

Reversing Illiberalism:
An analysis of the domestic factors determining the EU's post-accession leverage capabilities

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Introduction

During the summer of 2012, a political crisis developed in Romania, largely resulting from a power struggle between President Traian Băsescu and Prime Minister Victor Ponta. Although the conflict was borne of a disagreement about which of the two should represent Romania at EU Summits, it quickly escalated when Ponta attempted to depose Băsescu using tactics that undermined the power of the country's Constitutional Court.ⁱ In July, the European Commission (2012c) responded to the crisis decisively by issuing a report via the Cooperation and Verification Mechanism (CVM) detailing concerns and issuing urgent recommendations to the Romanian government; almost immediately, Mr. Ponta committed to implementation of those reforms (para. 4). By the end of August, the power of the Constitutional Court had been restored. On August 28, the Romanian parliament honored a ruling of the Constitutional Court that invalidated attempts to impeach Băsescu.ⁱⁱ In short, using the CVM report, the European Commission successfully pressured Mr. Ponta to reverse illiberal actions that his government had taken.

In Hungary, on the other hand, the EU has not been as successful. At several points during the administration of current Prime Minister, the EU has expressed concerns to the Hungarian government regarding actions that they have taken that compromise the independence of the Constitutional Court, but such actions by the government have continued largely unchecked.ⁱⁱⁱ Initially, EU leverage attempts appeared somewhat successful in Hungary: after the European Parliament criticized elements of the new Hungarian Constitution in 2011, many illiberal elements of the Constitution were struck down or repealed.^{iv} The EU's successes were only temporary, however. In 2013, after the passage of the Fourth Amendment to the Hungarian Constitution, which, among other things, permanently eliminated the Constitutional Court's

ability to review the constitutionality of fiscal legislation, Mr. Orbán's only response to EU criticism was to deny allegations that the amendment compromised the Court's independence.^v

Comparisons between the EU's success in Romania and failure in Hungary raise an important question: what explains the variation in outcomes given the EU's attempts in both cases to compel a member state government to reverse illiberal actions? I argue that three factors are most important in explaining this variation. First is trust: if the citizens in the targeted member state place a high level of trust in the EU and a relatively low level of trust in the national government, the government will be more likely to capitulate to EU demands for fear of paying high domestic political costs for defying the EU. Second is friends in high places: if the government is protected from material sanctions by a powerful party group within the European Parliament, the EU will be less likely to use material sanctions against that member state. Third is domestic contention: if the nature of the illiberal actions is such that the government has successfully curbed domestic political competition, the targeted state will be less likely to capitulate to EU demands, since they will have less reason to fear domestic electoral consequences of non-compliance or of incurring sanctions.

A specific definition of illiberalism is crucial to my analysis. Defining illiberalism in any concrete, measurable way is somewhat difficult, because "liberalism" is often defined in terms of broad, vague principles. Specificity is crucial to my analysis, however, and I therefore define illiberalism as follows: an action is considered illiberal if it either (a) compromises the ability of government institutions to perform their functions or (b) compromises the ability of voters to hold government elites accountable. In the Romanian and Hungarian cases in particular, illiberal actions have mostly taken the form of either (a) actions that compromise the independence and efficacy of the constitutional court or (b) actions that compromise political competition. The

former is particularly important in the context of European parliamentary systems, because in systems in which the executive and legislative branches are combined, the constitutional court places perhaps the most important check on the government's authority. The latter is equally important in any democratic system.

I will preliminarily test my hypotheses through an analysis of the Romanian and Hungarian cases, which for now are the only ones available. Applied to these cases, my analysis suggests the following: first, the Romanian government has been more inclined to capitulate to EU demands than the Hungarian government largely because the Romanian population's relatively high trust in the EU gives the government reason to fear the domestic political costs of defying it. Second, Hungarian Prime Minister Viktor Orbán's strong alliance with the European People's Party in the European Parliament has allowed his government to act with a fair amount of certainty that the EU will not invoke Article 7 TEU, its most powerful sanction, whereas the alliance of Romania's Prime Minister Victor Ponta with the Party of European Socialists has not provided a similar guarantee. Third, the Hungarian government's success in curbing domestic political competition has made them less sensitive to internal pressure and to EU demands, whereas this has not been a factor in Romania.

The rest of this thesis is organized as follows: Section I is a brief overview of current literature on closely related topics, pointing out gaps in that literature and describing how my thesis contributes to it. Section II provides an overview of the actions by the ruling parties that have undermined liberal democracy in both countries. This helps us understand the nature and effectiveness of the EU's response to those actions. Section III looks at how well my hypotheses explain the outcomes in my two cases. The conclusion briefly discusses the implications of my

findings for future attempts by the EU to pressure a member government to reverse reforms that undermine liberal democracy.

Section I: Literature Review

It is important to review briefly the literature on what leverage mechanisms the EU has used and whether they have worked because the EU's use of leverage mechanisms is central to my analysis. Sketching this literature will also help me explain the gap that I help fill with this thesis. Most literature on EU leverage has focused on domestic and EU-level factors that determine the EU's ability to leverage *gradual* reform. However, little is known about the domestic factors that help determine whether or not the EU can use its leverage to compel member state governments to reverse new policies that undermine liberal democracy, such as the recent illiberal actions taken by the Romanian and Hungarian governments.

EU Leverage in the Pre-Accession Period

The body of research on EU leverage mechanisms in the pre-accession period is important because it explains the EU's strong track record in incentivizing domestic reform: Because the EU was, during the pre-accession period, "willing to monitor implementation and sanction non-compliance" with domestic political reforms, domestic political actors incurred great cost by not legitimately implementing reforms, and they were therefore willing to implement the EU's reforms (Levitz and Pop-Eleches 2010, 472). Most research on the EU's leverage capabilities in the pre-accession period has been positive. In particular, Vachudova (2005) argues that EU monitoring and conditionality created a "focal point for cooperation" of opposition parties in prospective member-states, causing those opposition parties to adopt pro-EU positions (179). As a result, when negative monitoring reports by the EU led to electoral costs for domestic elites, opposition parties came to power that were held accountable to

implementing EU reforms (179). Writing specifically about Bulgaria and Romania, Noutcheva and Bechev (2008) argue that in spite of domestic factors that “obstructed reform in the sectors most susceptible to political influence and least likely to be reformed without external pressure,” the EU was able to use conditionality in those two countries to “[tilt] the political balance in favour of a consensus on pro-EU reforms” (114).

Analysis of the effectiveness of EU conditionality is not *universally* positive, however; Hughes and Sasse (2003), for example, are critical of the “ad hocism, inconsistency, and a stress on formal measures rather than substantive evaluation of implementation” that they argue constituted the EU’s monitoring of minority rights in prospective member states (1). Regardless of assessments of the EU’s efficacy, however, the vast majority of literature on pre-accession leverage shares a focus on the EU’s ability to leverage *gradual* reform only.

Post-Accession Leverage

Scholarly literature on post-accession leverage is less abundant and less conclusive than that on pre-accession leverage. Most literature on post-accession leverage has focused on Romania and Bulgaria, because the EU has attempted to continue to leverage reform in those countries through the Cooperation and Verification Mechanism, which monitors progress on judicial reform, corruption, and organized crime (European Commission 2012c).¹

Assessment of the effectiveness of the CVM has been relatively positive as well. Broadly considering the issue of post-accession progress on democratic reforms in Bulgaria and Romania, Levitz and Pop-Eleches (2009) argue that the two countries have been successful in

¹ A detailed explanation of the Cooperation and Verification Mechanism can be found at http://ec.europa.eu/cvm/index_en.htm

² Although the President does not have an official party affiliation, since Article 84 of the Constitution of Romania bars the President from membership in a political party, Băsescu has traditionally been associated with the PDL.

³ In addition to marginalizing the Constitutional Court, both Emergency Ordinances were not in

sustaining reforms made in the pre-accession period. Writing shortly after Romanian and Bulgarian accession to the EU, Noutcheva and Bechev (2008) predicted the importance of “continued EU supervision and monitoring of the critical semireformed sectors in Bulgaria and Romania” (117). Spendzharova and Vachudova (2011) argue that “the EU incentives that shape elite choices stem primarily from public monitoring by the European Commission of government performance and the possibility of sanctions by the EU” (39). Similarly, Pridham (2006) suggests that both monitoring of reform progress and conditionality are necessary (186). Dimitrova (2010) argues that “the EU’s mechanisms for monitoring and sanctions can influence actors’ cost-benefit calculations” (145). In an analysis that addresses the importance of monitoring by the EU rather than of leverage mechanisms more broadly, Levitz and Pop-Eleches (2010) indicate that monitoring is essential to ensure that “backsliding” on pre-accession reform progress does not occur; since EU funds have been a major incentive for Romania and Bulgaria to continue to reform, the EU must use monitoring to ensure that those funds are used properly and that there are consequences for improper use (478). Andreev (2009) is more pessimistic, however; in his analysis of post-accession reform in Romania, he argues that “corruption has remained an enduring problem, while the EU bodies have continued to closely monitor the reform process in the country” (379). All of this research, with the possible exception of Andreev (2009), suggests that the monitoring and leverage mechanism created by the EU through the CVM enables the EU to influence the activities of domestic political actors and domestic politics in general.

Like literature on pre-accession leverage, literature on the CVM has focused almost entirely on gradual reform. This makes sense: until the recent passage of the new Hungarian Constitution and the 2012 Romanian Political Crisis, there had not been many notable cases in

which the EU attempted to leverage member states to reverse illiberal actions. These cases have therefore created a new opportunity to broaden the scope of research to focus on EU attempts to leverage reversal of illiberalism.

Leverage in Hungary and Romania

The academic debate about threats to liberal democracy in Hungary and also in Romania—and how EU membership has restrained them—is still in its developmental stages, since the illiberal actions taken by those two countries’ governments are so recent and—in the Hungarian case—ongoing. In particular, the current literature lacks any thorough demonstrations of the factors particular to the targeted member state that may determine the EU’s success or failure; I intend to add to the current body of literature by addressing that issue.

Early literature on the Hungarian and Romanian cases has mainly characterized the nature of the illiberal actions themselves: Scheppele (2013a), for example, describes Hungary as a “Frankenstate,” arguing that the Hungarian government has combined “the bits and pieces of perfectly reasonable democratic institutions in monstrous ways, much as Frankenstein’s monster was created from bits and pieces of other living things. No one part is objectionable; the horror emerges from the combinations” (5). Other early literature also analyzed the effectiveness of the threat of EU sanctions in the two cases: most notably, Pop-Eleches (2013) compares the two cases and determines that the threat of EU sanctions has been more effective in Romania than in Hungary, but does not test any hypotheses attempting to explain why that might be the case (11).

More recently, in-depth analysis of the two cases has emerged. Sedelmeier (2014) offers the most comprehensive analysis of EU attempts to leverage reversal of illiberal actions. Sedelmeier’s (2014) analysis begins with an empirical demonstration of the factors that determine whether EU actors “support sanctions against Member states that breach democracy,”

through which he finds that “actors support sanctions either if they are committed to the values of liberal democracy (that is, have a GAL orientation) or if they are ideologically distant from the target government” (112). Sedelmeier (2014) then turns to a discussion of the “effectiveness of EU instruments against democratic backsliding in Hungary and Romania,” in which he finds that “the main variation in the EU’s success is across countries,” but also that “cross-issue variation within countries supports the material leverage hypothesis,” meaning that the evidence supports the notion that “target governments carry out domestic changes demanded by the EU if the costs of threatened EU sanctions exceed the domestic adjustment costs” (114-117).

Sedelmeier (2014) also demonstrates that social pressure can be effective even without the threat of material sanctions if domestic conditions are favorable, but he does not attempt to determine the specific domestic conditions that determine the EU’s success or failure (105). In short, although Sedelmeier’s analysis supports the notion that both material leverage and social pressure can be effective depending on EU-level and country-specific factors, it does not demonstrate what specific factors particular to the target member state may determine the EU’s success or failure. In this thesis, I attempt to fill that gap.

Section II: Background

It is important to explain briefly the illiberal actions that were taken by the Romanian and Hungarian governments in order to understand the nature of the two countries’ breaches of liberal democracy and that of the EU’s response in each case.

Romania

My analysis of the Romanian case is primarily concerned with one set of events—termed by the media the “Romanian political crisis of 2012”—that occurred during the summer of that year. That set of events can be summarized as follows:

Following Victor Ponta's appointment as Romanian Prime Minister, the country entered a state of cohabitation: Ponta, of the Social Democratic Party (PSD), shared the executive with President Traian Băsescu of the centre-right Democratic Liberal Party (PDL).² The two leaders' political differences developed into a direct conflict for the first time in June 2012, when they quarreled over who should represent Romania at meetings of the European Council.^{vi} Although the President had traditionally represented Romania in the EU, Ponta argued that the EU's increased focus on economic affairs meant the Prime Minister would be the more appropriate representative.^{vii} Just ahead of the European Council meeting in question, the Romanian Constitutional Court ruled in favor of the President representing the country at the meeting.^{viii} Ponta disregarded that ruling, however, citing pro-Băsescu bias on the part of the Court as his reason.^{ix} Shortly thereafter, the conflict ended when Băsescu conceded to Ponta the right to attend the summit.^x

Although Ponta's disregard for the Constitutional Court's decision is concerning, more notable were his government's subsequent efforts to impeach President Băsescu, which included several actions that subverted the Constitutional Court's authority and independence. First, in order to prevent the Constitutional Court from hindering the impeachment process, Ponta issued two Emergency Ordinances, numbers 38/2012 and 41/2012. The former effectively stripped the Constitutional Court of its ability to rule on the constitutionality of parliamentary decisions (European Commission 2012a, 4); the latter amended the rules governing a referendum, changing the threshold for successful impeachment from two thirds of all eligible voters to two-

² Although the President does not have an official party affiliation, since Article 84 of the Constitution of Romania bars the President from membership in a political party, Băsescu has traditionally been associated with the PDL.

thirds of votes cast (Venice Commission 2012, 4).³ Additionally, the European Commission notes several other actions taken by the Ponta government—such as the neglect to publish Constitutional Court decisions in the Official Journal—as attempts to marginalize the Court (European Commission 2012b, 7). In short, although the Constitutional Court was not the Ponta government’s main target, their efforts to marginalize the Court in order to impeach Băsescu demonstrate the extent to which they were willing to compromise liberalism to achieve political goals.

As the Romanian Political Crisis intensified, the European Commission officially raised concerns about the Romanian government’s actions in the July 2012 Cooperation and Verification Mechanism Report. In that report, the Commission both criticized the government’s actions and enumerated specific recommendations (European Commission 2012b). The Romanian government’s progress on implementing those recommendations serves as a valuable benchmark for assessing whether the Romanian government legitimately reversed the illiberal actions that it took. Very shortly after the publication of the report, Ponta committed to Commission President José Manuel Barroso to implement the recommended reforms (European Commission 2012c, para. 4). A little over one month later, early signs indicated that the Ponta government was taking steps to restore the Constitutional Court’s power: on August 28, the government officially honored a Constitutional Court ruling that invalidated the government’s attempts to impeach Băsescu and allowed Băsescu to return to his post.^{xi} In January 2013, the

³ In addition to marginalizing the Constitutional Court, both Emergency Ordinances were not in line with Constitutional requirements governing the use of Emergency Ordinances. Article 115 of the Constitution of Romania governs the use of emergency ordinances by the Government. Article 115.4 dictates that “the Government may only adopt emergency ordinances in exceptional cases.” Article 115.6 dictates that “emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the state, the rights, freedoms, and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly.”

Commission issued another CVM report in which it qualitatively assessed the progress that the Romanian government had made in following its recommendations (European Commission 2013). The following table summarizes the January 2013 report's assessment of progress on those recommendations that specifically address the 2012 Political Crisis:⁴

Table 1

Recommendation	Action	Recommendation Satisfied?
Repeal Emergency Ordinance no. 38/2012	De facto reinstatement of Constitutional Court's power to check the constitutionality of parliamentary decisions	Yes
Repeal Emergency Ordinance no. 41/2012	Repealed officially	Yes
Respect Constitutional Requirements Governing Use of Emergency Decrees ⁵	Verbal commitment by the Romanian Government; since July 2012, emergency ordinances have only been used in accordance with Constitutional requirements	Yes
Implement all decisions of the Constitutional Court	Respect for Constitutional Court ruling on the July 29 referendum; no further instances of refusal to comply with Constitutional Court rulings	Yes
Publish all decisions of the Constitutional Court in the Official Journal ⁶	Since July 2012, decisions of the Constitutional Court have been published in the Official Journal	Yes
Require all political parties and government authorities to respect the independence of the judiciary	No action taken	No

According to the Commission's assessment, the Romanian government successfully complied with all but one of the recommendations listed in Table 1.⁷ Additionally, it is important to note that the only recommendation listed above with which the Romanian government did not comply is also the only one that recommends broad reform rather than specific, measurable action. In every instance in which the Commission recommended that the Romanian government take specific, measurable steps to reverse illiberal actions, the government did so.

Hungary

⁴ All information in this table is derived from European Commission (2013), pp. 2-3.

⁵ See footnote 4.

⁶ Article 147.1 of the Constitution of Romania dictates that "decisions of the Constitutional Court shall be published in the Official Gazette of Romania."

⁷ Although the table does not list all recommendations made by the Commission, it does list all recommendations that refer specifically to the 2012 Political Crisis.

Illiberal actions taken by the Fidesz government in Hungary are both more varied and more numerous than those taken by the Romanian government. For simplicity's sake, however, they can be consolidated into two major events: the passage of the new Hungarian Constitution in January 2012 and the passage of the Fourth Amendment to that Constitution in March 2013. In this section, I will describe both events, the criticism and recommendations issued by the EU in each instance, and the way in which the Hungarian government responded to the EU. In order to avoid a laundry list, however, I will not attempt to describe all illiberal actions taken by the Hungarian government. I will instead focus only on those actions that (a) compromised the independence and efficacy of the Constitutional Court or (b) marginalized domestic political opposition. The former will set the stage for my analysis by accurately portraying the scale of the Fidesz government's actions and will highlight the parallels between the Romanian and Hungarian cases. The latter is important to the assessment of my third hypothesis, which specifically concerns marginalization of political opposition.

The first notable illiberal actions taken by the Hungarian government were compiled into the new Hungarian Constitution and related legislation, which went into effect on January 1, 2012.^{xii} One of the most concerning pieces of legislation related to the Constitution was the Act on Transitional Provisions of Hungary's Fundamental Law, which eliminated the Constitutional Court's ability to review the constitutionality of fiscal legislation; although the Constitution itself eliminated that power of the Constitutional Court at times when Hungary's national debt is greater than half the country's GDP, the Act on Transitional Provisions extends that elimination indefinitely (Bánkuti, et al. 2012, 12). Additionally, as described by Bánkuti, et al. (2012), the Hungarian Parliament passed the Act on the Constitutional Court, which placed two further limits on the independence and efficacy of the Constitutional Court. First, it created a process

for nominating and appointing judges to the Constitutional Court that allows the majority party to independently select judges without the support of or consultation with the opposition (62). Second, it abolished a process called *actio popularis* through which any Hungarian citizen could previously initiate review of a law by the Constitutional Court, regardless of whether the petitioner was actually affected by the law in question (56).

In response to the above and other illiberal actions taken by the Hungarian government, EU institutions and other international and supranational actors expressed concerns, issued criticisms, and made recommendations. Perhaps the most notable set of EU criticisms and recommendations came in the form of the July 5 2011 Resolution of the European Parliament, which, among other things, recommended that the Hungarian government reinstate the Constitutional Court's power to review fiscal legislation (European Parliament 2011, sec. 1). In the year that followed initial criticisms of the new Hungarian Constitution, the EU's efforts seemed to be at least somewhat effective. According to Kim Lane Scheppele's assessment, the Hungarian government did, in fact, "[appear] to modify some of the most offending reforms," and the Constitutional Court—despite its weakened position—successfully "[struck] down many of the most worrisome laws passed by the Fidesz party."^{xiii} Additionally, Orbán made a visit to the European Parliament in January of 2012; although his response to Hungary's critics in the EU was relatively aggressive, he explicitly committed to work with the EU to resolve issues with the Constitution and related legislation.^{xiv} In short, criticisms and recommendations issued by the EU in response to the Hungarian Constitution seemed at least somewhat successful at leveraging the reversal of the government's illiberal actions.

That did not mark the end of illiberalism in Hungary, however. In March 2013, the Hungarian government passed the Fourth Amendment to the Constitution, which further

compromised the independence and efficacy of the Constitutional Court. In her testimony to the Helsinki Commission, Kim Lane Scheppelle (2013b) identifies three ways in which the March 2013 amendment compromises Court's power. First, the amendment nullifies all pre-2012 Constitutional Court rulings; Scheppelle (2013b) notes that this is problematic in that it "annuls primarily the cases that defined and protected constitutional rights" (para. 35). Second, the amendment makes permanent the provision of the Constitution barring the Constitutional Court from ruling on fiscal legislation (para. 34). Finally, the amendment eliminates the ability of the court to "[review] constitutional amendments for substantive conflicts with constitutional principles;" this final change is particularly problematic because the Fidesz Party controls a two-thirds majority of Parliament, which gives the party the power to amend the Constitution independently (para. 30).

Additionally, the Fourth Amendment included several attempts to marginalize domestic political competition. In her March 19, 2013, testimony to the Helsinki Commission, Kim Lane Scheppelle described several of those actions in detail. Of particular importance are the following four changes made by the Fidesz government. First, the Fidesz government gave the Fidesz-appointed president of the National Judicial Office the power to reassign any case in the Hungarian court system to a new court, meaning that any case involving members of opposition parties could be assigned to Fidesz-friendly courts (Scheppelle 2013b). Second, the Fidesz government has engaged in significant gerrymandering of electoral districts (Scheppelle 2013b). Third, the Fidesz government has banned political advertising in any media other than public broadcasting controlled by the Fidesz media board (Scheppelle 2013b). Finally, the Fidesz government has ensured that, even if the opposition wins a majority in the upcoming election, the Fidesz-controlled budget council will have the power to veto any budget that the new

government passes, which would in turn give the President of Hungary the option to dissolve Parliament and hold new elections (Scheppele 2013b). In short, the Hungarian government made it very difficult for opposition parties to win a majority in future elections.

Although numerous criticisms were mounted against the March 2013 amendment in the immediate aftermath of its passage, the most comprehensive criticism did not come until nearly four months after the passage of the amendment. On June 25, 2013, the European Parliament released a report, known as the “Tavares Report,” condemning numerous actions taken by the Hungarian Government and making multiple recommendations for reform (European Parliament 2013). Among those recommendations were several concerning the Constitutional Court specifically, including recommendations to restore the Constitutional Court’s ability to review constitutional amendments, restore pre-2012 case law, and strive for a non-partisan process for appointing judges to the Court (European Parliament 2013, sec. 71). Additionally, the report included several recommendations related to marginalization of political opposition, such as a recommendation to invite the Venice Commission to review Hungary’s electoral laws and to ensure bipartisan representation on the National Election Committee (European Parliament 2013, sec. 71).

Prime Minister Orbán’s response to criticisms of the Fourth Amendment was quite different from his previous response to criticisms of the Constitution itself. Perhaps most emblematic of Orbán’s response to criticisms of the Fourth Amendment is his speech delivered to the European Parliament on July 3, 2013, in which he denied the Tavares Report’s allegations, called the report unfair, and refused to commit to its recommendations.^{xv}

It is important to note that the Tavares Report is not merely a condemnation of Hungary; as Scheppele (2013c) explains, it also “puts a very clever system of monitoring and assessment

in place” by creating a committee of Commission, European Council, and European Parliament members to monitor Hungary and creating a “Copenhagen Commission” of non-political experts to monitor and assess Hungary’s compliance with the recommendations of the report (para. 13-16). To date, however, even though the report makes the possibility of sanctions explicit, it has not successfully pressured the Hungarian government to comply with the recommendations of the report or even convinced the government to nominally commit to working to resolve the EU’s concerns.

Section IV: Analysis

In this section, I test my three hypotheses with respect to the Romanian and Hungarian cases. My three hypotheses are described in the introduction and are restated here: First, if the citizens in the member state in question place a high level of trust in the EU and a relatively low level of trust in the national government, the member state government will be more likely to capitulate to EU demands for fear of domestic political costs of defying the EU. Second, if the member state government in question is protected from material sanctions by a powerful party group within the European Parliament, the EU will be less likely and less able to impose material sanctions against that member state. Third, if the nature of the illiberal actions is such that the government has successfully curbed domestic political competition, the member state government will be less likely to capitulate to EU demands, since they will have less reason to fear domestic electoral consequences of non-compliance or of incurring sanctions.

My three hypotheses are based on the assumption that criticism and recommendations from the EU can serve as an effective leverage mechanism in two situations: first, if domestic political conditions are such that defiance of the EU would directly lead to domestic political consequences for the target government; and second, if the EU has material sanctions “up its

sleeve” that it can use to punish non-compliance with recommendations (i.e., implied *material* consequences of non-compliance). Inversely, if neither exists, criticisms and recommendations from the EU will likely fail as a leverage mechanism.

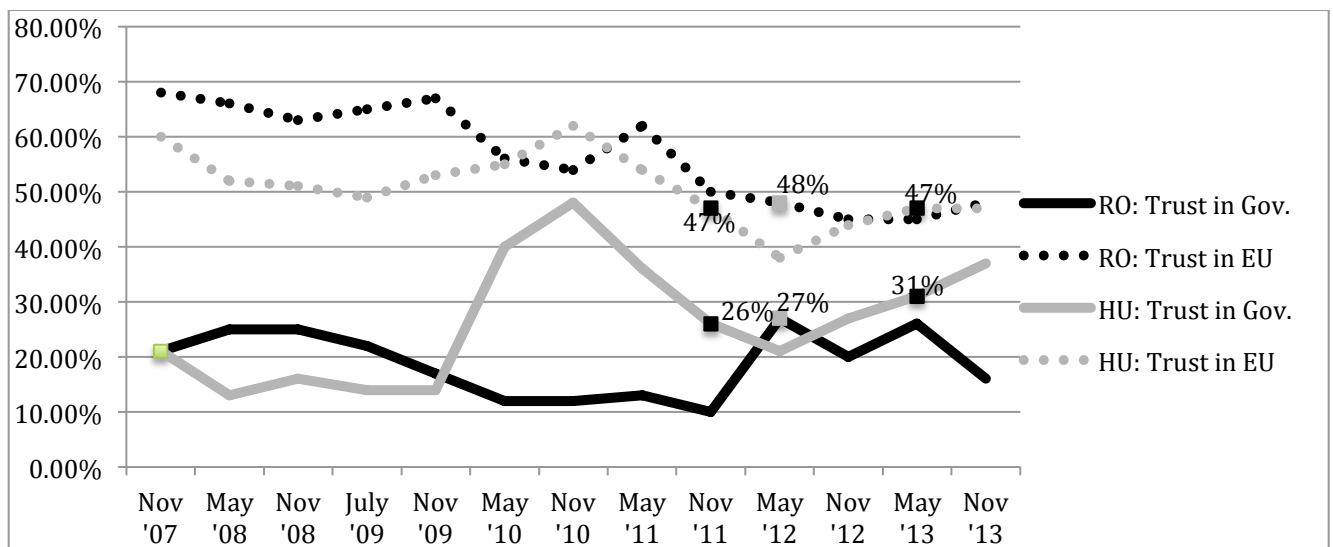
Hypothesis I: The Trust Gap

One factor that predicts whether or not the EU is successful in leveraging a target member state to reverse illiberal actions is what I term the “trust gap,” or the extent to which the voting populace in each country places more trust in the EU than in the national government. In both Hungary and Romania, the trust gap has generally been positive (i.e., the populace has placed more trust in the EU than in the national government).^{xvi} Indeed, this has traditionally been the case throughout the EU: from 2004 through 2013, the populace of the EU as a whole has consistently indicated a greater level of trust in the EU than in their respective national governments.^{xvii} What should be considered, therefore, is not the *existence* of a positive trust gap, but the *size* of the trust gap. Specifically, I consider the size of the trust gap at the point in time closest to the time at which the EU criticized illiberal actions taken by the member state government in question.

The trust gap is important because it reflects factors that would inform government leaders deciding whether or not to stand up to EU criticism – and defy EU pressure. The logic is relatively straightforward: measured in terms of domestic popularity, it would be costly for a relatively unpopular, untrusted government to defy a relatively popular, trusted EU; it would be less costly for a relatively popular, trusted government to defy a relatively unpopular, untrusted EU. I hypothesize, therefore, that when the trust gap is both large and positive (i.e., the populace places significantly more trust in the EU than in the government), the government is more likely to respond positively to EU criticisms and recommendations.

Figures 1 and 2 are based on Eurobarometer public opinion polls conducted between 2007 and 2013.^{xviii} Eurobarometer polls are conducted biannually: once near the middle of the year and once near the end. Figure 1 tracks the level of trust that the Hungarian and Romanian populaces place in their national governments and in the EU, respectively.⁸ Figure 2 tracks the trust gap for both countries over that time period. Values in Figure 2 represent the difference between trust in the EU and trust in the national government. For example, in May of 2012 the trust gap in Romania was 21% because 27% of the populace indicated trust in the national government and 48% of the populace indicated trust in the EU ($48-27=21$).

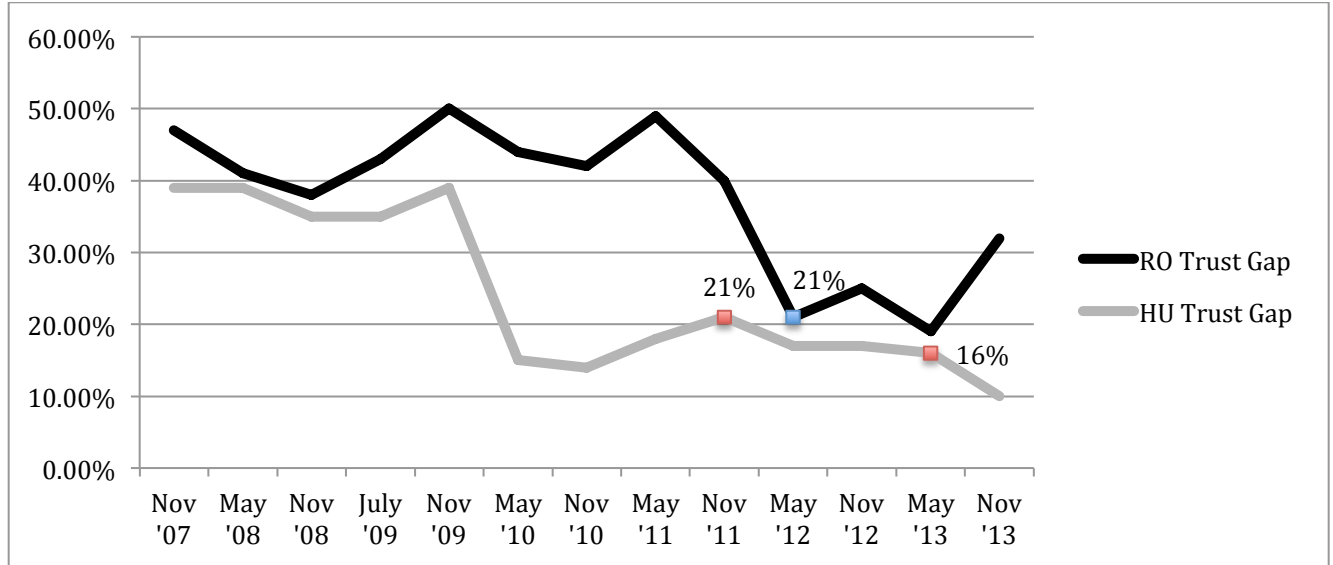
Figure 1: Trust in the EU and Trust in National Governments⁹



⁸ The data represented in these charts represents answers collected through biannual Eurobarometer polls to the questions “For each of the following media and institutions, please tell me if you tend to trust it or tend not to trust it: The (Nationality) Government” and “For each of the following media and institutions, please tell me if you tend to trust it or tend not to trust it: The European Union.” Percentages in Figure 1 correspond to the percentage of the sample in each country that answered “Tend to trust” to those questions. Percentages in Figure 2 correspond to the percentage of the sample in each country that answered “Tend to trust for the EU” minus the percentage of the sample that answered “Tend to trust” for the (Nationality) Government.

⁹ All data in Figures 1 and 2 is derived from Eurobarometer polling results, accessible at http://ec.europa.eu/public_opinion/archives/eb_arch_en.htm

Figure 2: The Trust Gap



Hungary

The two important points to consider for Hungary are November 2011 and May 2013, because these are the two points closest to times at which the EU attempted to leverage the Hungarian government to reverse its illiberal actions. In November 2011, the trust gap in Hungary was at 21%, the largest since the Fidesz government took power, and it had risen steadily over the past year. Trust in the EU among Hungarians was relatively average for Hungary (47%). Trust in the Hungarian government was at its lowest point since the Fidesz government had taken power (26%) and had been falling for the past year.

As discussed in Section II, above, in January of 2012—amid criticism and threats of infringement proceedings from the EU—Viktor Orbán visited European Parliament, where he delivered a speech assuring members of Parliament that the issues that the European Union had with the Hungarian Constitution and related legislation would be resolved. This response aligns with my hypothesis in two ways. First, as predicted by the existence of a relatively large trust gap, Orbán responded positively to the EU’s criticisms and demands. Second, the nature of his

response suggests that he made it with public opinion in mind: it is relatively unusual for a government leader to visit European Parliament, and his trip garnered significant attention in the news media.

In May of 2013, the Eurobarometer indicates that the trust gap in Hungary was at 16%, its lowest point in two years, and had been steadily shrinking since November 2011. Trust in the Hungarian Government was relatively high (31%) and had risen consistently over the last two polling periods. Trust in the European Union was, again, relatively average for Hungary, at 47%.

As discussed in Section II, perhaps the most notable criticism of the Hungarian Government issued by the EU is the so-called “Tavares Report,” approved by the European Parliament on June 25, 2013. In response to that report, Orbán again visited European Parliament, but the speech he delivered was starkly different from that which he gave in January 2012: calling the report politically motivated and unfair, he refused to commit to the recommended reforms. Again, Orbán’s response to EU criticism aligns with my hypothesis: the trust gap was small and shrinking, and Orbán actively defied the EU in his response to criticism.

Romania

The most important point for Romania is May 2012, because that is the point closest to the time at which the EU attempted to leverage reversal of illiberal actions there. In May 2012, the trust gap in Romania (21%) was relatively small for Romania, but relatively large when compared with that of the EU as a whole, which stood at 3% at the time and has fluctuated between 3% and 10% over the last several years. Trust in the Romanian government was at 27%, and trust in the EU was relatively average for Romania, at 48%.

As discussed in Section II, after the EU issued the July 2012 CVM report that criticized the Romanian Government and made numerous recommendations, Prime Minister Ponta responded by committing to implement the reforms recommended by the EU; by the release of the next CVM report in January 2013, Ponta had, for the most part, made good on his promise. The Romanian Government's response is also in line with my hypothesis that a large trust gap increases the likelihood that the targeted government will respond positively to EU criticism.

Hypothesis II: Political Alliances

Another factor that determines whether or not the EU has substantial leverage on a government that appears to be undermining liberal democracy is whether or not the ruling party leaders are being protected by a strong party organization in the European Parliament. The EU's most powerful sanction is Article 7 TEU, which allows the EU to suspend a member state's voting rights on the Council when it is determined that there is a "clear risk of a breach by a member state of the values referred to in Article 2." (Treaty on European Union, Article 7). In order for Article 7 to be invoked, the European Parliament must approve the measure "by a two-thirds majority of the votes cast, representing the majority of its component Members" (Treaty on European Union, Article 7). If a strong European party organization is protecting the target government in the European Parliament, then the EU does not have its most powerful material leverage mechanism "up its sleeve," eliminating this important source of pressure.

Prime Minister Orbán is an influential member of the European People's Party (EPP), the single largest party in European Parliament. The EPP currently controls 274 of the European Parliament's 766 seats, which amounts to roughly 36% of the body. It would therefore be impossible for the European Parliament to invoke Article 7 without the support or abstention of at least some members of the EPP. As Sedelmeier (2014) observes, the EPP has indicated that it

does not support sanctions—including the invocation of Article 7—against Hungary (112).

There are several reasons this may be the case. First, although Orbán's current premiership only began in 2010, he has been a prominent important figure in European politics and in the EPP for over a decade. Additionally, as Sedelmeier (2014) notes, TAN-aligned (traditional/authoritarian/nationalist) parties such as the EPP generally only support sanctions against their political opponents (112). Regardless of the reasons that the EPP chooses to protect Orbán, however, their protection greatly reduces the EU's leverage capabilities in Hungary. To be clear, the important factor here is not simply that Orbán has a strong alliance with the EPP. What is important is that Orbán has an alliance with a party with enough representation in European Parliament to block invocation of Article 7, and that party has indicated that it does not support sanctions against Hungary (Sedelmeier 2014, 112). In short, because the EPP will use its clout in the European Parliament to protect the Hungarian government, it would be very difficult for the Parliament to invoke Article 7 against Hungary. This is important because it allows Orbán's government to act with a fair degree of certainty that the European Union will not actually invoke Article 7, even if Hungary does not comply with its recommendations and continues to breach liberal democracy. When responding to the Tavares Report, for example, even though the report specifically threatens the invocation of Article 7, Orbán was able to actively defy his critics in European Parliament with a virtual guarantee that actual invocation was not likely.

The case is not the same for Ponta's government in Romania. Although he is a prominent member of the Party of European Socialists, Ponta cannot be confident that the European Parliament will not approve the invocation of Article 7 for two reasons. First, the Socialists only control 194 seats in European Parliament, meaning that they would not be able to

prevent the invocation of Article 7 unless joined by other parties in abstaining or voting against invocation. Second, as Sedelmeier (2014) observes, because the Party of European Socialists is GAL-aligned (green/alternative/libertarian), they would approve sanctions against Romania because of their commitment to the values of liberal democracy, regardless of their alliance with Ponta (112). Ponta's positive response to EU criticism therefore supports this hypothesis as well.

Hypothesis III: Domestic Political Competition

Finally, I hypothesize that the EU's leverage diminishes when the target government is able to restrict political competition and marginalize political opposition parties. As explained above, when deciding how to respond to EU criticism and recommendations, it is logical for target governments to consider possible domestic political consequences of defying the EU or incurring EU sanctions. If domestic political opposition is already weakened by illiberal actions, however, the possibility of domestic political consequences is reduced. Therefore, in situations in which the government has successfully marginalized domestic political opposition, the government does not have to tread as carefully as they otherwise would when responding to EU criticism and recommendations, since they are somewhat insulated from possible electoral consequences of their actions.

Through the Fourth Amendment, the Hungarian government took several actions, described in Section II, above, that limited the power of opposition parties. In short, Fidesz has taken significant steps to ensure that opposition parties will not gain power in future elections and that, even if they do gain power, measures are in place to allow Fidesz to return to power. These actions that protect the Fidesz party from electoral defeat in the future effectively allow the government to operate under a set of assumptions that is unavailable in a healthy liberal democracy: the Fidesz government is able to respond to EU criticisms and recommendations

with the knowledge that even if criticism from the EU negatively affects public perception of the party and even if the EU does impose sanctions, the party would be insulated from the full brunt of domestic political consequences because they have created an uneven playing field. This allows Fidesz to respond negatively to EU criticism and recommendations with less fear of domestic political consequences than they would have if operating under normal conditions of healthy political competition.

This hypothesis can be tested in the Hungarian case by comparing the government's response to criticism of the Constitution in 2012 to its response to criticism of the Fourth Amendment in 2013, because political opposition had not yet been successfully marginalized in the first case and had been marginalized in the second. As described in Section II, in 2012—before opposition parties had been significantly weakened—Orbán responded positively to EU criticism, committing to resolve concerns with the new Hungarian Constitution. In the summer of 2013—after the Fourth Amendment had weakened political opposition—Orbán responded to the Tavares Report by denying the report's allegations and refusing to commit to recommended reforms. These findings support my hypothesis: when operating under normal conditions of healthy political competition, Orbán responded positively to EU criticism and recommendations; when operating under abnormal conditions in which political opposition had been weakened, Orbán responded negatively.

Although the Romanian government attempted to consolidate power in the summer of 2012, they were not as drastic or as successful as the Hungarian government in attempts to marginalize opposition parties. Thus, when the EU issued the July 2012 CVM report, the Romanian government was operating under normal conditions of healthy political competition. As described in Section II, Ponta responded to that report by committing to the recommended

reforms. This, too, is consistent with my hypothesis: when operating under normal conditions of healthy political competition, Ponta responded positively to EU criticism and recommendations.

Summary

The table below summarizes my findings with respect to all three hypotheses:

Hypothesis	Country	Finding	Hypothesis Supported (1) or not supported (0)
Hypothesis 1: Trust Gap	Hungary	When a large trust gap existed, Orbán government responded positively to the EU; when a small trust gap existed, Orbán government responded negatively to the EU	1
	Romania	A large trust gap existed; Ponta responded positively to EU criticism	1
Hypothesis 2: Political Alliances	Hungary	Orbán government has a strong alliance with the EPP, a party that is willing and able to block Article 7 invocation in EP; Orbán government responded negatively to EU criticism	1
	Romania	Ponta government has a strong alliance with the S&D, a party that is unwilling and unable to block Article 7 invocation in EP; Ponta government responded positively to EU criticism	1
Hypothesis 3: Domestic Political Competition	Hungary	Orbán government used methods that successfully marginalized domestic political opposition; Orbán government responded negatively to EU criticism	1
	Romania	Ponta government used methods that did not successfully marginalize domestic political competition; Ponta government responded positively to EU criticism	1

Conclusion

At first glance, the Romanian and Hungarian cases paint a bleak picture of the EU's post-accession leverage capabilities. The fact that the EU failed in Hungary might suggest that the EU's leverage mechanisms are relatively weak, especially in cases of such extensive assault on liberal democracy as that seen in Hungary. I argue that this is not the case. I provide preliminary evidence that a specific constellation of factors peculiar to Hungary caused the EU to

fail in the Hungarian case. Without Hungary's specific combination of domestic social conditions (i.e. a small trust gap) that allowed the government to defy the EU, a relationship with the EPP that protected Hungary from Article 7, and marginalization of political opposition, the EU would likely have been more successful. Only when all three of these factors existed in combination was Hungary able to defy the EU with impunity. In short, the fact that the EU only failed under particular circumstances in Hungary suggests that the EU's failure might best be considered an exceptional and unusual case rather than an embodiment of systemic failures of EU leverage.

Furthermore, my analysis suggests that it would be very difficult for other countries to follow the "Orbán playbook," since the factors that I argue are important are generally outside of the government's control. Although governments may be able to influence public opinion, they cannot control it, and the trust gap is therefore likely to fluctuate beyond the government's control. Similarly, although governments can work to build relationships with powerful European Parliament factions, building a relationship strong enough that it virtually guarantees protection from Article 7 invocation is difficult and took Viktor Orbán over a decade. Finally, although other governments can attempt to marginalize domestic political opposition, it is unlikely that they would be able to do so as extensively as Hungary did, since Hungary's ability to so fundamentally alter the electoral landscape can largely be attributed to its two-thirds supermajority, which allowed Fidesz to pass legislation and amend the constitution without any opposition support. In short, although other EU member states may attempt to copy Orbán in the future, they are unlikely to be as successful as Orbán's government has been.

Reality and perception are very different, however, and it is likely that the Hungarian case will cause the EU and international actors to view future breaches of liberal democracy with

increased skepticism, even if it is unlikely that future illiberal governments will be as successful as Orbán's government. This is not a bad thing, because it will lead European and international actors to take illiberal actions by EU member states more seriously. It is in this, perhaps, that the EU's failure in Hungary has a silver lining: by showing the danger of failing to respond decisively to breaches of liberal democracy, the Hungarian case may cause European actors to respond more quickly and more decisively in the future.

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