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WORKING PAPER

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**Tilting the playing field
through informal power
in Hungary and Poland -
How did Russia's war in
Ukraine change the EU's
approach?**

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Abstract

While democratic backsliding and the EU's constraining role has received notable scholarly attention from the formal, legal perspective, its responses (or lack thereof) to informal power in Central and Eastern Europe is still understudied. This working paper aims to fill this gap by looking at the case of Hungary and Poland where the governments tilted the playing field informally since 2010 and 2015 respectively. It applies the concept of informal power to explain how the Hungarian and Polish governments captured the media in an uncoded, informal way under the watch of the European Union. Despite the EU coming up with new tools to address the problem, it failed to force Hungary and Poland to comply with the core values of the EU. Triggering the Rule of Law Conditionality Mechanism against Hungary and withholding multiple financial transfers both from Poland and Hungary marked a turning point in the dispute within the EU. The working paper briefly explains the linkages between the informal power, and the responses of the EU institutions. The theoretical expectation is that due to the increasing politicization of the EU's responses, it would address certain aspects of informal power and ignores others in a selective way. Empirically, the paper maps the legal and political toolkit of the EU and how it addressed democratic backsliding in Hungary and Poland, before and after Russia invaded Ukraine.

Keywords: Hungary, Poland, Informal power, European Union, media capture, clientelism, politicization, Russia, Ukraine

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Tilting the playing field through informal power in Hungary and Poland - How did Russia's war in Ukraine change the EU's approach?

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Introduction

Democratic backsliding as a political phenomenon gained substantial scholarly attention in the past decade as it became more prominent in Central-Eastern Europe. Hungary and Poland are powerful cases where the turning points cannot be fully described legally because the national governments are tilting the playing field in an uncoded way. In fact, they are textbook examples of the instrumental exploitation of informal power where the government skews the playing field with clientelist corruption, informal media capture, and electoral clientelism (Zgut, 2022).

Over the past decades, legal and policy innovations, and academic proposals were centered around the question of monitoring the Member States' compliance with the founding values of the EU (Art 2 TEU), such as the rule of law and democracy, and how their enforcement could be improved through institutional and legal reforms at the level of the EU. While certain new member states have gone through a comprehensive reform process designed to address the spread of discretionary behavior in public administration through top-down technical assistance and EU-led actions,² it was not employed with regard to Hungary and Poland. Moreover, empirical evidence shows that despite the EU's introduction of various innovative tools, it has not yet succeeded to force these two Member States to comply with the core values of the EU.

Triggering the Conditionality Mechanism against Hungary and withholding multiple financial transfers both from Poland and Hungary marked a turning point in the Rule of Law dispute within the EU. Having access to EU funding has never been seen as a reward for compliance but a key membership right and the Court of Justice of the European Union has also rejected any logic of reciprocity, typical for international law arena. It is argued by Baraggia and Bonelli (2022) that the Rule of Law Conditionality mechanism introduced in 2020 is more politicized and less "technocratic" than the original proposal, which leaves the key decision-making powers firmly in the hands of the Council and the Member States. However, this paper suggests that the EU still fails to recognize the informal power; capturing the media in an uncoded, informal way is one of the issues that was mostly ignored by the EU Commission.

¹ European Studies Unit, ESU, IFIS /CEU DI.

² Corruption and Verification Mechanism for Romania and Bulgaria, European Semester and Country Specific Recommendations for all member states, among others.

While there is a mushrooming knowledge about the EU's constraining role regarding the formal, legal violation of democracy its response (or lack thereof) addressing the informal power is still neglected by the mainstream academic discourse. This paper aims to fill this gap by looking at the case of Hungary and Poland where the governments tilted the playing field informally, in particular with media capture since 2010 and 2015 respectively.

The paper has a twofold role. Theoretically, it aims at studying the linkages between the informal power in Hungary and Poland and the constraining role of the EU institutions. The theoretical expectation is that due to the ever-increasing politicization of the EU's sanctioning behavior, the EU addresses certain aspects of informal power and ignores others in a selective way. It stipulates that the EU fails to address informal media capture in Hungary and Poland that formally complies with EU law while substantially tilting the playing field in an informal way. Empirically, it maps the legal and political toolkit of the EU and how it addressed democratic backsliding in Hungary and Poland, before and after Russia invaded Ukraine.

It not only adds to the existing literature that mainly considers the formal power and its formal violation of the EU law, but it also carries an added value in terms of mapping missing EU reactions to the informal power. Besides focusing on the relationship between informal power and EU responses, the study also adds to the body of literature concentrating on the Central Eastern European region. The paper is constructed as follows: first, a literature review and a conceptual summary are provided on the notion of informal power and how it relates to media capture in the context of democratic backsliding. Second, a theoretical framework is offered that combines the constraining role of the EU with expectations about responsive strategies to national-level informal power. Third, the case selection and methods are asserted, which is followed by a qualitative study, provided on two levels. Firstly, by mapping the Fidesz and PiS government's informal media capture and then summarizing the responses of the EU towards democratic backsliding. It is done through the analysis of official documents, media coverage, and secondary resources, as well as 20 semi-structured, in-depth interviews to reconstruct the complex relationship between informal power and the EU-level responses. The paper concludes with suggestions for future research and policy recommendations.

1. Informal power and democratic backsliding

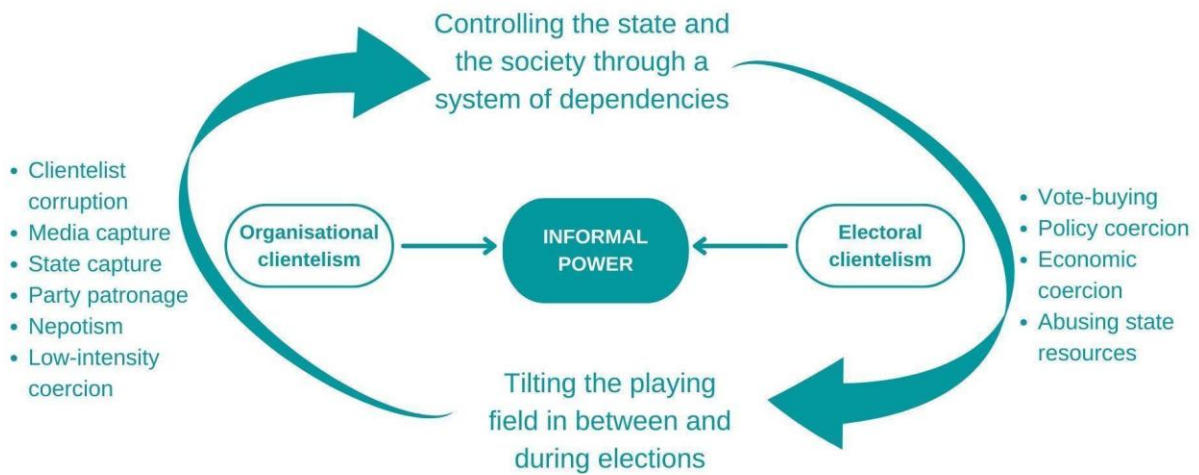
One of the absolute conditions of an established democracy is that political power is not possessed and monopolized by one individual or a group (Sartori, 1987). Whereas it is almost impossible to prevent certain political actors from temporarily gaining power as their personal possession, democracy should be "the power of nobody" (Lefort, 1986). The Post-Communist region has historically struggled to fulfill this criterion due to the variant level of non-democratic types of informality that is dominating the polity (Robinson, 2007).

Whereas informality, in general, has been discussed within the theoretical framework of authoritarianism, informal power remained relatively under-discussed in the context of democratic backsliding in CEE. By democratic backsliding, this article refers to the deterioration of the rule of law and democratic governance as well as the concentration of political, social and economic power (Diamond and Plattner, 2016; Merkel, 2004). While most studies on the region's informal tendencies are centered either around party politics (Grzymala-Busse, 2004, 2012) or argue that informality prevails throughout external economic actors' influence on the party system (Klíma, 2019), this paper employs a different approach. It considers non-democratic informality as one aspect of governmental power when analyzing the functioning of the regime (Zgut, 2022).

Accounting for how power is being used in political systems, this paper invokes Mungiu-Pippidi (2006) who distinguished between two main social-political systems. One of them is universalism, which characterises modern states where power is shared and makes a clear distinction between public and private. This is in line with Weber's ideal bureaucracy, which is based on a hierarchical division of labor and governed by explicit rules (Weber, 1968). The other is particularism, or the particular state, based on the concentration of power and the interconnection of the public and private spheres. While the former behaves against anti-corruption, particularism tends to use public power for economic gain.

Extensive theoretical and empirical studies (Kitschelt and Wilkinson, 2007; Koehler, 2008; Giordano and Hayoz, 2013) have shown that concentrated political power is used to maintain a clientelistic system where in exchange for the goodies the beneficiaries perpetuate the power of their patrons. Although clientelism and corruption are being taken as two distinguished notions, this paper follows Sajó (2003) who discussed the two concepts under one roof by claiming that corruption has become the foundation of the Post-Communist region's clientelist social structure. He conceptualized this state-centered phenomenon as clientelist corruption, as a form of structural corruption which should be distinguished from the discrete individual acts of corruption (Sajó, 2003). In the words of Gherghina and Volintiru (2022), although electoral and organizational clientelism are two different types of clientelistic transactions, they should be regarded as mutually reinforcing and complementary.

Figure 1. The concept of informal power (Zgut, 2022).



Therefore, informal power refers to uncoded, informally enforced interactions of the government that create an uneven playing field to its benefit. It accounts both for organizational and electoral clientelist exchange which creates a system of dependence for the political/economic/civic actors closely allied with the regime, and also between the voters and the government. Informal power is often underpinned by low-intensity coercion to consolidate control over the state and society. This is more difficult for international observers to identify than formal mechanisms of repression (Zgut, 2022).

Media capture is one of the most effective tools with which autocrats can tilt the playing field to undermine the opposition (Levitsky and Ziblatt, 2019). This paper refers to it as a condition in which news media are controlled “either directly by governments or by vested interests networked with politics” (Mungiu-Pippidi and Ghinea, 2012: 180). We build on the concept of Besley and Prat (2006), who argued that media capture traces back to economic considerations. Their theoretical reasoning was that a diverse media market with numerous independent media enterprises provides a guarantee against governmental influence. In hybrid regimes, a clientelistic network of media ownership has a significant role in this exchange (Sajó and Tuovinen, 2019). When it comes to the informal linkage between economic and political power, part of the Post-communist region could be best characterized by the informal collusion of power and ownership (Magyar and Madlovics, 2021).

2. The constraining behavior of the EU institutions

We must pay greater attention to Hungary and Poland's use of informal power because the EU has been primarily designed in a way that traditionally focuses on formal institutional changes through its rule of law instruments. In the words of Gora and De Wilde (2020), once you have a hammer, every problem looks like a nail. In addition to that, the Commission prefers to resolve compliance breaches through structured dialogue with the relevant Member State (Batory, 2016: 688), instead of using more effective legal tools, such as the infringement procedures. Since the EU is a community of law, compliance with EU law is ultimately voluntary and the EU is, unlike other federal states, not even empowered to use coercion to enforce EU law against a reluctant member state (Bieber and Maiani, 2014: 1060–1 in Closa, 2020).

It intertwines with the lack of political will to act; as Kochenov and Bárd (2019) rightly put it, the Council is the firmest of all the institutions turning a blind eye to the rule of law problem itself, let alone the issue of informal power that remains unaddressed by the EU. The general interplay between the Member States and EU institutions is based on consent building and deliberation (Bickerton, Hudson, and Puetter, 2015) to maintain dialogue-based instruments, including the Council's rule of law review process and the Article 7 procedure against Poland and Hungary (Hegedűs, 2023). While Pech and Scheppele (2017) claimed that the EU's inaction lies in the combined supermajority requirements in the Parliament and Council, Hooghe and Marks (2019) emphasized the unanimity requirement in the Council as the main obstacle allowing supranational bodies to intervene in domestic constitutional reform. In the words of Closa (2021), the internal logic of behavior within the Commission, the EP, and the Council has contributed to a more limited sanctioning activity in this regard.

As Closa (2021: 501) argued, the European Union's institutional design "paradoxically permits (and even encourages) logic that might be inhibiting its sanctioning capacity". Whereas the European Parliament mobilizes along party lines within the context of Rule of Law breaches and the activation of Article 7 sanctions (Kelemen, 2017; Sargentini and Dimitrovs, 2016; Sedelmeier, 2013), European party groups protect errant governments from their political family but are prepared to act against those that belong to different families. Kelemen (2017, 2020³) provides a fully elaborated theory of the authoritarian equilibrium in which the EU paradoxically supports the survival of authoritarian governments under its tent. He argues that partial politicization, EU subsidies, and emigration are key factors that reinforce the consolidation of authoritarian rule in Hungary. Consequently, the constraining role of the EU is limited as there are various political and economic incentives that provide a safe environment for these regimes to operate. In comparison to fully developed federations, the EU tolerates autocratic member states partly because they play a much more powerful role in the decision-making system. It corresponds with the argument of Closa (2021: 503) that the EU institutions follow logics of

³ Kelemen, D. (2020) Time to call Hungary and Poland's bluff. POLITICO <https://www.politico.eu/article/time-to-call-hungary-and-polands-bluff/> - Accessed on March 4, 2023.

behavior that are “combined with intergovernmental logic that may yield suboptimal results for sanction enforcement”. As Kelemen (2017) argued even more convincingly, the Juncker Commission (2014–2019) refused to sanction the Orbán government because the President of the Commission and the majority of the body belonged to the same European People’s Party (EPP) who owed their dominance of the EU’s executive to the support of the EPP fraction in the EP.

What explains the current sanctioning behavior of the von der Leyen Commission and the Council of the EU which showcased a more assertive approach towards Hungary and Poland after Russia invaded Ukraine? Triggering the Rule of Law conditionality indicates a significant power accumulation for the EU that is now willing to use funds as leverage, which is a novelty in the EU governance. What are the theoretical, structural, and political contextual features that may influence this process? The theory of politicization has been increasingly applied to many EU studies and research, indicating the ending of the so-called permissive consensus. In fact, a wealth of literature (Hutter, Grande and Kriesi, 2016; Hoeglinger, 2016; De Wilde, Leupold and Schmidtke, 2016) demonstrated that the politicization of European governance is not new in the post-Maastricht historical feature of integration. They argue that it appears to follow a rather cyclical trajectory that accelerated considerably over the past decades (De Wilde, Leupold and Schmidtke, 2016). While there are various definitions, this paper defines politicization as the act of transporting a non-political issue into the arena of politics (De Wilde and Zürn, 2012). It accounts for a publicly visible polarization of interests, values, or opinions towards the process of policy formation within the EU. It is argued that “politicization happens as a result of authority transfers from Member States and the main drive is the ever-increasing authority of the EU” (Hutter, Grande and Kriesi 2016; De Wilde and Zürn, 2012). Our expectation is that due to the ever-increasing politicization of the EU’s sanctioning behavior, the EU addresses certain aspects of informal power and ignores others.

3. Case selection and methodology

The paper builds on the case of Hungary and Poland and investigates whether and how the EU institutions address informal power underpinning democratic backsliding in the respective countries. Studying these two countries is warranted on multiple grounds. Firstly, according to the global democracy indexes, they are the most advanced Member States in terms of democratic and rule of law backsliding. Hungary departed from the group of democracies and was classified as a hybrid⁴ or electoral authoritarian regime⁵. V-dem indicated that Poland is shifting in a similar direction: in 2021 it has taken over [from Hungary] the first position of top

⁴ Hungary: Freedom in the world (2020) Freedom House. <https://freedomhouse.org/country/hungary/freedom-world/2020> - Accessed on February 28, 2023.

⁵ Varieties for Democracy Report (2021), Autocratization turn viral https://www.v-dem.net/documents/12/dr_2021.pdf - Accessed on February 28, 2023.

autocratizing position. While the global democracy indexes still consider Poland as a diminished type of democracy,⁶ Bodnar and Ploszka (2020) argue that the country has essentially followed Hungary's path in the competitive authoritarian regime by 2020. Secondly, significant informal power is traceable with regard to the operation of their government in both cases (Zgut, 2022; Magyar and Madlovics, 2021). Thirdly, Hungary and Poland are under Article 7 (1) procedure of TEU, and the Commission is currently withholding EU funds from both countries due to their lack of compliance with EU law.

The paper relies on a qualitative exploratory research method, which includes the study of official documents, media coverage, and secondary resources, as well as 20 semi-structured, in-depth interviews. The interviews were made with academics, and experts of watchdog organizations who are mapping democratic backsliding, media capture, and the constraining role of the EU. Whereas primary sources and the authors' previous research permit explaining informal power in Hungary and Poland, empirical evidence for the responses of the EU institutions emerges from direct interviews with experts.

4. Empirical analysis

4.1 Democratic backsliding and informal power in Hungary and Poland

A wealth of literature has been discussing how Fidesz and PiS weakened checks and balances and undermined democratic institutions since 2010 and 2015 respectively (Sadurski, 2019; Enyedi and Krekó, 2019; Bozóki and Hegedűs, 2018). It manifested through, among others, packing the court system and the state audit office, with political loyalists, and both governments were referring to foreign legal examples to justify the capture of the polity. In order to amend the political system, Hungary has been abusing its Fundamental Law, while Poland has been disregarding it and, at the same time, creating its new invisible illiberal constitution (Drinóczi and Bień-Kacała, 2021). In the words of Grabowska-Moroz (2021: 1), the Polish government's "arbitrary legislative amendments not only implemented an anti-constitutional political agenda but also secured unchecked public power and allowed them to avoid accountability." Having a constitutional majority, the decisions of the Orbán regime are often formally taken in accordance with national constitutional norms. While they do not employ openly oppressive methods, both the Hungarian and the Polish governments are instrumentalizing the law to fit the authoritarian goals of the regime in practice. The main difference is that lacking a constitutional majority, the Polish government has openly violated Poland's constitution since 2015 (Jakab and Kirchmair, 2021; Jakab, 2022).

One of the very first international conflicts of Orbán's government was triggered by the newly enacted media law in 2010. The regulations caused tension with the EU because they enabled

⁶ According to Freedom House, Poland is qualified as a semi-consolidated democracy, and V-dem defined it as an electoral democracy.

the establishment of a joint institution overseeing the press, the national news agency, and the Hungarian media market, the National Media and Infocommunications Authority and the Media Council.⁷ PiS also introduced the so-called small media law, amending the former Law on Radio and Television Broadcasting which raised questions about the rule of law in the country at the end of 2015.

However, democratic backsliding was not exclusively defined by formal, codified means. These legislative changes were complemented by various informal power tools, with which the governments skewed the playing field during and in between elections, albeit to a different extent in these two countries. The underlying issue of democratic backsliding in Hungary and Poland is that the governments are exploiting informal power to consolidate control over the state and the society. It has more complex underpinnings, therefore differently salient than the formal violation of the law.

Clientelist corruption is prominent in both regimes where business and political alliances are taking advantage of companies, public procurements and investment opportunities to benefit the ruling elite. Informal power, however, prevails differently in Hungary and Poland. Party patronage and nepotism are the key features of Polish organizational clientelism, which manifests mainly through the mass allocation of public administration and public sector jobs to party members and their relatives (Jasiecki, 2018). In the case of Hungary, the scale of party patronage and nepotism was extended to the political and economic monopolization of the state in which state resources are being redistributed in a top-down personalized fashion, centered around the network of the Prime Minister (Magyar and Madlovics, 2021). Both regimes wield power informally through media capture⁸ and by using powerful individuals and companies to silence or turn over media outlets independent of the government. Once again, Hungary is more advanced in this regard where the media industry has gone through considerable changes in a top-down centralized fashion (Polyák, 2015; Bajomi-Lázár, 2014).

Firstly, the public broadcaster has been instrumentalized for propaganda purposes in both countries. Fidesz and PiS increased political control over public broadcasters, including national and regional public television, radio, websites, and social media (Wójcik, 2022). It significantly contributed to the massive government-led smear campaigns against George Soros, refugees and the EU, in Hungary – where the EU greatly contributed to the financing of this media empire via its financial support. In Poland, campaigns routinely revolved around judges defending the rule of law, teachers, protesters against curbs on women’s reproductive rights, and asylum seekers. In both cases, the public broadcaster consistently presents the opposition and the LGBTQI people as a threat to the state and the nation’s interests (Przybylski, 2018). The main difference in their

⁷ Pop, Valentina (2016) Barroso puts the squeeze on Hungary over media law. EUobserver. <https://euobserver.com/eu-political/31597> - Accessed on March 3, 2023.

⁸ It is argued by Dragomir (2019) that media capture prevails through four main steps. (1) capture of the media regulator; (2) control of the public service broadcaster; (3) use of state financing as a control tool; and (4) ownership control. <https://cmds.ceu.edu/article/2019-05-27/media-capture-europe-mdif-publishes-new-report-dragomir> - Accessed on March 2, 2023.

narratives is traceable through Fidesz' and PiS's strategic behavior toward Russia and its war in Ukraine. While the Hungarian pro-governmental media is mainly disseminating the Kremlin's anti-Western narratives, the Polish government is fully supporting Ukraine and the Western alliance amid the war.⁹

Secondly, while the Hungarian and Polish governments increased spending on public television, state advertising appears to be mainly directed to government-friendly media platforms in both countries (Bátorfy and Urbán, 2019; Kowalski, 2020). The National Communications Office, which is part of the Hungarian Prime Minister's Office, controls the state's advertising expenditures; 80 per cent of the state advertising budget was allocated to the approximately 500 government-affiliated media under the umbrella of the KESMA Foundation (Bátorfy and Urbán, 2019). In 2020, TV2 Media Group, which is owned by Orbán's childhood friend, Lőrinc Mészáros, received ten times more state advertising revenue than RTL Hungary, the largest remaining independent broadcaster.¹⁰ In addition to that, a certain chilling effect was generated on the market as foreign investors stopped advertising in media independent of Fidesz. It indicates that foreign investors, in particular the German automotive industry,¹¹ are showcasing economic self-censorship in order to maintain business privileges provided by the Orbán government (Zgut, 2022; Osvath, 2020, see n 10).

In Poland, the government financially boosts government-friendly media outlets with the help of state-owned companies (Zgut, 2022). Public funds are channeled through advertisements and partnerships sponsored by state-controlled companies, creating a tight dependency between the government and the media outlets. As for support for televisions, 92.6 per cent of advertising expenditure of state-owned companies was channeled towards two groups - TVP and Polsat (Kowalski, 2020). The public broadcaster was the main beneficiary, getting 53 per cent of the overall funds. Despite that their market position is better, media platforms independent from the Polish government such as Gazeta Wyborcza and TVN remained unnoticed for the state advertisement.

Thirdly, private media ownership has become increasingly politicized in both countries, where a clientelistic network centered around the ruling elite gained significance to tilt the playing field. This is the most prominent in Hungary, where foreign media investors were replaced by domestic political investors affiliated with the ruling elite (Bátorfy and Urbán 2019; Sajó and Tuovinen, 2019). The control over the autonomous broadcasting regulatory agency by government

⁹ Notes from Poland (2022) "The paths of Poland and Hungary have diverged," says Polish PM <https://notesfrompoland.com/2022/07/30/the-paths-of-poland-and-hungary-have-diverged-says-polish-pm/> - Accessed on March 7, 2023.

¹⁰ International Press Institute (2022). Mission report: Media freedom in Hungary ahead of 2022 election. Available at: <https://ipi.media/mission-report-media-freedom-in-hungary-ahead-of-2022-election/> - Accessed on April 19, 2023.

¹¹ Osvath, S.V. (2020) Ausländische Unternehmen werben lieber in staatsnahen Medien. Deutschlandfunk. <https://www.deutschlandfunk.de/kritik-aus-ungarn-auslaendische-unternehmen-werben-lieber-100.html> - Accessed on March 12, 2023.

appointees enables the acquisition of private media outlets and licenses (frequencies) and facilitates bias in broadcasting which is tolerated by loyalist authorities (Sajó and Tuovinen, 2019). These allies use the revenue generated in their government-supported businesses for the acquisition and operation of media outlets. It resulted in an unprecedented level of ownership concentration and the creation of a huge right-wing media conglomerate called the Central European Press and Media Foundation (KESMA), into which government-friendly businessmen transferred the ownership of 476 media outlets for free.¹² With this, the government captured a robust arsenal of media outlets financed by taxpayers' money that supports the executive's position in a top-down centralized fashion. It is a feudalistic societal structure in which property relations define the connection between people down to the everyday life of ordinary subjects of a state (Madlovics and Magyar, 2021), where the private property can be expropriated in case of a conflict between the media owner and the ruling elite (Csillag, 2020; Zgut, 2022). Low-intensity coercion on different scales has been reportedly put on media stakeholders independent of the government. One of the most notorious examples is Zoltán Varga, the owner of Central Media, the country's last remaining media empire independent of Fidesz. Not only has he been under surveillance by Pegasus spy software in 2019, Varga also claimed that he's been facing various intimidation tactics from the Hungarian government to sell out his business to oligarchs close to the Prime Minister.¹³ According to the report of the European Parliament, the overarching goal of the Hungarian government's abuse of Pegasus software was to gain further political and financial control over the public sphere and the media market as a whole.¹⁴

While low-intensity coercion is less prominent in Poland, the government managed to shape local media ownership via a state company. PiS has used the state-controlled oil and gas company PKN Orlen as the economic platform to execute the process of media capture. It purchased the Polska Press media organization from its German owner media group Verlagsgruppe Passau. Consequently, Daniel Obajtek, a close political ally of Kaczyński, now controls 20 out of Poland's 24 regional newspapers, more than 120 local magazines, 500 online portals with an outreach of 17 million users (Wójcik, 2022). This has gone under the label of the so-called "repolonization" of the media. What's more, it happened despite the fact that the Court of Competition and Consumer Protection did not approve the purchase which was simply ignored by PKN Orlen (Klimkiweicz, 2021). The media empire of the influential priest, Tadeusz Rydzyk, serves as another disseminating platform of national-Catholic ideology backing the Polish government's policies. Since 2015, Rydzyk has accumulated business companies, foundations, and a journalism school

¹² Média Mérték Műhely (2019). Funding for public service media in Hungary – a form of unlawful state aid? Mérték. Available at: <https://mertek.eu/en/2019/01/09/funding-for-public-service-media-in-hungary-a-form-of-unlawful-state-aid/> - Accessed on April 19, 2023.

¹³ Simon, Z. Nardelli, A. (2020) Media Mogul Says He Faces Intimidation Tactics By Orban's Government. Bloomberg. <https://www.bloomberg.com/news/articles/2020-09-22/media-mogul-fears-the-squeeze-of-orban-s-grip> - Accessed on March 1, 2023.

¹⁴ Halmai, K. (2023) Pegasus-ügy: itt a jelentéstervezet, Magyarországon durva visszaélések történtek. Nepszava. https://nepszava.hu/3193368_pegasus-kemsoftver-visszaeles-magyarorszag-ep-mediapiac - Accessed on April 7, 2023.

in Toruń. His popular Radio Maryja and Telewizja Trwam television channels have received PLN 214 million in state support from various governmental sources since PiS came to power including the Prime Minister's Office and ministerial departments.¹⁵

What's more, the Competition Authorities and the politically captured Media Councils played significant roles in the expansion of pro-government media in both countries. As the political control over the broadcasting regulatory agencies has increased, they have been approving acquisitions and merging processes in a politically biased way (Sadurski, 2019; Bátorfy and Urban 2019). In addition to that, the captured Chief Prosecutor's Office has failed to take action or has delayed and/or eventually blocked investigations into corruption cases related to the ruling elite.

These breakdowns did not correspond to the rule of law deterioration only but negatively impacted the electoral component of democracy and political competition as well. As Sajó (2021) eloquently put it: In Orbán's system, elections take place in a media environment extremely tilted toward the governing party, which has perfected the art of "ruling by cheating."

The Organization of Security and Cooperation in Europe (OSCE) has declared that Hungary's 2018 parliamentary elections and Poland's 2020 presidential elections were unfair due to the state media's outsized control of the information voters' used to make their decisions. In the words of Krekó, "The efficiency of Orbán's informational autocracy in shaping public opinion is explained through specific cases in which the government could easily shore up its popularity by manipulating information, such as during the pandemic and after the start of Russia's invasion of Ukraine."¹⁶ As for Poland, Bodnar and Plozka (2020) argued that capturing the public media and abusing state funds to boost pro-PiS private media significantly contributed to the fact that Poland is following the path of competitive authoritarianism.

4.2 Different responses of the EU institutions towards Hungary and Poland

The EU institutions have responded to the Hungarian and Polish remodeling with various legal and political tools at different speeds. While the Orbán government systematically abolished checks and balances by hollowing out democratic institutions, it surprised the EU which stepped up relatively slowly toward Hungary (Batory, 2016). The EU Commission showed more awareness towards Hungary only after PiS started Poland's authoritarian remodeling in 2015 by formally violating its own constitution (Jakab, 2022).

The European Parliament provided the primary floor for the majority of the debates on Hungary and Poland. It regularly held hearings in which the Hungarian and Polish governments had to

¹⁵ Mikolajewska, B. (2019) 214.158.441 złotych z publicznych pieniędzy na "dzieła" o. Rydzyka [WYLICZENIE OKO.PRESS] OKO Press. <https://oko.press/214-238-441-zl-na-dzieła-o-rydzyka> - Accessed on February 28, 2023.

¹⁶ Krekó, P. (2022) The Birth of an Illiberal Informational Autocracy in Europe: A Case Study on Hungary. *Journal Of Illiberalism Studies*. <https://www.illiberalism.org/the-birth-of-an-illiberal-informational-autocracy-in-europe-a-case-study-on-hungary/> - Accessed on July 6, 2023.

explain their ‘illiberal’ turn. Four EP committees¹⁷ have been particularly active in arguing that Hungary breached the fundamental values of the EU. Therefore, they were advocating for the launching of the Article 7 procedure against Hungary. Assessing the substance of democratic backsliding was first achieved by the European Parliament with the “Tavares Report” in 2013 and with the “Sargentini Report” in 2018, but completely neglected by the Commission (Hegedűs, 2019). One month after the Polish government changed the act governing the Constitutional Tribunal in December 2015, the Commission activated the Rule of Law framework. It did so despite that the legal service of the Council had expressed its reservations concerning the legal basis of this instrument. As Halmai (2018) put it, such “pre-preventive” measures have been exhausted in Poland and have never been used against the Hungarian government. The framework is a so-called “ante-room” of Article 7 that enables the Commission to assess “systemic threats” to the rule of law in EU member states. The main object of this tool - introduced in 2014, mainly because of Hungary, but never used against it - is to prevent emerging threats to the rule of law to escalate to the point where Brussels has to trigger Article 7 when necessary. It is built upon the method of dialogue and mediation and did not prevent the Polish government from proceeding with a judiciary overhaul. What’s more, slow EU procedures, mainly dominated by the exchange of correspondence in the name of “dialogue” give further leeway and more time to autocrats to consolidate their system.

Despite the fact that the EU institutions were aware that the media freedom and pluralism crisis is part of a broader rule-of-law backsliding in Europe, they have not contained or reversed the negative changes in this respect in Hungary and Poland. Its responses to the deterioration in media freedom and pluralism have been different from their reactions to other elements of the rule-of-law backsliding— notably the attacks on judicial independence, LGBTQI rights, migration law, academic freedom, and civil society organizations (Wójcik, 2022). It is argued that the EU is not addressing these issues through its legal instruments. As one of the interviewees put it: “Despite that the independence of the media authority is already regulated in the EU’s Audiovisual Media Services Directive (AVMSD), it almost exclusively imposes formal requirements – like autonomous budget, a ban on recalling members, etc. – which are easily met by the text of a well-designed national law. This is the case in Hungary, where the configuration and functioning of the Hungarian Media Council formally comply with the EU requirements, but it was proven to be seriously biased in practice” (INTERVIEW #2). He argued that when it comes to the tendering of radio frequencies and the awarding of media acquisitions, the Media Council always favors the pro-government players which cannot be grasped on the basis of the EU directive. Both Hungary and Poland transposed the AVMSD into domestic law in 2019 and in 2021 respectively.

¹⁷ The Committee on Civil Liberties, Justice and Home Affairs (LIBE), the Budgetary Control Committee (CONT), the Culture and Education Committee (CULT) and the EP’s Women’s Rights and Gender Equality Committee (FEMM).

4.2.1 Annual Rule of Law Report – “preventive” and other monitoring tools

As a response to developments in Hungary and Poland, another preventive instrument was introduced in 2019. The Annual Rule of Law Report was designed to “assist early detection of emerging rule of law problems wherever they appear” by “provid[ing] a synthesis of significant developments in the Member States and at EU level”.¹⁸ Since 2020, along with the independence of the judiciary, the anti-corruption framework, and other institutional issues related to checks and balances, the report conceptualizes media freedom and pluralism as part of the rule of law. While the report includes recommendations for national authorities, it does not provide enforcement mechanisms. It was argued by Priebus (2022) that such preventive tools aiming at identifying issues might be useful and applicable in cases where democratic backsliding is in an early stage, like in the Czech Republic, but not in Hungary or Poland where the process is at a more advanced stage. A monitoring system for the detection of threats to media freedom and pluralism was also established. The EU-funded Centre for Media Pluralism and Media Freedom in its annual Media Pluralism Monitor identifies risks. It maps the fundamental protection, market plurality, political independence, and social inclusiveness in the 27 member states and in the candidate states.

4.2.2 Article 7(1) procedure

The EU Commission did not trigger Article 7 procedure against Hungary but it was launched by the European Parliament, only in 2018. In contrast to that, the Commission did trigger Article 7 against Poland at a greater speed: 2 years after the Kaczyński regime came to power again in 2015. The procedure, which involves structured discussion and timetable for recommendations, could ultimately result in the suspension of Poland’s and Hungary’s voting rights in the EU institutions. As for Hungary, the procedure concerns the functioning of the electoral system; the independence of the judiciary; corruption and conflicts of interest; privacy and data protection; freedom of expression; academic freedom; freedom of association; freedom of religion; the right to equal treatment; minorities rights; the rights of migrants, refugees, and asylum seekers; and economic and social rights. Its scope against Poland is very narrow; it concerns changes made to the composition and functioning of the Constitutional Tribunal, the National Council for Judiciary, the Supreme Court, the ordinary courts, and the powers of the Public Prosecutor’s Office only. However, it does not address media freedom and pluralism issues at all.

As it is convincingly documented, the procedure has proven incapable of forcing the Hungarian and the Polish government to comply with the core values as spelled out in Article 2¹⁹ of the Treaty on the European Union (Halmai, 2018; Kochenov, 2021). It is argued that in its current

¹⁸ EU Commission press release (2019) Available at

https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4169 - Accessed on April 19.

¹⁹ Article 2 states: “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.”

format, Article 7 is entirely unsuitable to constrain backslider regimes and to protect the constitutional fabric of the EU. One of its weakest elements lies in the unanimity requirement – meaning that at the end of the procedure, all member states have to approve the decision. Sadurski (2019) claimed that it is a straightforward and blunt instrument in a community that avoids harsh language and sanctioning its own member states. It is a political instrument par excellence in a deeply legalized environment, that was meant to serve the role of deterrence, thus it was not designed to be used in practice. Whereas the Article 7 procedure is structurally unsuitable to constrain member states due to the above-mentioned institutional shortcomings, it is also overseeing some forms of informal power in the gray zone of legality, including the informal capture of the media.

Table 3. Source: Compiled by the author based on desktop research

| The scope of Article 7 procedure | Hungary | Poland |
|---|----------------|---------------|
| Electoral system | Investigated | - |
| Judiciary independence | Investigated | Investigated |
| Corruption and conflict of interest | Investigated | - |
| Privacy and Data Protection | Investigated | - |
| Freedom of Expression | Investigated | - |
| Academic Freedom | Investigated | - |
| Freedom of religion | Investigated | - |
| Freedom of Assembly | Investigated | - |
| Right to equal treatment | Investigated | - |
| Minority Rights | Investigated | - |
| Constitutional system | Investigated | - |

4.2.3 Infringement procedures²⁰

While the EU Commission triggered numerous infringement procedures against Hungary and Poland, regarding the rule of law, issues of non-discrimination, freedom of association and in one case about media freedom in Hungary, it did not address informal media capture, let alone preventing further democratic backsliding in these countries. Poland and Hungary are openly not enforcing judgments of the CJEU: in the case of Poland, decisions of the Luxembourg Court were dismissed concerning rule of law and judicial reforms (Bárd and Bodnar, 2021). In the case of Hungary, the government has failed to fulfill its obligations under EU law in the area of procedures for granting international protection and not pushing back third country nationals to the neighbouring countries.²¹

The Commission launched only one infringement procedure that concerns media freedom and pluralism in Hungary in June 2021. It addresses the Orbán government's action over the Media Council's decision to deny Klubrádió an extension of its license, arguing that the decision was nontransparent, disproportionate, and breached the European Electronic Communications Code. "Whereas media regulation has been traditionally the competence of member states, the EU Commission has clear competencies with regards to competition law and state aid – two fields that were clearly violated by the Hungarian and Polish governments" – argued one interviewee (INTERVIEW#2). Mérték Media Monitor, former MEP Benedek Jávor, as well as Klubrádió, filed a state aid complaint, indicating that Hungary's way of funding to its public service broadcaster – which in practice functions as a state broadcaster – has serious anti-competitive effects. The Commission plans to reject the related state aid complaint, as stated in its preliminary assessment. "The Commission's reasoning is that the case is also stunningly weak, for example, it argues that it is not only the size of the audience that should be taken into account when placing advertising, but 'other factors' as well, but the Commission does not define what does it mean by "other factors" - urged the same interviewee (INTERVIEW#2).

The structural vulnerability of infringement procedures stems from the fact that once it is launched, the "processing of a case from one legal step to the next [letter of formal notice; reasoned opinion; referral to the ECJ] entails a considerable degree of choice for the Commission" (Mendrinou, 1996: 12). The Commission has so far used Article 2 TEU only as a subsidiary ground for review in EU law infringement proceedings (Baraggia and Bonelli, 2022). What's more, there has been a steep decline in the number of infringement procedures, both in the case of sending letters of formal notice to member states and referrals to the Court of Justice (Kelemen and Pavone, 2021). While the European Commission could launch this type of legal action against Member States that fail to implement EU law since 2004, the number of these has

²⁰ Infringement procedures allow the EU Commission to take legal action against the member states that reject to implement or undercut EU law. It allows the EU to hold member states to account on a line-by-line basis, and encourages compliance given the potential fines imposed by the CJEU, either with a lump sum (around 40 million EUR the highest to date, or on a daily basis which is about 100.000 EUR but can be much higher).

²¹ Judgment of the Court (Grand Chamber) of 17 December 2020. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0808>.

plummeted to a level not seen since the early 1980s. While the overall decline became prominent in almost all Member States, Pech and Bárd (2019) argued that it is particularly striking how few Article 2 TEU-related infringement actions were launched with the CJEU between 2010 and 2021. In the case of Hungary, the Commission triggered no more than a total of eight Article 2 TEU-related infringement actions which is less than one launch per year. Since it activated its Rule of Law Framework in January 2016 against Poland, the Commission has also launched less than one infringement action with the Court per year.²² However, it's a significant development that the Commission triggered an infringement action against the Hungarian anti-LGBTQI+ bill, claiming that it violates fundamental rights by equating homosexuality with pedophilia.²³ This is an important precedent case where the Commission, supported by 15 member states and the EP is basing its claim also on Article 2, arguing that the core EU values are being undermined by the discriminatory nature of the Hungarian law. Another important development is that the Commission launched an infringement procedure against Poland because of a law dubbed "Lex Tusk."²⁴ This is the very first time that the Commission sues a nation state directly for violating the democratic values of integration.²⁵

4.2.4 Withholding EU funds – The Rule of Law conditionality Mechanism and the Enabling conditions

It has been argued that financial sanctions are not a typical instrument of enforcement of EU law, even if the use of sanctions is on the rise admittedly (Montaldo, Costamagna and Miglio, 2021). However, in response to the abuses of EU funds and weak anti-corruption frameworks in certain member states, the EU has come up with yet another legal innovation of the Rule of Law Conditionality Mechanism in 2020.²⁶ Its main objective is to safeguard the EU's budget and financial interests in the case of breaching the rule of law principles. It also supports the reforms that are suggested under the European Semester. Under the Conditionality Regulation, financial measures can be adopted in case of (1) Breaches of the rule of law in a member state, and (2) these breaches must affect or seriously risk affecting sound financial management of the EU budget or protection of the Union's financial interests in a sufficiently direct way.

²² In the same report, Pech and Bárd argued that this number is particularly low taking into account that the Commission opened 903 new infringement cases against EU countries in 2020, 797 in 2019, 644 in 2018, 716 in 2017 and 986 in 2016.

²³ A total of 15 European Union countries have joined a legal case: Belgium, Luxembourg, Netherlands, Portugal, Austria, Ireland, Denmark, Malta, Spain, Sweden, Finland, Slovenia, France, Germany and Greece, together with the European Parliament, will act as third parties in the lawsuit filed on July 15, 2022.

²⁴ It could block allegedly pro-Russian politicians from public office, a move that critics say could be used by PiS against political opponents, particularly the former Prime Minister Donald Tusk ahead of the election.

²⁵ Foy, H. and Minder, R. (2023) Brussels takes legal action against Warsaw's 'Lex Tusk'. Financial Times. <https://www.ft.com/content/9d205c6e-7976-40c0-b644-a2482f98bf5e> - Accessed on June 9, 2023.

²⁶ The Council of the European Union and the European Parliament adopted the European Commission's regulation to link the disbursement of EU funds to compliance with the rule of law in December 2020.

Compared to the original proposal of 2018, the mechanism was significantly weakened under the leadership of Germany's Presidency of the Council of the EU.²⁷ In addition to that, its implementation has been delayed due to the non-binding conclusions of the European Council of December 2020. The Hungarian and Polish governments managed to include a deferral clause so that they could tie up the regulation in litigation before the Court of Justice of the European Union. After this case was heard by the EU Court in October 2021, a final decision was made by the beginning of 2022. It was argued by Kelemen, Scheppele, and Morijn²⁸ that the regulation itself did not require any guidelines and is already applicable by issuing a notification letter. Still, the mechanism was not triggered against Poland at all but against Hungary only in April 2022. Following up on Baraggia and Bonelli (2022: 152), the biggest flaw of the mechanism is that “it jeopardizes the principle of equality between Member States under stress and introduces logics that are in contrast with traditional principles and structures of EU law”. While conditionality per se is not dangerous and should be used, the current practice shows that the selective use of it could undermine the legitimacy of the tool.

What's even more important is that the Commission and the member states updated the regulation on the common provisions of the cohesion funds. It introduced the “enabling conditions” that are defining the so-called horizontal requirements to be fulfilled in order to receive cohesion funds. In other words, the EU has created an opportunity to link budgetary tools to the rule of law toolkit.²⁹

4.2.5 The Media Freedom Act

A new legislative proposal in the making needs to be mentioned here. The EU started to work on a more comprehensive media freedom and pluralism protection system. The proposed Media Freedom Act (MFA) aims to protect media freedom and pluralism, building on the 2020 European Democracy Action Plan. According to the draft presented in September 2022, it would require Member States to respect the editorial freedom of media outlets. As far as public media is concerned, the MFA would require that Member States ensure adequate and stable funding to guarantee their independence; that their leadership is appointed in a transparent, open, and non-discriminatory manner; and that they provide impartial and pluralistic programming. One of the most significant innovations in regard to private media is that the MFA would introduce requirements for the allocation of state advertising to media in a transparent and non-

²⁷ Kelemen, D. (2020) Time to call Hungary and Poland's bluff. POLITICO <https://www.politico.eu/article/time-to-call-hungary-and-polands-bluff/> - Accessed on March 4, 2023.

²⁸ Kelemen, D. Scheppele, K.L. and Morijn, J. (2021) The EU has to cut funding for Hungary - a legal case. https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf - Accessed on March 23, 2023.

²⁹ Maurice, E. (2023) The Rule of Law: the uncertain gamble on conditionality. Robert Schuman Institute. <https://www.robert-schuman.eu/en/european-issues/0660-the-rule-of-law-the-uncertain-gamble-on-conditionality> - Accessed on March 15, 2023.

discriminatory. News outlets would have to ensure transparency of ownership and to guarantee the independence of editorial decisions, taking into account conflicts of interest (Wójcik, 2022).

While it is designed to be a powerful tool against capturing the media, it is argued by our interviewees that in its current format, it could be also circumvented with informal tools. “As for the transparency of the ownership structure, it will be very difficult to demonstrate the direct linkages between the clientelist network of the Hungarian Prime Minister and the media empire centered in KESMA. After the former owners deliberately donated their assets to KESMA, they ceased to be connected to these media platforms on paper” - argued an expert (INTERVIEW#2).

Another concern was raised about the draft that proposes establishing a pan-European group of national media regulators, the European Board for Media Services, which would be composed of representatives of national regulatory authorities. “It is not clear how the EU would assess whether national representatives are independent or unbiased - the latter which is very prominent in Hungary and Poland, where the regulatory bodies were captured and staffed with political loyalists” (INTERVIEW#1).

Furthermore, as other interviewees put it, the infringement procedure should be efficient to address this problem. Since the “public advertising in the Hungarian and Polish media market is clearly discriminatory and market-distorting, state aid regulation seemed to be a sufficient tool against this issue. The EU Commission has clear competencies both in terms of competition law and state aid, therefore, it should explore the potential of infringement actions to protect media freedom and pluralism where it needs be” (INTERVIEW2#).

4.2.6 The war in Ukraine and its impact

The Commission has been resistant and dismissive to take up legal innovations up until 2022 not to escalate cases with rule of law issues in order to “maintain dialogue” (Hegedűs, 2023). Triggering the Conditionality Mechanism against Hungary arguably marks a significant change in this risk-avoiding strategy, even if the Commission could have done it much earlier.

The mechanism affects two sources of income for the Orbán regime: one of it stems from the 2021-2027 EU budget’s cohesion funds and involves 55 per cent of the funding for three operational programs, worth €6.3 billion altogether that are withheld until the Council, on the proposal of the Commission is convinced that Hungary can spend them fairly. The other derives from the Covid-19 recovery fund (Recovery and Resilience Facility) and accounts for €5.8 billion. In November 2022, the Commission decided to unblock the €5.8 billion recovery plan for Hungary, but the reimbursement of the money is linked to 270 milestones among which 27 are essential preconditions: “super milestones”. These aim to strengthen the independence of the judiciary, auditing rules and control of how EU funds are used. Hungary has not yet fully implemented the super milestones until March 31, 2023, before it could receive any payment under the Recovery and Resilience Facility.

The Commission, under the Common Provisions Regulation also withholds almost €22 billion of Hungary's 2021-27 EU funding which would serve to promote sustainable development. It accounts for one-third of all the EU funds that are allocated to Hungary from the overall MMF budget. The reasoning is that Hungary is currently not fulfilling the horizontal enabling condition on the EU Charter of Fundamental Rights, in particular concerning judicial independence that concerns all programmes, in the protection of academic freedom, refugees, and LGBTQ people. The Orbán government proposed several remedial measures aiming at answering the Council's and the Commission's concerns, including enhancing transparency of public spending, and putting to public consultation the draft laws and a reform of the judiciary. However, it is argued by watchdog organizations that the measures do not meet the requirements laid down by the European Commission and the Council.³⁰ As another interviewee put it: "Fulfilling these milestones would mean the deconstruction of the fundamentals of the political system that was built since 2010. Clientelist systemic corruption became the key feature and a systemic underpinning of the Orbán regime. Substantial compliance with these milestones would significantly undercut the operation of the regime. Therefore, the Hungarian government is far from fulfilling these expectations, and the probability of a de facto change in systemic practice is close to zero" (INTERVIEW#4).

Poland also has not received any reimbursement neither from its €35.4 billion Covid recovery assets, which includes grants and loans, nor from €75 billion in cohesion funds, which may be held up until the country complies with the EU charter (the enabling conditions). On top of that, Poland is currently paying a daily fine of €1 million for flouting an EU court order to dissolve a disciplinary chamber for judges, for which the Polish government filed a complaint in December 2022 aimed at stopping the fines. It is indicative, however, that the Rule of Law conditionality has not been triggered against Poland. The official reasoning is that the Commission did not identify direct linkages between the deterioration of the rule of law in Poland and the financial integrity of the EU. However, one of our interviewees claimed that "There was a strong intention to trigger the Conditionality mechanism against Poland too. One of the main concerns was the takeover of the Public Prosecutor's office, which was merged with the Justice Ministry. Thus, it has been entirely incorporated into the executive branch. As a result, the chief Prosecutor, Zbigniew Ziobro not only did not investigate the power abuse of the ruling camp but his office was also implicated with clientelist corruption. But after Russia invaded Ukraine, the EU Commission made a calculation that there are too many procedures going on against Poland (like Article 7(1), infringement procedures, etc.). Given that the country provides exemplary behavior when it comes to supporting Ukraine both domestically and internationally, the Commission decided not to "take the risk of alienating the Polish government with yet another procedure against Poland" (INTERVIEW#2 and INTERVIEW#6).

³⁰ Amnesty International, The Government's draft law on the judiciary does not comply with RRP super milestones. (2023) <https://www.amnesty.hu/the-governments-draft-law-on-the-judiciary-does-not-comply-with-rrp-super-milestones/> - Accessed on April 5, 2023.

5. Towards the politicization of EU responses

This paper argues that there are at least three contributing factors through which we can explain the EU Commission's and the Council's changing approaches toward Hungary and Poland.

1. Firstly, at the beginning of the conflict, the clarity of the violation of national and EU law was a decisive contributing factor. It means that the Commission acted faster and more assertively in the case of Poland, when the government denied the publication of certain decisions of the Polish Constitutional Tribunal. Up until today, a significant number of constitutional court and ordinary court judges have been appointed in an illegal manner, according to the decisions of the ECtHR and the CJEU. While both the Polish and the Hungarian governments violated EU law, the Commission was more cautious in cases where most of the decisions were formally taken in accordance with national constitutional and 2/3 majority (Jakab, 2022). The Hungarian government instrumentalized the weaknesses of the existing institutions while reshuffling and abusing power without *de jure* violating the law (Closa et al., 2016). In front of the EU institutions, each new legislative action was explained with the argument that there was some law just like it somewhere in Europe (Scheppele, 2018), which was often argued by the Polish government as well. However, it was also argued by two of my interviewees that while the Hungarian government put a great emphasis on legalism, the legislative procedure often does not fulfill the very basic tenets of democracy by fostering non-transparent fast-tracking, lacking initial consultation with the stakeholder and misusing national consultation as a semi-formalized informal tool to legitimize certain measures. The fundamental feature of the Orbán regime is that the government is keen on maintaining the facade of a rule of law country, claiming that decisions are formally taken in accordance with national legislation. In order to justify their policies that undermined checks and balances on their power and to shield themselves against potential EU interventions, Fidesz and PiS employed the twin concepts of constitutional identity and constitutional pluralism.³¹ Moreover, these governments started to legally question the basic foundations of the European integration, such as the primacy of EU law. It eventually intertwined with the exploitation of power for political purposes.
2. Secondly, partisanship largely contributed to the fact that Orbán's party has been protected by the strongest caucus in the European Parliament, the European People's Party up until 2019. In contrast to that, Jarosław Kaczyński's PiS never enjoyed such a protective political shield (Kelemen, 2017) as it belongs to the European Conservatives and Reformers (ECR) which has a weaker position in the European Parliament. Empirical

³¹ Kelemen, D. and Pech, L. (2018) Why autocrats love constitutional identity and constitutional pluralism? RECONNECT. <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf> - Accessed on March 22, 2023.

data³² shows that Beata Szydło's (PiS) government was outvoted in the Council more frequently than the previous Polish governments led by Donald Tusk, belonging to EPP. Although the EPP remained divided on the assessment of Orbán's politics, the party tolerated and even supported the Hungarian Prime Minister for years (Bátory, 2016; Kelemen, 2019). This privileged relationship was also reinforced by the economic relations between the Hungarian government and the German automotive industry. Kelemen (2019) argued that despite the fact that Orbán installed a hybrid authoritarian regime, the EU membership helped autocratic regimes access financing in a more indirect sense, by encouraging the inflow of Foreign Direct Investment (FDI). In other words, as long as Hungary met the EU's economic criteria (kept the budget deficit below 3 percent of GDP), and offered strategic partnerships to multinational companies from Germany, Berlin's concerns regarding the centralization of power, weakening of checks and balances remained vague in the Council.³³ It fitted into the reasoning of Bozóki and Hegedűs (2018) who argued that the EU has a threefold role in the functioning of Viktor Orbán's hybrid regime: it has a systemic constraining, a system-supporting, and a system-legitimizing role. However, leaving the EPP carried negative implications for Fidesz; the European Parliament declared that Hungary no longer qualifies as a democracy and turned into an electoral autocracy. Only a handful EPP members opposed it.³⁴

3. Thirdly, changing dynamics towards Hungary and Poland were also traceable along the changing external environment of the EU. Gostyńska-Jakubowska³⁵ claimed that "Orbán conducted most of his controversial reforms between 2010 and 2012 when the EU was preoccupied with the euro crisis". In contrast to that, while the EU was challenged with multiple threats of terrorism, the refugee crisis, and the Brexit referendum, the Juncker Commission became more assertive vis-à-vis the member states than the Barroso Commission was before. It was argued by Müller, that Orbán's performance during these procedures can be best captured by a so-called "peacock dance", in which the Hungarian prime minister proceeds with mere "cosmetic changes in reaction to criticism from Brussels".³⁶ Batory (2016) reached the same conclusion that through the overlapping

³² Zgut, E. (2019) Edit Zgut: Sonderweg of the Eastern member states of the EU. Magyarországi Európa Társaság. Available at: https://europatarsasag.hu/sites/default/files/csatolmanyok/zgut_edit_cee_sonderweg_0.pdf - Accessed May 2, 2023.

³³ Panyi, Sz. (2020) How Orbán played Germany, Europe's great power <https://www.direkt36.hu/en/a-magyar-nemet-kapcsolatok-rejtett-tortenete> - Accessed on March 7, 2023.

³⁴ László, R. (2022) Orbán's regime set out to promote political realignment in Europe. Heinrich Böll Stiftung, <https://cz.boell.org/en/2022/11/02/orbans-regime-political-realignment-europe> - Accessed on March 7, 2023.

³⁵ Gostyńska-Jakubowska, A. (2016) Poland: Europe's new enfant terrible? <https://www.cer.eu/publications/archive/bulletin-article/2016/poland-europes-new-enfant-terrible> - Accessed on March 7, 2023.

³⁶ Müller, J.W. (2017) What Happens When an Autocrat's Conservative Enablers Finally Turn on Him? The Atlantic. Available at: <https://www.theatlantic.com/international/archive/2018/09/orban-hungary-europe-populism-illiberalism/570136/> - Accessed at May 2, 2023.

aspects of symbolic or creative compliance, the Hungarian government's compliance took place on paper but not in the spirit, and while the EU law is put on the books, at least to the extent demanded, but its purpose is lost in practice. A wealth of literature (Kochenov and Bard, 2019; Kelemen, 2020³⁷; Pech and Scheppele, 2017) argues that the EU institutions have been tolerating this strategic behavior that reinforced democratic deterioration in Hungary for too long. Arguably, the Council is the firmest of all the institutions turning a blind eye to the rule of law problem itself, let alone the issue of informal power that remains unaddressed. In contrast to that, Poland followed a strictly confrontational strategic behavior during the period of the Szydło government and became open for negotiation only after 2018 with Mateusz Morawiecki replacing her as Prime Minister. As Cianciara (2018: 19) noted, the PiS government accused the EU institutions of a “lack of objective judgment, one-sidedness, ignorance, prejudice, and double standards.” After Kaczyński declared his aim to “have Budapest on the Vistula” and the Polish government copied various authoritarian measures of Fidesz, the EU institutions eventually paid more attention to the Hungarian case too (Jakab, 2022). The above-mentioned process also enforced strategic cooperation between the Hungarian and Polish governments. The most prominent and efficient use of their coalition manifested in the negotiations procedure over the EU’s €1.8 trillion MMF budget and coronavirus recovery package in 2020. In the words of Holesch and Kyriazi (2021), the “EU’s decision rules have, in turn, contributed to the formation of the coalition, with the possibility of veto encouraging the formation of a bilateral stable coalition instead of broader consensus-seeking”.

The significance of the behavior of the respective governments became even more prominent after Russia invaded Ukraine in 2022. The war markedly changed the dynamics and balance of power in the EU Council. The Hungarian government openly pushed a pro-Russian foreign policy and slowed down EU measures that aimed at supporting Ukraine. What’s more, Hungary is the only EU member state that still has not ratified the NATO accession of Sweden.³⁸ This strategic behavior, underpinned by threatening with vetoes in the Council, has obviously played a key role in alienating the country’s Central European allies. Poland, in contrast, hosted more than 5 million refugees from Ukraine by providing them with residency for 18 months as well as many other rights, services and benefits associated with it. Furthermore, Poland has been at the forefront of international condemnation of the Kremlin, calling for weapons deliveries to Ukraine and the toughest possible sanctions against Russia. It eventually contributed to forging the necessary minorities in the Council to impose financial sanctions over the Hungarian government in the frame of the Conditionality Regulation. These diverging paths were also shown on 13 December

³⁷ Kelemen, D. (2020) Time to call Hungary and Poland’s bluff. POLITICO <https://www.politico.eu/article/time-to-call-hungary-and-polands-bluff/> - Accessed on March 4, 2023.

³⁸ Bayer, L. (2023) Annoying side show: Hungary frustrates NATO allies. POLITICO <https://www.politico.eu/article/hungary-nato-sweden-bid-accession-block-democracy-viktor-orban/> - Accessed on April 13.

2022 at the Committee of Permanent Representatives (COREPER) summit, when every EU Member States (including Poland) voted unanimously to suspend EU funds allocated to Hungary. This was possible due to the package deal and the fact that Hungary had blackmailed the other Member States. Neither the Polish nor the Italian Government vetoed against the suspension of EU funds for Hungary, which was mediated by the Czech EU Presidency. The deviation from a previously cautious approach towards a more enforcement-based approach indicates that the Member States and the Commission entailed significant political costs in exchange for questionable benefits for national governments. The issues of the Hungarian democratic backsliding and clientelist corruption gained more visibility within Western societies too, which was further triggered by the rogue strategic behavior of the Orbán regime within the Council. Their previously appeasing approach of tolerating that Viktor Orbán showed a willingness to negotiate in Brussels then fought his Eurosceptic “fight for independence” at home for a decade seems to come to an end as well. However, it remains to be seen if the Commission will insist on ensuring that the measures agreed on will not end up in another “box-ticking exercise”, and if they will suspend payments and even open another rule of law procedure if the Hungarian government is not fulfilling its commitments substantially.

6. Conclusion

The powerful examples of Hungary and Poland show that EU scrutiny can be avoided when national governments use informal power to weaken democracy by tilting the playing field. Informal media capture is not the primary domain through which democratic backsliding prevailed in Hungary and Poland, but the theoretical literature and growing evidence confirm that it is key in terms of the informal distortion of democracy. In other words, as the political director of the Hungarian Prime Minister, Balázs Orbán, put it: “Media is a strategic sector and a matter of sovereignty because whoever controls the media of a country controls the mindset of that country and, through that, the country itself.”³⁹

The aim of the paper was twofold. First, it provides an attempt in creating an analytical linkage between the informal power and the constraining role of the EU. Secondly, by using the example of Hungary and Poland, it supplies empirical results on the topic. The paper shows that our theoretical expectations are confirmed. Due to the increasing politicization of the EU’s sanctioning behavior, the EU addresses certain aspects of informal power and ignores others in a selective way. Although the Commission and the EU Council became more assertive in withholding EU funds after Russia invaded Ukraine, they still did not take risks to confront informal media capture through their legal and political toolkit. As a result, the Hungarian and Polish governments operating with informal power are still benefiting from the *modus operandi*

³⁹ Barnóczki, B. (2023) Balázs Orbán: Whoever controls the media of a country controls the mindset of that country. Telex.hu <https://telex.hu/english/2023/01/25/balazs-orban-whoever-controls-the-media-of-a-country-controls-the-thinking-of-that-country> - Accessed on March 9, 2023.

of integration. What's more, measuring democracy in the EU remains conditional which is defined by the actual priorities of the Council. In the case of Hungary, overlooking backsliding was driven by economic priorities. After Russia invaded Ukraine, the member state's priority shifted towards geopolitics which led to the isolation of Hungary but not Poland. Consequently, it remains to be seen if Kelemen's theory of an authoritarian equilibrium will be fully undercut in the long run by politicization in practice.

The findings of this paper carry important ramifications for the EU from a broader perspective as well. In the words of Kelemen⁴⁰, "[i]t has often been argued – even by the most well-meaning defenders of democracy and the rule of law in the EU, that the Union simply cannot do more because it lacks the necessary tools to do so. This is a damaging myth. The EU has always had in its possession the necessary tools to steer backsliding member states back towards democracy – or at least to strongly discourage any others from following their lead." In the similar words of Laurent Pech, the EU leaders repeatedly engage in a "rule of law instrument creation cycle" – reacting to new episodes of backsliding by calling for the creation of new tools, rather than using tools it already has. As a result, "the EU has an ever better-stocked toolbox, the contents of which have barely been used"⁴¹. Triggering the Rule of law Conditionality against Hungary and using the enabling conditions against Poland demonstrated once again that the EU has tools to step up for the protection of democracy and the rule of law, and politicization is key.

While knowledge about the responsive EU strategies is valuable, the analysis may be further theorized to discuss circumstances under which EU responses may prove to be successful to tackle democratic backsliding and informal power. Would the Hungarian media market look markedly different today if the EU Commission would have launched an infringement procedure 10 years ago? To put it in a broader perspective: are the growing politicization and salience of the EU sanctioning regime a direct response to the transfer of authority to the EU or are they part of a broader phenomenon that affects Western liberal democracies more generally (Hutter and Kriesi, 2019)? Taking into account the normative and empirical consequences of politicization, the EU could be also seen as a further indicator of Europeanization that triggers resistance, polarizes public opinion and propels specific counter-discourses, in the form of Euroscepticism, among others (Guerra and Trenz, 2019).

Secondly, since Central and Eastern Europe is a hotbed of various forms of non-democratic informality, this threat to the EU will not disappear anytime soon. Clientelist corruption and media captures are regional calamities and a burdensome heritage of communism. Given that Hungary and Poland have become "trendsetters" in Central and Eastern Europe (Ágh, 2016), the EU is being challenged by the fact that they could popularize the idea and toolkit of undermining democracy with informal power and influence leaders in Europe. This leads to the third point, namely the need to extend the case study selection. Informal power is like a black box, varying

⁴⁰ Progressive Yearbook (2022). Available at: <https://feps-europe.eu/publication/841-progressive-yearbook-2022/>- Accessed on April 10, 2023.

⁴¹ Ibid.

across regions in Europe, therefore, mapping an East-West-North-South comparison and linking it to the responses of the EU would better fill the knowledge gap in the literature.

What strategies can be designed and implemented to undercut the negative effects of informal power in Hungary and Poland? A holistic and combined approach is needed, based on three main pillars: immediate legal action, efficient suspension of EU funds and more emphasis on law enforcement. Although it might sound counter-intuitive, the EU should not give up on combatting informal power with legal tools. Immediate legal actions should therefore mean more and more effective infringement actions with interim measures, especially in the case of media capture. It should develop how to measure the democratic functionality of state authorities related to the media. For example, when regulating the functioning of media authority bodies in the member states, the Audiovisual Media Services Directive and the new Media Freedom Act should map the decisions of the national media authorities as well. Increasing more direct funds to local gatekeepers like investigative journalists and cross-border media cooperations is another good way of evening the tilted playing field.

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