on the individuality of each order. In this way, the constitutional essence of an order is emphasised based on its own experience and account of that experience. Viewed from this angle, every constitutional order possesses an identity that can be protected in various ways, even though an order might not use the term "identity" as such. This applies to all constitutional orders irrespective of whether an order has a codified constitution or not, as constitutional identity is not a synonym for, or limited to, codified constitutions. On this characterisation not only national orders but also a supranational order such as the EU possesses constitutional identity (van der Schyff 2015, 18).

According to Schyff, EU constitutional identity emphasises the EU as a distinct supranational actor in the field of constitutional law (van der Schyff 2015, 16).

[2] Ibid.

2 The EU Toolbox of Responses to Populism
EU Toolbox

2.1 *The EU Framework to Strengthen the Rule of Law*

The EU Framework to Strengthen the Rule of Law (the Framework) was introduced in 2014 by a communication from the Commission.[3] The Framework was revised in 2019.[4] The aim of the Framework is to quickly react to systemic threats against the Rule of Law and maybe even prevent the activation of the Article 7 procedure. Furthermore, the aim of the Framework is to support other tools such as the preliminary rulings and the infringement procedure (Tornøe and Wegener 2020, 35).

The Framework works in three phases of dialogue to create fast suggestions from the Commission to the Member State in order to "fix the problem". In phase one, the Commission identifies the threat and starts the dialogue with the Member State in question. In phase two, the Commission issues one or more recommendations to solve/eliminate the threat of the Rule of Law. The recommendations have deadlines for the Member State to make changes accordingly. Finally, in phase three, the Commission follows up on the situation in the Member State to check if the threat actually has been eliminated.[5] The Framework has only been initiated with one Member State: Poland.[6]

2.2 *Article 7 TEU: Procedure*

Article 7 introduces the possibility to suspend a Member State's rights as a consequence of breaching the values of the EU as listed in Article 2 TEU. Its Sect. 1 allows the Commission, the Parliament or one-third of the Member States to determine if there is a clear risk of a Member State breaching the values, and by a majority of four-fifth of the Council. The Parliament must consent before the Council can take a vote. Section 2 empowers the Council to suspend Member State's rights, that is, voting rights, on a proposal by the Commission or one-third Member States and with the Parliament consenting. A decision by Sect. 2 must be approved

[3] COM (2014) 158 final.
[4] COM (2019) 163 final.
[5] COM (2014) 158 final, 7–8.
[6] COM (2019) 163 final, 3.

unanimously in the Council. The procedure can be activated in instances of breaches of the Member State that do not involve EU law. This underlines the importance of the procedure and the protection of the values (Tornøe and Wegener 2020, 42).

2.3 Preliminary Rulings

According to article 267, the ECJ has the competence to interpret the treaties and to determine the meaning and validity of EU law when so requested by national courts. National courts can have the ECJ rule on preliminary questions when it is necessary for the national case. The aim of the preliminary rulings is to ensure that EU law is interpreted and applied uniformly in all Member States.

2.4 The Infringement Procedure: Article 258-260 TFEU

Article 258 TFEU stipulates that if the Commission considers that a Member State has failed to fulfil one of its obligations deriving from the Treaties the Commission may bring the case before the ECJ. Beforehand the Commission must deliver a reasoned opinion, allowing the Member State to submit its observations. The Commission sets out a deadline for the Member State to comply with the Commission's reasoned opinion. In case of non-compliance, the Commission can submit the case to the Court of Justice. Finally, it is implied by Article 260, paragraph 1, that if the Court of Justice finds that the Member State has failed to fulfil its obligation under the Treaties, it must take the necessary steps to comply with the judgement. In extension paragraph 2 to states that in case of non-compliance with a judgement the Commission can bring the case before the court after having heard the Member State. The Court of Justice can impose on the Member State a lump sum as well as periodic penalty payments.

2.5 Interim Measures: Article 279 TFEU

Article 279 TFEU simply prescribes that the Court of Justice in any case where it deems it necessary may prescribe interim measures. This is further

specified in the Rules of Procedure of the Court of Justice.[7] Some formal criteria must be adhered to, but essentially three material criteria must be met to prescribe interim measures: *fumus boni juris* (the application must not be unfounded), urgency and balancing of interests. It is also possible to apply for interim measures without hearing the opposing party due to the urgency of the case.

Lastly, a comment is due concerning the enforcement of the interim measures. Neither TFEU nor the procedural rules directly prescribe how interim measures can be enforced. However, in the order of 20 November 2017 in case C-441/17 *Białowieża* the Court of Justice found that Article 279 TFEU allows for the Court of justice to impose any interim measure to enforce other interim measures, even if the applicant has only applied for "ordinary measures" the Court of Justice can prescribe such measures "ex officio".

2.6 Rule of Law Mechanism/Conditionality

Following a substantial amount of controversy in the Council, The European Parliament passed Regulation 2020/2092 in December 2020, prescribing the so-called Rule of Law Mechanism. The mechanism envisages compliance with the principle of rule of law as a condition to benefiting from the Union budget (MFF). So far, the Mechanism has not been applied.

The Mechanism allows for the Commission to propose measures to be adopted by the Council implementing economic sanctions until the Member State complies with the principle of rule of law. However, some conditions must be met before measures can be adopted. The quintessential prerequisite that must be met is that the infringement of the principle of rule of law is connected to the Union budget or the financial interests of the Union and that the infringement concerns the actions of any of the Member States' public authorities at any governmental level.

[7] Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65), on 19 July 2016 (OJ L 217, 12.8.2016, p. 69), on 9 April 2019 (OJ L 111, 25.4.2019, p. 73) and on 26 November 2019 (OJ L 316, 6.12.2019, p. 103).

3 Observations on the Effects of Populism on the EU Legal System in General

Based on the discussion of different EU responses to populism in Sect. 3, we may make a number of general observations on the reactions chosen by the EU. First, the EU has responded to populism through a value-based approach with an outset in Article 2, TEU, on fundamental values of the EU focusing on the principle of rule of law. Second, the EU responses to populism combine political/soft law instruments initiated by the political EU institutions as well as judicial instruments applied by the CJEU. Third, existing instruments (Article 7 (TEU), Articles 278 and 279 TFEU)) as well as new instruments such as the new EU Framework to Strengthen the Rule of Law introduced in 2014, amended in 2019, and the new budgetary sanctions introduced in 2020, have been applied/introduced. Fourth, and in relation to the previous points, the EU responses draw on preventive measures as well as responses with sanctions. Fifth, the EU's strategy consists of a combination of the different instruments. The different instruments can be used in combination, and application of one instrument may even strengthen the impact of another.

From these observations on the reactions of the EU to populism, we naturally move on to make some general observations on the impact of populism on the EU legal system. Populism seems to have had a more lasting impact on the EU legal system, which goes beyond the specific and concrete recommendations, opinions and judgements. The populist crisis has created a general awareness in the EU of fundamental EU values. One might say that that the crisis has pushed the EU towards an even more value-based legal system but also a transformation of values to legally enforceable principles. In particular, the reactions to populism have caused a more precise and detailed interpretation and implementation of the EU principle of rule of law. The EU principle of rule of law has become an "umbrella" principle for many other legal principles, which are interpreted as sub-principles of the rule of law principle. We also see a recent move towards a focus on new EU principles as a reaction to populism. Both of these trends reflect that many EU legal principles are challenged by populist actions. We shall return to the two mentioned trends in Sect. 5 where we in connection with these observations ask whether populism has contributed to a crystallisation of EU constitutional identity. Another interesting impact of populism on the EU legal system is that the effectiveness of existing available EU tools and their interplay in cases of violations of

EU Law have been tested. This way, the flaws of the EU legal sanction system have been highlighted. Though, some of these flaws were already anticipated ex. the difficulties of applying Article 7, part 2, it has now become clear at a very concrete level how serious the impact is and that calls for possible reforms of the EU legal system in order to more effectively handle violations of general EU legal principles.[8] One reaction triggered by the populist crisis has been for the EU to develop new preventive and sanctioned responses to violations of the EU principle of rule of law. Finally, populism has driven a closer cooperation between the EU legal system and the European Convention of Human Rights system including the Venice Commission. This is among others reflected when the EU institutions refer to the recognition of legal principles at the European Court of Human Rights and standards, opinions and recommendation by the Council of Europe. They *"provide well-established guidance to promote and uphold the rule of law"*.[9]

4 Crystallising EU Constitutional Identity Through the Challenge of Populism?

While national constitutional identity has its legal basis and a definition in the TEU, Article 4, Part 2, and in the case law of the CJEU, EU constitutional identity is according to some authors still a contested concept. In 2020, Martins for instance wrote that "[c]ontrary to the Member State constitutional identity, which under various denominations has preoccupied doctrine and jurisprudence since the sixties, and has deepened within the last two decades, the notion of a EU constitutional identity has emerged and developed over the last decade as a novel concept still in progress of crystallisation" (Martins 2020, 36). Other authors such as Van der Schyff embraces the concept of EU Constitutional identity and we rely on his definition. The current populist crisis in the EU seems to be a driver of a more well-defined EU constitutional identity. EU's fundamental values and principles are by some scholars viewed as common constitutional principles (Kadelbach 2020, 14, 18) and the crisis has forced the EU to reflect on and refine the interpretation and scope of its values and

[8] Scheppele and Kelemen have put forward a series of more promising legal alternatives for enforcing liberal democratic values (within the existing legal framework) than applying Article 7. See Scheppele and Kelemen, *Defending Democracy in EU Member States*, 413–456.

[9] COM(2020) 580 final.

principles. Some scholars even characterise the fundamental values in Article 2, TEU, as a shared constitutional profile of the EU and its Member States, and as constitutive to the European identity (von Bogdandy and Ioannidis 2014, 59; Kaczorowska 2013, 28; van der Schyff 2015, 18). In light of this, the current development may lead to a crystallisation of EU's constitutional identity.

Looking back at the history of the EU, we find a number of events, which are linked directly or indirectly to a crystallisation of EU values. One might call them "constituting moments" in defining an EU identity and maybe even an EU constitutional identity. The Coal and Steel Community was a reaction to the Second World War and the Cold War, and this way the background of the EU was a wish to avoid war and violations of human dignity in Europe in the future (Martins 2020, 36–37). The Declaration on European Identity based on the Copenhagen Conference in 1973, following Denmark's, the UK's and Ireland's accession to the EC, emphasised human rights as part of European identity. The Maastricht Treaty extended EU powers and parts of literature have stated that this called for a need for legitimating the new EU powers. This was handled among others by the formulation of common EU values in the Treaty (Belov 2017; Faraguna 2017, 1619). With the Nice Treaty, Article 7, TEU, is revised. The context is the East enlargement, and Austria's right-wing government (1999), which caused sanctions from 14 MS's (Halmai 2018, 11; Sadurski 2010, 394). EU fundamental values were emphasised in the following Treaty on a Constitution for Europe. The Kadi judgement[10] on fundamental rights is said to be the CJEU's first contribution to establishing an EU constitutional identity (Martins 2020, 36). This takes place one year after the Lisbon Treaty was signed (after the failed Treaty on a Constitution for Europe) and one year before the Lisbon Treaty stepped into force, which also meant that the EU Charter on Fundamental Rights changed its status from political to legal. Finally, the "Rule of law crisis" has triggered a crystallisation of EU's values and principles both at the political institutions and at the CJEU, especially as regards the EU principle of rule of law but not only.

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We shall emphasise two observations as regards the process of crystallisation of EU values through the "rule of law crisis". First, the rule of law principle in Article 2, TEU, is being defined as an "umbrella principle", which covers many sub-principles. This development is summarised very

[10] Joined cases C-402/05 P and C-415/05 P.

well in the Commissions description of Article 2, TEU, when the "Rule of Law Report Mechanism" was launched

> **The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law**. These principles have been **recognised by the European Court of Justice—with recent case law of particular importance**—and the European Court of Human Rights. In addition, the Council of Europe has developed standards and issued opinions and recommendations that provide well-established guidance to promote and uphold the rule of law. (bold inserted by authors).[11]

As part of this process, values are transformed into enforceable principles.

A second important observation is that the EU starts to crystallise other values in Article 2, TEU. The Commission has expressed and summarised it the following way

> "**The European Rule of Law Mechanism is one element of a broader endeavour at the EU level to strengthen the values of democracy, equality, and respect for human rights**. It will be **complemented by a set of upcoming initiatives […]** to **promote a society in which pluralism, non-discrimination, justice, solidarity and equality prevail**."[12] (Bold inserted by authors)

This way, the challenge of populism has already contributed to a crystallisation of EU's fundamental values and principles—by some scholars viewed as common constitutional principles, a shared constitutional profile of the EU and its Member States, and as constitutive to the European identity (von Bogdandy and Ioannidis 2014, 59; Kaczorowska 2013, 28; Lavelle 2019, 35; van der Schyff 2015, 13)—especially in the field of rule of law, and there seems to be a potential for a continuation of this process bringing in other fundamental EU values including democracy and

[11] COM(2020) 580 final.
[12] Ibid.

fundamental rights. The latter has already been included as part of EU constitutional identity by the CJEU in 2008.

In light of this, it seems plausible to claim that the "EU rule of law crisis" has emphasised the EU as a distinct supranational actor in the field of constitutional law. It has driven a crystallisation of and a more well-defined EU constitutional identity based on the EU's experiences during the crisis—which can probably also be viewed as a strengthening of the EU (at least from a legal perspective) bearing in mind that this is not a zero-sum game.

5 The Effects of the EU Tools on Populism: The Polish Case

5.1 Methodology Applied: General and Specific Effect

For the sake of evaluating the effects of the application of EU tools on populism in the context of the Polish case, a distinction is made between specific effect and general effect.

Specific effect is understood as whether the applied tool, in a narrow sense, reached its goal. In other words, did the application of the tool force the Member State to bring the infringement to a halt?

General effect is understood as whether the applied tool, in a wider sense, has compelled the Member State to cease its general populist steps harming the rule of law principle

5.2 The Rule of Law Framework and the Activation of Article 7 TEU

The Framework was activated towards Poland by a dialogue in January 2016 and the second phase was concluded with a recommendation on 27 July 2016. The Framework was initiated in lieu of the judicial reforms initiated after the change of government in 2015. Phase two was initiated as the dialogue of phase one seemed ineffectual. The phases of the Framework were finished in the fall of 2017, after a total of three written recommendations from the Commission and answers from the Polish government.

The three recommendations from the Commission were mainly centred around the changes to the Polish Constitutional Court. The Polish

government had changed the rules of process of the court, the majority rules and appointed a new president of the court. The government had also appointed five new judges to the court, three of which conflicted with the constitution. The efficiency of the court and the access to correct constitutional review of new laws were restricted by the changes. Even though Poland made some minor changes to the laws after the recommendations, the big picture was pretty much the same at the end of the process: the Constitutional Court was weakened, and the effectiveness of judicial review of legislation was thus questionable (Tornøe and Wegener 2020).

As the Polish government did not comply with the recommendations of the Commission, the Framework had limited, if any specific effect. As a general effect, the Framework should be capable to trigger a process based on dialogue and cooperation. This does not seem to have been successful either as the Polish government continued their judicial reforms after 2017 as well.

As a consequence, the Commission activated the Article 7 TEU procedure. In its proposal, the Commission repeated its concerns and recommendations from the Framework dialogue and suggested that the Council should determine a clear risk of breach of Article 2 TEU in accordance with Article 7 (1) TEU. The risks regarding the Constitutional Court were now affecting the entire judicial system of Poland. As of today, the Council still has not made a final decision regarding the matter.

As the Council has not made a decision, the activation of Article 7 has had no specific effect on the Rule of Law in Poland. Article 7 (1) only opens the possibility to determine a clear risk of breach of the values of the EU. It is therefore questionable if a final decision from the Council will trigger a specific effect. A decision might be able to create a general effect because of a possible political pressure on Poland but have not occurred yet (Tornøe and Wegener 2020, 44–45).

The Framework and Article 7 procedure present many similarities. Both reactions are quickly initiated which is a pro—but at the same time, the reactions do not have a time limit, which is a con. Finally, it is a positive element that these instruments were successful at least in creating a dialogue with the Member State, and they should theoretically be able to create the best general effect on the Rule of Law as this is one of their aims (Tornøe and Wegener 2020, 86).

5.3 Preliminary Rulings Regarding Poland

There have been a number of preliminary rulings regarding Polish law either from Polish courts or from other Member States' courts in the period of the Polish judicial reforms (2015 until today). This Article has examined two cases: C-216/18 Minister of Justice and Equality and C-585/18 A.K.

(a) C-216/18—Minister of Justice and Equality

This case originated in the Irish High Court. The High Court was asking the ECJ for an interpretation of the rules on the European arrest warrant and if the rules implied an obligation for the Irish court to examine the independence of the courts in Poland and the security of the defendant's rights to a fair trial. The ECJ answered that the Irish court could not assume there was a clear risk of breach when a proposal for decision regarding Article 7 (1) was only proposed but not passed by the Council. The Irish court therefore had to assess the risk for an infringement of the defendant's rights in the specific case. In this specific case, the Irish court found that the risk of the defendant's rights being breached was not strong enough to prevent the Irish court from effectuating the arrest warrant.

(b) 5.3.2. C-585/18—A.K.

The A.K. case at the ECJ was a ruling on the combined cases C-585/18, C-624/18 and C-625/18. All the national cases originated in two chambers of the Polish Supreme Court. All cases concerned the early retirement of Supreme Court judges and the denial to prolong one judge's term in office. The Polish court was asking the ECJ if the new disciplinary chamber of the Polish Supreme Court was in accordance with Article 2 and 19 (1) TEU, Article 267 (3) TFEU and Article 47 of the EU Charter of Fundamental Rights and if not, if the other chambers of the Supreme Court should set aside rules of competence of the disciplinary chamber. The ECJ defined the principle of independent courts and judges and left the actual evaluation of the disciplinary chamber to the Polish court. If the Polish court found that the disciplinary chamber did not work in accordance with the principle of independence, then the precedence of EU law would allow the Supreme Court to set the competence of the disciplinary chamber aside and rule in the cases itself.

In both national cases, different chambers of the Polish Supreme Court found that the disciplinary chamber was not an independent court in accordance with EU law. The Polish government and the judges of the disciplinary chamber did not agree and no changes in the organisation of the courts have therefore been made.

The preliminary rulings did not have a specific effect on the Rule of Law in Poland but did have a specific effect in the national cases as the rulings affect the outcome of the national courts' rulings. C-216/18 has had a specific effect in other cases about a European Arrest warrant issued by Poland and C-585/18 has been referenced by the ECJ in infringement rulings regarding the independence of the courts.

On the one hand, it is a pro that the rulings give the ECJ an opportunity to create such binding precedent for interpretation across the EU. On the other hand, it is a con that the EU cannot itself commence the preliminary rulings—they take their origin in cases in the Member States—and the EU or ECJ cannot introduce sanctions if the Member States do not comply with the rulings without commencing an infringement procedure.

5.4 Infringement Proceedings Against Poland

Two infringement proceedings have been concluded and resulted in the Court of Justice ruling that Poland infringed Article 19(1), second subparagraph, by not having insured the independence of the Polish judiciary.[13] Other proceedings concerning the independence of the judiciary are still in progress and therefore cannot form part of this analysis. However, in one of these cases, the court of Justice ordered interim measures to avoid irreparable damage.[14]

In both the settled cases, the retirement age of the judges was lowered, also affecting judges already in office, while simultaneously granting the Polish government the power to extend a judge's term in office two times for up to six years, which otherwise resulted in the retirement of the judges. The Polish authorities were not bound by any specific criteria, and there was no time limit for the processing of application for extension. As

[13] Judgement of 5 November 2019 in Case C-192/18 concerning the independence of the judges in the ordinary courts in Poland, and judgement of 24 June 2019 in case C-619/18 concerning the independence of the judges of the Polish supreme court.

[14] Order of 8 April 2020 in Case C-791/19 R concerning the National Council of the Judiciary's lack of independence affecting the disciplinary chamber in the Supreme Court further affecting the general independence of the Polish Judiciary.

judges remained in office until a decision had been made, the Court of Justice found that the judges were not safe from political pressure emanating from their career's dependence on the extension. However, as interim measures were not prescribed in one case, they will be examined individually.

In the third case, which has not yet been concluded, the Court of Justice has prescribed interim measures. The Commissions claimed that the new disciplinary system endangers the independence of the judiciary as the content of judgements following the amendments could constitute a disciplinary offence. The fact that the new disciplinary chamber in the Supreme Court could not be considered independent also contributed to this. Finally, the Commission argued that Poland had infringed its obligation under Article 267 TFEU as a motion for a preliminary ruling could constitute a disciplinary offence.

(a) Case C-619/18—The Supreme Court

The Court of Justice ruled the specific provisions in the Polish legislation as contrary to EU law. This resulted in the legislator changing these provisions and reinstating the judges who had been retired against their will. Subsequently, no similar provisions were implemented. This is equally supported by the fact that no proceedings concerning the infringement of the judgement were initiated. However, it should not be forgotten that in this case the Court of Justice prescribed interim measures. It is clear from the facts of the case, that the illegal provisions were abolished after the order of the Court of Justice and before the judgement. The interim measures also prevented Poland to continue acting in line with the provisions in question and forced Poland to reinstate the judges of the Supreme Court.

This implies that the infringement proceedings combined with the interim measures had a very concrete or specific effect and that the interim measures allowed to quickly counter the effects of the provisions in question. However, it can be questioned if it had a general effect as no other legislative acts which were challenged in the Article 7-proceedings were abolished.

As a side note, in this case the expedited procedure was granted by the Court of Justice resulting in the case been processed in 14 months.

(b) Case C-192/18—The Ordinary Courts

In this case, the Court of Justice similarly found that the provisions lowering the retirement age and granting the minister of justice the power to extend the term in office of the judges were illegal. Consequently, this meant that the provisions had to be abolished. No subsequent proceedings have been initiated.

The action was brought before the court on 15 March 2018 and the Court of Justice made its ruling on 5 November 2019. Notably, the Commission had not applied for interim measures.

During the proceedings Poland explained that the provisions were modified from 12 April 2018. At first, this seems to imply that Poland complied with the Commission's grievances towards the provisions. However, some sources indicate that the Minister of Justice had retired several judges and since the judgement did not prescribe them to reinstate, it is unclear whether this was the case. Furthermore, even though the provision was amended the changes still allowed for judges' terms of office. It shifted the authority to the National Council of the Judiciary (which has been the subject of several cases)[15] and only changed the considerations to consider when deciding slightly. Lastly, even though it was stated in the judgement that the lack of obligation to provide the motivation for the decision was part of the illegality of the provisions, the new provisions did not change this.

The previous show that the infringement proceeding had a specific effect as it resulted in the illegal provisions' amendment. However, it can be called into question if the goal of the proceedings were achieved to full extent as it is implied that not all judges were reinstated. The proceedings have had a limited general effect as it did not result in any other (positive) changes apart from what the judgement itself prescribed.

(c) 5.4.3 Case C-791/19—The National Council of the Judiciary

The proceedings in the current case have not yet been concluded, why it is only applicable when examining the effect of interim measures.

The Court of justice prescribed interim measures stating that the application of the provisions was to cease, essentially entailing that the disciplinary chamber should abstain from handling cases. However, contrary to case C-619/18, in this case Poland did not comply with the order of interim measures. This undermines the previous assessment of Interim

[15] E.g. C-487/19, C-791/19, and C-204/21.

measures and implies that in this case the response had neither a specific nor general effect.

As a side note, consideration should be given to the fact that in the order of 20 November 2017 in C-441/17 (the Court of Justice found that within the frame of interim measures it was allowed to prescribe penalty payments. In that case, this seemed to have ensured the compliance.

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5.5 The Effect of Infringement Proceedings Before the Court of Justice and Interim Measures

When comparing the different preceding findings, it becomes clear that the infringement procedure has an effect. It has a specific effect resulting in the abolishment of the illegal provisions. However, applying a broader perspective the only limited or no general effect is achieved as the proceedings did not result in Poland amending other provisions damaging the Rule of Law; however, the ruling forms a part of the jurisprudence of the Court of Justice and therefore has some general effect.

Following the examination of case C-619/18, it is implied that there is a higher degree of efficiency when applying interim measures as opposed to when not applied. However, following the examination of C-791/19, it becomes clear that it is not absolute efficiency as Poland did not comply with the order.

A final comment can be made concerning the time scope of the infringement proceedings. Concerning C-619/18, the case was initiated 14 August 2018 and concluded on 24 June 2019. C-192/18 commenced on 29 July 2017 and concluded on 15 November 2019, amounting to more than two years. Case C-791/19 was initiated on 3 April 2019 and has not yet been concluded. All three cases were previously subject to the Article 7-proceedings against Poland, why they in reality have had an even longer life span. Notably only in C-619/18 the expedited procedure was applied. Comparing this to the previous findings, it implies that this tool improves the efficiency further.

Ultimately, it can be concluded, that the greatest effect is achieved by applying both the expedited procedure and interim measures. Contrarily, the adequateness of the procedure without these additional measures can be questioned as the damage may already have been inflicted when the judgement is pronounced.

The advantages of the infringement proceeding are that it entails a specific legal effect. However, the downside to this very specific effect is the

lack of general effectiveness concerning the compliance with the Rule of Law as a general principle. It is also a disadvantage that the sanctioning of an infringement of a judgement requires new proceedings. If a case is subject to the expedited procedure, it can be an advantage to use the infringement proceeding as the temporal aspect is very short. The opposite is the case if the procedure is not granted.

Concerning the interim measures, they have a specific legal effect and can be used swiftly, which is a big advantage when defending the Rule of Law. However, it is disadvantageous that interim measures depend on the existence of an independent case. The tool also has some of the same problems and advantages as the infringement proceeding itself, as it has a narrow scope of application and there is no automatic sanction in case of non-compliance, unless the Court ordered otherwise initially. The effectiveness can also be called into question as Poland did not comply with one order.

5.6 The Presumed Effect of the Rule of Law Mechanism

As the Rule of Law Mechanism (the Mechanism) has not yet been applied, it is difficult to conduct a case study. However, as strengths and weaknesses appear from the preceding analyses of the applied tools, a "preliminary" assessment can be attempted, by theoretically applying the preceding conclusions to the Mechanism.

The competent authority to pass measures is the Council. A qualified majority (15 out of 27 Member States) may pass the measures proposed by the Commission. Thus, the number of positive votes is required compared to the Article 7-procedure. This seems to be an improvement.

The Mechanism prescribes that from the date when the Commission has notified the Member State that it intends to propose measures the maximal processing time is seven months, exceptionally nine months. This is equally an improvement as this is a recurring disadvantage. However, it may also result in the measures not being passed as the Council may not be able to pass a decision within the time frame due to political disputes.

The Mechanism also has an elaborate definition of the Rule of Law. This may also prove to be an advantage as the obligations of a Member State become clearer than otherwise. Prima facie, the clearer definition will most likely enable the Mechanism to be applied to more cases than previous.

Also, for the sake of the application of the Mechanism, it sets out that the Member State is attributable of all breaches, as these are defined in the regulation, for example, endangering the independence of the judiciary, by public authorities at all governmental levels. The Mechanism sets out specific criteria concerning which type of actions that can constitute a breach of the Rule of Law. The overall criteria are that the actions breaching the rule of law of a public authority affect or seriously risk affecting the sound management of Union funds or the financial interests of the Union. However, there is a presumption that a breach of the Rule of Law concerning the functioning of Public authorities or the legal system affects the sound management of the Union Funds, that is, if a body deciding who will be awarded the contract in a public procurement does not function and EU funds are involved this would be the case. This system entails that the majority, if not all, of the populist measures from the Polish cases can be addressed through the Mechanism.

Finally, the Mechanism prescribes certain measures. These measures essentially constitute economic sanctions by disrupting payments or recollection of previous instalments or refusal to approve programmes. Unless otherwise specified in the Council decision, the Member State still has the same obligations towards the citizens in its country, for example, of regional aid is revoked, the planned construction works would still need to be carried out. It should be noted that the measures are directly applicable to the Member State and do not require a previous procedure to be completed, that is, unlike the infringement proceedings. This system may prove to be effective as it aims to ensure that the citizens do not suffer directly due to the actions of the Member State. This is further supported by the fact that Poland is one of the largest beneficiaries of EU funds, which implies a large economic incitement. It is also important to note that it is also possible to pass the measures before the damage has an impact, which can be an important factor, that is, this played a large role in C-619/18.

The Mechanism can be used to counter both specific and general dangers to the rule of law, which most likely will prove to be a strength as the lack of either has shown to be a weakness of the previous tools. The fact that the Commission must hear the Member State is also a positive aspect as it preserves the dialogue from other legal tools which may mediate before hard sanctions are passed. It can be contemplated whether an outright penal fine would strengthen the effect even further. If the Mechanism has a weakness, per the preceding analysis, it is that the decision-making

body is the Council. This has previously proven to inhibit the effectiveness. However, all in all, the Mechanism appears appropriate to solve most of the problems raised throughout the Polish cases.

6 Conclusions

We have shown that populism has impacted the EU legal system at a general level in number of ways. These are changes, which seem to have a more permanent character. Importantly, populism seems to have an effect on general values and principles of the EU, which has led to a transformation of values to legally enforceable principles and a more precise and detailed interpretation and implementation of the EU principle of rule of law. Two interesting trends are that (1) the EU principle of rule of law has become an "umbrella" principle for many other legal principles, which are interpreted as sub-principles of the rule of law principle, and (2) we also see a recent move towards a focus on new EU principles as a reaction to populism. We have shown how different events in the history of the EU are linked to moments of defining values, identity and constitutional identity of the EU, and in light of this that populism seems to be a contemporary driver in crystallising EU constitutional identity.

Through the study of Poland as a case, we have shown that the EU has several reactions in their toolbox, which might be able to counter populism within the Union. The choice of tool depends on the national case and whether the EU wishes for a specific or general effect.

The Rule of Law Framework and Article 7 TEU should primarily be used to create a dialogue with the Member State in question and aim at changing the mindset towards the Rule of Law. However, the tools cannot ensure a general or political effect.

The Member States themselves can also contribute to defend the Rule of Law against populism, by applying preliminary rulings to the ECJ in order to have the ECJ interpret EU law regarding national cases related to the Rule of Law in either their own or other Member States. This allows for a general effect due to the binding nature of ruling from the ECJ and the possible precedent of the case. It also creates a specific effect in the national cases.

Concerning the infringement procedure, it is clear that the procedure can be an adequate tool to counter specific populist challenges to the rule of law, if it is utilised in the proper manner. The best practice case is the application of the procedure accompanied by the expedited procedure and

interim measures. In the present case this ensured compliance with the ruling at a preceding stage. This thesis is further underlined as in the case where interim measures and the expedited procedure were not applied, the subsequent compliance with the judgement can be disputed. Lastly, it should be noted that the effectiveness of interim measures to some extent depends on either the Member State's will to comply or that the Court of Justice decides to describe penalty payments in case of non-compliance.

When it comes to the Rule of Law Mechanism, we have shown through a comparison with the adequateness of other tools what the adequateness of the Mechanism can be presumed to be. Following this, it appears that the Mechanism is quite adequate to deal with populist threats towards the rule of law in both a specific and general sense. Notably, the lower majority rule, the immediate economic sanctions and the time limit for the process are features, which contribute in a positive manner.

In conclusion, an interaction between populism and the EU legal order has taken place both ways. Populism has had an effect on the general features of the EU legal system, and the EU responses to populism have had some effect on populism (based on the Polish case study). The crises of the EU contribute to defining the Union; its legal system, values and identity. This way, crises may even end up strengthening the EU in a longer-term perspective.

AU3

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Author Queries

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Queries	Details Required	Author's Response
AU1	Please check if the sentence "Finally, the "Rule of law crisis" has triggered…" is complete.	
AU2	Please provide the missing closing parenthesis in the sentence "As a side note, consideration…"	
AU3	References "Koncewicz (2020), Scheppele and Kelemann (2020), Schroeder (2016), and Wigand et al. (2020)" were not cited anywhere in the text. Please provide in text citation or delete the reference from the reference list.	