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The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values?

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Abstract

In response to noncompliance with the EU's fundamental values such as democracy and the rule of law in Hungary and Poland, the EU Commission has established the Justice Scoreboard, the Rule of Law Framework and the Rule of Law Mechanism. Moreover, the Commission has proposed linking the disbursement of funds to respect for the rule of law (Rule of Law conditionality). However, the deployment of these measures has not restored compliance. Drawing on the two dominant approaches in compliance studies, the management approach and the enforcement approach, this paper argues that with the exception of Rule of Law conditionality, the Commission's tools are characterized by a mismatch between the causes of the problems identified and the solutions chosen. Instead of sanctioning voluntary noncompliance, they rely on soft measures, which are recommended in cases of involuntary noncompliance, but which are not suitable in cases of deliberate noncompliance.

Keywords: rule of law; enforcement; management; EU Commission; noncompliance

Introduction

When the first troubling violations of the rule of law and democratic procedures in Hungary and Romania occurred between 2010 and 2012, the European Commission, which, according to Article 17 (1) of the Treaty of the European Union (TEU) must ensure the application of EU law, had only two Treaty-based instruments at its disposal: the preventive and sanctioning mechanisms established by Article 7 TEU, and the ordinary infringement procedure established by Article 258 of the Treaty on the Functioning of the European Union (TFEU). These instruments, however, were seen as insufficient, and then-Commission President José Manuel Barroso argued that 'a better developed set of instruments' (Barroso, 2012) was needed to enable the EU to respond more adequately to such a '“rule of law” crisis' (Reding, 2013).

What followed was an unprecedented 'multiplication of new instruments' (Pech, 2020b, p. 16) by the Commission. In 2013, as part of the European Semester, the Commission introduced the Justice Scoreboard. In 2014, the Rule of Law Framework (the so-called pre-Article 7 procedure) was established, followed in 2018 by the Commission's proposal to link EU funds to respect for the rule of law, a diluted version of which was adopted in December 2020. Finally, in 2019, the Commission announced its comprehensive Annual Rule of Law Review Cycle – later rebranded as the Rule of Law Mechanism – culminating in an Annual Report on the Rule of Law, published for the first time in September 2020.

The objective of these tools is twofold: to restore compliance with democratic norms and the rule of law in actual backsliding states and to prevent similar developments in

other EU Member States. However, the selective deployment of some of these new instruments in addition to the triggering of the Article 7 (1) procedure against both Poland and Hungary (see, for example, Pech, 2020a) and the use of several rule of law-related infringement procedures against Hungary (Anders and Priebus, 2021) and Poland (Pech and Kochenov, 2021) have not led to any improvements in either of these countries (European Parliament, 2020). On the contrary, recent assaults on the freedom of the media (the silencing of Klubrádio) and LGBTQ rights in Hungary (Bayer, 2021b), the open defiance of Court of Justice rulings in both countries (Zalan, 2020; Czene, 2021; Bayer, 2021a) and the legally disputed removal of Poland's human rights ombudsman (Cienski, 2021) signal a steady worsening of these situations. Furthermore, in addition to this *deepening* of the rule of law crisis, the EU is also confronted with an *expansion* of the crisis, as similar tendencies have spread to other eastern EU Member States, such as the Czech Republic (Hanley and Vachudova, 2018) and Slovenia (Brezar, 2020). To summarize, an increase in the number of novel rule of law instruments is matched by further deterioration of these situations in Member States.

Against this backdrop, scholars seek to explain *why* these efforts fail. Several scholars point out that the actual problem is not that the EU lacks adequate tools but that EU institutions lack the will to use the instruments available more forcefully (for example, Bugarič, 2016; Pech and Scheppele, 2017). The Commission has undoubtedly been very reluctant to trigger rule of law instruments – for example, the Article 7 procedure and the Rule of Law Framework against Hungary or the new instrument of Rule of Law conditionality against both Hungary and Poland. However, while the effectiveness of these instruments indeed depends substantially on their actual use, their design and their underlying ideas about how best to address rule of law problems also sets limits on what they can achieve.

Based on this consideration, this article approaches the question from a different theoretical angle and offers a novel explanation for why some of these instruments are ill-equipped to reverse or at least halt instances of backsliding. By drawing on the two dominant theoretical approaches from compliance studies, the *management* and *enforcement* approaches, it is argued that from a purely theoretical perspective, the Commission's new rule of law instruments are ill-equipped to deal with serious noncompliance because of the inherent mismatch between the causes of the problems identified and the solutions chosen. While the Commission acknowledges that the dismantling of the rule of law in some states is 'the result of deliberate policy choices' (European Commission, 2019a, p. 5), it has mainly not reacted with instruments entailing sanctions, as suggested by the enforcement approach. Instead, the new tools predominantly rely on prevention and dialogue, mechanisms which are recommended by management theorists who assume that noncompliance is involuntary. Put differently: Although the Commission has correctly identified the origins of noncompliance, it has not drawn the correct conclusions concerning the remedies to rule of law breaches.

To demonstrate this argument, the article analyses the four abovementioned rule of law instruments according to two analytical dimensions, namely, *prevention* and *dialogue* as typical of management (dimension 1) and *sanctions* as characteristic of enforcement logic (dimension 2). As will be shown, with the exception of the more recent initiative to link EU payments to respect for the rule of law, the Commission is not *enforcing* – as the

language in the rule of law debate often suggests – but rather *managing* rule of law problems with its new instruments.¹

The remainder of this article is structured as follows. After a brief analytical distinction between ordinary noncompliance and noncompliance with the EU's fundamental values, the two dominant compliance approaches are introduced, and the two analytical dimensions (dialogue and prevention; sanctions) corresponding to the two compliance logics are elucidated. This section is followed by a systematic analysis of the Commission's rule of law instruments according to these analytical dimensions. Methodologically, this section is based on a qualitative analysis of relevant Commission primary documents, mainly communications, press releases and reports. The next chapter summarizes the findings and argues that there is a mismatch between the sources of noncompliance and the strategies to remedy these situations. The final part concludes and qualifies the theoretical inference from the compliance logic that maintains that sanctions alone are the correct solution to cases of deliberate backsliding.

I. Noncompliance in the EU: Ordinary Violations of EU Law versus Violations of Article 2 Values

Noncompliance with primary and secondary law is a regular feature of EU governance. Therefore, research on policy implementation in EU Member States has extensively studied the sources of noncompliance, concluding that in regard to ordinary violations of EU law, the sources of noncompliance can be either involuntary or voluntary (see for example Börzel *et al.*, 2010; Treib, 2014).

A persistent and systematic breach of the EU's fundamental values as enshrined in Article 2 TEU – and currently seen in Hungary and Poland – also represents an instance of noncompliance, although it is qualitatively distinct from occasional noncompliance with European primary and secondary law on the one hand (Kochenov and Bárd, 2018, p. 17) and simple individual breaches of fundamental rights and miscarriages of justice on the other (European Commission, 2014a, p. 5). Both noncompliance with primary and secondary law as well as individual breaches of certain rights and principles can occasionally occur in any Member State without jeopardizing membership obligations. If, however, these violations become a pattern of noncompliance (Scheppele, 2016; Scheppele *et al.*, 2021) and a systemic threat to the rule of law and democracy (European Commission, 2014a, p. 6), they cannot be treated as singular administrative or executive mistakes.

Moreover, while ordinary noncompliance can be caused involuntarily, for example, by lacking the administrative capacity to implement EU legislation, it is by now uncontested that the systematic violations of the rule of law, democratic procedures and minority rights in Hungary and Poland are voluntary. In fact, the Commission's 2019 Communication on how to further strengthen the rule of law is based on the premise that the undermining of the rule of law in certain states is “the result of deliberate policy choices” (European Commission, 2019a, p. 5).

¹While the scholarly literature often refers to the *enforcement* of EU values (for example, Kochenov and Pech, 2015; Jakab and Kochenov, 2017b; Blaubergger and van Hüllen, 2021), it is debatable whether we can actually speak about enforcement in a strict sense in this context.

According to Jakab and Kochenov, what we see in these states is an ideological choice not to comply with certain fundamental values, a form of noncompliance that is located at one end of a 'spectrum of defiance' (the other end being exceptional noncompliance through error) (Jakab and Kochenov, 2017a). Continued noncompliance by Polish authorities following several Court of Justice rulings as well as the Polish Constitutional Tribunal's landmark judgement from October 2021 concerning the supremacy of the Polish constitution over EU law at the Polish Prime Minister's request (K 3/21) do not leave any doubts about the deliberate nature of this noncompliance. The outright defiance of court rulings and the persistent refusal to reverse their controversial reforms, as seen in the Hungarian case, similarly accentuate the voluntary character of this noncompliance (see Anders and Priebe, 2021). In the literature, the qualitatively distinct character of this noncompliance is highlighted by labels such as 'rule of law backsliding' (Pech and Scheppele, 2017) or 'democratic backsliding' (Bermeo, 2016).²

In addition to distinguishing between ordinary noncompliance and deliberate noncompliance with Article 2 values, we must also differentiate between deliberate noncompliance with these values by governmental actors in a liberal democracy based on the rule of law on the one hand and deliberate noncompliance in electoral democracies (Poland) and electoral autocracies (Hungary) on the other. While in the former such offences are likely to be stymied by other institutions (for example, the constitutional court or parliament), in the latter the chances of such defence are much lower because checks-and-balances mechanisms and the rule of law have already been seriously weakened.³ This situation entails that the effects of such noncompliant behaviour vary across regime contexts and that noncompliance is much harder to remedy in contexts where backsliding has already resulted in the undermining of independent institutions.

In sum, the systematic dismantling of democracy and the rule of law in the European context represents an especially severe instance of noncompliance with EU law caused deliberately by purposeful actors. With regard to the European Commission, this situation entails that the Commission, which, according to Article 17 (1) TEU, 'shall ensure the application of the Treaties' and 'oversee the application of Union law', is legally bound to react if Member State governments violate the EU's fundamental values.

II. Management versus Enforcement Approaches in Compliance Studies

According to the literature on noncompliance, there are basically two differing logics concerning how to influence noncompliant behaviour – that is, to make rule violators comply (Börzel, 2003, p. 198): the logics of management and enforcement.⁴ The *management approach* assumes that noncompliance is involuntary because states are principally

²This paper uses the terms voluntary/deliberate noncompliance and rule of law backsliding synonymously.

³Classification according to Alizada *et al.* (2021). On these types of regimes see Lührmann *et al.* (2018).

⁴As a third approach, scholars occasionally cite compliance through persuasion (Börzel, 2003, pp. 201 f.). According to this approach, noncompliance is voluntary because norms are not yet internalized by actors, making processes of social learning and persuasion central elements. This approach is disregarded here for two reasons: First, because the management approach also emphasizes persuasion as a central mechanism; in fact, as Hartlapp (2007, p. 657) notes, it is occasionally difficult to distinguish them in empirical terms. Second, it can be assumed that with accession to the EU, candidates willingly accept obligations stemming from membership and that lacking internalization of norms thus cannot be the reason for noncompliance.

interested in fulfilling commitments (Chayes and Chayes, 1993). Violations of treaties or rules are thus accidentally caused by factors such as imprecise treaty language or the lack of administrative capacities to fulfil certain commitments. Furthermore, adopting rules takes time, which can lead to longer periods of adjustment. The *enforcement approach*, on the other hand, is based on the premise that noncompliance is voluntary, i.e., the result of a deliberate decision (Downs *et al.*, 1996). Accordingly, actors' choices not to comply are based on cost–benefit calculations: if the costs of compliance exceed the costs of refusal, they will refrain from fulfilling their commitments because they are unwilling to bear the costs of compliance (Börzel, 2003, p. 198).

Since the two approaches identify different sources of noncompliance, they also propose different solutions. *Management* theorists believe in actual problem-solving, which includes strategies such as the clarification of ambiguous treaty formulations, capacity building through technical and financial assistance and 'jawboning', the process of persuading actors to change their behaviour (Chayes and Chayes, 1993, p. 204). *Enforcement* theorists, in contrast, assume that to change the recalcitrant actor's behaviour, their calculations must be altered by increasing the costs of noncompliance. This increase can be achieved through systematic monitoring of rule implementation and sanctions in case of detected rule violations (Tallberg, 2002, p. 612; Downs *et al.*, 1996; Dorn and Fulton, 1997). Rule violators must be publicly exposed and punished, and 'the punishment must hurt the transgressor state at least as much as that state could gain by the violation' (Downs *et al.*, 1996, p. 386).

On the basis of these different paths to the restoration of compliance, we can develop two analytical dimensions corresponding to these two logics. The first dimension is dialogue and prevention, as these are the typical mechanisms used by the management approach, in which prevention includes strategies such as financial and technical assistance, the enhancement of knowledge, rule interpretation and monitoring. The second dimension is sanctions, for example financial sanctions, which can occur either in isolation or in combination with monitoring and are characteristic of the enforcement approach.

In contrast to the usual conceptualization in the enforcement approach, monitoring and enforcement are treated here as analytically distinct because the detection of noncompliance does not automatically lead to enforcement (Weaver, 2014, p. 247); the law still needs to be enforced by other means. For this reason, monitoring alone – that is, without at least the possibility of sanctions – is not regarded as enforcement. Therefore, only monitoring coupled with possible sanctions qualifies as enforcement in the strict sense, while monitoring in isolation is regarded as part of a more comprehensive prevention and problem-solving strategy.

III. The Commission's Instruments against Backsliding –Prevention and Dialogue or Sanctions?

In this section, the two dimensions of prevention and dialogue outlined above as well as sanctions (either in isolation or combined with monitoring) will be used as analytical categories to analyse the Commission's recently developed rule of law instruments: The Justice Scoreboard, the Rule of Law Framework, the Rule of Law Review Cycle with its Annual Rule of Law Report and the new 'general regime of conditionality for the

protection of the Union budget', the so-called Rule of Law conditionality instrument adopted in December 2020.⁵

While according to the enforcement approach, sanctions are an adequate response to deliberate rule violations, this analysis will show that all of the Commission's tools except one follow the logic of management. As a result, this fact leads to a mismatch between the sources of rule violations and the remedies chosen, which from a purely theoretical perspective can account for these instruments' ineffectiveness.

It should be noted that the first three instruments (the Justice Scoreboard, the Framework and the Review Cycle) differ from Rule of Law conditionality insofar, as they were created by the Commission by its own authority, while the proposal linking the disbursement of EU funds to the rule of law was subject to the ordinary legislative procedure and as such conditional upon the agreement of the Parliament and the Council. Moreover, the Justice Scoreboard was introduced as part of the European Semester and as such was not initially meant as 'a mechanism for guaranteeing the rule of law across the EU' (European Commission, 2013c). However, it is included here because the Commission has recently referred to it as one of the instruments that 'could be further developed to better address rule of law issues' (European Commission, 2019a, p. 12).

Dimension 1: Prevention and Dialogue

The Commission's rule of law strategy puts a great deal of emphasis on the idea of the early identification of problems to prevent the emergence of situations in which the rule of law is systematically threatened or undermined. Such early detection was the principal idea inspiring the creation of the Justice Scoreboard in 2013, which annually assesses the efficiency, quality and independence of Member State judiciaries. This assessment is justified by the argument that effective national judicial systems function as the backbone of the Single Market and that shortcomings in one justice system can negatively affect the functioning of the whole market (European Commission, 2013a, 2013b, 1 f.). Therefore, the major objective of the annual reports is to identify 'potential shortcomings and good examples' (European Commission, 2013b, p. 2) as well as 'issues that deserve particular attention' (European Commission, 2013c). In this sense, these reports function as an 'early warning system' (European Commission, 2013a). Moreover, the Justice Scoreboard is a 'comparative tool' (European Commission, 2013a) monitoring all systems instead of being limited to one or a few cases that are perceived as problematic.

The 2014 Rule of Law Framework's equally preventive character is reflected in both its design and its framing by the Commission. The Framework was the first explicit attempt by the EU to deal with the emerging rule of law crisis and to bridge the gap between the "soft power" of political persuasion and the "nuclear option" of article 7' (Barroso, 2012). According to the Commission, the Framework can be activated in situations when a systemic threat to the rule of law is clearly present which, however, falls short of the criteria for activating Article 7 procedures (European Commission, 2014a, p. 3).⁶ Deploying this framework should thus 'enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat

⁵The infringement procedure, as the Commission's most important weapon, is not included here because the paper is only interested in rule of law tools designed by the Commission itself as a direct response to the rule of law crisis.

⁶See for these criteria European Commission (2003).

to the rule of law' (European Commission, 2014a, p. 6) and the activation of Article 7. Consequently, the Commission framed the Framework as a 'pre-Article 7 procedure' and an 'early warning tool' (European Commission, 2014b).

The same reliance on prevention prevails in the Commission's 2019 Rule of Law Mechanism. It encompasses a Rule of Law Review Cycle stretching over a period of one year and culminates in an Annual Rule of Law Report. The Mechanism is supposed to 'act as a preventive tool, deepening dialogue and joint awareness of rule of law issues' (European Commission, 2021) and 'is designed as a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening. It focuses on improving understanding and awareness of issues and significant developments in areas with a direct bearing on the respect for the rule of law – justice system, anti-corruption framework, media pluralism and freedom, and other institutional issues linked to checks and balances' (European Commission, 2020, p. 3). As such, the mechanism is based on two preventive pillars: the promotion of a rule of law culture and the prevention of rule of law problems from emerging or deepening, as well as one 'active' pillar, an effective common response in case a significant problem is identified (European Commission, 2019a, pp. 5–15).

The *promotion of a rule of law culture* includes measures such as the dissemination of knowledge, new programmes for promoting values (for example, the Rights and Values Programme), a 'dedicated communication strategy on rule of law' (European Commission, 2019a, p. 6) and dialogue and exchange among different groups. Since these measures are typical management strategies intended to solve problems by providing information and raising awareness concerning rule of law issues, they are not confined to and targeted at one specific noncompliant member but are applied across all Member States.

The second pillar, in contrast, focuses on the *prevention of rule of law problems from emerging or deepening* in one specific country. Prevention here takes the two major forms of close cooperation and dialogue with Member States as well as 'dedicated monitoring' (European Commission, 2019a, p. 9) of developments within these states. The formal framework within which this monitoring is carried out is the Rule of Law Review Cycle, which culminates in an Annual Rule of Law Report. The Report's objective is to 'assist early detection of emerging rule of law problems' (European Commission, 2019b), and it is thus preventive like the Scoreboard. In contrast to the latter, which focuses on rather technical aspects of the judiciary, such as the length of proceedings or the number of pending cases, however, the annual monitoring is broader in scope. Unlike what its name suggest, it not only addresses rule of law issues in a narrow sense, such as the functioning and independence of the judiciary, but also includes issues pertaining to institutional checks and balances – such as the separation of powers, the process for enacting laws or constitutional review of laws – media pluralism and the Member State's capacity to fight corruption (European Commission, 2019a, p. 9, 2020, pp. 4–24). Because the undisputed rationale behind its introduction was to reject accusations, especially by Hungary and Poland, that the EU's rule of law instruments are targeted specifically at them, the Report, similar to the Scoreboard, is a comparative tool pertaining to all Member States.⁷

⁷The assessment of deficiencies at the national level without differentiation between occasional shortcomings and systemic trends, however is, a major point of criticism voiced by the European Parliament, as this situation could lead to a 'trivialisation' of the most serious breaches (European Parliament, 2021).

The Framework and the Review Cycle are both designed as multistage processes, but while the latter is limited to one year, the length of a Member States' assessment under the Framework is fully at the Commission's discretion. However, after the identification of problems, both of these instruments encourage extensive dialogues with Member States to find mutually satisfying solutions. In this way, both tools aim to prevent the activation of 'hard' rule of law instruments such as the Article 7 procedure.

The Framework's primary objective of 'finding a solution through a dialogue with the Member State concerned' is based on a 'structured exchange' that takes place over three stages (European Commission, 2014b, p. 7). In the first stage, the Commission assesses the situation by conducting a confidential exchange with the government. If the problems cannot be solved by these bilateral discussions, the Commission can, in a second step, issue a Rule of Law Recommendation. In the final stage, the Commission, through further confidential bilateral exchanges, monitors whether the government is complying with its recommendations.

Dialogue and discussion are also at the core of the Review Cycle's second preventive pillar, which envisages two distinct phases of consultations. The first phase encompasses discussions with stakeholders at the national level in preparation for the annual report, which are not limited to governments ('input from Member States') but also include different societal and administrative actors in a 'network of national contact persons' (European Commission, 2019a, p. 10) to take into account voices from civil society and academia ('targeted stakeholder consultation'). The results of these comprehensive consultations subsequently feed back into the report.⁸ The second phase envisages inter-institutional consultations between the European Parliament and the Council *after* the publication of the report. According to the Commission, the report should serve as a starting point for discussions on the rule of law within the EU institutions and, if necessary, also on follow-up measures.⁹

Dimension 2: Sanctions

Whereas the Scoreboard, the Framework and the Mechanism rely heavily on prevention and dialogue, they are not explicitly linked to actual sanctions. Instead of including the prospect of material sanctions as a possible result of the procedures, the Framework and the Mechanism only entail the possibility of activating other instruments. As a pre-Article 7 procedure the Framework might in theory ultimately – that is, after the completion of the third stage, lead to the activation of either the preventive or sanctioning arm of Article 7. However, even in this case there is no explicit link between a failed solution

⁸In practice, this activity translates into an online consultation process (that is, where stakeholders can make contributions within a given time frame) and country visits. The purpose is to gather as much information from as many sources as possible to make the report as objective as possible.

⁹Pursuant to the 2020 report, the Council announced a reform of its Annual Rule of Law Dialogue, which was established in 2014. The Dialogue is now divided into a general discussion on the rule of law and country-specific discussions based on the report's country-specific chapters (Council of the EU, 2020, p. 2). The first country hearings took place on 17 November, 2020, and pertained to Belgium, Bulgaria, the Czech Republic, Denmark and Estonia; the second round of hearings took place on 20 April, 2021, and addressed Germany, France, Greece, Ireland and Spain. On 23 November, 2021, Croatia, Italy, Cyprus, Latvia and Lithuania were the subjects of a third set of country-specific discussions.

to the problem and this procedure; instead, the Commission has the freedom to ‘assess the possibility of activating one of the mechanisms set out in Article 7 TEU’ (European Commission, 2014a, p. 8).

The same is true for the Review Cycle and the Annual Report. In the press release accompanying its 2019 communication, the Commission pledged that it would ‘continue to make full use of its enforcement powers, if early detection and prevention measures are not effective’ (European Commission, 2019b), including Article 7 procedures, the Court of Justice of the European Union’s case law and a ‘strategic approach’ to infringement procedures (European Commission, 2019a, 13 f.). However, again, the Commission can freely decide whether to resort to any of these if dialogue fails.

Moreover, the Scoreboard, the Rule of Law Reports and the Commission’s Rule of Law Recommendations within the Framework fall into the category of soft law instruments (Article 288 TFEU), which, although used to enforce hard law, are not binding and thus are problematic to enforce (Ştefan, 2017, 202 f.). This fact entails that the Commission can only hope that Member States are “inspired” by these publications and, as a result, carry out necessary reforms. This hope, however, seems very unlikely if reforms were implemented by governments with the aim of strengthening their own power bases in the first place.

The only instance when the Commission linked the procedure to direct sanctions was its proposal ‘on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States’ (European Commission, 2018), which served as the basis for Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, the so-called Rule of Law conditionality mechanism, which was adopted in December 2020.

According to its original idea, the Commission would have been able to propose different measures in case it detected ‘generalised deficiencies as regards the rule of law’ in a Member State. These measures included the suspension of payments and commitments, a reduction of funding under existing commitments and a prohibition against concluding new commitments (European Commission, 2018, p. 7). The regulation that was ultimately adopted replaced the phrase ‘generalised deficiencies as regards the rule of law’ with ‘breaches of the principles of the rule of law in a Member State [which] affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way’ (Article 6). This replacement basically transformed the original mechanism for protection of the rule of law into a mechanism for protecting the EU budget (see also Dimitrovs and Droste, 2021), which therefore cannot be activated for general rule of law violations and only comes into effect if these violations have a direct bearing on the implementation of the EU budget or the spending of EU money.

Despite its reduced scope and the fact that withholding funding is not a sanction in the proper sense (that is, a financial penalty) but a form of negative conditionality (see Viță, 2017), the new regime has a clear sanctioning purpose, as proposed by enforcement theorists. Depending on the amount of money to be withheld and the targeted government’s alternative sources of compensation for financial losses, this negative conditionality potentially has the power to change the government’s incentive structure. At least theoretically, therefore, this new regime gives the EU a powerful weapon.

IV. Management Instead of Enforcement of EU Values

The analysis of the four rule of law tools along these two analytical dimensions shows that the Commission's approach is mostly one of *managing* instead of *enforcing* the EU's fundamental values. At the core of the Commission's strategy lies the goal of prevention through early detection and bilateral dialogue. While prevention is mostly targeted at future cases, its primary mechanism in cases of actual rule of law violations is confidential bilateral dialogue. The Commission trusts that these dialogues can contribute to a swift 'de-escalation and resolution of rule of law issues' (European Commission, 2019b), especially because national political or judicial reforms are sensitive domestic matters that are best dealt with in a nonconfrontational environment. Sanctions, in contrast, are seen as remedy of last resort, as measures to be taken only after all else has failed: 'the objective must not be to impose a sanction but to find a solution that protects the rule of law, with cooperation and mutual support at the core – without ruling out an effective, proportionate and dissuasive response as a last resort' (European Commission, 2019a, p. 5). Therefore, with the exception of the financial conditionality mechanism, all recent Commission tools neglect the aspect of enforcement.

When analysed against the backdrop of the two compliance approaches, we can discover a mismatch between the strategies that *should be* and the strategies that *are* actually deployed in cases of deliberate rule violation. Instead of sanctioning violations, the Commission resorts to negotiations and predominantly designs rule of law instruments based on noncoercive mechanisms. It seems, therefore, that the Commission has adopted the wrong approach, although it has correctly identified the source of noncompliance. As a consequence, the Commission's approach is characterized by a mismatch between the source of noncompliance and the remedies chosen.

Theoretically, this mismatch explains why the Justice Scoreboard, the Framework and the Review Cycle with its Annual Report have not made any difference, and more generally, why management strategies are ill-equipped to deal with deliberate backsliding. Member States such as Poland and Hungary dismantle democracy and the rule of law on purpose. Therefore, without a change in the targeted governments' cost–benefit calculations through sanctions, no change in their behaviour can be expected. Without sanctions, compliance with the rules is much more expensive than continued noncompliance. It follows that the newly developed instruments have a limited capacity to induce change.

Although not conceptualized as a mismatch, scholarly work on the EU's and the Commission's responses to rule of law backsliding has extensively criticized this 'discursive approach' (Kochenov and Pech, 2015, p. 532). Scholars are sceptical regarding the Commission's institutional innovations and the capacity of those innovations to reverse backsliding precisely because of their 'soft' nature (Kochenov and Pech, 2015, 2016; Blauberger, 2016; Kochenov, 2019; Uitz, 2019).¹⁰ To summarize this criticism, the Commission's strategy 'is based on the misguided assumption that a discursive approach with would-be autocrats can work' (Pech and Kochenov, 2019, p. 3). This criticism is accompanied by various calls to create more robust instruments and to transform the EU into a militant democracy (Scheppele *et al.*, 2021).

¹⁰See for an exception Sedelmeier (2017).

While the Commission does not follow the path towards compliance recommended by enforcement theorists, its preference for management is in line with its general approach to rule of law protection. Even when deploying any of these new soft tools, the Commission is very reluctant to proceed to the use of hard instruments if dialogue and prevention fail. This fact is exemplified by the application of the Rule of Law Framework against Poland (see Kochenov and Pech, 2016): activated in January 2016, the Commission could have triggered Article 7 procedures after its first recommendation in July that year. Instead, it took the Commission three more recommendations to finally trigger Article 7 (1) in December 2017.

Similarly, even though the Commission has initiated several rule of law-related infringement procedures against both Hungary and Poland, it has been reluctant to ask the Court to impose fines under Article 260 (2) TFEU in cases of continued noncompliance.¹¹ This cautious approach is daunting given that in the past years, the Court of Justice has, via several rule of law rulings, provided the Commission with a legally more robust way to challenge backsliding governments through infringement procedures. The Court has repeatedly opened up new avenues for Commission action, which the Commission, however, has refused to exploit more often than not (see Pech and Kochenov, 2021). As a result, serious rule of law problems are not addressed, as shown, for example, by the fact that a large number of illegally appointed justices are still presiding in several Polish courts (Pech and Kochenov, 2021, Chapter 6).

Moreover, this cautious approach is also in line with the problem-solving strategy preferred by the Commission in ordinary noncompliance cases. As the literature indicates, the Commission traditionally prefers consensual strategies (management) over coercive measures (enforcement) (Hartlapp, 2007; Batory, 2016, p. 688; see also Closa, 2019). Actual enforcement through, for example, infringement procedures is typically considered to be a last resort and pursued in cases where an ‘added value’ can be expected (Communication from the Commission, 2017).

While this approach has been repeatedly criticised, it can be explained by the EU’s less-than-a-state character. Since the EU is not a state, it lacks coercive powers and must rely on Member States in regard to the implementation of EU law (Bieber and Maiani, 2014; Treib, 2014). This ‘compliance dilemma’ (Closa, 2020) affects the Commission’s responses to breaches of Article 2 values and can explain its reliance on soft measures (Closa, 2019, p. 703, 2020, p. 5). In combination with the fact that the creation of more forceful instruments requires the support of other EU institutions, especially the Council, it is therefore not surprising that the Commission’s new instruments follow the logic of management instead of the logic of sanctioning.

V. Discussion and Conclusion: Sanctions as the Correct Solution to Democratic and Rule of Law Backsliding?

Since 2010, the EU Commission has introduced several new instruments to close the EU’s growing ‘commitment–compliance gap’ (Börzel, 2016) with regard to the EU’s fundamental values. However, while the only tool following the logic of enforcement,

¹¹On request by the Commission in September 2021, the European Court of Justice ordered Poland to pay a record penalty of 1 million euros per day after the Polish government had refused to suspend the Disciplinary Chamber of the Polish Supreme Court following a Court ruling that found it incompatible with EU law (Euronews, 2021).

namely, Rule of Law conditionality, has not yet been deployed, the actual activation of tools relying on prevention and dialogue such as the Annual Rule of Law Review Cycle or the Rule of Law Framework has not contributed to the reversal of democratic backsliding.

This article offers a novel, theoretically informed explanation for why such management tools are unlikely to work. Through the perspective of the two traditional compliance approaches, it becomes apparent that these tools are ill-equipped to deal with severe breaches of the rule of law and democracy at the national level because they are characterized by a mismatch between the deliberate nature of noncompliance and the solutions chosen. The Commission combines the enforcement approach's assumptions concerning the cause of noncompliance with the management approach's path towards compliance. As a result, these new tools are biased towards managing rather than enforcing the EU's fundamental values. This lack of enforcement, however, squarely contrasts with the dominant discourse framing the whole rule of law debate in terms of the *enforcement* of EU values.

While the enforcement approach offers a theoretically convincing explanation for why the Commission's new rule of law tools are ineffective, we need to be careful, however, in concluding that sanctions alone are the correct method to reverse backsliding. Such a theoretical inference is too myopic, as it does not take into account crucial domestic and EU-level context factors that influence the effectiveness of sanctions.

As we know from research on candidate Europeanization, governments will not adopt EU rules if they perceive the adoption costs as being exceedingly high and the rules themselves as detrimental to their own power bases (Schimmelfennig and Sedelmeier, 2004, 2005). Moreover, sanctions, or at least the threat of them, are less effective the more authoritarian the targeted state is, making the context of their application an important factor determining the success of sanctions (Sedelmeier, 2017; Blauburger and van Hüllen, 2021, p. 6). Another crucial factor is Western leverage (Levitsky and Way, 2005, 2020), which is the extent to which targeted governments can compensate for a possible loss of EU money through other, non-Western sources.¹² The more that such governments can compensate these losses through other sources of money, the less financial sanctions will hurt them.

Therefore, there are reasons to doubt that after a decade of undisturbed authoritarian reform and consolidation, financial sanctions *alone* will lead to a substantial reversal of illiberal trends.¹³ In comparison to the simple process of naming and shaming associated with management strategies, enforcement through sanctions is undoubtedly more likely to hurt incumbents. The withholding of money alone, however, will hardly suffice, especially because under conditions of highly centralized government power and government control of the media, the targeted governments are likely to be successful in 'playing the blame game on Brussels' (Schlippach and Treib, 2017).

Therefore, such financial sanctions should be combined with stronger financial and organizational support for domestic democratic forces such as parties, civil society actors

¹²Hungary, for example, has established strong economic and financial ties to China and Russia as part of its new foreign policy approach, which is called 'keleti nyitás' (Eastern Opening).

¹³See for a critical assessment of the EU's capacity to reverse backsliding in Hungary and Poland through these instruments at this stage (Drinóczi, 2021).

and citizens (see also Theuns, 2020). If citizens become aware of the consequences the government's continued violations have for their countries, an active support for their efforts to induce change from below could be essential. This support, however, must go beyond the Commission's recent strategy of raising awareness concerning European values. Thus, in cases like Hungary and Poland a combination of management and enforcement strategies with a focus on the empowerment of democratic forces could be a more promising route to compliance than either pure management or pure enforcement.

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