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***The European Union's response to internal democratic  
backsliding: evidence from Hungary and Poland***

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**Mayo 2023, Buenos Aires, Argentina**



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**Abstract**

*Hungary and Poland, which have been members of the European Union since 2004, are in a democratic backsliding path. The EU has had a limited response towards this illiberal trend: Article 7.2 of the EU treaty, which is known as the “nuclear option” to fight authoritarianism as it involves revoking the illiberal countries voting powers in the bloc, has never been activated. This thesis analyses the reasons behind the EU’s behavior. To do so, it examines the interplay of institutions, ideas, and interests in shaping the relation between Brussels, Hungary and Poland. Upon thorough examination of expert reports, primary sources, academic papers and statistic reports, I found that there are three main explanations for the EU’s limited response. (1) There is a design problem with the EU’s institutions to fight illiberalism which makes them insufficient or ineffective; (2) The political maneuvers of Hungary and Poland to back each other successfully counteracts the EU’s actions; and (3) Hungary and Poland meet strategic interests to certain groups within the European Parliament or to the EU as a whole, which makes them tolerate the authoritarian tendencies. The first explanation is a necessary condition to explain the EU’s actions (or lack of action) as it sets the ‘rules of the game’, but to understand the whole panorama it is crucial to explore how the actors in argument two and three come into play and exploit these rules to their benefit. It is a combination of all three arguments that best explains the EU’s limited response towards illiberalism within the block.*

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## **Introduction: The European Union and the imminent threat to its core values**

In recent times, one of the processes that has most called upon the attention of the European and international community has been the democratic decline of Hungary and Poland. Both States began their democratic trajectory in 1989, after the fall of the Soviet Union. By 2004 they met the Copenhagen Criteria<sup>1</sup> and were accepted in the European Union (EU). However, in the latest years the democratic trend began to reverse in a much steeper way than the average of the EU. In 2010 in Hungary, Victor Orban and his right-wing nationalist party, Fidesz, rose to power with an absolute parliamentary majority. Similarly, in 2015 in Poland, the Law and Justice conservative party (PiS) won both the parliamentary and Presidential elections with Andres Duda as Head of State and radicalist Jarosław Kaczyński behind the scenes. Ever since Fidez and the PiS reached power, they passed laws that deeply undermined democratic values in their respective countries. Among them, anti-migrant and anti-LGBT+ policies, laws restricting media freedom and judicial autonomy, and decrees that manipulated electoral rules to their favor. In addition, they purged the bureaucracy and the military, which translated into a replacement of competence by loyalty within the government; and amended the constitution, hindering democratic checks and balances. Most recently, as Human Rights Watch remarked in one of their latest reports, Orban and Duda have used the Covid 19 pandemic to justify political power-grabs that put democratic standards in jeopardy.<sup>1</sup>

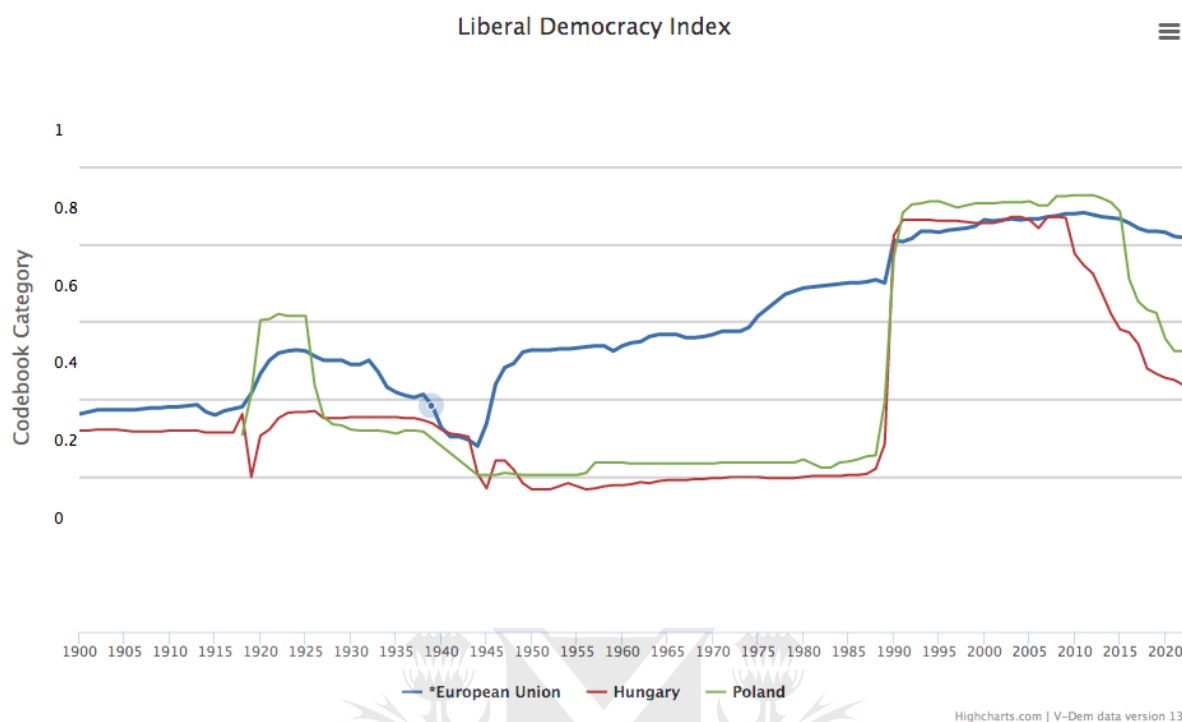
The following graph illustrates Hungary and Poland's democratic trajectory in V-dem's<sup>2</sup> liberal democracy index, showing its catchup along the post-Cold War and its recent decline, in comparison to the EU's average.

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<sup>1</sup> The Copenhagen criteria (1993), established the minimum conditions that must be fulfilled by those States that wish to join the bloc. These are: (1) “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; and (3) the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the ‘acquis’), and adherence to the aims of political, economic and monetary union.” As observed, two out of the three conditions involve promoting democratic standards. See (insert link a copen criteria)

<sup>2</sup> V-Dem is an independent think tank that studies the qualities of government.

Figure 1. Liberal Democracy Index (1900-2022)



Hungary and Poland's behavior goes against the European Union's core values which are set forth in Article 2 of the European Union Treaty.

“The Union is founded on the values of **respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights**, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”  
(Treaty of the European Union Art.2., 1993)

Simply put, the European Union flags democracy. In fact, they have a series of tools to fight illiberal threats that emerge within the bloc, which range from recommendations to the suspension of the illiberal country's voting rights. The latter is known as the “nuclear option” and occurs when Article 7.2. of the Treaty of the EU is activated. However -to this date<sup>3</sup>- although the European body has observed the democratic decay in Hungary and Poland and publicly called them upon it in a “name and shame” strategy; Article 7.2. of the Treaty of the EU has never been activated. For practical purposes, Hungary and Poland continue to enjoy EU membership with all of its benefits: they still have a voice and vote within the bloc, they were never suspended, and they did not stop receiving the annual EU funds. Even though specific EU payments to Hungary and Poland have been frozen, the latest long-term EU budget (2021-2027)

<sup>3</sup> April 2023

shows that Hungary was given 5,974 million Euros by the European Union.<sup>ii</sup> This represents approximately 2.5% of the country's Gross Domestic Product (GDP)<sup>iii</sup>. The economist Istvan Csillag proved that without the funds Hungary receives from the EU, the Hungarian economy would collapse.<sup>iv</sup> Poland received more than three times as much EU funding as Hungary: 18,727 million<sup>v</sup>, equivalent to 2,75% of its GDP.<sup>vi</sup> The EU's financing thus contributes to consolidating the regime of the authoritarian, populist leaders in Hungary and Poland. As Kelemen well puts it "even the best-intentioned federal fiscal transfer programs may inadvertently sustain subnational autocracy, and federal democratic leaders may find themselves in the perverse position of funding subnational regimes that openly defy democratic norms."<sup>vii</sup>

The purpose of this thesis is to evaluate the reasons behind the EU's limited response towards Hungary and Poland's authoritarian advances. My main point is that there are three potential arguments that explain the EU's behavior. The first one is **institutional** and has to do with a normative design problem in the EU's tools to fight illiberalism: they are either insufficient or ineffective. The second one is based on shared **ideas** by Hungary and Poland which makes them cooperate and successfully counteract Brussel's interventions. The third one is that Hungary and Poland meet strategic **interests** to certain groups within the European Parliament or to the EU as a whole, which makes them tolerate the authoritarian tendencies. It is important to highlight that these arguments are not mutually exclusive, and it is most likely a combination of two or more that lead to a full understanding of the European Union's actions.

In methodological terms, this study will have an analytical narrative based on descriptive inference informed by a conceptual toolbox built around the notions of democratic backsliding, institutions, interests and ideas. In the first section, the concept of **democratic backsliding** will be defined and explored in the cases of Hungary and Poland in order to illustrate how they constitute a threat to the EU's democratic core values. A qualitative analysis of both case studies will be conducted, complemented with quantitative data from independent think tanks such as

Freedom House<sup>4</sup>, V-Dem<sup>5</sup> and The Economist Intelligence Unit<sup>6</sup>. In section two, the role played by the EU's **institutions** will be evaluated. The institutional design of the EU's tools to fight illiberalism will be analyzed, taking into consideration its enforcement mechanism, the veto players generated by the needed majorities to activate Article 7.2 of the EU Treaty, and the potentially missing tools. Thus, this module will evaluate my first argument. Section three will study the part played by shared **ideas** and the need for cooperation between Hungary and Poland.

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<sup>4</sup> Freedom House is a think tank that annually ranks freedom levels in countries worldwide since 1973 (195 countries by 2022). Scores range from 0 to 100, with 100 being the maximum degree of freedom possible. This result is composed of the sum of two categories: political rights score and civil liberties score. Inside the political rights category there are 3 subcategories: electoral process, which includes 3 questions, political pluralism and participation, which includes 4 questions; and functioning of government, which includes an additional 3 questions. This makes a total of 10 indicators for measuring political rights. Each one of them can rank between 0 and 4 points; hence the maximum score for political right is 40 (or 4 in each of the 10 categories). A discretionary question that addresses forced democratic change is added in this category, and up to 4 points may be subtracted depending on the gravity of the situation. As for civil liberties, there are 4 subcategories: freedom of expression and belief, which includes 4 questions, associational and organizational rights, which includes 3 questions, rule of law, that has 4 questions, and personal autonomy and individual rights, that covers another 4 questions. Each of the 15 indicators can rank between 0 and 4; therefore, the maximum score for civil liberties is 60 (or 4 in the 15 categories). With the combination of these scores, Freedom House classifies countries as “free”, “partly free” or “not free”.

<sup>5</sup> The V-Dem institute publishes the Democracy Report annually. It is produced as a worldwide collaboration consisting of 3,700 experts from more than 180 countries. The report examines democracy relying on two main indexes: the Liberal Democracy Index (LDI) and the Regimes of the World (RoW) index. The LDI is composed of two subindexes: electoral democracy and the liberal component index. On the one hand, the electoral democracy index is formed by taking the average of two different aggregations of 5 indicators: freedom of association, clean elections, freedom of expression and alternative sources of information, elected officials and suffrage. The first form of aggregation is the weighted average of the 5 mentioned indicators (1/8 or 1/4 depending on the importance given to each variable); and the second one is a direct multiplication of the 5 indices. On the other hand, the liberal component index is formed by averaging 3 subindexes: equality before the law and individual liberties (composed of 20 indicators), judicial constraints on the executive (made of 5 indicators), and legislative constraints on the executive (made of 4 indicators) This last category gets set to 0 whenever the sub variable “legislature bicameral” is 0. Once the electoral democracy index and the liberal component index are calculated, the liberal democracy index is composed by doing:  $0.25 \times \text{electoral democracy index score} + 1.585 \times \text{liberal component score} + 0.5 \times \text{electoral democracy index score} + 1.585 \times \text{liberal component score}$ . On the other hand, RoW entails a thorough implementation of Dahl's definition of Polyarchy (1971), analyzing almost all countries from 1900 to our time. It bases on civil, electoral and political liberties which are later distinguished between two types of democracies (liberal and electoral), and two types of autocracies (electoral and closed), the first type being the best and the latter the worst.

<sup>6</sup> The Democracy Index created by the Economist Intelligence Unit (EIU) covers 164 countries annually since 2010 (and every two years since 2006). Democracy is measured by the level of fulfillment of 5 interrelated categories: electoral process and pluralism, civil liberties, the functioning of government, political participation; and political culture. In order to measure these categories, the EIU considers 60 indicators, which take the form of a 60 question survey where the possible answers are 1, 0.5 or 0. Each category is given a score from 0 to 10, with 0 being the least democratic score and 10 the most democratic one. There are 4 indicators which have more influence on the final score of each category: whether national elections are free and fair, the security of voters, the influence of foreign powers on government, and the capability of the civil service to implement policies. If the answer to one of these questions is 0, one point will be subtracted from the corresponding category's score; and if it's 0.5, a half point will be subtracted. The overall democracy score comes from the average of the 5 categories. Countries that score between 0-3.99 points are classified as authoritarian regimes; those that score between 4 and 5.99 as hybrid regimes; those between 6 to 7.99 as flawed democracies and those that score 8 points, or more are considered full democracies



In this section, the EU's tools to fight illiberalism will be explored in practice, where the illiberal countries' cooperation comes into play. Hence, this module will address my second argument. In the fourth section, the strategic **interests** met by Hungary and Poland -both transnational and international- at different points in time will be evaluated to explore my third argument. In order to evaluate the concepts of democratic backsliding, institutions, ideas and interests for this particular context I made an inductive analysis based on statistical reports, academic papers, expert reports and primary sources that allowed me to reconstruct the situation in Brussels, Hungary and Poland. All insights will be summarized in a final conclusion.



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## Section 1: Democratic Backsliding in Hungary and Poland

### 1.1. *Defining democratic backsliding*

The scholarly literature defines democratic backsliding as “a process that reverses transitions to democracy or that initiates a transition away from democracy toward a more authoritarian (or hybrid) regime”.<sup>viii</sup> Hence, to understand what the concept entails, it is first necessary to define democracy. Robert Dahl, perhaps the most recognized academic on the subject, affirmed that democracy is an ideal that is truly only practiced at the time of voting. The most similar system to democracy that can be empirically found is what he calls a “polyarchy”, which has eight key characteristics: (1) freedom to form and join organizations, (2) freedom of expression, (3) right to vote, (4) eligibility for public office, (4) right of political leaders to compete for support, (5) right of political leaders to compete for votes, (6) alternative sources of information, (7) free and fair elections, (8) institutions for making government policies depend on votes and other expressions of preference.<sup>ix</sup> Therefore, the process of a democratic government purposely deviating from the characteristics mentioned by Dahl can be classified as democratic backsliding.

However, there is another crucial element needed to fully comprehend democratic backsliding as a concept: the process occurs in such a way that it does not seem corrupt. Unlike the typical autocrats, Victor Orban and Andres Duda rose to power via democratic means, which implies that they have -or at least had at the time that they were first elected- a majority of supporters. Most of the anti-democratic laws that they passed were done so with a majority of parliamentary support. Therefore, their actions against democracy could ironically be legitimized by the democratic institutions themselves. Nancy Bermeo, a political scientist from Oxford University, expands on this concept. She argues that democratic backsliding can take three different forms. Firstly, the typical *coup d'états* are replaced by “**promissory coups**”, where a government takes power but has a rhetoric that renders the takeover necessary for eventually restoring democracy. Secondly, executive coups are now becoming “**executive aggrandizements**”, where -instead of replacing the opposition- the incumbent establishes laws or decrees that weaken checks on the executive power and give it room to maneuver freely. Thirdly, electoral fraud is being replaced by “**longer-term strategic harassment and manipulation**”. This strategy consists in “hampering media access, using government funds for incumbent campaigns, keeping opposition candidates off the ballot, hampering voter registration, packing electoral

commissions, changing electoral rules to favor incumbents, and harassing opponents—but all done in such a way that the elections themselves do not appear fraudulent.”<sup>x</sup>

Other relevant scholars agree with Bermeo: the way governments turn authoritarian has changed. For instance, Milan Svobik, Professor of Political Science at Yale University, finds that the risk of a military coup on a democratic government has significantly decreased, while incumbent takeovers have not.<sup>xi</sup> Therefore, democratic backsliding entails a ‘more real’- or at least more probable- threat to democracy than military coups nowadays. Similarly, Michael Coppedge, one of the main investigators for the V-Dem project, analyzed V-dem indicators and found that there is a growing repression of the media and a deterioration of political disclosure. In addition, he found that power is increasingly being concentrated in the executive, at the expense of the other two powers.<sup>xii</sup> Hence, the probability of democratic deterioration via indirect means is increasing and proves to be a real threat.

As there is a vast consensus on the new path for autocracy, this study will consider Bermeo’s definition of democratic backsliding. It will assess if Hungary and Poland are in this path that threatens democracy in the EU by paying special attention to the existence of “promissory coups”, “executive aggrandizements” and “long-term strategic harassment and manipulation”. In addition, the key years of democratic decline will be found quantitatively using indicators of independent think tanks such as Freedom House, V-Dem and The Economist Intelligence Unit.

### *1.2. Democratic Backsliding in Hungary*

Ever since the fall of the Soviet Union, Hungary has been a parliamentary republic, with the Prime Minister being the most important figure. In 2004 they were accepted in the European Union and continued their democratic catch-up until 2010, when Victor Orbán was elected Prime Minister for the second time (he was previously Prime Minister from 1998 to 2002). What made this time different is that his party -Fidesz- got 227 seats out of the total 386 in the Unicameral National Assembly, representing over 58% of the Parliament. Furthermore, their allies - the Christian Democratic People’s Party- got another 36 seats, meaning that Orbán controlled 68% of the Parliament.<sup>xiii</sup> Having a supermajority of over  $\frac{2}{3}$  enabled Fidesz to amend the Constitution in their favor and pass laws that deeply undermined the checks and balances of a democratic regime. Out of the three ways that Bermeo mentions that democratic backsliding

can take place, two of them can be found in Hungary: “executive aggrandizements” and “long-term strategic harassment and manipulation”.

As explored, executive aggrandizements makes reference to laws established by the incumbent that weaken checks on the executive power. Since Orbán already controlled the executive and legislative branches, his main attack was launched on the judiciary. His first move was to replace the country’s Constitution by the ‘Fundamental Law of Hungary’ in 2011 (entering into force on January 1st, 2012), without a plebiscite or participation from opposing parties.<sup>xiv</sup> The Constitutional Court, which had been an independent organ since 1989, was compromised by Orbán’s new laws. Justices candidates that used to be proposed by an ‘all-party’ committee (and later approved by the Parliament) were now directly chosen by the Parliament, which of course was Fidesz dominated.<sup>xv</sup> In order to quickly gain a Fidesz majority, the number of Justices was changed from 11 to 15; and their period in office was altered from 9 to 12 years. The first newly appointed Justice was István Stumpf, who had no legal practice experience but was a long-time friend of Orbán.<sup>xvi</sup> Similarly, the President of the Constitutional Court, that used to be appointed by the judges themselves, was now named by parliamentary majority, giving this institution the final blow on its independence. In addition, the Constitutional Court’s maneuver to act was significantly reduced since it could no longer review State finances, which used to be a key tool to keep the executive in check.<sup>xvii</sup> Another judicial institution that was compromised by Orbán’s new laws was the Supreme Court, which was completely abolished and replaced by the Kuria. This was done in order to remove András Baka, the independent President of the Court, and replace him with a Fidesz loyalist.<sup>xviii</sup> Moreover, the retirement age of judges was reduced by eight years, forcing all judges over 62 into retirement. This affected 274 judges<sup>xix</sup>; a majority of them independent. Last but not least, the National Judiciary Office (NJO) was created, which is a body that centralized Hungarian courts administration and became in charge of recruiting and evaluating judges, as well as managing the court’s budget and allocating cases. Laws established that the President of the NJO had to be elected by a  $\frac{2}{3}$  majority in Parliament; in other words, he would be personally appointed by Fidesz.<sup>xx</sup> Amnesty International described in its 2020 report that “the NJO President’s had a practice of invalidating judges’ and court leadership applications in a non-transparent way and without giving clear justification.” In the same line, Human Rights Watch stated in its 2013 report that “the new constitution and other legal changes have curbed the independence of the judiciary and the administration of justice (...) Together these changes have undermined an important check on the government.”<sup>xxi</sup>

The lack of checks on the executive worsened with the Covid-19 pandemic, since the Parliament passed a law that declared an indefinite state of emergency and allowed Orban to rule by decree.<sup>xxii</sup> As Amnesty International's Hungary director Dávid Vig stated, this bill gives Viktor Orban and his government "carte blanche to restrict human rights".<sup>xxiii</sup> For instance, in 2020 he prohibited adoption by same-sex marriages and refused to ratify the Istanbul convention that protects women from violence. Similarly, in 2021 a law was passed that prohibited the "promotion and portrayal of homosexuality" for people under 18 in both films, advertisements and sexual education.<sup>xxiv</sup> Orban's government targeted minorities, without being checked by the other powers. In this sense, executive aggrandizement has deeply hindered the checks and balances that characterize a democratic government as well as threaten the respect for human rights. This puts the country on an authoritarian path that is incompatible with EU values.

Furthermore, long-term strategic harassment and manipulation is also present in Hungary. It takes form in apparently not fraudulent elections, but where all the previous conditions tilt the playing field in the incumbent's favor. A clear example of this is Hungary's New Press and Media Act that was passed in 2010, just a few months after Orban reached power. This law created the National Media and Infocommunications Authority (NMHH), a media control body supervised by Fidez. All media outlets have to register and the body can impose fines up to 700.000 euros for "imbalanced news coverage" or for being "insulting" or "against public morality".<sup>xxv</sup> As Scheppele well puts it "rather than jailing journalists, engaging in blatant censorship, or simply shuttering hostile media, Orban let economic pressure do the work".<sup>xxvi</sup> According to Hungary-expert journalist Paul Landvai, it is estimated that the New Press and Media Act guaranteed that "80% of viewers and listeners receive only information provided directly or indirectly by the government."<sup>xxvii</sup> Media manipulation in Hungary was noticed by the World Press Freedom Index, an indicator compiled by Reporters Without Borders, where Hungary's position declined from 25/175 in 2009 to 40/175 in 2012. This downward trend continued and by 2022 Hungary reached the 85th place. In addition, Human Rights Watch affirmed that "the media law undermines media freedom and is incompatible with Hungary's human rights obligation".<sup>xxviii</sup>

Another form of long-term manipulation is indirectly threatening to cut government benefits to those voters that are employed by the government. In 2011, Fidez changed the structure of social-welfare by a 'public employment scheme', employing 5% of the labor force.<sup>xxix</sup> Isabel

Mares and Lauren Young found that those people that were government employees due to this program were threatened with termination if they did not vote in Orbán's favor.<sup>xxx</sup> In addition, Orbán changed the electoral system from a two rounds structure, where only those candidates with over 50% of the votes could go to the second round, to one without runoffs. This meant that the opposition was more divided and hence favored Fidesz. Furthermore, in the 2014 and 2018 election there were “fake parties” created with similar names to the real opposing parties, in order to confuse voters and further split opposition.<sup>xxxi</sup> In this sense, the change in electoral rules and media manipulation proves Hungary's democratic backslide and threat to the EU values.

These issues did not go without notice from democratic raters. Freedom House changed Hungary's classification from “free” (which they had since 1990) to “partly free” in 2018.<sup>xxxii</sup> Similarly, V-Dem downgraded Hungary's RoW (Regimes of the World) classification from “liberal democracy”- which they had since 1991- to “electoral democracy” in 2010, and to “electoral autocracy” in 2018.<sup>xxxiii</sup> The Economist Intelligence Unit continues to classify Hungary as a “flawed democracy”, but it's score is in a downward trend: in 2006 (when the index began) Hungary scored 7,53/10 while in 2022 it scored 6,64/10, making it 0,64 points away from being classified as a hybrid regime.<sup>xxxiv</sup>

Both the qualitative and quantitative analysis of Hungary's democratic trajectory prove that it is in the process of democratic backsliding. Executive aggrandizement and long-term strategic harassment and manipulation are taking place in the country and therefore make Hungary a threat to the EU's values. The quantitative evaluation shows that the threat began in 2010, when Orbán rose to power with a supermajority, and became more imminent in 2018, when intimidation to civil society groups and the opposition became the norm.<sup>xxxv</sup>

### *1.3. Democratic Backsliding in Poland*

Poland is a parliamentary republic with a Prime Minister and a Head of State: The President. After the Soviet Union fell, Poland began its democratic trajectory. In 2004 they were accepted in the European Union and were in their good graces until the Law and Justice (PiS) ultra-conservative nationalist party rose to power in 2015. The PiS won the elections with 235 seats out of the 460 in the Sejm (Parliament's lower house), representing 51% of the legislative body<sup>xxxvi</sup>. Andrzej Duda was the elected Presidential candidate, who appeared to be more

moderate than previous party leaders. However, Jarosław Kaczyński, the PiS's founder who had a radicalist and authoritarian style, was hidden in the shadows.<sup>xxxvii</sup> Immediately after Duda's victory the PiS returned to its radical-right catholic style; and launched an attack against LGBTQ+ minorities and 'pro-choice' groups. They also compromised democratic institutions such as the Constitutional Court, independent media and electoral rules. Drawing a parallelism to Orbán's Hungary, "executive aggrandizements" and "long-term strategic harassment and manipulation" can be found in the PiS's Poland. In fact, shortly after Fidesz won in 2010, Kaczynski expressed admiration for Orbán's leadership style: "Viktor Orbán gave us an example of how we can win (...) The day will come when we will succeed, and we will have Budapest in Warsaw."<sup>xxxviii</sup> And in fact they did.

Even though the PiS was missing 72 seats to have the supermajority needed to amend the Constitution<sup>xxxix</sup>, they still were able to pass laws that undermined the division of powers in order to weaken the checks on the executive branch. The judiciary was the main victim, especially Poland's Constitutional Tribunal. The PiS "imposed procedural rules that paralyze courts, packed courts with PiS-friendly appointees, and, in some cases, refused to follow or publish official opinions."<sup>xl</sup> One of the first acts by Duda was to refuse to swear in three judges that were appointed by the previous government and instead appointed PiS loyalists. Additionally, in December 2015 the Sejm approved a law that made the process of giving a verdict much harder and therefore made the judiciary more inefficient. Before the reform, only a simple majority was needed to pass a verdict and only three out of the fifteen judges had to be present for it to be valid.<sup>xli</sup> Now, at least 13 judges need to be present and the decision has to have a  $\frac{2}{3}$  majority.<sup>xlii</sup> Moreover, now the cases have to be trialed and evaluated in order of submission, without the ability to prioritize, which makes the courts more inefficient and hinders their ability to check on the executive. The Constitutional Tribunal questioned the constitutionality of these acts, but the PiS refused to publish their opinion.<sup>xliii</sup> In addition, Poland's National Council of the Judiciary (NCJ), which is an organ dedicated to the protection of the judiciary's independence and deals with judicial appointments (including Supreme Court Judges), was also infiltrated by the PiS. In 2017 Duda passed a law that allowed the Sejm to handpick the members of the NCJ and terminated the current Council's judges.<sup>xliv</sup> This allowed the PiS to replace Supreme Court Judges, including the President of the Court who's term in office is fixed by the Constitution and was not yet over.<sup>xlv</sup> Furthermore, in 2017 the PiS created the Disciplinary Chamber, which sanctions judges discretionary. It is of course led by a PiS appointee and coincidentally sanctioned judges that go against Duda's political will.<sup>xlvi</sup> On this

account, executive aggrandizement is present in Poland and puts it in an authoritarian path that proves dangerous to EU values.

As for long term strategic harassment and manipulation, the PiS heavily focused on media control. In December 2015 the media law was amended so that the PiS could terminate all public TV and radio leaders; so that they could appoint party loyalists to spread their message (and their message alone). In 2016, the National Broadcasting Council, which was Poland's independent broadcasting regulator appointed by the Polish Constitution to control public media and give radio and TV licenses (fairly), was replaced by the National Media Council (RNM), controlled by the PiS. The attack against independent media continued throughout Duda's regime. The most recent event occurred in February 2021, when a law imposing progressive taxes on media was presented. According to the Nation's in Transit report by Freedom House, "international press freedom associations, publishers, broadcasters, and most media experts warned that the goal of the proposed tax was to harm the profitability of independent media in order to make them vulnerable to takeover efforts by state-owned companies."<sup>xlvii</sup> However, after a country-wide protest on February 10th (2021) the proposal was put on hold. Nevertheless, Reporters Without Borders downgraded Poland's media freedom score from 18th in 2015 to 65th in 2022.<sup>xlviii</sup>

Another form of long-term strategic harassment and manipulation can be illustrated by the 2020 Presidential Election. In 2006, Poland's Constitutional Court had ruled that the electoral code could not be amended six months preceding the elections.<sup>xlix</sup> However, taking advantage of the COVID 19 pandemic, Duda ignored this ruling and changed the election's date and mechanism. Originally, they were scheduled for May 2020 and the National Electoral Commission (PWK) was supposed to be the institution in charge of its administration. But the PiS changed the mechanism to mail-in ballots and the authority was transferred to the Post office. Moreover, on May 10th the election was directly canceled, without giving a new date until June 3rd. It is important to note that the May election was not postponed but "abandoned" without any formal constitutional authority to make this action legal.<sup>l</sup> Finally, elections were held on June 28th, where Duda won with 51% of the votes.<sup>li</sup> The Election observers from the Organization for Security and Co-operation in Europe (OSCE) stated that: "in an evidently polarized and biased media landscape, the public broadcaster failed to ensure balanced and impartial coverage, and rather served as a campaign tool for the incumbent."<sup>lii</sup> This is a clear form of democratic backsliding: elections were not fraudulent, but they were certainly not fair.



Democratic raters captured Poland's democracy decline. The country's V-Dem's RoW classification was downgraded from "liberal democracy" in 2015 to "electoral democracy" in 2016.<sup>liii</sup> Similarly, its Freedom House democracy index dropped from 93/100 in 2014 to 81/100 in 2021 (but still classifies Poland as free).<sup>liv</sup> Moreover, in the Economist Intelligence Unit's democracy index Poland's score declined from 7,47/10 in 2014 (only half a point away from being a "full democracy") to 6,48 in 2021 (only 0,48 points away from being a "hybrid regime"); and continues to classify as a "flawed democracy".<sup>lv</sup> All democracy raters ranked Poland high up in their democracy score before 2015, but ever since the PiS took power the country has been on a downward trend. In the three indices, the most prominent drop from one year to another was in 2017 (which evaluates 2016). This is most likely due to the revolutionary agenda introduced by the PiS in its first year in office, which targeted independent media and the judiciary.

The qualitative analysis of Poland shows that, following Orban's handbook, executive aggrandizement and long-term strategic harassment are present in the country. Hence, Poland is in the process of democratic backsliding and presents a threat to EU values. The quantitative evaluation shows that independent think tanks notice the decline, but not in such an imminent manner that changes their qualification to authoritarianism. Nevertheless, if a lesson can be learnt from Hungary- and many other populist leaders worldwide- is that the hints of authoritarianism present themselves before a complete democratic collapse.

## Section 2: The limits of the EU's institutional design

Now that it has been established that Poland and Hungary are both in the process of democratic backsliding and constitute a threat to the EU's values, the European Union's response will be addressed. This will heavily depend on its institutional design. As political scientist David Lake states, "institutions are sets of rules, known and shared by the relevant community, that structure political interactions." They "create procedures for making joint decisions, such as voting rules; they also lay out standards of acceptable behavior, and they often include provisions for monitoring compliance and punishing those who violate the rules." For the purpose of this study, the EU's institutions will be understood as the tools designed to combat illiberalism within the bloc, taking into account the majorities needed for their activation and their enforcement mechanisms. The underlying argument of this section is that the EU's defense tools against authoritarianism are either not sufficient or not effective.

### *2.1. EU available tools to combat authoritarianism*

There are three main tools that the EU has to combat the illiberal threat within the block: (1) recommendations, (2) legally binding declarations, and (3) Article 7 of the Treaty of the EU. There is no provision to expel a member. Figure 4 illustrates the different mechanisms, its legal basis, the EU organ that can initiate its use, all the decision makers involved and the effects. There is also a new Rule of Law Conditionality Agreement as of January 2021 that adds a new layer of protection to the EU's budget, which is not included in the mechanisms set by the EU to protect the rule of law; but nevertheless impacts countries that deviate from the democratic path.<sup>lvi</sup>

Figure 4: Mechanisms for protecting rule of law within EU States<sup>lvii</sup>

<b>Name of Mechanism</b>	<b>Legal Basis</b>	<b>Initiator</b>	<b>Decision-maker</b>	<b>Effects</b>
Cooperation and verification mechanism	Acts of accession	Commission	Commission	Non-binding recommendations
Commission rule of law framework	n/a	Commission	Commission	Non-binding recommendations
Council's rule of law dialogues	n/a	Council	Council	n/a
Infringement proceedings	Article 258 & 260 TFEU	Commission	Court of Justice	Legally binding determination of breach of EU law, possibly interim measures and financial penalties
Preliminary references	Article 267 FEU	National courts	Court of Justice	Legally binding interpretation of EU law, empowering national courts to set aside non-compliant national legislation
Breach of values procedure- preventive mechanism	Article 7.1 TEU	Commission, Parliament or 1/3 of Member States	Council (majority of 4/5) after obtaining the consent of the EP (2/3 of votes cast, representing the majority of MEPs)	Declaration that there is a clear risk of breach of EU values by the Member State concerned and possible recommendations addressed by the Council to that Member State
Breach of values procedure- sanction mechanism	Article 7.2 TEU	Commission or 1/3 of Member States	Step 1: European Council (unanimity), Parliament (consent by 2/3 of votes cast, representing the majority of MEPs); Step 2: Council by qualified majority	Suspension of certain rights deriving from the application of the Treaties, including voting rights of the Member State concerned in the Council

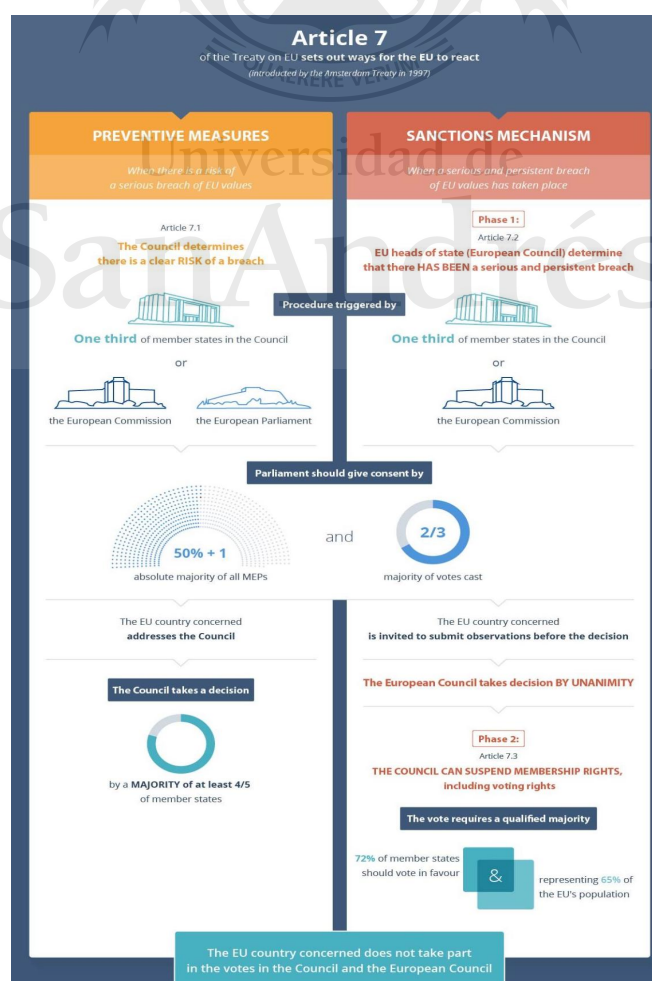
The European Commission can make recommendations through the “Cooperation and Verification Mechanism” or the “Commission Rule of Law Framework”. The former is used for new member States when they have failed to implement some of the commitments reached in the accession negotiations; and the latter was introduced in 2014 to have a structured dialogue with member States who allegedly broke the rule of law.<sup>lviii</sup> Similarly, the European Council can make recommendations to all member States via their annual “Rule of Law Dialogues”, which was created in 2014 to establish an “open and constructive debate on the situation regarding the rule of law in all member States”.<sup>lix</sup> The main problem with all of the mentioned mechanisms is that they come from “soft law”, which means that they are not legally binding. Therefore, States are not forced by any legal means to respect the recommendations made by the European Commission or Council. Jan Klabbers, a recognized International Law Associate Professor at the University of Helsinki, even argues that soft law “serves no identifiable purpose”.<sup>lx</sup>

On the other hand, the European Court of Justice can make legally binding determinations of breach of EU rule, or binding interpretations of EU law that legally force a member State to abide by EU rules. In joining the EU, all member States agreed that their citizens not only need to abide by their local constitutions and judicial departments but also to the EU laws and the European Court of Justice’s rulings. However, the problem with these measures in practice is that, even though they are legally binding, they are not enforceable. The EU is an integrated block, but it still is in the arena of international law which is, according to political philosopher Hedley Bull, an “anarchic society” where there is no “international police”.<sup>lxi</sup> Therefore, as political scientist David Lake well puts it: “even though enforcement provisions may be specified in an agreement, the enforcement of international law ultimately depends on the principle of national self-help”.<sup>lxii</sup> Simply put, if a nation is reluctant to comply with the block’s law, the EU does not have the necessary authority or “global police” to enforce it.

The strongest tool that the EU has to control and sanction those States that deviate from the values that they have pledged to in Article 2 of the Treaty of the European Union is Article 7 of the Treaty of the European Union. It creates an incentive to abide to EU law because if Article 7.2 is passed, the illiberal country judged no longer has voting powers in the bloc.

Article 7 of the EU Treaty consists of two parts: a warning (7.1) and a sanction (7.2). Article 7.1 can be invoked if there is “a clear risk of a serious breach by a Member State of the values referred to in Article 2”<sup>lxiii</sup>. It can be triggered by either  $\frac{1}{3}$  of Member States, by the European Parliament or by the European Commission. All entities need to have the consent of an absolute majority of the members of Parliament (50% +1) in order for the proposal to proceed. After this stage, the country concerned addresses the Council -which is composed of the heads of State of the EU members-, and  $\frac{4}{5}$  of its members need to approve the motion in order for it to pass. The head of State of the country in question does not participate in the vote. If the motion passes, recommendations are made, and the country is in observation. If the violation to Article 2 persists, Article 7.2 can be invoked by  $\frac{1}{3}$  of the Council or the European Commission. Additionally, both entities need to have the consent of  $\frac{2}{3}$  of the members of Parliament; and the country concerned can submit observations before the decision of the Council. The Council can suspend membership rights if they decide this **unanimously**.<sup>lxiv</sup> The following infographic illustrates the process.

Figure 5. Article 7 activation process



The fact that the final decision to invoke Article 7.2 has to be unanimous by the European Council members implies that there are 26 veto players. Political scientist George Tsebelis defines veto players as “decision makers whose agreement is required for the change of the status quo”<sup>lxv</sup>. This means that even if only one of the actors does not agree with changing the status quo, their position will prevail over the 25 that agree: the status quo will not change. The highlight of Tsebelis thesis is that the amount of veto players and the ideological distance between them determines how easy it is to change the status quo.

Firstly, the more veto players, the more likely it's harder to change the current situation. This happens because each veto player has a different ideal point, and they would only agree to change the current status quo if the new point would be closer to their ideal one. With more veto players, the probability that the preferences of all of the players are closer to the new situation rather than the status quo decreases, so change becomes less likely. Let “not sanctioning Hungary/Poland” be the status quo and “sanctioning Hungary/Poland” be the new potential situation. As one can imagine, when evaluating if Poland should be sanctioned under Article 7.2 of the EU Treaty, Hungary’s position will always be closer to not sanctioning than sanctioning, because the situation could be turned against them (and vice versa). Hence, they will use their veto power if this new situation is proposed. In this context, Article 7.2 will never be approved. As Scheppele well puts it “by letting Hungary slide, EU members squandered their ability to act collectively to sanction Poland.”<sup>lxvi</sup>

Secondly, Tsebelis established that the more ideological distance between veto players, the less possibility for change, because their preferred points are further apart. Considering that countries which have similar degrees of democracy have shared values, V-Dem’s Liberal Democracy score is useful to compare the ideology of Hungary and Poland to that of other EU members. For instance, by March 2023 Hungary scored 0.34 out of 1 and Poland 0.43, while France scored 0.8 and Spain 0.79.<sup>lxvii</sup> This 0,46 point distance between France and Hungary suggests, according to Tsebelis theory, that the status quo will be harder to change. In this case: the motion to activate Article 7.2 will be hard to pass.

In sum, there are two structural design problems with the EU’s institutions to fight illiberalism. Firstly, there is a lack of enforcement of the recommendations and legally binding declarations, which makes Poland and Hungary less likely to abide by them. Secondly, the approval threshold

for the activation of Article 7.2 of the treaty is too high. It generates too many veto players with very different ideologies, which makes unanimity hard.

The European Union has most likely recognized the limits of its institutional design to fight illiberalism, since in 2021 they decided to innovate. With the COVID-19 recovery funds package, they saw an opportunity to put pressure on the authoritarian regimes. In 2020, the EU created a new indirect tool known as the Rule of Law Conditionality Regulation (applied since January 2021). It aims to add “an additional layer of protection in cases when breaches of the rule of law principles affect or risk affecting the EU financial interests”.<sup>lxviii</sup> It can suspend certain payments to protect the budget from rule of law breaches. The process for its activation begins with the European Commission proving that there is a breach in rule of law which directly affects the EU budget and no other budget protection mechanism can stop it. Next, a measure is proposed, such as the suspension of certain payment, and the European Council makes the final decision.<sup>lxix</sup> As Lake stated, “the primary way that institutions promote cooperation is through enforcement, or the imposing of punishments on actors who fail to cooperate.”<sup>lxx</sup> Therefore, by stopping significant EU funding to illiberal regimes such as Hungary and Poland, there is a higher chance that States abide by EU law than with soft recommendations from the Council, non-enforceable legislative action from the Court of Justice or a never activated Article 7. In Section 3 we will see how these mechanisms play out in practice.

## 2.2. *EU missing tools to combat illiberalism*

Even with the new Rule of Law Conditionality Regulation in place, there is a reality that can't be ignored: the EU is still forced to finance the illiberal countries in its annual fund distribution. There is no provision to permanently eliminate a member from the bloc, and all members receive a percentage of the EU's funding, which is handled by the incumbent.<sup>7</sup> Hence, the EU indirectly finances authoritarian regimes. In addition, assuming Hungary and Poland are rational actors who want to maximize their benefit, their calculation of deviating from the rule of law does not consider being dropped from the union and complete financial cut-off as a potential punishment, which makes them less likely to cooperate with the EU. In a counterfactual argument, if the stakes were higher, States would think twice before undergoing a democratic backsliding

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<sup>7</sup> As it was mentioned in the introduction, the latest long-term EU budget for 2021-2027 shows that Hungary was given 5,974 million Euros by the European Union and Poland 18,727 million).

process. Moreover, the EU can't intervene in local politics, by -for instance- financing a pro-democratic local party. Article 7 of Regulation (EC) No. 2004/2003 of the European Parliament explicitly states it.

“The funding of political parties at European level from the general budget of the European Union or from any other source may not be used for the direct or indirect funding of other political parties, and in particular national political parties, which shall continue to be governed by national rules.”

Therefore, as Kelemen well puts it: “the EU has developed just enough EU-level partisan politics to help protect local authoritarians, but not enough to support local democratic oppositions. “ lxxi

All in all, **the EU's institutions in the matter of democracy create a club of incumbents with veto powers and financial resources.** The EU can use a “name and shame” strategy by giving recommendations or by delivering legally binding but not enforceable court rulings; but as long as Article 7.2. is not activated- which is hard given the institutional design rules- the EU's hands are tied. They cannot expel authoritarians from the Union and simultaneously don't have the possibility of financially supporting local democratic opposing parties. This favors my first argument: the EU tools are insufficient and those in place are rendered ineffective by the high majorities needed in its institutional design.

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### **Section 3: Hungary and Poland's shared ideas and their need for cooperation**

The EU's institutional design for combating authoritarianism has been evaluated. In this section we will see how these tools play out in practice and how the alliance of Hungary and Poland affects the efficiency of the mechanisms. First, the existence of this alliance will be studied. Secondly, we will see how this alliance exploits the structural problem of the EU's institutional design to their favor. The underlying argument in this section is that the alliance of Hungary and Poland successfully counteracts the EU's measures.

#### *3.1. The Hungarian-Polish alliance*

Constructivist theory of international relations focuses on the role of ideas, culture and norms as key factors to define interactions in the international arena. According to Alexander Wendt, one of the most prominent constructivists worldwide, "the structures of human association are determined primarily by shared ideas rather than material forces".<sup>lxxii</sup> This suggests that individuals or countries whose ideas or ideologies align are more likely to cooperate with each other. Similarly, Mark L. Haas, Professor of Political Science at Duquesne University, found in a comprehensive study that "ideological similarities among States' leaders are likely to significantly mitigate the potency of the security dilemma as a source of international tension, whereas ideological differences will be a powerful stimulant of mistrust and hostility".<sup>lxxiii</sup> This means that countries whose ideologies are similar are more likely to form alliances between them, while they are less likely to cooperate with countries whose ideologies are very different. In this case, Hungary and Poland are more likely to cooperate with each other as they have a shared past and culture, and their leaders have a similar ideological background.

For starters, they are both Central European countries which were part of the Soviet Union until the end of the Cold War. Nowadays, they both form part of the Visegrad Group (V4), a cultural and political alliance between Hungary, Poland, Czech Republic and Slovakia.<sup>lxxiv</sup> Additionally, the PiS and Fidez have had an akin catholic rhetoric.<sup>lxxv</sup> For instance, both leaders have initiated policies to restrict abortion, declared conservative Christian teaching to be the backbone of the State Police, and have launched several policies against LGBTQ+ groups.<sup>lxxvi</sup> Moreover, as studied in section one, Hungary and Poland have a similar nationalist and populist playbook, which aims to centralize the executive power by targeting the judiciary and restricting media freedom. In both cases, the constitutional and electoral laws were revised. This shared ideology

makes them more likely to cooperate, not only because it mitigates the potency of the security dilemma but also because, as Hungarian politician and member of the European Parliament Márton Gyöngyösi said, “Polish-Hungarian relations are underpinned by a mythologized friendship.”<sup>lxxvii</sup>

### *3.2. The role of the Hungarian-Polish alliance in successfully counteracting EU tools*

This subsection will evaluate how the Hungarian-Polish alliance translates into practice to counteract EU tools. Therefore, the EU’s tools presented in Section 2 will be explored in practice. Up to date, the EU has used the following mechanisms to deal with the illiberal regimes in Hungary and Poland: (1) the Commission’s rule of law framework, (2) infringement proceedings, (3) preliminary references, (4) Article 7.1. and (4) the new Rule of Law Conditionality Regulation. Hungary and Poland’s alliance will mainly play a part in the activation of Article 7.1.

The Commission’s rule of law framework was first used in 2016 to issue recommendations to Poland. It established that the reforms in Poland’s Constitutional Court breached the rule of law since judges had been “unlawfully elected”. The European Commission demanded the PiS to reinstate the three judges that were elected by the previous government in 2015 (which the PiS had neglected), to publish and implement Poland’s Constitutional Court rulings, and to reverse the reforms made to the Supreme Court and the National Council of the Judiciary.<sup>lxxviii</sup> As these recommendations are not legally binding, Duda’s government simply disregarded them and refused to make any significant changes. In fact, Poland submitted a White Paper on the Reform of the Polish Judiciary, which aimed to “explain that the criticism of the reforms is unfounded” and “to clear any doubts our European partners may have about the rule of law in Poland.”<sup>lxxix</sup> On this account, the main factor which counteracts EU’s measures is their own lack of enforcement, not the Hungarian-Polish alliance.

As for infringement proceedings, in 2012, a case was made against Hungary for lowering the retirement age of judges from 70 to 62 years. Both the Court and the Commission established that this was a scheme which “violated the principle of proportionality”.<sup>lxxx</sup> Shortly after this decision, Orban established a new bill to deal with the judges that were unlawfully dismissed due to the new retirement age regulation. As of March 2013, the dismissed judges could choose between (a) requesting reinstatement and being fully compensated for their loss, (b) retirement

with a compensation equal to a twelve-month salary or (c) stay in a ‘reserve’ position, where they are retired but may be requested to work in a temporary judicial position if needed (e.g.: replacement of a judge who cannot finish his/her term).<sup>lxxxix</sup> The European Commission stated that they were “satisfied that Hungary has brought its legislation in line with EU law”.<sup>lxxxix</sup> In this particular case, even though the proceedings fall under non-enforceable international law, Hungary complied, and the rule of law protection mechanism worked.

Similarly, the European Commission initiated a case against Poland in 2018 for lowering the retirement age of Supreme Court Judges from 70 to 65; and for giving the Polish President the power to extend the period in office of judges to his discretion.<sup>lxxxix</sup> The European Court proved that Poland’s actions were against EU’s rule of law standards and demanded for the suspension of set law. As a response, Duda signed an amendment which removed the early retirement provision in order to ease tensions with the EU.<sup>lxxxix</sup>

However, the relationship between the EU courts and Poland reached a peak of tension in 2021 when Poland’s Constitutional Court found Articles 1, 4 (3), 19 (1&2) of the Treaty of the European Union unconstitutional, going against the primacy of EU law<sup>lxxxix</sup>. This event occurred after the Court of Justice of the EU used the “preliminary reference” mechanism and found that the new Polish laws regarding the National Council of the Judiciary (NCJ) -which allowed the Sejm to indirectly appoint Supreme Court judges- was against EU law and hence should be revoked.<sup>lxxxix</sup> Duda not only failed to comply with the EU Court’s demands, but directly subordinated EU law to national law, “rejecting the legal bedrock upon which the European Union is based.”<sup>lxxxix</sup> Shortly after, the EU launched infringement proceedings due to “serious concerns with respect to the Polish Constitutional Tribunal and its recent case law”<sup>lxxxix</sup>, sent a formal letter of notice for not complying with the EU court’s verdict, and imposed a €1 million a day sanction (which continues to increase and Poland has not yet paid). This issue has not yet been resolved up to date. But whatever the outcome turns out to be, this case proves that States don’t always surrender to the EU court’s rulings: international law ultimately depends on national self-enforcing.<sup>lxxxix</sup> On this account, the lack of enforcement is the EU’s institutions undoing, not the Hungarian-Polish alliance.

The third tool used (or attempted to use) by the EU to stop the illiberal threat was the activation of Article 7.1. In June 2015 it was attempted to be used against Hungary, but the resolution did not pass the Council. However, in 2018 the European Parliament (EP) triggered Article 7.1

against Hungary for breaching the EU's core values. The proposal was approved with 448 votes against 197.<sup>xc</sup> Similarly, in 2017 the European Commission triggered Article 7.1 against Poland, and the European Parliament approved this in 2018. The Council's decision is still pending. As European Parliament News state "despite the deteriorating situation in both countries in recent years, member states have avoided voting to determine whether there is 'a clear risk of a serious breach' of the EU's common values, the next step in this Article 7 procedure."<sup>xc</sup>

Moreover, even if the process would advance, Hungary has already publicly stated that it would use its veto power. Zsolt Semjén, Hungary's deputy Prime Minister, stated that "the Polish-Hungarian friendship and the Hungarian government's commitment to treaties obliges us to step up against the Commission's move in all forums."<sup>xcii</sup> Furthermore, Semjén added that "it is unacceptable that Brussels is exerting pressure on sovereign member states and arbitrarily punishing democratically elected governments."<sup>xciii</sup> In practice, it is evident that Hungary and Poland's preferred positions align and that their shared ideologies are far apart from other EU members. Therefore, according to Tsebelis veto player theory, Article 7.2 will be hard to pass since the current status quo is closer to the preferences of at least one veto player. In this case, the Hungarian-Polish alliance is crucial to explain the limits of the EU's tools: **they exploited the flaws of the institutional design to their favor.** The EU's institutional design did not foresee an event where there were two allied authoritarian countries.

As for the new Rule of Law Conditionality agreement, it was first triggered against Hungary in April 2022. The European Commission proposed to "freeze 65% of the regional funds to Hungary for the years 2021-2027, which amounts to €7.5 billion."<sup>xciv</sup> This represents 20% of the EU funds allocated for Hungary in the seven mentioned years and 3% of Hungary's annual GDP.<sup>xcv</sup> In addition, recovery for COVID-19 funds for Hungary (€7 billion) and Poland (€35.4 billion) were frozen until they could prove to have judicial independence and abide by EU rules.<sup>xcvi</sup> The European Court of Justice assured that "sound financial management of the EU's budget could be seriously compromised by breaches of rule of law" in Hungary and Poland.<sup>xcvii</sup>

The freezing of assets proved to be a quite effective tool in forcing the populist leaders' hand. In July 2022 Duda abolished the Disciplinary Chamber, which was a PiS controlled body that sanctioned judges discretionary, in order to unlock the 35 billion euros from the pandemic recovery funds.<sup>xcviii</sup> Similarly, Orban launched a 17 commitment program for reducing corruption within the Hungarian government. However, the Commission revised the new laws

and concluded that “Hungary failed to adequately implement central aspects of the necessary 17 remedial measures agreed under the general conditionality mechanism by the deadline of 19 November, as it had committed to.” Therefore, their proposal to freeze the €7.5 billion regional funds was accepted by the Council in December 2022.<sup>xcix</sup> (The difference in the treatment towards Hungary and Poland on this issue will be discussed in the following section). However, as the Washington Post reports, Orban has “pledged to meet EU demands on judicial independence by the end of March (2023)”.<sup>c</sup> In this case, the Hungarian-Polish alliance does not play a significant role since they are both out for themselves. <sup>8</sup>

In sum, **the Hungarian and Polish alliance comes into play when they have room to exploit the EU’s institutional design flaws.** With recommendations or legally binding but not enforceable court rulings, the institutional flaws on their own are enough to explain the limited efficiency of the EUs actions. It is not necessary for the Hungarian-Polish alliance to act. However, when it comes to Article 7, the alliance of Hungary and Poland is crucial to explain the lack of action by the EU. It is therefore a combination of argument one and two that best explains the EU’s limited response towards illiberalism: the EU’s tools are ineffective because of a structural design problem that is exploited when necessary by the alliance between Hungary and Poland.

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<sup>8</sup> The new Rule of Law Conditionality agreement seems to be effective in controlling illiberal regimes within the EU: the imposing of sanctions incentives actors to cooperate. However, the shift in EUs action -from recommendations to sanctions- is very recent. It has been in practice for less than a year, so it may be too soon to tell on its effectiveness. Nevertheless, it does seem to be on the right track for stopping the freedom to maneuver of authoritarian leaders.

## Section 4. The role of strategic interests

Up until now we have assumed that Hungary and Poland were on one side of the equation while the rest of the EU members were on the other side, wanting to stop illiberalism at all cost. However, in this section we will analyze the tendency to be more lenient towards Hungary or Poland at different points in time due to the strategic interest that they met. As David Lake well puts it, interests are “what actors want to achieve through political action; their preferences over the outcomes that might result from their political choices”.<sup>ci</sup> A way to think about the relationship between the illiberal regimes and the EU is as if Hungary and Poland were authoritarian provinces within a democratic federal State (with Hungary and Poland being the authoritarian provinces, and the EU being the democratic central State). In this sense, the work of comparative politics expert Edward L. Gibson may be of help. The author explains that an authoritarian province may survive in a nationally democratic State if its illiberal tendencies are overshadowed by other, more convenient, strategic interests that it can provide to the central State, such as votes. In Gibson’s words:

“Authoritarian provincial political elites, with their abundant supplies of voters and legislators, can be important members of national governing coalitions. Thus, democratically elected central governments may find that the costs of challenging peripheral authoritarians outweigh the benefits because the authoritarian periphery serves the democratic center in tasks vital to national political governance. If subnational authoritarianism persists in a nationally democratic country, therefore, it is because it often meets important strategic needs of national democratic governments.”<sup>cii</sup>

Therefore, the underlying argument in this section is that Hungary and/or Poland may serve a strategic interest to specific groups within the EU or to the EU as a whole that makes them be willing to put up with the authoritarian tendencies. In the following subsections the strategic interest met by Hungary and Poland at different points in time will be addressed.

### 4.1. Strategic interest in the European Parliament

The European Parliament creates and amends legislation and has hold over the annual EU budget (along with the Council). There are currently 705 members of the European Parliament (MEP) and seven political groups.<sup>9</sup> Each State has a fixed number of members depending on its

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<sup>9</sup>“A formally recognized political group must consist of at least **23 MEPs** coming from at least one-quarter of the member states (i.e. seven, at least). MEPs may only belong to one political group while some do not belong to any political groups at all and are referred to as “non-attached” Members.”<https://www.europarl.europa.eu/news/en/faq/1/what-are-political-groups-and-how-are-they-formed>

size, ranging from six to ninety-six. Hungary provides 21 MEPs and Poland 52. Historically, most Hungarian parliament members belonged to the European People's Party group (EPP), which has a center right orientation and is the largest political group in the European Parliament. Hungary's members made the EPP have a majority in the Parliament, which made their alliance crucial for the group. In contrast, Poland always belonged to the European Conservatives and Reformist (ECC) group, which has a marginal influence over European politics. In this sense, Hungary is a more 'relevant' ally than Poland, which could explain the difference in the EU's response towards the decline in both countries.

For instance, when Article 7.1 was attempted to be enacted against Hungary in 2015, the EPP publicly defended Orban: 187 EPP members voted against the resolution and only six in favor and three abstentions.<sup>ciii</sup> In contrast, when the European Parliament voted to activate Article 7.1 against Poland the resolution passed without much resistance<sup>civ</sup>. The PiS did not have the backing of powerful partisan allies, which goes to show the importance that strategic interests play. The EPP group members were able to tolerate Hungary's democratic backslide due to the strategic interest that they met.

In the same line, political science experts Mauritius J. Meijers and Harmen Van Der Veer proved that "strategic interests determine MEPs' responses to democratic backsliding". They argue that not only group members vote against sanctioning their own, but that those groups who have members belonging to illiberal regimes are unlikely to bring democratic transgressions into the political agenda.<sup>cv</sup>

However, this panorama has changed in recent years. In 2021, 148 MEPs voted in favor of a new rule that would allow the EPP to vote out members from the group. Hungary perceived this as a direct threat and in March 2021 Fidez quit the EPP group.<sup>cvi</sup> Ever since then, the EPP has been harsher regarding the demands for reform in Hungary. For instance, by blocking their demand to unlock the pandemic recovery funds. Jeroen Lenaers, the EPP Group's Spokesman on Civil Liberties, Justice and Home Affairs said in September 2022 that "only significant, tangible and lasting progress in rebuilding democratic and anti-corruption safeguards should enable the release of EU taxpayers' money".<sup>cvii</sup> As Daniel Kelemen states, Gibson's subnational authoritarianism theory translates in EU politics: "where an authoritarian leader in an EU

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member state delivers votes to an EU-level political coalition – such as a party group in the European Parliament – its EU-level co-partisans will have incentives to tolerate its democratic backsliding and shield it from EU sanctions.”<sup>cviii</sup> When this situation changed, the EPP’s attitude towards Hungary “coincidentally” did so too.

#### *4.2. Strategic interests for the EU body as a whole*

Tables turned in recent years. Not only Hungary was no longer part of the EPP, but Poland met a key strategic interest to the EU as a whole: they became a crucial ally to support Ukraine in their war against Russia in 2022.

This conflict roots back to the cold war era, when Ukraine was part of the Soviet Union. As of 1991 Ukraine is an independent State, but Putin - Russia’s authoritarian leader- sees Ukraine as a historical part of Russia and claims its legitimacy over the territory.<sup>cxix</sup> In 2014 they annexed Crimea, in the South of Ukraine, without significant international response. In November 2021 Russia began sending troops to its borders with Ukraine; and by February 2022 a full-fledged attack was launched on the country. But this time, Putin met with international resistance. Following the United States lead, the EU imposed harsh economic sanctions on Russia, such as banning Russian crude oil imports, putting a stop to plans for opening a Russian pipeline in Germany, a SWIFT ban for several Russian banks (this means that Russia will no longer be able to use the Society for Worldwide Interbank Financial Telecommunication interface to transfer money, and isolates it for the global financial system), asset freezing and prohibition of transactions with Russia’s Central Bank, among others.<sup>cx</sup> They also sent significant financial aid to Ukrainian armed forces (€3.6 billion by February 2023)<sup>cxii</sup> and provided “immediate and collective protection” to Ukrainian refugees through their temporary protection mechanism. Here is where Poland comes into play.

As Kuisz and Wigura stated in their Foreign Affairs article, “Europe and Poland need each other more than ever”.<sup>cxiii</sup> Poland shares a border with Ukraine, so they have emerged as a “vital element of the puzzle” to helping Ukrainian refugees. It is estimated that Poland welcomed 3.5 million Ukrainian refugees and provided almost \$3 billion in aid.<sup>cxiiii</sup> In addition, they sent weaponry and became the “global hub for arms deliveries and other equipment headed to Ukraine”.<sup>cxv</sup> This made Poland pass from being a pariah within the EU to becoming a savior in the international community’s eyes. As the recognized think tank ECFR (European Council of



Foreign Relations) puts it: “Poland’s role as the hub for Ukraine’s military support means it is indispensable for US and European efforts to help Ukraine resist Russia’s aggression.”<sup>cxv</sup>

This apparent alignment with EU values by Poland’s part translated in an attitudinal change from the EU towards them. In May 2022 the European Parliament had issued a resolution for the European Commission to block Poland’s €35.4 billion recovery and resilience plan (KPO: EU funds to Poland for pandemic recovery) because the State had not yet met rule of law standards, especially regarding the independence of the judiciary.<sup>cxvi</sup> There is a judicial reform bill in the makings in Poland that allegedly complies with the EU’s standards, but has not yet been passed by the upper house or sanctioned by Duda<sup>cxvii</sup> In fact, Duda has sent the bill to be revised by the Constitutional Tribunal, which is not independent or impartial. Beata Szydlo, an important polish politician and member of the European Parliament tweeted about this situation: “Poland generously helps millions of Ukrainian refugees and supports the fighting Ukraine. How do MEPs react to this? They issue a resolution calling on the EC to continue blocking KPO for Poland, and even to withdraw other funds. Fighting against Poland is working for Putin!”<sup>cxviii</sup> Even though the panorama regarding rule of law standards and the new judicial bill did not change, on June 1st, 2022 the European Commission endorsed Poland’s plan. In fact, one of its objectives is to contribute to “reinforce public services including education and healthcare, at a time when large numbers of Ukrainians have been welcomed into Poland.”<sup>cxix</sup>

The case for Hungary was different. Even though the Hungarian-Polish alliance is still strong, Orban's attitude towards Ukraine was contrary to Poland’s: he did not hold all the sanctions against Russia, did not send weapons or military assistance to Ukraine and has even been accused of offering safe escape routes to Kremlin officials.<sup>cxx</sup> One could find it a coincidence, but Hungary’s pandemic recovery funds were not unblocked by the EU.

This illustrates how strategic interests may shift the EU’s attitude towards punishing illiberalism. In this case, Poland’s authoritarian tendencies can be overlooked because of their strategic position in the Ukraine war, whereas in Hungary, which no longer meets a strategic interest, the EU is no longer willing to succumb.

To sum up, strategic interests - both to the EU body as a whole and to particular groups of the European Parliament- play a crucial role in the way that the EU acts towards illiberal regimes. When Hungary represented the needed majority for the EPP, the EU’s attitude towards them was more lenient in comparison to Poland, mainly because of the political power that the EPP

held. However, now that Poland represents a crucial international ally against Ukraine and Hungary stands against them and is no longer part of the EPP, the EU is able to overlook judicial corruption in Poland while not in Hungary. **The EU's attitude towards illiberalism is determined by a strategic interaction between rational actors that weigh the benefits and the costs of combating the authoritarian regime.**



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## Conclusion

Hungary and Poland are both in the process of democratic backsliding, as “executive aggrandizements” and “long-term strategic harassment and manipulation” are present in both countries. This study aimed to evaluate the reasons behind the EU’s limited response towards this backslide. To do so, it examined the interplay of institutions, ideas, and interests in shaping the relation between Brussels and Hungary and Poland.

Upon close examination of expert reports, primary sources, academic papers and statistic reports, I found, firstly, that there is a design problem in the EU’s institutions to fight illiberalism within the bloc: they are either insufficient or ineffective. On the one hand, insufficiency comes from the fact that the EU has the obligation to continue the monetary flow to illiberal countries because they are still EU members- and the money is received by the incumbent- but is prohibited to financially support local democratic opposition. Even though the Rule of Law Conditionality agreement suspends some payments to the illiberal regimes, the EU lacks the possibility to completely stop the monetary flow to such countries. Hence, the economic cost of democratic backsliding is not as large, which reduces the incentive to adhere to EU’s standards. On the other hand, ineffectiveness comes from structural institutional problems. The main structural issue is that the tools to fight illiberalism are either non-enforceable or need an overwhelming majority to be passed, which generates too many veto players. In a system composed of 26 veto players whose ideological preferences are far apart, it is very hard for Article 7.2. of the EU treaty to be activated, especially when only one country at a time can be judged.

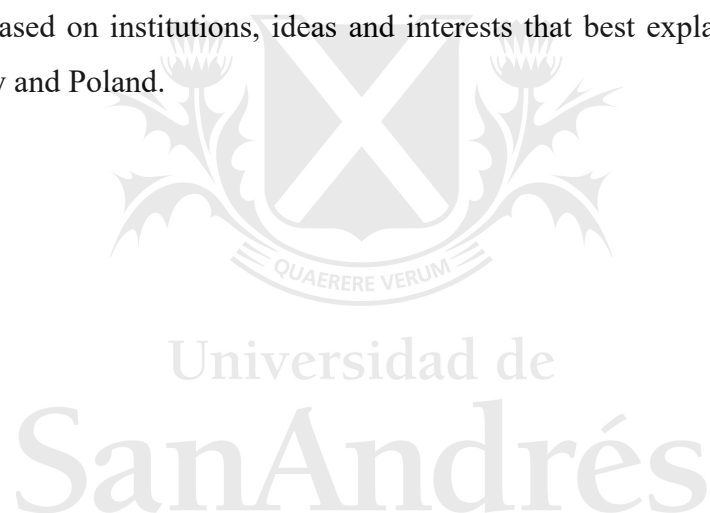
Secondly, I found that this structural downfall is exploited by the allegiance of Hungary and Poland. When the structural problem of the EU’s tools are not enough to render their actions ineffective, Hungary uses its veto powers if Article 7 wants to be used against Poland, and vice versa. Their shared ideas, roots and ideology makes them more likely to cooperate with one another.

Thirdly, Hungary and Poland met strategic interests at different points in time to both the EU body as a whole and to certain groups within the European Parliament, which made them so valuable that the EU was willing to overlook their autocratic tendencies. In this case, strategic interests trumped core values. When Hungary provided the EPP the necessary members to have a majority in the Parliament, they were more lenient towards them than to Poland. However, when Poland represented a key ally against Russia in the Ukraine war and Hungary stopped

being part of the EPP and did not help Ukraine, the EU became harsher with Hungary and more lenient towards Poland.

The most effective tool that the EU has to fight illiberalism appears to be the new Rule of Law Conditionality agreement, since its activation is feasible, enforceable and the Hungarian-Polish alliance does not play a major role. However, it is still too new to tell. A future study could analyze its effectiveness.

All in all, the downfall in the EU's institutional design to fight illiberalism is a necessary condition to explain their limited response towards authoritarianism in Hungary and Poland, since it tilts the playing field in the illiberal country's favor. Nevertheless, to comprehend the whole panorama it is crucial to understand how the Hungarian-Polish alliance and the interested parties within the EU exploit these institutional downfalls. Therefore, it is a combination of the three arguments based on institutions, ideas and interests that best explains the EU's limited actions in Hungary and Poland.



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