Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU

1. Introduction

The emergence of populist governments with an agenda of illiberal constitutional reforms in some EU Member States threatens the EU's core values i.e. democracy and the Rule of Law (RoL). The breaches of these values by the Hungarian (since 2012) and Polish (since 2016) governments threaten the underlying EU consensus and have created an ongoing crisis. The EU faces a dilemma: either the EU tolerates these regimes, thereby implicitly condoning their violations of the basic values, or it sanctions them, confronting the legitimacy of national (democratic) governments with the legal discipline of supranational RoL guarantees. The EU has so far addressed this disjunction using soft and partial mechanisms. This article aims to explain this limited sanctioning activity and argues that internal institutional logics of behaviour contribute part of the explanation.

Protection of the RoL and democracy through a sanctions mechanism is not an exclusive feature of the EU. A significant number of regional organisations (ROs) and intergovernmental organisations have developed similar mechanisms in other regions (author, 2017). While other ROs such as Mercosur focus on democracy as the value protected, the EU has tackled breaches as offences against RoL: the broader and vaguer scope of the values in Article 2 of the Treaty on European Union (TEU) permits framing the erosion of the separation of powers (targeting mainly judicial independence) as a

RoL matter. However, organisations in other regions such as Latin America (Closa and Palestinis, 2018) and Africa (see Hellquist, 2018 and in this volume) have been much more assertive in activating sanctions mechanisms. Puzzlingly, most of these other organisations have institutional designs heavily skewed towards intergovernmentalism. What explains the EU's limited sanctioning decisions? I argue that internal logics of behaviour within each of the institutions have inhibited more assertive actions.

The Treaty of Nice (2000) introduced Article 7 and the Lisbon Treaty (2010) perfected it. Its drafters sought an insurance mechanism to prevent the post-communist members who had acceded in 2004 from backsliding towards authoritarianism (Sadurksi, 2010). Article 7 contains two different procedures which could be termed the 'preventive' and the 'corrective' stages using an analogy with the terminology consolidated for the excessive deficit procedure in the area of fiscal and macroeconomic governance. These differ in the nature of the threat that they identify: the preventive stage concerns the 'clear risk of a serious breach' of values in Article 2, while the corrective stage applies to the actual (i.e. serious and persistent) breach of these same values. What is a 'clear risk', and what distinguishes it from a 'serious and persistent' one is not defined (with the exception that the second stage adds 'persistent'). This lack of definition grants a significant margin of discretion for actors to interpret situations.

These two stages are not necessarily successive, although logically they look so: while an offender could breach the values without any prior indication, it would appear more logical that previous signals would have indicated to national authorities the emergence of a serious risk of a breach. In fact, the 'preventive' stage originated in the willingness to employ a form of early warning that the 1999 Austrian RoL situation (see

section 5.3) provoked (Sadurski, 2010). In any case, nothing in the Treaties requires activating the preventive stage to activate the corrective stage.

Table 1 here

Activation of the procedure limits the EP's role to the preventive stage while both the Commission and the Member States can trigger either stage. The decision-making requirements draw a crucial distinction between the two stages. While the preventive one requires a four-fifths qualified majority of the Council, plus the EP's consent, the corrective stage requires the European Council to act by unanimity. Then, the Council may adopt sanctions by qualified majority. Pech and Scheppele (2017) explicitly blame the combined supermajority requirements in the Parliament and Council for the EU's inaction, while Hooghe and Marks (2019) see unanimity as a sign of the reluctance of national governments to allow supranational bodies to intervene in domestic constitutional reform.

Finally, sanctions in the proper sense, only exist at the end of the second stage. These are undefined since the only sanctions explicitly mentioned are the suspension of the offending state's membership rights. The scope of treaty competence limits possible sanctions and this grants the Council a wide margin for manoeuvre to determine potential sanctions, with the only limitation being that these should consider the possible consequences for natural and legal persons.

This paper explains the lack of sanctions as resulting from the institutional patterns of behaviour and interactions that Article 7 determines. Both the European Parliament (EP) and the Commission can initiate the procedure but in both cases, internal logics (partisanship on the one hand, and calculus about obtaining compliance on the other)

condition their performance. The lack of an assertive line from either cannot counterbalance the Member State governments' tendency to inhibit action within the Council.

To construct this thesis, I first discuss the theoretically informed patterns of behaviour that Article 7's institutional design determines. I then present the cases and EU's reactions to then. Next, I summarily present the evidence on the EU institutions' performance, seeking to identify how they navigated their sanctioning options. The final discussion and conclusion present the paper's main argument: partisan politics have dominated the EP's actions towards the RoL mechanisms, though electoral considerations have tamed the protective stance towards offenders within the same party group. The Commission action derives from a combination of, on the one hand, the anticipation of the effects of any possible action combine the 'compliance dilemma' i.e. choosing to seek compliance either by sanctioning a state and thus risking alienating its national authorities or alternatively by engaging with offending states, inviting their commitment precisely by not imposing sanctions (Closa; 2019). On the other hand, this combines with the calculation of the Council's support and the effects of failure to obtain it decisively. This conditions its willingness to activate the sanctions mechanism. The combined effect leads to a preference for engagement mechanisms that which fall short of sanctions. Finally, procedures and voting rules within the Council permit offending governments to block decisions with the support of enough partners. Other governments are reluctant to apply sanctions because they resist EU interference in domestic constitutional structures, have ideological proximity with the offenders or feel solidarity prompted by fears of spill-over. In summary, each institution follows its own logic and thus a coordinated strategy is needed (Oliver and Stefanelli, 2016) which runs

counter to the logic of the institutional setup. However, evidence also shows that partial actions within the three institutions interact to produce a small but nevertheless perceptible and significant change in internal positions.

2. Institutional logics within the EU sanctions regime

Scholarship considers the EU the most advanced, even unique, example of supranational regional governance. Several legal and institutional elements justify this perception. First, EU secondary norms (EU law) acquire primacy and apply with direct effect within the Member States. Second, Member States have delegated authority to the independent agencies placed above them. Thus, the Commission benefits from delegated authority to initiate legislation, execute policies and guard the treaties, while the CJEU adjudicates on disputes and interprets EU law. Finally, Member State representatives in the Council take decisions by majority in most policy areas.

Despite this, I argue that supranational institutions can follow logics of behaviour that – combining with intergovernmental logics – can yield suboptimal results for sanctions enforcement. Rather than identifying the locus of inaction in a single institution, this paper argues that the combination of the three produces such an outcome. Institutional logics derive from treaty rules that identify the institutions involved in specific decisions and their roles and interactions. Those rules determine the sequence of moves, the actors' options and the information they control, and the rules thus affect the actors' strategies and the outcomes of their interactions (Tsebelis and Garrett, 2001: 384). The EU therefore embodies a plurality of policymaking modes (Wallace, Pollack and Young, 2014: 7-8). Determining the precise model within a given

policy arena requires making explicit previous assumptions on the actors' behaviour within a given institutional design. The EU's Article 7 sanctions mechanism involves three institutions: Commission, Council and the EP.

The subtleties of this design emerges when we apply existing models of institutional behaviour and interinstitutional interaction. Certainly, eschewing secondary legislation in developing Article 7 prevented the emergence of the traditional Commission-CJEU enforcement partnership (Marks and Hooghe; 2019). But this does not mean that the other EU institutions do not share the same interest in securing compliance with EU norms. My argument is that institutional preferences determine their behaviour regarding the enforcement of Article 7, and different logics inform these preferences. As a consequence, the interaction of the different logics have created a scenario in which, for the moment, the EP's partisanship-dictated behaviour matches the national governments' reluctance to act as enforcers of their partners' compliance. Against that background, the Commission calculates the options for securing compliance rather than merely seeking enforcement (with no guarantee of compliance).

Findings on EP behaviour varies depending on the issue. It tends to mobilise along party lines when voting on legislative proposals (Hix et al., 2007) but also as a conditional agenda setter (Tsebelis; 1994), a power maximiser when a veto is available (author, 2019b), and as a Commission ally (Rosén, 2016). Within the context of RoL breaches and the activation of Article 7 sanctions, the prevalent explanations for the EP's actions point towards the effects of partisanship in the EU (Sedelmeier, 2014 & 2017; Kelemen, 2016; Sargentini and Dimtrov, 2016): European party groups protect errant governments from their political family but are prepared to act against those that belong to different families. Kelemen (2020) has convincingly made partisanship a key component of his

notion of 'authoritarian equilibrium': *(the EU) has not politicized sufficiently that autocrats' Europarty allies pay meaningful reputational costs for supporting them or that the autocrats' EU-level opponents can intervene in the ways that might help dislodge them*.

Several hypotheses can explain the Commission's actions. First, partisanship could hypothetically explain the Commission's behaviour: the proximity between the Commission and its President's ideological orientation could explain its appetite for sanctions. Kelemen (2016: 226) thus claims that the Juncker Commission (2014-2019) ultimately refused to sanction the Orbán government because the Commission President and the majority of Commissioners were European Peoples Party (EPP) members who owed their dominance of the EU's executive to the support of the EPP group in the European Parliament. However, this thesis contradicts research into Commission behaviour, which found no evidence that ideology, or more specifically party affiliation, plays any role in explaining the Commission's activity (Wonka 2008, Kassim et al., 2013).

The sanctions literature provides alternative explanations. A main effect of sanctions can be the 'rally-round-the-flag' effect that occurs whenever a threat of sanctions arouses a nationalist response within the target government or population, undermining the effectiveness of the sanctions threat (Galtung, 1967). Pervasive nationalism can further exacerbate the rally-round-the-flag effect since it inclines states and societies to endure considerable hardship rather than abandon what they view as national interests. Observers have warned that rally-round-the-flag effects could emerge if the EU activates Article 7 (Schlipphak and Treib, 2016; Editors CMLR, 2016: 602), consequently increasing the support for exactly the domestic actors EU

intervention is supposed to counteract. Commission-led decisions can have a galvanising effect within the 'impeached' state and as a corollary, further alienate this Member State's government and population from the EU and its institutions (Bieber and Maiani, 2014; Wilms, 2017: 68).

Third, interinstitutional dynamics can also inform Commission behaviour: formal and informal interaction with other EU institutions shape the Commission's formal agenda-setting power (Marks, Hooghe and Blank; 1996). Whether these interactions limit, constrain or model Commission behaviour depends on the relative position of the other two decision-making institutions (i.e. the EP and the Council). These insights are particularly useful for understanding Commission behaviour under Article 7, where it has initiative power but does not intervene in decision-making, which depends on Council and Parliament. The theoretical expectation is thus that the Commission informs its tactical decisions on the procedure feeding in the other institutions' expected behaviour. Kochenov and Pech (2016: 1066) argue that lack of Council support for activating Article 7 explains the Commission's new Framework proposal[i] and, in fact, other policy areas provide evidence of this calculated Commission attitude. Thus, the Commission has not proposed sanctions on excessive budgetary deficits since the Council voted down its 2003 recommendations to impose fines on France and Germany for breaching the Pact, despite opening more than 38 sanctions procedures.

The Commission anticipates that lack of Council support could provoke unwanted and undesired negative effects, both for EU RoL protection and for the Commission itself (Closa, 2019). However, the offending government and authorities could also present the Council's refusal to back the Commission as implicit endorsement of their constitutional and policy reforms, or it could be perceived as de-authorising the

Commission, thus undermining its authority in this and any other enforcement mechanism. Unsurprisingly, the Commission prioritises preserving its EU law enforcement toolkit rather than exhausting it without a minimum guarantee of success a political calculus criticised because *insulation from politics was institutionally organised to enable it to take 'difficult' decisions to ensure the application of Union law* (Pech and Scheppele, 2017a).

This anticipation of Council behaviour points to alternative courses for action but it also melds with alternative explanatory hypotheses for Commission behaviour. Some see a contradiction between the ostracising effects of sanctions and the EU ethos of compromise, mutual accommodation and mutual trust (Hellquist, 2018). Are EU institutional actions (and specifically Commission actions) in Article 7 situations adequately informed for this ethos? Certainly, the Commission's compliance-seeking strategy relies on a combination of formal and informal, and coercive and problem-solving instruments, bundled together to maximise leverage (Sedelmeier, 2014: 113). The Commission prefers to resolve compliance breaches through structured dialogue with the relevant Member State (Batory 2016: 688). This preference derives from the Commission's perception of a 'compliance dilemma': because the EU is a community of law, lacking real coercive power, it relies on voluntary compliance, enforcement and sanctions, which do not guarantee the acquiescence of national authorities to secure compliance. Even where enforcement is possible, lawyers agree that Member States' compliance with EU law is ultimately voluntary and the EU is, unlike many federal states, not even theoretically empowered to use coercion to enforce EU law against a recalcitrant Member State (Bieber and Maiani 2014: 1060–1). The Commission appears to be aware of this dilemma and therefore seeks amicable solutions to potential RoL

conflicts, before risking a formal procedure which could create 'trenches' between EU institutions and the affected Member States (Wilms, 2017: 76). Accordingly, the Commission considers dialogue as the most appropriate way to address breaches of EU law, including conformity with Article 2 values. Pech and Scheppele (2017) have vigorously criticised this approach, which they view as *based on the questionable presumption that a discursive approach could produce positive results*: it simply delays invoking Article 7. In any case, this compliance dilemma informs Commission enforcement strategy and explains its preference for alternative mechanisms which avoid confrontation and enhance engagement with domestic authorities (Closa, 2019).

The Council, on the other hand, lacks the collective will of the Commission and its working method essentially relies on the aggregation of its individual members' preferences. Individual preferences thus determine much of the Council's behaviour before interaction with any EU institution. Voting requirements also model the members' behaviour. Specifically, under the sanctions mechanism's unanimity requirement (see below), each individual government can veto a decision and all preferences thus initially count as equal. In this situation, the existence of more than one infringing government renders the deployment of the 'biting' clause of Article 7 virtually impossible, unless the joint activation of Article 7 against both would permit removing the 'fellow-traveller' veto (Scheppele, 2016, Pech and Scheppele, 2017). The more lenient supermajority requirements also put the same question to national governments: are they prepared to act as sanctions mechanism enforcers? Scholars and commentators have blamed the Council for taking no action whatsoever in relation to the crises in Hungary and Poland (Oliver and Stefanelli, 2016; Pech and Scheppele, 2017). In fact, governments have only used the purely bilateral option of bringing

another non-compliant Member State to the European Court of Justice for a violation of an obligation under the Treaties (Article 259 TFEU) six times (two of which were withdrawn) (Wilms, 2017: 65-66), illustrating the governments' unwillingness to directly assume enforcement, and even less so sanctions.

What explains the governments' reluctance? There is evidence that Council partisanship could contribute to explaining legislative outcomes (Mattila, 2004; Aspinwall, 2007), but the evidence also shows partisanship's absence in Council decision-making (Schneider and Urpelainen, 2014). What might then explain the Council's preferences? Intuitively, preferences for the strict respect of national competences and geopolitical proximity combined with sympathy for political objectives of errand authorities could explain government positions.

In summary, the three institutions behave according to internal logics that may combine to generate suboptimal conditions for the pursuit of enforcement via sanctions. The next section presents the cases and explains how I will seek to substantiate this thesis.

3. Cases: RoL breaches and EU responses

The illiberal agendas of the Hungarian and Polish governments prompted a RoL crisis in the EU. Their policies promote institutional capture and RoL backsliding. Without going into detail, the rich literature on backsliding agrees that reflects the introduction of legislation which undermines judicial independence, limits the powers of the Constitutional court and restricts NGO activity. The Hungarian government has gone even further by suppressing its Ombudsman and harassing the Central European

University (CEU) which finally changed its location to Vienna. Other governments such as Romania's have also recently inspired significant concerns at the state of the national judiciary and widespread corruption, as well as legislating to attacking NGOs.

EU responses include an array of instruments comprising critical EP resolutions against both governments, a number of infringement cases before the CJEU and the creation of new instruments (such as the Commission's *Framework on the RoL* and the Council's dialogue on the RoL). As for sanctions activity, in 2017 the Commission activated the preventive stage of Article 7 against the Polish government, while the EP did the same in 2018 against the Hungarian government.

Methodologically, this paper rehearses a plausibility probe (Eckstein, 1975): it aims at probing into the details of a particular case to shed light on a broader theoretical argument. This method is particularly suitable given that access to empirical evidence on the preferences and motivations of two of the three institutions involved (Commission and Council) is difficult. Research into the EP's Article 7 activity has unsurprisingly therefore advanced comparatively much more and theoretical findings on EP preferences have largely been consolidated. Empirical evidence for the Commission's preferences and tactical decisions emerge from direct interviews with Commission officials (author, 2019) and primary sources, while secondary sources permit mapping national government preferences.

4. The European Parliament: partisanship and its limits

The EP has been the most active institution in engaging with RoL breaches in Member States since 2012 through resolutions and debates, but not activating Article 7

until 2018, when it started the preventive stage against the Hungarian government.[ii] A lack of parliamentary majorities explains the different outcomes. Considering the resolutions addressing specific Member State offences as a proxy, none obtained a majority similar to the one required to activate Article 7 (i.e. 2/3 MEPs). Exceptionally, the EP approved a 2016 Resolution on the recent developments in Poland[iii] and their impact on fundamental rights (448 MEPs in favour out of 693).

Evidence shows patterns of behaviour of European Parliament party groups along ideological lines. Thus, the Liberals (Alliance of Liberals and Democrats for Europe, ALDE, now called *Renew Europe*) have been particularly vocal and backed all the resolutions. A liberal (Sargenttini) drafted the Resolution which activated Article 7 against the Hungarian government. Liberals also led in proposing the establishment of a pact for democratic governance which practically mirrors the EU's economic governance.[iv] This proposal did not obtain support in the chamber. Liberals do not govern in any of the offending states and they do not therefore need to 'protect' any friendly governments. Evidence shows partisanship at work for both the Party of European Socialists and the EPP, though the EPP has attracted the greatest criticism because of its support and even outright protection of the Hungarian Fidesz government. Already in 2013, most EPP MEPs voted against the Tavares Report (Pech and Scheppele, 2017b), and EPP vice-chair Manfred Weber dismissed it as a politically motivated attack on the Orbán government by leftist parties.[v] In 2018, 57 EPP MEPs voted against triggering Article 7 procedure, while 28 abstained. Ideological sympathy partly explains support, for instance, from numerous EPP MEPs from the Visegrad countries and the German Christian Democratic Union for Fidesz (Wolkenstein, 2018). But Fidesz support for the EPP plays a role in explanation. Thus, Fidesz support served to consolidate the EPP's dominance of the EP

during the 2014-2019 term. Fidesz's twelve seats contributed to the EPP's slim majority over its main competitors for pre-eminence in the EP, the Socialist and Democrats Group (S&D) (221 versus 191). The EPP majority could have been vulnerable if the S&D had garnered support from other groups. Evidence shows Fidesz support for mainstream EPP policies. Thus, despite Fidesz's long history of political animosity with Juncker, all Fidesz MEPs eventually voted in favour of his candidature as Commission President. Fidesz also voted in favour of the EPP's candidate for the EP President, Antonio Tajani in 2017. On the other hand, the EPP has rewarded support by placing Fidesz politicians in key leadership posts in the Parliament.

EPP partisanship suffers from deep internal tensions going back at least to the 2013 Tavares Resolution, which several EPP MEPs supported despite the party whipping against it. The 2019 elections came after Orbán's latest attacks on the CEU and his vicious criticism of EPP and Commission President Juncker. Several EPP members requested the suspension of Fidesz, which happened on 20 March 2019. The EPP created a special committee of Three Wise Men to examine Fidesz's adherence to the EPP's standards. The committee produced a 13-point questionnaire that Orbán responded to in a wholly defiant and truculent tone, concluding in his final answer: *sorry, this is a complete nonsense*[1] (see a summary of events in Kelemen; 2020).

The result of the elections provided an excellent opportunity for Orbán to cash in his support for EPP in exchange for some trade-offs. The socialist candidate (and Commissioner in charge of the RoL), Timmermans had criticised the EPP and its candidate Manfred Weber severely for the cover they provide Orbán for RoL violations. As a lead candidate for the position of Commission President, Orbán rejected the

[1] Responses available at https://visegradpost.com/en/2019/06/18/orbans-answers-to-epp-letter/

'extremist pro-immigration' left-wing Timmermans as 'George Soros's candidate' and claimed that he (in along with the other Visgerad countries) had 'successfully torpedoed' him. He also welcomed the fact that the EPP candidate Manfred Weber could not become President of the Commission, as he had spoken disrespectfully about the citizens of several countries, including those of Hungary.[vi] Orbán then pushed for the election of the EPP's von der Leyen and he (along with PiS) claimed that their EP votes had been instrumental in her election (she obtained 383 votes, 9 more than needed and allegedly, all 12 Fidesz and 26 Pis MEPs voted for her).[vii] In return, the EPP promoted a Fidesz MEP as Vice President of the Chamber and Fidesz members obtained three committee vice-chairs. In the aftermath of the election, von der Leyen indicated she would try to deescalate tensions between the Commission and the governments in East Central Europe over rule of law (Rettman 2019). Furthermore, even though the EP rejected the first candidate proposed by the Hungarian government for Commissioner, it approved the second (Várlhegy), and von der Leyen allocated him the enlargement and neighbourhood portfolio, very much sought after by Orbán. EP elections results and the process of designating top EU positions thus provided an unexpected scenario in which partisanship militated not only against strong enforcement of RoL protection but also conditioned the election of the next Commission president and rewarded partisanship.

In contrasts, Poland's PiS (*Prawo i Sprawiedliwość*, *Law and Justice*) belongs to the European Conservatives and Reformists (ERG) group along with the British Conservatives and AfD (*Alternative für Deutschland*) and this alignment places it in a much less comfortable position. PiS not only lacks the support of a dominant group but also belongs to one systematically at odds with the dominant mainstream EP groups.

Unsurprisingly, EPP (114 members out of 199), ALDE and S&D supported the 2016 Resolution[viii] that called for the activation of Article 7. After the 2019 elections, PiS did not obtain any relevant institutional positions in the EP although its leadership expressed hopes that their support would be rewarded with a different approach to rule of law protection.

In summary, partisanship has conditioned EP actions. Moreover, the 2019 elections results have created the right environment for the negative effects of partisanship to spill over to other institutions through its influence in the election of the Commission President and the Commissioners. This might cast doubts on the EP's future capacity to act against RoL infringements. As the next section will show, this partisanship logic has differed significantly from the prominent one within the Commission.

5. The Commission: anticipation of effects and the compliance dilemma

The Commission has been the most engaged actor in relation to RoL breaches. It has launched a significant number of infringement procedures, it has created and activated the 2014 *Framework for the RoL* and, in 2017 it finally activated Article 7 against Poland. The literature, however, unanimously concurs in its criticism of the Commission's lack of assertive action. What explains the Commission action and inaction? Several causes coincide (Closa, 2019) but, in contrast to the EP, there is no evidence of partisanship. Rather, the anticipation of the effects of sanctions provides more convincing and compelling explanations. Several factors affect the Commission's calculations.

5.1. Undesired domestic effects of sanctioning strategies

The domestic reaction to illiberal policies has diverged between Hungary and Poland. In Hungary large demonstrations have backed the domestic stance towards the EU since 2012 (Varnagy, 2013). The apparent popularity of some government rhetoric (e.g. against migrants) has allowed it to contain any impact on its popularity. The Hungarian government has also skilfully exploited the Commission's actions, criticising them as imperialist bullying similar to what Hungary endured from the Soviet Union in Communist days (Sadecki, 2014). Hungarian civil society initially reacted with protests at government backsliding, but their lack of success put civil resistance on hold.

In Poland, however, a large number of demonstrations have punctuated the PiS legislatives initiatives, providing continuous challenge from Polish civil society to the government programme. In May and June 2016, thousands took to the streets in Poland. In October 2016, the *Black Protest* brought thousands of women out to march against new PiS laws restricting abortion. In December 2016, PiS regulation of Parliament media access prompted demonstrations of thousands that evolved into a broader protest against the government. However, the crisis did not seem to have affected the patterns of support among Poland's main parties since *the opposition simply mobilised people who already opposed the government anyway around questions too abstract for ordinary Poles,* more *concerned with socioeconomic issues on which Law and Justice is more in tune with public opinion* (Szczerbiak; 2017).

The *Committee for the Defence of Democracy* (KOD) has played a key role in mobilisations, not only because of its ability to attract large citizens support but also because its Europeanisation and internationalisation strategy invoked European identity

and Poland's integration with the EU, and depicted the PiS government as anti-European and Eurosceptic (Karolewski, 2016). By appealing to pro-European sentiments, this strategy diminished the government's ability to mobilise a rally-around-the-flag response and, at the same time, increased the legitimacy of the EU's actions.

Empirical evidence (Closa, 2019) does not suggest that the patterns of domestic public opposition/support for offending governments influenced the Commission's actions. Nevertheless, these patterns could have acted as indicators of the relevant states' long-term engagement with the broader European project. The next section discusses this issue, which shows causative elements for explaining the Commission's behaviour.

5.2. The compliance dilemma

The Commission learnt about the risk of Member State's long-term disengagement during the experience of applying sanctions against Austria in 1999 (Merlingen et al. 200). On that occasion, even though there was not an official EU response, several EU governments withdrew their ambassadors to Austria in reaction to the accession of the far right Austrian Freedom Party to government. Neither the Commission nor the Council decided any sanction and, yet, this episode plays a very important role in the Commission's calculations on whether to activate Article 7. Accordingly, Timmermans opined that the Austrian precedent actually weakened the EU's capacity to act because it was a political response with totally counterproductive outcomes. As a consequence, the Commission learned about the need to listen to and dialogue with an offending government (Timmermans, 2015).

The Commission therefore prefers engagement strategies and punctual enforcement through infringement procedures (Closa, 2019). With respect to the former, the Commission launched its RoL Framework in 2014 precisely to engage and improve the basis for interacting with national authorities. Despite encountering criticism, engagement has permitted the Commission's to amplify its concerns to a wider EU audience, including national governments, and to raise awareness about the situation in Hungary and Poland what appears to be a precondition for government mobilisation.

5.3 Preference for infringement procedures.

In Commission eyes, infringement procedures provide a clear legal basis which firmly establishes its legitimacy to act. The Commission noted in its 2003 Communication on the RoL of 2003 that '*Article 7 is not confined to areas covered by Union law*. Moreover, *the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously*'.[ix] In short, the Commission interpreted that Article 7 TEU is not limited to the acquis. However, it has based its actions on the existence of specific legal bases that permit the use of infringement procedures. Accordingly, the Commission identified a large number of violations of EU law in relation to Hungary, but concluded that 'concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play' (Jourova, 2015). The Commissioner concluded that there were no 'grounds at this stage to trigger Article 7 or the RoL Framework'.

The domestic reactions encountered justify the Commission's preference for specific legal bases for concrete actions: when it activated the RoL Framework, the Polish authorities challenged its competence. Polish President Duda and Foreign Affairs Minister Waszczykowski claimed that the Commission had 'overstepped its bounds'. PiS leader Kaczyński threatened to bring the Commission before the CJEU. The Polish Ministry of Foreign Affairs declared that Poland was *ready to defend its claims at the Court of Justice* and argued that it is *for the Court of Justice to decide whether a member state has failed to fulfil an obligation imposed on it by the Treaties*.[x] Although those threats never materialised, the Commission boldly argued that its intervention was strictly limited to specific violations of EU values. Timmermans declared that *the only ones who could determine the fate of the Polish nation are the Polish people* and that no one else could do that. But he also argued that the Commission must fight any violations of the Treaties (Timmermans, 2017).

5.4 Anticipation of Council support

Research (Closa, 2019) confirms that the expectation of obtaining support from the Council conditions the Commission's decisions on whether to trigger Article 7. President Juncker bitterly deplored the fact that the Council *a priori* refusal to support the Commission, de facto obviates Article 7.[xi] The Commission has thus aimed at preparing a sufficient supporting majority, or at least a more favourable environment in the Council. For this, the Commission has recurrently put the issue on the Council agenda to force it to debate and after each of these debates, the Commission recorded the Council's support for its actions. Thus, First Vice President Timmermans noted after

the May 2017 Council discussions, that *a very broad majority of Member States supported the Commission's role and efforts to address this issue.* He also recorded the support for Commission continuing dialogue *with a view to resolving the pending issues* and Council acceptance of being *updated as appropriate* (Timmermans, 2017). Commission anticipation depended on calculating the Council's position, which the next section presents.

6. The Council: prevention of competence extension, ideological sympathy and fear of spill-over effects

The Council has remained extremely cautious in its approach to RoL breaches, let alone sanctions. When the Commission created its new 2014 Framework for the protection of RoL in 2014, the Council Legal Service delivered a strongly critical opinion[xii] which probably reflected the views of the more critical governments. In response, the Council created its alternative *Annual RoL Dialogue* which merely articulates *a process of debate, dialogue and engagement with all member states, EU institutions and stakeholders that could consider the need of a collaborative and systemic method* [sic].[xiii] Unsurprisingly, the Dialogue has attracted harsh criticism because it is at best conceived as a mechanism for values promotion or at worse, *it* asks Member States to report on themselves (Pech and Scheppelle; 2017). Since triggering Article 7, the Council discussed the situation in Poland on six occasions in 2018 and held three formal hearings plus an additional hearing on Poland. Why have Member State governments refrained from acting? Evidence shows three factors at work.

a. A genuine distaste for a perceived unwanted expansion of EU powers and more precisely, EU Commission powers. Reflecting this view, the Council Legal Service opined[xiv] that the Commission had competence on the matter. Several governments harbour doubts about the extent of EU competence to adjudicate on domestic constitutional issues and are, moreover, eager to assert the autonomy of democratically elected governments. Thus, the UK government argued that in the Commission's Framework was an unwanted expansion of EU powers.[xv] Other governments, such as Bulgaria's, repeated similar concerns at being required to cede more sovereignty.[xvi]

b. Ideological sympathy with the infringing government's substantive political objectives (e.g. institutional capture). The illiberal programmes of governments in Hungary and Poland are closely related and other governments in the region have implemented policies with similar democractic backsliding effects, flirting with the same kinds of ideology. This sympathy spills over to certain groups within Western Member States. Consequently, Hungary anticipated in 2016 that it would use its veto to block any sanctions against Poland, arguing that a *campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people* (Orbán, 2017). Whilst ideology explains mutual support in the case of few governments, other factors concur to explain the larger constituency opposed to sanctions from national governments.

c. Support as anticipated self-defence. Central and Eastern European governments have prevented, voted against or being reluctant to show support for enforcement actions against Poland and Hungary. The governments of Czechia, Croatia and Slovakia thus joined Hungary to oppose calling the first Article 7 hearing on Poland in June 2018. The Bulgarian government (which abstained) appealed for solidarity with Poland because it perceived the process as the first in a series of attacks on Central and Eastern European Member States.[xvii] Both the Presidencies of Bulgaria[xviii] and Romania dragged their feet in the Article 7 procedure but also even in the very gentle Dialogue, which they did not convene. Finally, the three Baltic states aired their desire to vote against the Commission's proposal on Poland if it were put to a vote. The latter may have been motived by fears of potential spill-over into some of their domestic policies which could equally have come under scrutiny if respect for Article 2 values were tested more stringently. Other governments, such as Malta's, have also maintained a reluctant stance because of similar concerns.

The pro-enforcement group of governments involves almost exclusively Western European states. In 2013, the governments of Germany, the Netherlands and Finland demanded stronger EU mechanisms for the RoL protection.[xix] The Commission strategy of forcing the Council to debate RoL breaches through its Framework recommendations and the more decisive triggering of Article 7 has caused the number of governments supporting more assertive action to grow. In 2017 a majority of Member States criticised Poland for its behaviour and lack of cooperation with the Commission (Maas, 2017; Macron, 2017). Only Hungary, Czechia and the United Kingdom directly or indirectly

supported Poland's position. The increase in critical governmental declarations regarding RoL offenders shows that the procedure has had the effect of slowly transforming the perceptions of some governments. Even though this change fell far short of sanctions, the continuation of the procedure is essential to sustain momentum. Hence, facing the lack of progress during 2019, a joint Franco-German statement called for a new hearing after the 2019 EP elections.[xx] As for the other institutions, the prevailing institutional conditions permitted the emergence of logics that tended to block sanctions but also allowed some meagre progress.

7. Conclusion: institutional interactions and EU sanctions regime

This paper has established that the logics that govern the three (i.e. EP, Commission and Council) EU institutions paradoxically lead to a lesser sanctioning activity that its supranational features may anticipate. The institutional design of Article 7 constructs a non-jurisdictional sanctions mechanism depending finally on national governments' willingness to enforce it and assume its costs. But even EU supranational institutions have modelled EU's sanctioning capacity: the EP has accommodated its actions to the logic of partisanship whilst the calculus of obtaining compliance and the preservation of the system have conditioned Commission's actions. Leaving aside the specific CJEU decisions, the compliance dilemma informs the overall system: in the absence of real material coercion, voluntary compliance is the most secure and almost only way to correct offences against EU values. Whilst so far, no Member State has challenged the authority of the CJEU, some governments have hinted at it. And why

would offenders against RoL respect judgments where compliance depends precisely on adherence to the rule of law?

Beyond institutional design, the EU's legal structure adds a further limitation to sanctioning actions: policies which could be used as sanctions mechanisms (such as trade restrictions) are internal policies governed by specific treaty rules. While there may be some leeway (for instance, regarding conditionality in structural funds), the legality of any sanctions does not only need to be checked against Article 7 but also against the specific treaty rules and secondary legislation which govern specific policy areas. Given that these were in no way conceived as potential sanctions mechanisms, it is doubtful that using specific policies as such would survive a legal challenge before the CJEU.

Funding: This paper is part of the project Institutional design in comparative regional integration (InDeCRI) (CSO2016-76130-P) supported by a grant from the Agencia Estatal de Investigación (AEI)

References

1. Aspinwall, Mark (2007) Government Preferences on European Integration: An Empirical Test of Five Theories. *British Journal of Political Science*, 37 (1): 89–114
2. Batory, Agnes (2016) Defying the Commission: creative compliance and respect for the RoL in the EU. *Public Administration* 94(3): 685–99

3. Bieber, Roland and Francesco Maiani (2014) Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?. *Common Market Law Review* 51: 1057–1092
4. Blauberger, Michael and R. Daniel Kelemen (2017) Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU. *Journal of European Public Policy* 24(3): 321–36
5. Closa, Carlos (2019) The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy* Vol. 26, No. 5, 696–716 https://doi.org/10.1080/13501763.2018.1477822
6. Closa, Carlos and Stefano Palestini (2018) Tutelage and Regime Survival in Democracy Protection in Regional Organizations. The case of MERCOSUR and UNASUR. *World Politics* 70(30).
7. Eckstein, Harry Case (1975) Studies and Theory in Political Science. 79–138 In Greenstein Fred I and Nelson W Polsby (eds.) *Handbook of Political Science, vol. 7, Political Science: Scope and Theory*. Reading, MA: Addison Wesley
8. Editors CMLR (2016) Editorial Comments, The RoL in the Union, the Rule of Union Law and the RoL by the Union: Three Interrelated Problems. *Common Market Law Review* 53: 597–605
9. Galtung, Johan (1967) On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia. *World Politics* 19(3): 378–416

10. Hellquist, Elin (2018) Ostracism and the EU's contradictory approach to sanctions at home and abroad. *Contemporary Politics* Volume 25, Issue 4 pages 393-418 DOI:10.1080/13569775.2018.1553083
11. Hix, Simon Abdul G. Noury and Gérard Roland (2007) *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press
12. Hooghe, Liesbet and Gary Marks (2019) Grand theories of European integration in the twenty-first century. *Journal of European Public Policy*: https://doi.org/10.1080/13501763.2019.1569711
13. Jourová, Věra (2015) Response Question for oral answer to the Commission by Claude Moraes on behalf of the LIBE Committee (O-000140/2015): Situation in Hungary: follow-up to European Parliament resolution of 10 June 2015 (2015/2935(RSP)) (B8-1110/2015), Brussels, 2 December 2015
14. Kelemen, R. Daniel (2017) Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union. *Government and Opposition* 52(2): 211–238
15. Kelemen, R. Daniel (forthcoming, 2020) The European Union's Authoritarian Equilibrium. *Journal of European Public Policy*
16. Kochenov, Dimitry and Laurent Pech (2016) Better late than never? On the European Commission's RoL framework and its first activation. *Journal of Common Market Studies* 54(5): 1062–74

17. Maas, Heiko (2017) A chance for the RoL Monday, 24 July 2017 https://www.bundesregierung.de/breg-en/service/a-chance-for-the-rule-of-law-403282
18. Macron, Emmanuel (2017) *Emmanuel Macron demande des sanctions contre la Pologne* Ouest France 27/04/2017 https://www.ouest-france.fr/politique/emmanuel-macron/emmanuel-macron-demande-des-sanctions-contre-la-pologne-4953682
19. Mattila, Mikko (2004) Contested Decisions. Empirical Analysis of Voting in the EU Council of Ministers. *European Journal of Political Research* 43 (1): 29–50
20. Merlingen, Michael; Cas Mudde and Ulrich Sedelmeier (2001) The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria. *Journal of Common Market Studies* 39 (1): 59–77
21. Oliver, Peter and Justine Stefanelli (2016) Strengthening the RoL in the EU: The Council's Inaction. *Journal of Common Market Studies* 54(5): 1075–1084
22. Orbán, Viktor (2017) Speech at the 28th Bálványos Summer Open University and Student Camp July 22, 2017 http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp
23. Pech, Laurent and Kim Lane Scheppele (2017) RoL Backsliding in the EU: Learning from past and present failures to prevent illiberal regimes from

consolidating within the EU. *Cambridge Yearbook of European Legal Studies*

24. Rettman, Andrew (2019) 'Von der Leyen signals soft touch on migrants, rule of law,' EU Observer, 19 July, https://euobserver.com/news/145504
25. Rosén, Guri (2016) A match made in heaven? Explaining patterns of cooperation between the Commission and the European Parliament. *Journal of European Integration* 38(4): 409–24
26. Sadecki A (2014) In a State of Necessity: How has Orban changed Hungary? *Centre for Eastern Studies*. http://www.osw.waw.pl/sites/default/files/pw_41_in-a-state-ofnecessity_net.pdf
27. Sadurski, Wojciech (2010) Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider. *Columbia Journal of European Law* 16(3): 385–426.
28. Sargentini, Judith and Aleksejs Dimitrovs (2016) The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?. *Journal of Common Market Studies Volume* 54(5): 1085–1092.
29. Scheppele, Kim Lane (2016) EU Can Still Block Hungary's Veto on Polish Sanctions 11 January 2016, politico.eu. http://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-onpolish-pis-sanctions/

30. Schlipphak, Bernd and Oliver Treib (2016) Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding. *Journal of European Public Policy* 24(3): 352–365, DOI: 10.1080/13501763.2016.1229359
31. Schneider, Christina J. and Johannes Urpelainen (2014) Partisan Heterogeneity and International Cooperation: The Case of the European Development Fund. *Journal of Conflict Resolution* 58(1): 120–142
32. Sedelmeier, Ulrich (2014) Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania After Accession. *Journal of Common Market Studies* 52(1): 105–121.
33. Sedelmeier, Ulrich (2017) Party-politics as Usual? Positions of the European Parliament's Political Groups towards Sanctions against Democratic Backsliding. Paper presented at the Fifteenth Biennial Conference of the European Union Studies Association. 4-6 May 2017, Miami Florida.
34. Timmermans, Frans (2015) The European Union and the RoL », keynote speech, Tilburg University, 31 August 2015
35. Timmermans, Frans (2017) Opening and closing remarks of First Vice-President Frans Timmermans on the RoL in Poland, at the European Parliament's Committee on Civil Liberties, Justice and Home Affairs SPEECH/17/3042 http://europa.eu/rapid/press-release_SPEECH-17-3042_en.htm
36. Tsebelis, George (1994) The Power of the EP a Conditional Agenda Setter. *American Political Science Review* 88(01) DOI: 10.2307/2944886

37. Tsebelis, George and Geoffrey Garrett (2001) The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union. *International Organization* 55(2): 357–390
38. Várnagy, Réka (2013) Hungary. *European Journal of Political Research (Political Data Yearbook)* 52:96-100
39. Wallace, Helen; Mark Pollack and Alasdair Young (2014) An overview, in *Policy-making in the European Union*, Oxford, Oxford University Press
40. Wilms, Guther (2017) Protecting Fundamental Values in the European Union through the RoL Articles 2 and 7 TEU from a legal, historical and comparative angle Florence: RSCAS, doi:10.2870/083300 http://cadmus.eui.eu/handle/1814/44987
41. Wolkenstein, Fabio (2018) Why did the EPP vote against Orbán? LSE EUIblog. http://blogs.lse.ac.uk/europpblog/2018/09/18/why-did-the-epp-vote-against-orban/

Endnotes

[i] European Commission (2014) 'A New EU Framework to Strengthen the RoL'. COM (2014)158 Final, 11 March 2014

[ii] EP (2018) European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, 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 (2017/2131(INL))

[iii] EP (2016) European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2016-0344%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN

[iv] ALDE (2015) The EU Democratic Governance Pact. Upholding the RoL and Fundamental Rights ALDE initiative outline https://d66.nl/content/uploads/sites/2/2015/01/ALDE-Democratic-Governance.pdf

[v] EPP Group (2013), 'EP Report on Hungary: EPP Group Rejects the Use of Double Standards', 3 July, www.eppgroup.eu/press-release/EPPGroup-rejects-the-use-of-double-standards

[vi] The Government enforced the will of the Hungarian people 12 July 2019 http://www.miniszterelnok.hu/the-government-has-enforced-the-will-of-the-hungarian-people/

[vii] Lluis Pellicer Hungría y Polonia piden contrapartidas al atribuirse la victoria de Von der Leyen El País 18 Julio 2019 https://elpais.com/internacional/2019/07/17/actualidad/1563392117_150527.html

[viii] See iv above

[ix] European Commission (2003) Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based Brussels, 15.10.2003 COM(2003) 606 final

[x] Polish FA Minister (2016) MFA statement on the Polish government's response to Commission Recommendation of 27.07.2016 http://www.msz.gov.pl/en/news/mfa_statement_on_the_polish_government_s_response_to_commission_recommendation_of_27_07_2016

[xi] Kuczkiewicz, Jurek Juncker au «Soir»: «Il y a un sérieux problème de gouvernance en Europe» 5 novembre 2016 http://www.lesoir.be/1360084/article/actualite/union-europeenne/2016-11-04/juncker-au-soir-il-y-un-serieux-probleme-gouvernance-en-europe

[xii] Presidency of the Council (2014) Note from the Presidency to the Council, 'Ensuring respect for the RoL in the European Union' (Doc No 15206/14). Opinion of the Council Legal Service (Doc No 10296/14)

[xiii] Council of the EU (2014) Council conclusions on fundamental rights and RoL and on the Commission's 2012 Report on the Application of the Charter of Fundamental Rights of the European Union https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf

[xiv] See xiv above

[xv] HM Government (2014) Review of the balance of Competences between the UK and the EU-EU enlargement (December 2014). Para 2.116

[xvi] Adelina Marini EP Pushes for Strong RoL Mechanism, Council and Commission Are Against 2 March 2015 http://www.euinside.eu/en/news/alde-want-a-democratic-governance-pact-but-no-will-for-that

[xvii] Georgi Gotev Bulgarian government sides with Orban against Article 7, 9 September 2018 https://www.euractiv.com/section/eu-elections-2019/news/bulgarian-government-sides-with-orban-against-article-7/

[xviii] Claudi Pérez La presidencia búlgara de la UE aparca el castigo a Polonia por violar el Estado de derecho El País 11 ENE 2018 https://elpais.com/internacional/2018/01/11/actualidad/1515682601_591498.html

[xix] This letter has disappeared from the Foreign Affairs Ministry site. However, reference to it is found in: Council of the European Union Press Release 3235th Council meeting General Affairs Luxembourg, 22 April 2013 http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf

[xx] Alexandra Brzozowski France and Germany pile pressure on Poland and Hungary over RoL EURACTIV.com 10 abr. 2019 https://www.euractiv.com/section/justice-home-affairs/news/france-and-germany-pile-pressure-on-poland-and-hungary-over-rule-of-law/

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