



## INSIGHT

### THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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## BETWEEN A ROCK AND A HARD PLACE: THE IMPACT OF RULE OF LAW BACKSLIDING ON THE EU'S RESPONSE TO THE RUSSO-UKRAINIAN WAR

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**ABSTRACT:** In the past decade, Hungary and Poland have experienced a process of rule of law backsliding that threatens the state of democracy at home, and affects the decision making and legitimacy of the European Union as a whole. In the face of Russia's war of aggression against Ukraine, the response of Hungary and Poland has been diametrically opposed, but equally damaging to the EU rule of law. The present *Insight* will analyse the response of these two member states to the Russian invasion, and it will argue that the war has highlighted major pitfalls in the EU's policy toward backsliding governments, which continue to benefit from funds and veto powers, undermining the EU's effectiveness in the process. However, a renewed fight for democracy in Europe could offer the perfect opportunity to be tough on autocrats inside and outside the Union.

**KEYWORDS:** rule of law – Ukraine – Hungary – Poland – foreign policy – decision making.

### I. INTRODUCTION

Ever since the late 2000s, the European Union has been facing a series of intersecting internal and external challenges that have at once put into question and advanced the integration project. From the Eurozone crisis to the Covid pandemic, the EU is now expected to take on a position of leadership on a global scale to front international emergencies. This has proven true once again in February 2022, when Russia initiated a full-scale invasion of Ukraine, bringing war to the European continent and to a directly neighbouring country to the block.

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While the initial response of the Union was praised for its rapidity and cohesion, displaying great commitment to peace and democracy, behind the scenes the EU is fighting a battle for the survival of its own rule of law and liberal order, which has been under threat for the past decade due to the illiberal turn of Hungary and Poland. The present *Insight* will explore the relation between these two ongoing crises, arguing that the detrimental effect of rule of law backsliding on the EU's external action *vis-à-vis* Russia's war of aggression is further evidence of the need to be tough on autocrats inside and outside the Union's borders.

To do so, the *Insight* will provide an account of Hungary and Poland's descent into autocratic behaviour and the different ideologies that have accompanied the process, emphasising the similarities with Putin's reforms in Russia. The second part will address the EU's response to the invasion of Ukraine, focusing on the impact of illiberal governments. Finally, the third section will argue that Hungary and Poland's rejection of EU law fundamentally undermines the EU not only internally, but also in its external action. As such, enforcement of values is necessary to strengthen the EU's legitimacy and effectiveness on the global stage.

## II. THE ADVENT OF PUTINISM IN EUROPE: ILLIBERALISM IN HUNGARY AND POLAND

The term "rule of law crisis," popularised in the literature since 2010, refers to the general attack to the founding values encapsulated in art. 2 TEU,<sup>1</sup> mostly triggered by the illiberal turn of Hungary and Poland in 2010 and 2015 respectively. In the 1990s, these two countries had led the way for the integration of post-communist States into Western institutions, from the Council of Europe to NATO, eventually joining the EU in 2004.<sup>2</sup> Indeed, despite their history as part of the Communist Bloc, the two states had developed promising young democracies by the turn of the century.<sup>3</sup> However, a combination of political, ideological and economic factors have allowed for populist and aspiring autocratic parties to emerge as winners in legitimate, democratic elections, granting them the power to enforce their illiberal agenda.<sup>4</sup>

The unparalleled assault to democracy and shared values which has taken place in Hungary and Poland has been described by scholars Pech and Scheppele as "rule of law backsliding".<sup>5</sup> They defined this phenomenon as: "the process through which elected public

<sup>1</sup> K Raube and F Costa Reis, 'The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis' in M Riddervold, J Trondal and A Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2021) 631.

<sup>2</sup> T Drińoczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) *German Law Journal* 1140, 1145.

<sup>3</sup> KL Scheppele, 'On Being Subject to the Rule of Law' (2019) *Hague Journal on the Rule of Law* 465.

<sup>4</sup> S Blombäck, 'Populism as a Challenge to Liberal Democracy in Europe' in A Bakardjieva Engelbrekt and others (eds) *The European Union in a Changing World Order* (Palgrave Macmillan 2020) 221.

<sup>5</sup> L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) *CYELS* 3.

authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party".<sup>6</sup>

The backsliding trajectory witnessed in Hungary and Poland has been amongst the steepest in the world in recent years.<sup>7</sup> The respective leading parties, Fidesz and PiS, emerged at the same time as a number of far-right populist parties across Europe, sharing an ideology based on the rejection of European integration and heightened nationalism.<sup>8</sup> In particular, both governments have promoted the narrative whereby the state is being weakened by a progressive loss of sovereignty, while liberal ideas including the respect for the rule of law, feminism, LGBT rights and multiculturalism undermine the state's capacity to pursue its "national interests".<sup>9</sup> Despite being similar, however, Hungary and Poland do present singularities related to the individual political and cultural history of the two countries.

The successful dismantling of constitutional democracy has resulted in Hungary becoming the EU's first non-democracy.<sup>10</sup> Moreover, the *ad hoc* mechanism to monitor and correct rule of law violations, art. 7(1) TEU, was triggered by the European Parliament in 2018,<sup>11</sup> although proceedings are still ongoing and have not yielded any significant result.

In his 13 consecutive years in power, Prime Minister Viktor Orbán has established a self-proclaimed "illiberal democracy"<sup>12</sup> inspired by oligarchies such as Russia and China, and their ability to become internationally competitive in recent decades.<sup>13</sup> Hungary's relations with Russia have become increasingly closer, with open declarations of political alignment between the two.<sup>14</sup> Furthermore, Hungary has been the recipient of great financial investments from the Kremlin, including the construction of a nuclear power plant, in exchange for political support and cooperation on Hungary's part.<sup>15</sup> Thanks to

<sup>6</sup> *Ibid.* 10.

<sup>7</sup> V-Dem Institute, *Autocratization Changing Nature? Democracy Report 2022* v-dem.net.

<sup>8</sup> See J Muis and T Immerzeel, 'Causes and Consequences of the Rise of Populist Radical Right Parties and Movements in Europe' (2017) *Current Sociology* 909.

<sup>9</sup> M Varga and A Buzogány, 'The Foreign Policy of Populists in Power: Contesting Liberalism in Poland and Hungary' (2021) *Geopolitics* 1442, 1450.

<sup>10</sup> European Parliament Resolution 2018/0902R(NLE) of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, para. 2.

<sup>11</sup> European Parliament Resolution 2017/2131(INL) of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the union is founded.

<sup>12</sup> A Di Gregorio, 'L'Ungheria e i Valori Europei. Un Matrimonio Difficile' (2018) *Rassegna Parlamentare* 445.

<sup>13</sup> *Ibid.* 447.

<sup>14</sup> C Campbell, 'Viktor Orbán Is Set for a Fourth Term as Hungary's Prime Minister. That Could Be a Boost for Putin' (3 April 2022) *TIME* time.com

<sup>15</sup> MA Orenstein and RD Kelemen, 'Trojan Horses in EU Foreign Policy' (2017) *JComMarSt* 87.

the high level of economic interdependence, Russia exercises great influence in the country, positioning Hungary as an ambassador for Russian interests within the EU.

Poland followed a similar trajectory to Hungary while Prawo i Sprawiedliwość (PiS) was in power between 2015 and 2023. After the elections of October 2023, a liberal coalition led by returning Prime Minister and former European Council President Donald Tusk has vowed to realign Poland with the EU and correct the democratic and rule of law decay the country experienced for seven years. Poland was in fact the first member state to be subjected to art. 7(1) TEU proceedings in 2017,<sup>16</sup> previously considered a “nuclear option”,<sup>17</sup> and is currently classed as a “semi-consolidated democracy”.<sup>18</sup> The previous leading party, PiS, roots its political beliefs on the sincere ideological rejection of Europeanisation and of the political process that followed the end of the communist regime in 1989.<sup>19</sup> What is interesting to note is that the policies adopted in Poland mirror the style of autocracy defined as “Putinism”:<sup>20</sup> a commitment to weaken checks on executive power, including the judiciary,<sup>21</sup> independent watchdogs and NGOs, seizing control of state media, antagonising dissenting voices, and last but not least the promotion of traditional values, particularly related to Christianity, and the subsequent removal of rights to women and sexual minorities based on these perceived common morals.<sup>22</sup>

Nevertheless, Poland remained an outlier amongst the far-right alliance in Europe in its longstanding tense relations with Russia, perceived as a security threat for the country.<sup>23</sup> Poland is a staunch supporter of greater NATO presence in Central Eastern Europe and has been sounding the alarm in regards to Russia’s ambitions over Ukraine since the annexation of Crimea in 2014.<sup>24</sup> However, regardless of the anti-Russian position declared by PiS, weaponizing supposed national traditions, faith and values has distanced

<sup>16</sup> European Commission COM(2017) 835 final, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland. Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017.

<sup>17</sup> See L Pech, ‘Article 7 TEU: From ‘Nuclear Option’ to ‘Sisyphian Procedure?’ in U Belavusau and A Gliszczyńska-Grabias (eds), *Constitutionalism under Stress* (OUP 2020).

<sup>18</sup> MA Orenstein and RD Kelemen, ‘Trojan Horses in EU Foreign Policy’ cit.

<sup>19</sup> D Kochenov and P Bárd, ‘Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement’ (Reconnect Working Papers 1-2018) 9.

<sup>20</sup> O Oliker, ‘Putinism, Populism and the Defence of Liberal Democracy’ (2017) *Survival* 7.

<sup>21</sup> Another element of note is the institution of a Soviet-style disciplinary regime for judges and relative muzzle-law to prevent judges from applying EU and international law, which may result in their suspension without pay and even prosecution. See: K Gajda-Roszczyńska and K Markiewicz, ‘Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland’ (2020) *Hague Journal on the Rule of Law* 451.

<sup>22</sup> M McFaul, ‘Putin, Putinism, and the Domestic Determinants of Russian Foreign Policy’ (2020) *International Security* 95.

<sup>23</sup> M Varga and A Buzogány, ‘The Foreign Policy of Populists in Power: Contesting Liberalism in Poland and Hungary’ cit. 1453.

<sup>24</sup> R Lisiakiewicz, ‘Poland’s Conception of European Security and Russia’ (2018) *Communist and Post-Communist Studies* 113, 116.

Poland from its Western allies, and paradoxically increased Russian influence, especially through the formation of a strong bond with Hungary.<sup>25</sup>

### III. DIVERGING APPROACHES TO THE INVASION OF UKRAINE

Putin's full-scale military invasion of Ukraine starting in February 2022 has provided yet another paradigm shift for the EU, which has played a significant role in the common Western response to the conflict. Though refraining from becoming directly involved, the Union has put together a solidarity package in support of Ukraine, including the supply of military and financial resources, but most importantly by deploying a series of severe economic sanctions against Russia through the framework of the common foreign and security policy.<sup>26</sup>

While the war-related efforts have been anchored in the preservation of democracy and the rule of law in Ukraine, the internal rule of law crisis has in turn been affecting the EU's own response. Hungary has quickly become a strong advocate for Russia within Western organisations, rejecting more severe measures in the form of sanctions to energy imports, and going as far as refusing to allow weapons to pass through its territory to reach Ukraine and vetoing a proposed EU ban on Russian oil several times,<sup>27</sup> until a watered down compromise was reached on the sixth package.<sup>28</sup> Orbán has used his leverage in the Council to seek to remove Russian oligarchs from the EU sanction list,<sup>29</sup> threaten vetoes to sanctions to the nuclear energy sector,<sup>30</sup> and while several other member states have stopped importing fossil fuels from Russia, Hungary has instead opted for signing a new energy cooperation deal with the Kremlin to increase its dependency on Russian gas, oil and nuclear fuel supplies.<sup>31</sup> Moreover, the government-controlled state media has been the only Western broadcaster validating Russian claims over the

<sup>25</sup> HA Conley, 'Upholding OSCE Commitments in Hungary and Poland' (2021) Center for Strategic and International Studies (CSIS) 1.

<sup>26</sup> ND Steiner, R Berlinschi, E Farvaque, J Fidrmuc, P Harms, A Mihailov, M Neugart and P Stanek, 'Rallying Around the EU Flag: Russia's Invasion of Ukraine and Attitudes Toward European Integration' (2023) *JComMarSt* 283, 284.

<sup>27</sup> J Barigazzi, B Moens and L Kijewski, 'EU Considers Shelving Ban on Russian Oil as Hungary Blocks Sanctions' (12 May 2022) *Politico politico.eu*.

<sup>28</sup> V Anghel and E Jones, 'Is Europe Really Forged Through Crisis? Pandemic EU and the Russia - Ukraine War' (2023) *Journal of European Public Policy* 766, 772.

<sup>29</sup> R Jozwiak, 'Hungary Looks To Remove Nine People From EU Sanctions List Imposed In Wake Or Russia Invasion Of Ukraine' (17 January 2023) *RadioFreeEurope rferl.org*.

<sup>30</sup> K Than, 'Hungary Will Veto EU Sanctions on Russian Nuclear Energy, PM Orban Says' (27 January 2023) *Reuters reuters.com*.

<sup>31</sup> G Gavin, 'Ukraine Accuses Hungary of Funding Russian War Crimes with Energy Deals' (12 April 2023) *Politico politico.eu*.

presumed responsibility of NATO in starting the conflict and the need to de-nazify Ukraine.<sup>32</sup>

Such an overt rejection of European values and cooperation has opened the door to intervention *vis-à-vis* Hungary's disregard for the rule of law. After already halting the pay out of the Resilience and Recovery Facility fund pending rule of law reforms, in early May 2022 the Commission announced<sup>33</sup> that it would finally trigger the Rule of Law Conditionality Regulation.<sup>34</sup> The resulting conditionality package was used to freeze more than 28.7 billion euros,<sup>35</sup> in an unprecedented move to demand that the Hungarian government put together reforms to restore judicial independence and prevent corruption, in line with its Treaty obligations.<sup>36</sup>

Nevertheless, at this point Orbán has enough bargaining power, thanks to the ability to veto EU initiatives in regard to Russia in the Council,<sup>37</sup> strong leadership from the Commission is paramount to effectively demand structural change and loyalty from Hungary. After all, Hungary is highly reliant on EU funds, and with record inflation and the spectre of a recession looming, Fidesz is in no position to reject this lifeline.<sup>38</sup> The political stakes are high: the Commission must not be tempted to make premature concessions, as the pressure of withholding funds will only increase over time and short term improvements are not enough to demonstrate success.

On the other hand, in the early stages of the conflict, Poland was quick to express support to Ukraine on the international arena, opening its borders to refugees<sup>39</sup> and being in favour of providing weapons.<sup>40</sup> Poland has been one of the main advocates for further sanctions,<sup>41</sup> including the ban of imports of gas, oil and coal from Russia.<sup>42</sup>

<sup>32</sup> P Krekó, 'Viktor Orbán Is the West's Pro-Putin Outlier' (20 March 2022) Foreign Policy [foreignpolicy.com](https://foreignpolicy.com).

<sup>33</sup> RD Kelemen, 'Appeasement, Ad Infinitum' (2022) *Maastricht Journal of European and Comparative Law* 177, 180.

<sup>34</sup> Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget.

<sup>35</sup> KL Scheppele and J Morijn, 'What Price Rule of Law?' in A Södersten and E Hercock (eds) *The Rule of Law in the EU: Crisis and Solutions* (Sieps 2023).

<sup>36</sup> See the findings of the 2023 Annual Rule of Law Report: Commission Staff Working Document SWD(2023) 817 final of 5 July 2023, '2023 Rule of Law Report Country Chapter on the Rule of Law Situation in Hungary'.

<sup>37</sup> R Emmott, 'EU Ministers Fail to Persuade Hungary to Sign Up to Russian Oil Embargo' (16 May 2022) Reuters [reuters.com](https://reuters.com).

<sup>38</sup> J Jaraczewski, 'Unexpected Complications: The Impact of the Russian Invasion of Ukraine on the Rule of Law Crisis in the EU: An Anti-Rule of Law Alliance' (23 December 2022) *Verfassungsblog* [verfassungsblog.de](https://verfassungsblog.de).

<sup>39</sup> M Karnitschnig, 'Poland Ready to Take More Ukrainians, Deputy PM Says' (28 March 2022) *Politico* [politico.eu](https://politico.eu).

<sup>40</sup> A Ward and J Gedeon, 'The U.S. Can't Stop Poland from Giving Ukraine its MiGs' (11 March 2022) *Politico* [politico.com](https://politico.com).

<sup>41</sup> M Morawiecki, 'Poland's 10-Point Plan to Save Ukraine' (25 March 2022) *Politico* [politico.eu](https://politico.eu).

<sup>42</sup> Z Wanat, 'Poland to Ban Russian Coal Imports' (29 March 2022) *Politico* [politico.eu](https://politico.eu).

Despite its goodwill towards Ukraine, however, Poland also sought to benefit from its newfound spirit of cooperation, and compliance in one area should not raise hopes for systemic realignment. In the fog of war, the Polish government kept pushing its authoritarian agenda, which included the appointment of loyal justices to increase control over the judiciary, refusing to implement key international rulings from the European Court of Human Rights (ECtHR) and from the European Court of Justice (ECJ), and presenting draft legislation to discourage foreign funding of Polish civil society, independent watchdogs,<sup>43</sup> and seeking to prevent opposition candidates from running in the 2023 parliamentary elections (the now infamous “Lex Tusk”).<sup>44</sup>

Moreover, Poland remained on collision course with the Union, at least from the national perspective. The ruling party PiS used the government-controlled public media to demonise the opposition as well as the EU itself, claiming that they have been “realising the Russian agenda at the request of Germany”.<sup>45</sup> Having been proven right about Russia, PiS’ sense of moral superiority, especially in contrast with Germany and the EU leadership by association,<sup>46</sup> regaled. Paradoxically, the narrative on Polish public broadcasters was one of condemnation towards the weak and cowardly Western powers, which is not so far from Russia’s own propaganda.<sup>47</sup> In turn, this sentiment was conveniently weaponised to reject the EU’s moral high ground with regard to rule of law issues.

The anti-war efforts seem to have succeeded in stalling talks of sanctions from the EU,<sup>48</sup> and shielded Poland from the activation of the Rule of Law Regulation, in contrast with Hungary. Further, in May 2022, arguably as a response to war related efforts, the Commission announced it would approve Poland’s national Recovery Plan, which had been withheld due to rule of law concerns, despite the lack of any structural change.<sup>49</sup> Though that decision was opposed by several commissioners and eventually backtracked,<sup>50</sup> the Commission appears to have stricken a dangerous compromise by letting Poland largely off the hook in a time of need, which given the government’s continued attacks to the judiciary could have resulted in dire consequences for the stability of the

<sup>43</sup> D Hegedüs, ‘US, EU Face Higher Hurdles Now for Action Against Orbán’s Tightening Grip in Hungary’ (10 May 2022) [Just Security justsecurity.org](https://www.justsecurity.org).

<sup>44</sup> W Sadurski, ‘The Law to Take Out Tusk’ (31 May 2023) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de).

<sup>45</sup> A Wójcik, ‘A Fragmented Response to Media Freedom at Risk in the Union’ (24 December 2022) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de).

<sup>46</sup> It is valuable to note that current Commission President Ursula von der Leyen had previously served as German defence minister under Chancellor Angela Merkel.

<sup>47</sup> E Zerofsky, ‘Poland’s War on Two Fronts’ (4 April 2023) [The New York Times nytimes.com](https://www.nytimes.com).

<sup>48</sup> The EU has not made any progress on action brought in relation to the government controlled Constitutional Tribunal, which was first launched in December after much delay, see [ec.europa.eu](https://ec.europa.eu).

<sup>49</sup> A Krzysztozek, ‘Poland to Soon Receive EU Recovery Funds After Striking Deal with Commission’ (17 May 2022) [Euractiv euractiv.com](https://www.euractiv.com).

<sup>50</sup> L Bayer, ‘Amid Commission Rebellion, von der Leyen Defends Polish Recovery Cash Plan’ (2 June 2022) [Politico politico.eu](https://www.politico.eu).

EU legal order. Fortunately, the result of the 2023 Polish parliamentary elections promises to reverse the course of democratic backsliding. However, issues related to the widespread capture of the judiciary and the PiS-aligned president Duda remain and threaten to derail attempts at corrections on the part of the new government, which shows again how the Commission missed an opportunity to apply conditionality measures that would have aided democracy sooner and more effectively.<sup>51</sup>

#### IV. CHALLENGES AND OPPORTUNITIES: DISCOVERING THE EU'S MILITANT DEMOCRACY POTENTIAL?

Russia's invasion of Ukraine poses a renewed challenge to the European Union as a defender of democracy, both in its neighbourhood and *vis-à-vis* its member states. Over one year on, and more than a decade since the beginning of the rule of law crisis, action is paramount to the survival of the European project and the reinstatement of a liberal balance in the continent. At the same time, this turning point has provided an opportunity to reassess the EU's strengths and shortcomings when it comes to its values and its role as a geopolitical actor.

First and foremost, employing instruments such as the Rule of Law Regulation and the Recovery Fund to make funds dependent on compliance with the rule of law has great potential to correct illiberal behaviour on paper. Union subsidies have been vital for autocratic regimes to entrench their illiberal policies while taking credit for any economic success.<sup>52</sup> Arguably, the timing of activation of conditionality mechanisms towards Hungary, while its government was openly antagonising the EU in support of Russia, is not coincidental. Now it is crucial that the Commission, as the body entrusted with preserving the Treaties, holds a firm line when it comes to its recent achievements.

The temptation to use a carrot rather than stick strategy and ease off oversight to maintain unity is understandable, but that is the same approach the EU has employed all along, and it has not paid off.<sup>53</sup> Furthermore, giving up the leverage obtained through the new enforcement cocktail by caving to the demands of self-interested governments looking to disrupt the EU's action is highly counterproductive. The Commission and the European Council have already set a dangerous precedent by agreeing to what Pavone defined as a "faustian bargain": giving in to Orban's extortion by unfreezing 10 billion euros in EU funds in return for his retreat at the time of voting to open negotiations on Ukraine's accession.<sup>54</sup> A pyrrhic victory that fails to significantly benefit Ukraine and sacrifices EU values. As

<sup>51</sup> Wojciech Kość, 'Poland's political war heats up' (15 January 2024) Politico [www.politico.eu](http://www.politico.eu).

<sup>52</sup> RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) *Journal of European Public Policy* 481, 483.

<sup>53</sup> See R Uitz, 'The Perils of Defending the Rule of Law Through Dialogue' (2019) *EuConst* 1.

<sup>54</sup> T Pavone, 'The EU's Faustian Bargain: The EU Betrays Ukraine and the Rule of Law - And We Will Live to Regret It' (17 December 2023) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).



Gráinne de Búrca argued, underestimating and failing to address authoritarian behaviour from within will only encourage emerging autocrats to expand their anti-democratic policies without fear of repercussions.<sup>55</sup>

Moreover, internal rule of law backsliding has unveiled the clear pitfalls of unanimity requirements in the Council. Looking at the stage of decision making in the Council in the second half of 2022, there appears to be a clear intersection between the two crises. On the one hand, Poland was spared, with no formal hearings of the ongoing art. 7(1) TEU procedure scheduled, which allowed for further autocratisation to run rampant without consequences.<sup>56</sup> On the other, Hungary was heard in relation to its own art. 7(1) proceedings, as well as the conditionality mechanism. Due to the overlap between the Council vote on approving the Commission's sanction proposal towards Hungary and the vote on providing aid to Ukraine, the Fidesz government employed a hostage policy by vetoing the aid package, which was only resolved when concessions on funding were made.<sup>57</sup> So, while protecting the budget through rule of law conditionality is a valid objective as it at least prevents money from flowing freely into the pockets of rogue governments,<sup>58</sup> it is not enough to protect a legal order that relies so heavily on intergovernmental decision-making and is based on the assumption of mutual trust and sincere cooperation.

Considering that veto powers in the Council are one of the rights that can be suspended due to systemic rule of law deficiencies, as per art. 7(2)-(3) TEU, this turn of events is the natural culmination of art. 7's failure since its first activation in 2017. No better example would encapsulate the dangers of allowing the proliferation of illiberal behaviours at home as the use of veto powers to block aid to a struggling democracy and sanctions on a belligerent autocracy.

At the same time, this may also reveal a structural flaw in the Union's Common Foreign and Security Policy, highlighting the drawbacks of unanimity, as it may be linked to foreign interference, like in the case of Hungary.<sup>59</sup> It is well known that foreign actors like Russia and China actively seek to influence decision making in this area, therefore there is a need

<sup>55</sup> G De Búrca, 'Poland and Hungary's EU membership: On Not Confronting Authoritarian Governments' (2022) *ICON* 1, 22.

<sup>56</sup> S Priebus, 'The Czech Presidency and the Rule of Law: Not Hungary's Satellite Anymore' (2023) *Czech Journal of International Relations* 160, 166.

<sup>57</sup> See: Council of the European Union, 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion Given Only Partial Remedial Action by Hungary. Brussels: Council of the European Union' (12 December 2022) [consilium.europa.eu](https://consilium.europa.eu).

<sup>58</sup> G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2019) *Hague Journal on the Rule of Law* 171, 185.

<sup>59</sup> N Koenig, 'Towards QMV in EU Foreign Policy: Different Paths at Multiple Speeds' (Hertie School Policy Brief 2022) 2.

to assess whether unanimity is an adequate system, or whether Treaty change is necessary to ensure autonomy through a different system, like qualified majority voting.<sup>60</sup>

Moreover, Hungary's overt turn as "Trojan horse" for Russia has sparked debate over its upcoming Council presidency in 2024 and whether a member state which is established to no longer be a democracy can be prevented from occupying the position.<sup>61</sup> In particular, art. 10 TEU, which sets out that member states shall be represented by their democratically accountable governments,<sup>62</sup> could be instrumentalised to ensure that an undemocratic member state is not represented in the Council, let alone at its helm.<sup>63</sup> Together with the explicit invocation of arts 2 and 10 TEU for the first time in late 2022 in infringement procedures lodged against Hungary<sup>64</sup> and Poland,<sup>65</sup> a clear path has opened towards the EU embracing militant democracy.<sup>66</sup>

The EU does in fact have a responsibility to defend its fundamental values *vis-à-vis* the member states, which is primarily manifested in the existence of art. 7 TEU, despite all its failures.<sup>67</sup> This idea was further elaborated upon by the Court of Justice, in particular with the development of the non-regression<sup>68</sup> doctrine in *Repubblica*.<sup>69</sup> This is of great importance now that enlargement is back on the table with regard to Ukraine and potentially more countries in the Eastern neighbourhood.<sup>70</sup> Before the EU can welcome more member states with a recent history of political instability and endemic corruption, it needs to stop relying on the expectation that the mere concept of membership will be enough to inspire compliance.

Furthermore, building a militant democracy that can address member states' deficiencies is especially important when related to the EU's foreign policy as it pertains to the ongoing war of aggression, both in practical terms to prevent Hungary from acting as

<sup>60</sup> D Fiott and G Tercovich, 'Votes, Vetoes, Values: Foreign Interference, QMV and EU Foreign Policy in a Competitive Age' (CSDS Policy Brief 21-2023) 1, 3.

<sup>61</sup> P Bárd, 'Can the Hungarian Council Presidency be Postponed – Legally?' (23 June 2023) *Verfassungsblog* [verfassungsblog.de](https://www.verfassungsblog.de).

<sup>62</sup> Art. 10(2) TEU reads: "Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens".

<sup>63</sup> J Cotter, 'To Everything there is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) *ELR* 69.

<sup>64</sup> Case C-769/22 *European Commission v Hungary* (pending).

<sup>65</sup> Commission Press Release, 'Rule of Law: Commission Launches Infringement Procedure Against Poland for Violating EU Law with the New Law Establishing a Special Committee' (8 June 2023) [ec.europa.eu](https://ec.europa.eu).

<sup>66</sup> FM Feisel, 'Walking A Democratic Tightrope' (15 June 2023) *Verfassungsblog* [verfassungsblog.de](https://www.verfassungsblog.de).

<sup>67</sup> U Wagrandl, 'Transnational Militant Democracy' (2018) *Global Constitutionalism* 142, 145.

<sup>68</sup> See: M Leloup, D Kochenov and A Dimitrovs, 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 *Repubblica v Il-Prim Ministru*' (Reconnect Working Paper 15-2021).

<sup>69</sup> C-896/19 *Repubblica v Il-Prim Ministru* ECLI:EU:C:2021:311.

<sup>70</sup> N Scicluna and S Auer, 'Pushing the EU's Boundaries: Enlargement and Foreign Policy Actorness after the Russian Invasion of Ukraine' (2023) *JComMarSt* 1, 8.

a Russian agent, and to reinforce the overall legitimacy of the EU's actions. The rule of law crisis has raised concerns that the Union's credibility as a promotor of democracy might be undermined when it is unable to inspire democratic compliance amongst its own members.<sup>71</sup> There is an important nexus between external and internal policy, whereby it is crucial that the rule of law is protected in both spheres and that there is a degree of coherence between the two.<sup>72</sup> Indeed, it can be argued that the EU has a constitutional mandate to defend its own founding principles in the context of its external relations and security policy.<sup>73</sup> On top of having a duty to generally "uphold and promote its values" found under art. 2 TEU according to art. 3(5) TEU, art. 21(1) TEU states that: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which seek to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, [...] and respect for the principles of the United Nations Charter and international law".

This responsibility is even more overtly present in the context of the European continent, where under art. 8 TEU, the EU aims to "develop a special relationship with neighbouring countries, [...] to establish an area of prosperity and good neighbourliness, founded on the values of the Union." A departure from its fundamental values certainly undermines the Union in its relations with third countries which it has vocally criticized for rule of law fallacies in the past, including in this case Russia.<sup>74</sup>

The general consensus among academics is that in over a year since the beginning of the Russian invasion, the European Union has shown remarkable if unexpected unity, assuming powers that had thus far been under member state discretion and furthering integration.<sup>75</sup> However, it is crucial that the rule of law crisis is not overshadowed by other competing interests, like it already has been during the migration crisis of 2015, Brexit and the Covid-19 pandemic. Indeed, time is ripe to uphold democracy and the rule of law inside and outside the Union's borders, and the two can only meaningfully be achieved in unison.

<sup>71</sup> S Meunier and MA Vachudova, 'Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union' (2018) *JComMarSt* 1631, 1642.

<sup>72</sup> L Pech, 'The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges' (2016) *Asia Europe Journal* 7, 15.

<sup>73</sup> C Hillion, 'The EU External Action as a Mandate to Uphold the Rule of Law Outside and Inside the Union' (2023) *ColumEurL* 228, 230.

<sup>74</sup> P Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) *Trinity College Law Review* 35, 37.

<sup>75</sup> E Chachko and K Linos, 'Ukraine and the Emergency Powers of International Institutions' (2022) *AJIL* 775, 786.

## V. CONCLUSION

The European Union finds itself between a rock and a hard place. The desire for unity, however, should not supersede the need for decisive action on the rule of law front. The conflict in Ukraine should be taken as a wakeup call. The EU's soft approach towards the Fidesz and PiS governments has undermined its own rule of law, as it now finds itself having to compromise its standards in order to uphold the values of democracy and freedom in its capacity as a global leader. Letting the situation degenerate in Hungary has resulted in undue external influences neutering the actions of the Council, but such an open challenge to EU values has finally triggered a decisive response from the Commission in the form of frozen funds. On the other hand, Poland's government under PiS, whose position with regard to Russia placed as a leader amongst Western powers, assumed a moral high ground and escaped oversight thanks to its efforts in support of Ukraine, while its descent into a legal black hole continued, until it was voted out in the general elections of October 2023, in open rejection of EU rules and values.

However, the power lies with the Union, and now is the time to strike while the iron is hot: with the economic impact of the war and the pandemic taking its toll, and new instruments directly linking the EU budget to the respect of the rule of law, EU institutions have a duty to make full use of all legal remedies available to them in order to neutralise the threat of illiberalism on all fronts and maximise the protection of democracy in the European neighbourhood.