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Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure

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ABSTRACT

When confronting democratic backsliding in its member states, the European Union (EU) cannot rely on material sanctions. There are formidable obstacles to using the one political safeguard that entails material sanctions, namely Article 7 of the Treaty on European Union (TEU). Moreover, the experience of the EU's pre-accession conditionality suggests that even a credible threat of material sanctions is least effective the more severe the breaches of liberal democracy. However, EU interventions without material leverage are not necessarily doomed, as the case of Romania in 2012 shows. Under favourable conditions the EU can thus elicit governments to repeal illiberal practices by relying primarily on social pressure and persuasion. This contribution assesses to what extent novel instruments that EU institutions have developed to confront democratic backsliding meet the requirements for effective social influence. It argues that the Commission's Rule of Law Framework has potential because it meets the criteria of formalisation, publicity, and impartiality. Yet to increase the likelihood of influence, it needs to be applied more consistently and should be embedded in a process of regular monitoring through a democracy scoreboard covering all member states.

KEYWORDS democratic backsliding, European Union, Hungary, Poland, rule of law, sanctions, social pressure.

INTRODUCTION

The increase of illiberal practices in member states of the European Union (EU) – most notably by the Fidesz government in Hungary since 2010 and the Law and Justice Party (PiS) government in Poland after December 2015 – has led to numerous calls to reform the EU's instruments against such 'democratic backsliding'. Yet a judicialisation of the EU's safeguards (Blauberger and Kelemen 2016) is unlikely as the EU member states are unwilling to cede any control over how to respond to such cases to autonomous institutional bodies. EU

institutions will therefore have to make do with the EU's current political safeguards. This contribution distinguishes such political safeguards according to two main mechanisms through which they seek to influence the behaviour of target governments: material sanctions and social influence (Sedelmeier 2014: 113-14). It argues that material sanctions are difficult to use, due to a combination of voting rules, member state preferences and party politics. Yet even if it were possible to facilitating the use of material sanctions, we should not overstate the scope for reining in backsliding through material sanctions: they are least likely to deter governments the more these rely on illiberal practices to maintain office.

EU institutions will therefore need to resort primarily to instruments based on social pressure to confront breaches of liberal democratic principles in the member states. These instruments include more recent institutional innovations, such as the Commission's Rule of Law Framework, its Justice Scoreboard, and the Council's dialogue to promote and safeguard the rule of law. Despite scepticism about these new monitoring and dialogue procedures at the EU level for lacking teeth, they are not inevitably powerless when faced with democratic backsliding. The case of the acquiescence of the Ponta government in Romania in 2012 demonstrates that under – admittedly demanding – conditions, EU influence is possible even without material sanctions. Social pressure through the EU's existing instruments might be able to achieve the desired results of domestic change, especially if they are adjusted and applied in such a way as to maximise their legitimacy. Especially the Commission's Rule of Law Framework has potential because it meets the criteria of formalisation, publicity, and impartiality. Yet to increase the likelihood of influence, it needs to be applied more consistently and should be embedded in a process of regular monitoring through a democracy scoreboard covering all member states.

The next section discusses the EU's main instrument through which it can wield material sanctions. It first analyses the obstacles for using this specific instrument, and second, drawing on the literature on EU accession conditionality, it points out the general limits of reining in backsliding through material sanctions. The subsequent section assesses the scope of novel EU instruments to address democratic backsliding through social influence. It draws on the literature on international socialisation and on the EU's previous experience of using social pressure to identify conditions under which these instruments can be used effectively and how these instruments and their application can be adjusted to increase the likelihood of successful social influence.

THE LIMITS OF MATERIAL SANCTIONS AGAINST DEMOCRATIC BACKSLIDING

Article 7 TEU is the EU's main instrument against domestic breaches of liberal democracy. It allows the European Council to suspend 'certain [membership] rights' of a member state that commits a 'serious and persistent breach' of the liberal democratic values contained in Article 2 TEU. Article 7 explicitly mentions that these rights include voting rights in the Council, but clearly other, and potentially even stronger (or weaker) sanctions (such as withholding funding from the EU budget) are possible. In principle, the EU therefore has significant sanctioning power, but Article 7 specifically, and material sanctions more generally, have limits as an instrument to rein in breaches of liberal democracy in the member states. First, a combination of voting rules, member state preferences, and party politics make it difficult to use Article 7. Second, even if it was easier to use it, insights from the literature on the EU's accession conditionality suggest that there are limits to the domestic changes that the EU can achieve through material sanctions when facing illiberal governments.

Political obstacles to the use of Article 7 TEU

There are formidable political obstacles to using Article 7 to defend liberal democracy in the member states. It has never been used since its insertion into the TEU through the Treaty of Amsterdam in 1997. Although the (then) member states agreed on sanctions against the Austrian government after the Austrian People's Party (ÖVP) formed a coalition with the radical right Freedom Party (FPÖ) in 2000, these sanctions were not based on Article 7. Instead they were – albeit collectively agreed – bilateral diplomatic sanctions (see Merlingen et al. 2001; Schlipphak and Treib 2016). Not only has Article 7 never been used; so far there has not even been a formal proposal to use it by either the Commission or the one third of the member states required by Article 7(2), let alone a vote on such a proposal in the EP or the European Council. The obstacles to using Article 7, and thus to threaten material sanctions credibly, result from a combination of voting rules, member state preferences, and party politics.

Article 7 requires very demanding majorities in EU institutions for the use of sanctions. It makes a distinction between establishing the existence of a breach of the EU's liberal democratic principles on the one hand, and deciding whether and how to sanction a breach on the other. Strictly speaking, Article 7 does then not actually make it very difficult

to use sanctions if a breach of Article 2 has been established: the member states can pass such a decision with a qualified majority. What makes it so difficult to use Article 7 is that the very establishment of a breach is also within the purview of the member states. And it is this decision, rather than the subsequent decision about sanctions, that requires extremely demanding majorities: unanimity (minus one) in the European Council and a two-thirds majority in the EP. These high voting thresholds also appear to deter even mere proposals to use Article 7: potential supporters are reluctant to submit a formal proposal for fear that a defeat will be interpreted as establishing the absence of a breach, rather than simply a shortfall of the required political support. For example, in October 2015 the centre-left S&D group in the European Parliament (EP) declined to support an attempt by the liberal ALDE group to initiate a vote on Article 7 against Hungary, despite agreeing in principle. But since the supporters did not have the required majority, they feared that ‘Orban will laugh at this’ (*EUobserver* 07.10.2015).

Member state preferences are another obstacle to using Article 7. Both these demanding voting rules and the general determination of the member states in the negotiations of the Amsterdam Treaty to maintain full control over the use of Article 7 reflect a strong underlying aversion to using sanctions. These unfavourable member state preferences stem partly from concerns about national sovereignty, especially among the less integration-minded governments. Partly they reflect more general concerns about isolating individual member states, and that alienating a government through applying sanctions would be detrimental to cooperative decision-making in the EU. Apart from a general disinclination of most member governments, the unanimity (minus one) requirement has become virtually insurmountable now that the European Council includes not only one, but two, illiberal governments – Fidesz in Hungary and PiS in Poland – that are potential targets of Article 7. And indeed, Hungarian Prime Minister Viktor Orbán was quick to announce that ‘Hungary will never support any sort of sanctions against Poland’ (*Financial Times*, 08.01.2016).

A further obstacle to using Article 7 is party politics. Commentators have suggested that a key reason why the EU has not sanctioned Hungary is the opposition of the European People’s Party (EPP), the political group in the EP to which Fidesz belongs (see e.g. Kelemen 2015). A more systematic analysis of the positions of the EP’s political groups confirms that there is indeed a partisan dimension to support and opposition for using Article 7, but it is

not simply a function of parties' ideological distance from the target government (in terms of the Left/Right orientation of the government parties). The partisan orientations that shape party groups' attitudes towards sanctions include additional dimensions, namely a political group's attitude towards European integration and their commitment to liberal democracy (Sedelmeier 2014: 108-113; Sedelmeier 2016). Of course the findings about EP group positions do not necessarily apply to the member state governments in the Council. Nonetheless, the requirement of the EP's assent in Article 7(2) TEU means that party politics – even if confined to the EP – present a formidable obstacle to using this tool to redress democratic backsliding in member states. Moreover, if party politics constrain the ability of the EP to expose and condemn democratic backsliding in member states, it silences precisely the EU institution that is usually the most vocal advocate of liberal democracy in the EU.

At the same time, these partisan dynamics also suggest that certain constellations with regard to the party-political composition of the target government might be more conducive to using Article 7 than others. First, illiberal measures by governments of the Left are more likely to be met with widespread opposition in the EP. Parties of the centre-right – that tend to score lower with regard to support for liberal democracy – are likely to support sanctions against their ideological rivals. And since centre-left parties tend to have a stronger commitment to liberal democracy, they are also more likely to be prepared to use sanctions against governments to which they are close on a Left/Right dimension. Indeed, this was the case for the Greens and Social Democrats with regard to Victor Ponta's centre-left government in Romania in 2012 (on which I will elaborate further below). Second, illiberal governments composed of national conservative parties or populist radical right parties might face support for sanctions not only from the centre-left, but also from the centre-right. Even if such governments are not equally ideologically (Left/Right) distant as parties of the Left, parties in the EPP might consider them ideological rivals, if they are members of other political groups: PiS in Poland is a member of the European Conservatives and Reformists (ECR) group, while its main domestic rival, the centre-right Civic Platform, is a member of the EPP. And indeed, the EPP supported the EP resolution of 13 April 2016 that expressed its concerns about democracy and the rule of law in Poland.

Yet these caveats notwithstanding, the key point remains that party politics, in addition to more traditional concerns about national sovereignty in the member states, and to the very demanding majority requirements in the EP and the European Council, greatly

reduce the possibility to use the sanctions of Article 7 against democratic backsliding in member states.

The limits of influence through material sanctions

In addition to the political obstacles for EU institutions to the *use* of material sanctions, their actual *capacity* to redress democratic backsliding is severely limited. Even credible threats of material sanctions are no panacea against illiberal practices in member states. The effectiveness of material sanctions decreases the more serious such cases are.

Although the EU has never used sanctions internally, there is a body of literature that can provide clues about the conditions under which material sanctions are effective. Studies of EU conditionality towards candidate countries suggest that the EU's material incentives – the prospect of EU membership, and conversely, the threat of withholding membership and its associated benefits – can be highly effective in bringing about domestic changes (Kelley 2004; Schimmelfennig and Sedelmeier 2004; Sedelmeier 2011; Vachudova 2005). Yet this literature also suggests that material incentives are insufficient when used towards illiberal governments (Schimmelfennig and Sedelmeier 2005b: 213-14; Schimmelfennig 2005). In cases like Slovakia under Vladimír Mečiar or Croatia under Franjo Tuđman, EU incentives were unable to bring about democratic domestic changes. These governments precisely relied on illiberal practices in order to maintain power and renouncing such practices would have threatened to undermine their ability to retain office. Even when faced with the threat of remaining outside the EU, illiberal leaders chose to maintain undemocratic practices. EU conditionality might have helped to lock in democratic change in fragile democracies when voter dissatisfaction led to the defeat of illiberal parties in 'watershed elections' (Vachudova 2005, Schimmelfennig and Sedelmeier 2005b). But EU interventions did not determine the outcome of such elections. At best, the EU played an indirect role through providing a focal point for opposition parties to unite and to moderate their platforms (Vachudova 2005).

These findings of the literature on pre-accession conditionality imply that the capacity of material sanctions to reverse democratic backsliding is limited. If illiberal governments are prepared to forego the possibility of joining the EU, would the threat of expulsion from the EU or withholding EU funds (let alone weaker material sanctions) make them change the practices that keep them in power? Of course such choices depend on the nature of their illiberal practices and to what extent they are critical for maintaining office.

Voters might also be more likely to punish governments in a post-accession scenario if they lose actual benefits of membership rather than in a pre-accession scenario when they had to forego prospective gains from membership.

Yet even widespread voter dissatisfaction about losing membership benefits might not endanger a government's grip on office. Illiberal practices precisely make it easier for governments to withstand a possible backlash from voters. Moreover, sanctions that impose material costs on the country by withdrawing the benefits of membership might not simply mobilise societal groups that lose out against the government. On the contrary, as also suggested by Schlipphak and Treib (2016), governments can use outside interventions through EU sanctions to mobilise domestic support. External threats can have a 'rallying-round-the-flag effect' as domestic groups back the government in order to avoid appearing disloyal (Galtung 1967). Moreover, governments can blame external sanctions for any hardship that voters experience and avoid scrutiny for failings of their own socio-economic policies.

In sum, we should not place exaggerated hopes into the capacity of material sanctions to reverse backsliding. They will be least effective the more severe, and thus the more 'systemic', the breaches of liberal democratic values are. From this perspective, Article 7 TEU is too blunt as an instrument. The sanctions it entails are potentially very far-reaching (as reflected in the notion of Article 7 as a 'nuclear option') and what makes member states reluctant to establish a breach in Article 7(2) in the first place might be precisely the open-ended nature of sanctions that could then be adopted under Article 7(3) with a qualified majority. Any attempt to give Article 7 TEU some more bite, therefore, would need to make it possible to use it more narrowly, to vote on clearly defined sanctions for specific illiberal practices (even with a higher majority requirement). It is unlikely that target governments completely abandon an illiberal governance system that guarantees their hold on power – even if they were credibly threatened with far-reaching sanctions. But they might be more inclined to acquiesce to changing specific aspects of their illiberal system of governance (say, control over the media) for which they are threatened with specific sanctions (such as a loss of funding) if it does not mean giving up all of their (illiberal) levers of power. Such a more selective and piece-meal use of Article 7 might not be ideal in view of the systemic defects of a 'Frankenstate' (Scheppele 2013), but given the EU's experience with accession

conditionality, it would be a pragmatic step towards using the EU's material leverage more effectively against democratic backsliding.

SOCIAL PRESSURE: POLITICAL SAFEGUARDS BEYOND ARTICLE 7 TEU

In view of the constraints on using the material sanctions of Article 7 effectively, we need to devote greater attention to alternative political safeguards that rely on persuasion (Checkel 2001, Risse 2000) and social pressure (Johnston 2001). A longstanding instrument are resolutions and own initiative reports by the EP. By exposing and criticising member state practices that breach liberal democratic principles, the main mechanism is shaming. In this section, I will focus on new instruments that EU institutions have developed to address democratic backsliding in member states. The emphasis on dialogue in the Commission's 'rule of law framework' marks it as an instrument based on persuasion, but the publicity of the process also entails a strong element of social pressure. The Council's 'rule of law dialogue' emphasises arguing and persuasion over the possibility of shaming individual member states.

To scrutinise the capacity of these new instruments to redress democratic backsliding, this section first establishes more clearly under what conditions social pressure is most likely to be successful. To identify these conditions, I draw on the EU's previous experience in using social pressure, and on the broader literature on international socialisation and the domestic impact of international institutions. I then discuss the implications of these findings for the EU's new instruments relying on social pressure, and how EU institutions need to apply them to increase the likelihood of success.

The scope of social pressure

The experience of EU institutions in dealing with the Romanian government in 2012 suggests that it is indeed possible to exert influence without material leverage. The Romanian government, led by Victor Ponta's Social Democratic Party (SDL) committed various breaches of the rule of law in attempting to impeach their party-political rival, the centre-right president Traian Basescu. EU institutions responded fairly quickly. Commission President Barroso and Council President Van Rompuy each held a meeting with Ponta and obtained his commitment to comply with a list of eleven measures to restore the rule of law. The EU was

therefore largely successful in pressing the government to reverse its measures (see also Isumen 2015; Pop-Eleches 2013).

The EU's influence on the Ponta government relied heavily on social pressure, for which the circumstances were highly favourable (Sedelmeier 2014: 114-118). First, social pressure took place both in the context of acceptable compliance costs and in the shadow of material pressure. It was not prohibitively costly for Ponta's government to comply with the EU's demands. The breaches of the rule of law that the government committed to impeach a deeply unpopular president bound to lose the presidential election scheduled for 2014 were an act of political expediency rather than essential to hold on to power. In addition, material leverage was not completely absent. In contrast to the Hungarian case in which the EPP clearly stated its defence of the Fidesz government, the potential threat of Article 7 might have found much less opposition in the case of the Romanian government. Second, domestic conditions for social influence (Checkel 2001; Johnston 2001; Schimmelfennig and Sedelmeier 2005a:18-20) were particularly conducive in Romania. The EU enjoys a high legitimacy both with the broader public and the main political parties, including Ponta's SDL. This strong legitimacy made the Romanian government more susceptible to shaming through the EU's interventions (not least since the then 39-year old Ponta was a relative novice to international diplomacy, which may have made him more open to persuasion).

The Romanian case thus demonstrates that it is possible for the EU to induce member state governments to reverse breaches of liberal democracy without threatening material sanctions. Admittedly, the conditions in this particular case were exceptionally conducive to social influence. But it certainly cautions against dismissing toothless mechanisms of social influence and persuasion too quickly as inevitably ineffective. Moreover, the Romanian case demonstrates that in contrast to the pessimistic view of Schlipphak and Treib (2016) interventions by existing EU institutions may be perceived as legitimate and do not necessarily create a domestic backlash. Crucially, this is much more likely if EU interventions entail social pressure rather than material sanctions.

To increase the likelihood of success of social pressure, we can derive from the literature – in addition to domestic conditions mentioned above – also certain principles for how it should be applied. In brief, the influence of international demands and criticism depends on their legitimacy, which in turn is determined by specific conditions (Checkel 2001; Frank 1990; Johnston 2001; Schimmelfennig and Sedelmeier 2005a:18-20). These

conditions include that social influence has to be applied consistently as well as impartially; moreover, social pressure requires publicity and transparency while a depoliticised setting and a deliberative quality of interactions with the target government are necessary for persuasion. The following sub-sections assess to what extent the instruments that the Commission and the Council developed to address backsliding meet these standards, and how they need to be adjusted to enhance their effectiveness.

The Commission's Rule of Law Framework

In March 2014, the Commission presented a new framework that it had adopted in order to confront systematic threats to liberal democracy in the member states (Commission 2014; see also Kochenov and Pech 2015). This framework creates a more formal procedure through which the Commission enters into a dialogue with a member state in order to resolve the situation. It involves up to three stages, if the problem is not solved at an earlier stage. In a first step, the Commission assesses whether there is a 'systemic threat' to the rule of law in a member state. If it finds that this is the case, it specifies its concerns in a 'rule of law opinion' to which the member state can respond. The second stage consists of a 'rule of law recommendation' in which the Commission proposes concrete measures to address the problems and specifies a deadline for the member state to do so. In the third stage, the Commission monitors the member state's implementation of its recommendation, and if it is not satisfied, it can propose using Article 7.

The process thus primarily establishes a more formal and structured dialogue between the Commission and the member state concerned in order to solve the issue without recourse to Article 7. But since the Commission can ultimately still only resort to proposing the use of Article 7 if the process fails, it considers the rule of law mechanism a 'pre-Article 7' procedure. It therefore also insists that the new process does not establish new powers for the Commission and that it is complementary to existing procedures. In fact, to a certain extent the procedure codifies earlier informal practice of the Commission and sets it within a more structured framework. As discussed above, in the case of Romania in 2012, Commission President Barroso presented Prime Minister Ponta with a list of 11 points to be addressed in order to solve the constitutional crisis, which is reminiscent of the suggested 'rule of law recommendation'. Moreover, the different stages in the process resemble the infringement procedures for breaches of EU law under Articles 258 and 260

TFEU and its three stages (a letter of formal notice, a 'reasoned opinion' and a referral to the CJEU). The Commission activated the new framework for the first time in January 2016 after the PiS government in Poland had taken measures to limit the independence of the constitutional court and of the media. After a number of contacts did not lead to concrete steps to address the concerns raised by the Commission, it issued a 'rule of law opinion' in June 2016.

In view of the conditions for effective social pressure, the rule of law framework is certainly a promising innovation. First, a more formal and structured procedure should enjoy greater legitimacy than informal practice. Second, the framework generates the transparency and publicity that is necessary for the use of social pressure and it is flexible enough to allow for more or less public politicisation, depending on domestic conditions in the target country. When targeting governments and elites that generally identify positively with the EU (as in the Romanian case), less politicisation and more confidential discussions are required, since they are more conducive to persuasion and allow the government to back down without losing face domestically. When the target government is Eurosceptic (as in the case of Fidesz or PiS), but the EU enjoys significant support among the public (as in Poland), greater publicity and a more transparent process that explicitly specifies the concerns of EU institutions is more promising as it provides additional legitimacy to the arguments of the domestic opposition. Third, since the Commission is an independent, supranational institution, the framework also meets the criterion of impartiality. The legitimacy of the process therefore might not even require creating a new body for this task or outsourcing it to external bodies, especially if the Commission's assessment draws transparently on external sources, such as Opinions of the Council of Europe's Venice Commission or of independent legal expert bodies. To avoid accusations of partisanship, the Commissioner of the country in question could abstain from votes in the college. Donald Tusk's criticism of using the framework against Poland (*Financial Times*, 18.01.2016) could be interpreted precisely as an attempt to avoid accusations of instrumentalising the EU to discredit domestic party political rivals.

At the same time, changes in application of the framework are necessary. The Commission might find it politically expedient to fudge or dodge cases that it fears it cannot win (Batory 2016), but this undermines the legitimacy of the EU's interventions. Argumentative consistency requires the Commission to go after all cases equally. In this

sense, using the Rule of Law mechanism against Poland but not Hungary undermines the legitimacy of the process, even if it were strategically expedient given the low likelihood of success in the latter case. By the same token, even if it proves impossible to trigger Article 7 against an unresponsive government, it is important to keep cases open and on the agenda to sustain social pressure as a resource for domestic actors working to expose and overturn illiberal government practices.

The EU Justice Scoreboard

Independently of the Rule of Law Framework, the Commission also developed a tool to monitor the effectiveness of national justice systems, the 'EU Justice Scoreboard', published annually since March 2013. The Scoreboard presents data on the efficiency of national courts according to specific comparative indicators (such as the length of judicial proceedings, the clearance rate, and number of pending cases), rather than an overall ranking of member states. The Scoreboard's data on perceptions of judicial independence, arguably the most salient issue for systemic rule of law crises among the data it covers, focus narrowly on perceptions of business end-users and are only a minor (albeit growing) part of the Scoreboard's assessments. This narrow focus fits the Commission's rationale for the Scoreboard: highlighting the importance of functioning national justice systems for economic growth and the operation of the Single Market (Commission 2013: 1-2). But the Scoreboard is therefore more suitable as an instrument to guide reforms to improve the efficiency of national justice systems, rather than for assessing their role in guaranteeing checks and balances and thus as a tool to identify threats to liberal democracy.

The Scoreboard in its current form is therefore a missed opportunity for a more effective exercise of social pressure. Yet if its scope was broadened, it could play an important role in embedding the rule of law mechanism in a process of regular monitoring across the member states. Along these lines, the EP has called on the Commission 'to cover the periodic state-by-state assessment of compliance with fundamental rights and the rule of law' (European Parliament 2015:16) and Kochenov and Pech (2015: 537) have suggested it might also be used for a 'rule of law ranking' of EU countries. Regular monitoring of all member states would increase the legitimacy of social pressure by avoiding accusations of focusing selectively on individual member states. It would also allow the Commission to comment regularly on measures that are problematic – even if the situation has not yet

reached the level of a 'systemic breach' and provide domestic actors with ideational leverage to fight against such measures. Regularly commenting on any problematic measures in all member states would also improve argumentative consistency and pre-empt attempts by illiberal governments to justify their own measures with reference to practices elsewhere that had not been denounced equally. Finally, regular monitoring also helps to operationalise the principles of Article 2 (see also Blauburger and Kelemen 2016), and rendering them more determinate increases the legitimacy of claims that they have been breached.

The Council's Rule of Law Dialogue

In contrast to the potential for effective social pressure of the Commission's new instruments (especially if adapted appropriately), the Council's new instrument to protect the rule of law in the member states is far more limited. In December 2014, the Council agreed to establish an annual 'dialogue ... to promote and safeguard the rule of law' among the member states within the General Affairs Council (Council 2014: 20-21). Key principles of the dialogue are that it should be 'conducted on a non partisan and evidence-based approach' according to 'the principle of sincere cooperation'; and that it should 'respect the national identities of Member States' (which may be Council-speak to legitimise different governments' interpretation of democracy). Arguably these principles reflect the concern of some member states that the dialogue should not be used to discuss, and potentially shame, specific member states. Instead of focusing on countries, the Council 'will consider, as needed, to launch debates on thematic subject matters' (2014: 21).

The early practice of the Council Dialogue suggests an aversion to discussing precisely the most salient challenges to liberal democracy among its members. The first Council Dialogue on 18 November 2015 focused primarily on the balance between counter-terrorism and the protection of human rights (*Agence Europe* 20.11.2015). Governments also raised more specific issues, such as how to respond to, and control, radical websites, and how to prevent a race to the bottom in the treatment of refugees. Notwithstanding the importance of these topics, this choice clearly seems to reflect an agreement among the member states to steer clear of discussing e.g. the political situation in Hungary, or more generally the broader issues that it raises with regard to protecting liberal democracy, such as the concentration of power by national governments. The focus of discussion seems to support

the view that the Dialogue was either primarily created as an attempt to 'kill off' the Commission's rule of law framework and to pre-empt its activation, or that it presents the lowest common-denominator compromise acceptable to the Hungarian government (Kochenov and Pech 2015: 534; 536).

The Council Dialogue might still play a useful role in codifying principles and best practice pertaining to certain aspects of liberal democracy in the member states before they become contested. But it does not seem to provide a forum conducive to either persuasion or social pressure once problems emerge.

CONCLUSIONS

This contribution has suggested that since the political feasibility of treaty changes to judicialise the EU's tools against democratic backsliding is limited (Blauberger and Kelemen 2016), the EU will have to rely on political safeguards, such as Article 7 TEU and modest institutional innovations like the Commission's 'rule of law mechanism'. Moreover, the effectiveness of the material sanctions is limited, partly because it is extremely difficult to use Article 7 TEU, partly because even a credible threat of severe material sanctions is unlikely to bring illiberal governments to renounce the very practices on which they rely to maintain office. A change to Article 7 to make a more selective use with clearly specified sanctions possible – even with a higher voting threshold – could make material sanctions a more effective threat. Yet short of such treaty changes, EU institutions will have to rely primarily on political safeguards based on dialogue, persuasion, and shaming rather than on material sanctions to influence illiberal governments.

Social pressure is not inevitably ineffective in countering democratic backsliding. The case of Romania in 2012 demonstrates that under certain – admittedly demanding – conditions in a target country, social pressure can lead the government to redress breaches of liberal democratic principles. These conditions are manifestly absent in the case of the Fidesz government in Hungary and arguably – albeit less unfavourable – in the case of the PiS government in Poland. Yet even in cases where the conditions are unconducive to social influence, it does not mean that the EU can do, and should do, nothing.

Instead, more attention should be devoted to applying the instruments that rely on social influence more effectively. The Council Dialogue is too averse to discussing specific member states to provide a forum for tackling backsliding through persuasion or social

pressure. Yet it might play an (albeit more limited) role in establishing a consensus about good practice on key issues before they become contested. The Commission's Rule of Law Framework meets key criteria for effective social pressure, such as a formal process, impartiality and publicity, but it needs to be applied more consistently to enhance its legitimacy on which it relies for its influence. The Commission's Justice Scoreboard in its current form is too narrowly focused on the efficiency of national court systems. A broader scope would enable it to embed the Rule of Law Framework in a process of continuous monitoring of compliance with liberal democratic principles across the member states.

In sum, even if EU institutions essentially have to rely on soft political instruments to confront democratic backsliding in member states, they are not powerless. But they have to be mindful to apply and to adjust them in such a way as to maximise their effectiveness.

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