

# Autocratization Induced Policy Learning in the European Union

## A Conceptual Framework

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### Abstract

The autocratization of Hungary and Poland triggered a plethora of institutional, legal and policy innovations in the European Union with the goal to enhance or enforce Member States's compliance with EU law and European values. However, there appears to be a ruling consensus among democracy and EU scholars that the institutional and policy answers addressing the authoritarian challenge remained ineffective or often even dysfunctional.

The paper focuses on the research puzzle how have policy learning modalities, characteristics, and traditions of the three key EU institutions influenced or determined the European Union's policy responses to the challenge posed by autocratizing Member States. Using explaining-outcome process tracing methodology, the empirical part of the paper investigates the main characteristics of the three key EU institutions' policy learning processes and tries to establish causal relations between the learning characteristics and the policy responses. By putting forward a four-dimensional conceptual framework to explain the applied policy strategies and institutional learning qualities of the three main EU institutions, the paper ultimately argues that the dominant political strategies of the Commission and the Council and the resulting inadequacy of their learning characteristics has been the key drivers behind the EU's policy failure. This inadequacy has not only resulted in flawed instrumental learning processes which ultimately produced deficient policy innovations and responses. Due to the subordinated role of instrumental learning to political learning the preservation of the Commission's and the Council's power position, institutional prerogatives, and the dialogue-based modus operandi of the integration logic of New Intergovernmentalism appear to have enjoyed clear primacy over providing adequate policy responses to the authoritarian challenge.

### Introduction

Since the foundation of the political union by the 1993 Maastricht Treaty, the European Union has been emerged as a community of shared values and democracy. (Closa & Kochenov 2016, Bakke & Sitter 2020, Kelemen 2020) The founding values of the integration were first introduced into the primary acquis by the Treaty of Amsterdam and are incorporated today in Article 2 TEU. According to this, *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

In spite of this self-declaration, the European Union can hardly be considered as a community of democracies anymore. Democracy is in global retreat since 2005 (Diamond 2015) and only a handful EU member states could escape the global trend. (V-Dem 2021) Social polarization, the hollowing of political representation, the erosion of public deliberation, and malicious electoral meddling of foreign powers pose significant challenges to the most-consolidated liberal

democracies of Europe and North America as well. (Levitsky & Ziblatt 2018, Mounk 2018, Snyder 2018)

However, first and foremost not these omnipresent challenges to pluralist democracy had the most significant impact on EU politics and the functioning of EU institutions, but the decade-long autocratization of two EU Member States: Hungary and Poland.

The demise of democracy and ongoing authoritarian developments of the above-mentioned Member States, or as Daniel R. Kelemen coined it, ‘Europe’s other democratic deficit’ (Kelemen 2017), did not remain unanswered by the European institutions. It triggered a plethora of institutional, legal and policy innovations within the European Union with the declared goal to enhance Member States’s compliance with EU law and European values. Nevertheless, there appears to be a broad consensus among scholars that the legal institutions developed and policy strategies applied to address the authoritarian challenge within the EU remained rather ineffective or often even dysfunctional. (Batory 2016, Closa & Kochenov 2016, Kelemen 2017, Hegedus 2019, Pech 2020, Costa Reis & Raube 2022) Especially, if the decade long time span—Hungary’s democratic demise started in 2010 and those of Poland in 2015—and the accelerating dynamics of intra-EU autocratization are also taken into consideration.

Based on the level of conceptualization and empirical research, available scholarly literature investigating the drivers behind EU responses to Member States’ autocratization can be put in two distinct categories. The first group of scholarship focuses on the institutional responses, policies, and potential drivers of individual EU institutions, most often the European Commission and the European Parliament, providing convincing explanations of the individual institutional positions to Member States’ autocratization in the EU. With regard to the European Commission the scholarship of Agnes Batory (Batory 2016) and Carlos Closa (Closa 2019) can be highlighted, while the research of Ulrich Sedelmeier (Sedelmeier 2016, 2017), Maurits J. Meijers and Harmen van der Veer (Meijers & van der Veer 2019), Lise Herman (Herman et al 2021) and Mihail Chiru and Natasha Wunsch (Chiru & Wunsch 2021, Wunsch & Chiru 2022) can be considered fundamental with regard to the European Parliament’s position toward democratic backsliding. In contrast, the second group of the scholarship aims its attention at truly EU-level drivers and explanations, leaving the specific characteristics of individual EU institutions often unconsidered. Such EU-level explanations are offered by R. Daniel Kelemen (Kelemen 2020) and Francisca Costa Reiz and Kolja Raube (Costa Reis & Raube 2022).

Unavoidably, both approaches have advantages but also intrinsic limitations that constrain either their explanatory scope or power. Due to the complex institutional nature of the European Union, the general applicability of the institutionally focused approaches remains limited, while explanatory frameworks focusing solely on the EU level and operating with limited number of variables remain insufficiently fine grained to catch the complexity of policy processes within the intricate institutional framework of the European Union.

Regarding the scholarship focusing on the performance of the European Commission as ‘Guardian of the Treaties’, both Batory (Batory 2016) and Closa (Closa 2019) argue that the Commission’s focus on procedural compliance and the fact that it prefers compliance via dialogue over compliance via enforcement opened up policy venues for autocratizing Member States to defy the European Commission by emulating symbolic compliance with EU law while in the same time they were able to substantially undermine checks and balances and the rule of law.

Concerning the research into the European Parliament’s behavior addressing the autocratization of Member States, scholars underlined the strategic considerations as well as ideological and value commitments of European political groups and the geographical distribution of their national member parties and MEPs as the key variables that determined voting behavior in the EP. Ulrich Sedelmeier (Sedelmeier 2016) argued that the approach of European political groups to Member State-level autocratization is determined by the groups political/ideational commitment to the

values of liberal democracy (measured on the GAL/TAN scale) and their ideological distance from the governing party of the autocratizing member state.

Focusing on the voting patterns of MEPs in roll call votes related to the autocratization of Hungary and Poland and the agenda setting through parliamentary questions and motions for resolutions, Maurits J. Meijers and Harmen van der Veer (Meijers & van der Veer 2019) claimed that strategic considerations and ideological factors may offer the best explanation to the decade long accommodation of the Hungarian governing party Fidesz by the EPP. These findings were corroborated by Lise Herman and her co-authors (Herman et al 2021) on the basis of a larger roll call vote dataset. However, they underlined the low and ever decreasing cohesion of the conservative political group on the issue, which enabled the partial support of the European Parliament's Article 7 motion against Hungary in September 2018 and the sidelining of the Fidesz MEPs within the EPP group following the suspension of Fidesz in the European People's Party. In addition, in their upcoming paper Natasha Wunsch and Mihai Chiru argue that geographical links may play an increasingly important role in the voting behavior of MEPs and underline that Central and Eastern European origin shows the second highest correlation with rejecting motions that address the autocratization of Hungary and Poland, outpaced only by the correlation with Eurosceptic ideological and value framework. (Wunsch & Chiru 2022)

As groundbreaking and gap filling these scholarly works have been in explaining the political variables and dynamics behind the political behavior and policy strategies of key EU institutions, they also had their own in-built limitations. It is definitely crucial to understand the dynamics between the relevant EU institutions on the one hand and the autocratizing Member States and their respective governing parties on the other hand. However, these dynamics may only partially determine the Commission's and the Parliament's approach to the issue.

The European Union has a complex institutional setting, in which EU-level political decisions are made within the interactive institutional triangle of the Commission, the European Parliament and the Council (the European Council included as well). Institutional positions and approaches toward democratic decline in individual Member States are not only influenced by the interaction with the Member State in question, but also with the other players of the institutional triangle. It is obviously necessary to reflect on the policy processes of the three key institutions independently from each other, as they represent different integration logics both in theory and in the political praxis. However, while doing so the inter-institutional dynamics of European politics cannot be left unconsidered either.

Against that background, a research project shall embrace a two-dimensional approach in its research design if it aims at providing EU-level explanations to the question why the autocratization of Member States could have advanced decade long in the allegedly value-based democratic community of the European Union. It must take into consideration both the particular integration and policy logics behind the three key institutions, as well as these three institutions' interactions not only with the member states in question but also with each other.

One of the most popular EU-level explanation for the integration's policy failure to constrain Member State's autocratization stems from the enlargement and conditionality literature and de facto predates the democratic demise of Hungary and Poland. In their respective papers on post-accession conditionality, Rachel A. Epstein, Frank Schimmelfennig and Ulrich Sedelmeier (Schimmelfennig & Sedelmeier 2004, Epstein & Sedelmeier 2008) argued that the changing incentive structures in the aftermath of EU-accession and the lack of post-accession conditionality may pose a threat of democratic backsliding of Member States. However, in their later research the authors repeatedly underlined that the lack of post-accession conditionality did not result in a general trend of democratic demise and mainly domestic factors were responsible for the autocratization of Hungary and Poland. (Sedelmeier 2014, Schimmelfennig & Sedelmeier 2020) Nevertheless, Sedelmeier's comparative scrutiny of the 2013 Romanian constitutional crisis and

Hungary's democratic demise (Sedelmeier 2014) also demonstrated that the differences in post-accession conditionality between countries of the 2004 and 2007 enlargement round resulted in a rather distinct political and legal toolkit of the EU institutions to address democratic demise related challenges.

The theory that probably came the closest to provide a real EU-level explanation to the democratic demise of certain Member States was published by R. Daniel Kelemen (Kelemen 2017). In his work 'Europe's other Democratic Deficit' Kelemen argues that the abuse of financial flows from the federal to the Member State-level and the dynamics between federal and national-level party elites in multi-level parties/party families are responsible for "hijacking" the political decision-making processes and enabling the evolution of authoritarian islands in democratic federations. These interactions are demonstrated in his paper not only through the example of the European Union, but also through state-level authoritarian dynamics in the United States and in India as well. In his subsequent Article 'The European Union's Authoritarian Equilibrium' (Kelemen 2020), he added a third dimension, the free movement of EU citizens to his model, which plays the role of a pressure valve for autocratizing regimes and weakens the voter base and human resource pool of democratizing opposition parties in the respective countries.

The first two variables identified by Kelemen have definitely played an important role in the advancing autocratization of Hungary and Poland. Aside of the party-political links between Fidesz and the European People's Party, the abuse of EU financial transfers by autocratizing national elites as domestic-level power resources is also well documented in the case of Hungary. (Bozóki-Hegedűs 2018, Magyar 2016) In contrast, in the case of Poland the abuse of EU financial transfers appears to play a rather subordinated, although slightly increasing role.

Focusing more closely on the EU's struggle to respond to Member State autocratization, Francesca Costa Reis and Kolja Raube offer a conceptual framework based on collective action theory and focusing on the explanatory logics of institutional actor behavior. (Costa Reis & Raube 2022) They claim that the dominant explanatory logic of institutional behavior (logic of consequences, logic of appropriateness and bounded rationality) explain the policy actions of the European Commission, the Council, the European Parliament and the Court of Justice of the European Union (CJEU) in the integration-democracy nexus, underlining that both the Commission and the Council were bound by a logic of consequences which preferred the strength of integration over enforcing compliance with EU values over a long period of time. The explanatory-logic-based conceptual framework provides an attractive theoretical base to investigate the positions and strategies of all main EU institutions and to draw EU-level conclusions. However, the binary nature of the integration-democracy nexus significantly reduces and blurs the scope of investigation, as it intrinsically insists that all moves that jeopardized the protection of EU values ultimately served—at least intentionally—the goal of maintaining the cohesion and good-functioning of the integration. In contrast, self-interested moves of European political groups, institutions and Member States that hampered the effective protection of European values may be very well accommodated in the category "logic of consequences", but do not necessarily fit into the integration-democracy nexus.

### **Autocratization Induced Institutional Learning in the European Union**

As demonstrated by the literature overview, two dimensional research designs that provide a conceptual frame to investigate the interactions both between the key EU institutions and autocratizing Member States on the one hand, and within the EU's institutional triangle on the other hand and thus allow to draw EU level conclusions are comparably rare. To contribute to the existing scholarship and in order to be able to incorporate the above guideline into a single research frame, this project applies the toolkit offered by policy learning theories to investigate the vertical

and horizontal interactions that may determine institutional and EU-level responses to the challenge posed by autocratizing Member States.

Policy learning theory appears to be particularly well-suited to the subject. It allows to focus on the (development of) particular horizontal and vertical policy interactions among the key actors (EU institutions and Member States) and offers a broad conceptual toolkit to investigate learning characteristics that may have fundamentally influenced policy formulation.

The paper investigates the research question **how have policy learning characteristics of the three key EU institutions influenced or determined the European Union's policy responses to the challenge of autocratizing Member States?**

In order answer this question, the paper applies a complex, four-dimensional conceptual framework of policy learning, that reflects on the 1) process, 2) the modality, and the 3) outcome of learning interactions related to the individual EU institutions, and 4) on the particular integration logics and traditions that shape the individual institutions' policy learning and policy responses.

Concerning the empirical research methodology, the project uses explaining-outcome process tracing methodology (Beach & Pedersen 2013) to identify key characteristics of the institutional learning processes and to prove that the learning induced changes in policy formulation and implementation are in causal relation with the policy outcomes.

In its empirical part, the paper investigates the development of policy formulation and implementation processes of the three key EU institutions related to the monitoring or enforcement of Hungary's and Poland's compliance with EU values.

In case of the European Commission, it examines the infringement strategy of the Guardian of the Treaties, the development and implementation of new policy instruments, and the Commission's position towards the Article 7 proceedings against Poland and Hungary. Regarding the Council, the paper focuses on the characteristics of the Article 7 hearings, the Council's own Rule of Law peer-review procedure, and the Council's position towards the Commission induced policy innovations. In case of the European Parliament, the Parliament's political resolutions on the developments in Poland and Hungary, the Parliament's own policy proposal (enshrined in the Tavares and in't Velt Reports) and its position toward the Article 7 proceedings and the Commission's initiatives will be the objects of investigations.

In contrast to the approach of Costa Reis and Raube, the paper considers the Court of Justice of the European Union as an external authority in the EU policy learning processes, not being part of the EU's institutional and policy concert. The reason is that although the CJEU's jurisdiction fundamentally influences the European Commission's infringement strategy (and vice versa), being an independent court, learning processes within the CJEU follow the pattern of legal argumentation and as such they can be hardly described with the vocabulary of policy learning.

In order to assess the particular integration logics and traditions of EU institutions that influence their policy learning performance, the paper uses the broader theoretical frame of New Intergovernmentalism as baseline. (Bickerton et al 2015) According to this grand concept of the European integration, the basic modus operandi of Member States and EU institutions among each other is consent building and deliberation. (Bickerton et al 2015, 30.) Enforcing compliance with Article 2 TEU values does not appear to be an exception from these general rules either. Within the institutional triangle, one can identify Member States and the Council as promoter, while the European Parliament as challenger of the integration logic of New Intergovernmentalism. As 'Guardian of the Treaties', the European Commission has been bound by the dialogue and deliberation-based approach of New Intergovernmentalism (Batory 2016), which undermined its enforcement praxis and determined the Commission's relations not only with the autocratizing Member States, but also with the Council and the Parliament.

## Policy learning

Policy learning in complex federal systems in general (Scharpf 1988) and in the European Union in particular (Radaelli 2008, Sabel & Zeitlin 2008, Zito & Schout 2009, Dunlop & Radaelli 2012, Radaelli & Dunlop 2013) can look back on a decades long research tradition that both covers a broad spectrum of particular policy fields (Dunlop & Radaelli 2016, Tamtik 2016) and reflects on the diversity of integration theories. Considering the fact that the three key institutions of the European Union represent different logics of the integration, this plethora of scholarly research provides a useful pool of focused, micro-level concepts to analyze and describe particularities of institutional behavior in case of the Commission, the Council, and the European Parliament.

In general, the paper follows the definition and understanding of learning formulated by Claire A. Dunlop and Claudio M. Radaelli as a “process of updating beliefs about policy based on lived or witnessed experiences, analysis or social interaction”. (Dunlop & Radaelli 2013)

Concerning the analytical items of empirical investigation, based on the distinction made by Heikkila and Gerlak, the paper considers the individual EU institutions (Commission, Council and the European Parliament) as the main actors of the learning process and the entirety of the European Union (represented by the institutional triangle) as the system. (Heikkila & Gerlak 2013) Obviously, the institutional learning of the Council represents a collective learning process of the 25 EU Member States which have to respond to the authoritarian developments in Poland and Hungary, hence—if otherwise not specified—the Council is considered as a substitute for intergovernmental learning without going into the particularities of the individual Member States. Main subjects of the empirical analysis (process tracing) are the particular vertical (between the EU institutions and autocratizing Member States) and horizontal (within the institutional triangle) policy interactions between the actors, the changes of which refer to updated policy beliefs, aka policy learning.

Instead of prioritizing particular components of policy learning, a comprehensive, four-dimensional conceptual framework is constructed for the purpose of the analysis. This framework encompasses the 1) processual dimension, 2) modality and 3) outcome of the policy learning interactions, complemented by the 4) particular, institution specific characteristics and logics of learning.

First, the paper analyzes the processual dimension of institutional learning, focusing on its different stages and scrutinizing the acquisition of the information, translation and dissemination. (Heikkila & Gerlak 2013, Dunlop & Radaelli 2016) According to the definition of Heikkila and Gerlak, the phase of information acquisition “involves the collection or receipt of information”, reflecting also on the source of information. (Heikkila & Gerlak 2013, 488.) The translation phase reflects on the interpretation of the meaning of new information or the application of the available information to a new context, representing the updating of policy beliefs. Dissemination—the transfer or embedding of information within a collective entity—is a crucial processual phase in several policy learning theories that emphasize the “spreading” of information/knowledge in the policy learning process, like policy diffusion. Nevertheless, as the paper focus on the external learning interactions of the main EU institutions, the question of dissemination within the individual institution will be neglected.

Second, regarding the modality of policy learning, the paper applies the categorization developed by Dunlop and Radaelli (Dunlop & Radaelli 2013, 2016) which differentiates between four distinct modalities of learning processes: hierarchical, reflexive, epistemical and learning as bargaining. In this context hierarchical learning refers to top-down policy processes which minimize negotiation and exception to the rules and favor the reinforcement of the set rules by incentives and sanctions. Reflexive learning is considered to be a horizontal or bottom-up learning process where potential

solutions to policy problems with high ambiguity are gathered at local/domestic level and best-practices spread with diffusion across the system. Epistemical learning refers to the process when—through the participation of authoritative expert communities—the acquisition and translation of information and policy beliefs takes place in knowledge mechanisms instead of hierarchical policy structures. Last but not least, learning as bargaining is practically a by-product of bargaining processes as bargaining updates policy thinking about the availability and efficiency of policy options in a given context.

Third, concerning the outcome dimension of the learning process, in accordance with the strong scholarly consensus in the literature (May 1992, Zito & Schout 2009, Gilardi 2010, Radaelli & Dunlop 2013), the paper distinguishes between instrumental learning (when the learning process aims at and in ideal case results in improved public policy performance, e.g. in better policies), social learning (with a change in the socially dominant policy ideas as outcome) and political (or strategic) learning (when learning affects the power and influence positions of the actors).

Fourth, the paper also refers to policy strategies induced by institution-specific characteristics and logics of learning which are not covered by the three above conceptual layers of institutional learning.

## **Empirical part**

Through explaining-outcome process tracing methodology, the empirical part of the paper establishes the main characteristics of the three key EU institutions policy learning processes and tries to identify causal relations between the learning characteristics and the EU's policy responses to the threat posed by autocratizing member states.

### ***The European Commission***

As ‘Guardian of the Treaties’—the institutional enforcer of Member States’ compliance with European law—the European Commission has been at the forefront of addressing Hungary’s and Poland’s autocratization. Overall, the Commission launched 13 high-profile infringement procedures against the Hungarian government with relevance to Article 2 TEU and 6 high-profile infringement procedures against the Polish one. It deployed the rule of law framework against Poland in January 2016 and in the lack of genuine developments triggered Article 7(1) TEU in December 2017 but refused to initiate the similar proceedings vis-à-vis Hungary. Ultimately, in July 2021 the Commission suspended the disbursement of the European Recovery Funds for Hungary and Poland due to systemic concerns with the rule of law in both countries. Furthermore, although it refrained from the de facto implementation of the Conditionality Regulation in the spirit of the December 2020 EUCO compromise (Alemanno & Chamon 2020), in April 2022 the Commission sent its first official letter to the Hungarian government according to Article 6 of the Regulation 2020/2092, officially introducing the application of the “general regime of conditionality for the protection of the Union budget” against the country.

Meanwhile, the Commission invented several new instruments and added them to its own or the Union’s toolkit to enhance Member States’ compliance with Article 2 TEU values. Such instruments were the 2014 Rule of Law Framework, the monitoring mechanism called Rule of Law Review Cycle launched in 2020, the Conditionality Regulation 2020/2092, and the European Democracy Action Plan. (Pech 2020) It is important to note that both the Rule of Law Framework and the Conditionality Regulation was heavily opposed by the Council, questioning their legality several times. (Kochenov & Pech 2015; Scheppele et al 2018)

In spite of this track record, criticism toward the performance of the European Commission in terms of addressing and opposing Member States’ autocratization is widespread in the scholarly

community. The four most often mentioned critic points are that the Commission 1) rather focused on the development of new mechanism instead of the implementation of existing ones in order to emulate political activism but avoid conflict with autocratizing Member States, 2) neglected its available enforcement tools in favor of a dialogue-based compliance strategy with the Fidesz- and PiS regimes, 3) for various reasons, it treated Hungary and Poland differently, following a much softer approach with the former, and 4) referred from taking any risk in its litigation strategy and therefore was only open for legal innovations already embraced by the CJEU. (Batory 2016, Hegedus 2019)

This criticism appears to be well-founded if we undertake a periodization of the Commission's infringement strategy. In its earliest stage, represented by the cases of the early retirement of Hungarian judges (C-286/12) and the independence of the Hungarian data protection authority (C-288/12), the Commission proceeded with legal arguments and merits which allowed to win the cases before the CJEU, but failed to touch upon the real core of the threat to European values. Hence even the successfully concluded infringement procedures were not able to remedy the breach of European law and values in the respective cases. (Hegedus 2019)

In the second phase, represented among others by the Hungarian cases of the "lex CEU" (C-66/18), the "the lex NGO" (C-78/18) and the infringement procedures initiated against the Polish laws on the ordinary courts (C-192/18) and the supreme court (C-919/18), the Commission has been bolder in the construction of the legal merits, addressing the real breaches of EU law and also using regular references to the EU Charter of Fundamental Rights and—following the CJEU rulings in the 'Portuguese Judges' (C-64/16) and Celmer (C-216/18 PPU) cases—Article 19(1) TEU. Nevertheless, in this second phase the Commission's infringement and litigation strategy still remained dialogue based, as the Guardian of the Treaties systematically refrained from triggering Article 260 TFEU or from asking the CJEU for interim measures that may have allowed the suspension of implementation of the respective national norms.

In the third phase, introduced by the infringement procedure launched against the Polish disciplinary regime of judges (C-204/21) the Commission systemically started to apply the tools of interim measures and daily fines based on Article 260 TFEU in its litigation strategy, representing a remarkable shift from the much-criticized dialogue-based approach to a more hierarchical, enforcement-based one. Ultimately, this development of the Commission's infringement strategy is a clear evidence of instrumental learning, even if that was not the main learning pattern of the Commission over the period of the past decade.

Based on the empirical analysis of its infringement strategy, its institutional behavior in the Article 7 proceedings, and its long-lasting focus on the development of new policy instruments instead of policy implementation, the following conclusions can be drawn with regard of the institutional learning characteristics of the European Commission.

In the processual dimension of learning, concerning information acquisition and translation, at least until the launch of Rule of Law Review Cycle in 2020 the Commission consequently relied on its internal expertise and disregarded inputs from the academic and policy community. This led to a misinterpretation of autocratization processes in Poland and Hungary, the exclusive framing of autocratization in rule of law terms, and the rejection of the fact that systemic deficiencies of democracy and rule of law are present in Hungary, demonstrated by the Commission's refusal to trigger Article 7 TEU against the Orbán regime. This exclusion of the expert community from the information acquisition and translation processes until 2020 resulted in the nearly complete lack of epistemic learning for the Commission. This cost approximately 8 years for the 'Guardian of the Treaties' until it was able to optimize its infringement strategy to the realities of autocratization in Hungary and Poland; way too late to avoid the systemic dismantling of pluralist liberal democracy in both countries. (V-Dem 2021)



Regarding the learning modalities, due to its preference to learning as bargaining (via dialogue), the Commission practically refrained from imposing hierarchical learning modalities over autocratizing member states until 2021 even if the hierarchical nature of the infringement procedure as policy instrument would have allowed it. This claim is fully supported by the fact that in the past the Commission refrained from using Article 260 TFEU and imposing penalty payments over autocratizing EU Member State or from asking the CJEU to introduce interim measures. In contrast, in relation to the CJEU, the Commission was engaged in hierarchical learning, actively adjusting its infringement strategy to the case of law of the CJEU, as demonstrated by the prompt references to Article 19 (1) TEU in the court referrals of infringement procedures shortly after the Portuguese Judges and Celmer cases in 2018.

It is important to note that the process of learning via bargaining is bidirectional. The Commission has not only tried to influence the policy processes of other EU institutions and the autocratizing Member States that way, but has also been responsive to policy inputs, especially if received from the Council. The Council's sovereignty-centered discourse and its approach that repeatedly questioned the legality of the Commission's measures intended to enhance (or enforce) Member States' compliance with fundamental EU values seriously discouraged the European Commission from acting as a committed Guardian of the Treaties. This setup, which has had significant influence on the Commission's infringement strategy until 2021 has its roots in the realities of New Intergovernmentalism, in the Council's role as promoter of this kind of integration logic, and in the fact that the Commission accepted to be bound by the grand rules of New Intergovernmentalism in order to maintain constructive, dialogue-based cooperation with Member States throughout all EU policy fields.

Concerning the learning outputs, the European Commission appeared to be mostly led by political learning instead of instrumental learning. In the first decade of Hungary's autocratization it prioritized the preservation of its own institutional prerogatives and immaculate track record of cases won before the CJEU (Hegedus 2019) over the development and implementation of an effective enforcement practice. To guarantee its powers and positions within the institutional triangle, the Commission not only refused any instrumental policy initiatives of the European Parliament, but with its dialogue-based enforcement strategy it also accommodated the Member States in order not to threaten cooperation with the Council in other policy areas.

The dominance of political learning and the conditions imposed over the Commission by New Intergovernmentalism led to the development of some specific policy characteristics and strategies by the Guardian of the Treaties. On the one hand, in order to avoid serious confrontation with the Council and on the other hand to be able to preserve its own institutional prerogatives and to protect its own face and power position from the criticism exerted by the European Parliament, the Commission developed a distinct institutional policy strategy shaped by its learning experiences.

In the rule of law field the Commission appears to act as a policy entrepreneur, a "purposeful opportunist" (Cram 1993), in a very similar manner as the Commission approached European social policy at the end of the eighties and beginning of the nineties. As political learning impacted the choice of policy instruments, the Commission opted for a policy strategy that allowed both the minimalization of political and legal risks and potential conflicts with Member States and the Council and the preservation/maximalization of its competences as Guardian of the Treaties and that for minimal political costs. This strategy that has guided the Commission until 2021 was institution and norm building without the conflict-loaded proper enforcement of norms.

Observing this strategy in good faith, just as in case of the European social policy three decades earlier, the Commission has been incrementally developing an institutional and normative framework that enabled the roll-out of new powers and policy instruments (Rule of Law Framework, Conditionality Regulation) and the de facto establishment of an ambitious new policy field (rule of law protection), once the altering political position of Member States and the Council

allows it. When the Nordic and Benelux countries became highly critical towards the autocratization of Poland and Hungary over 2020 and 2021, this shift appeared to enable the above-mentioned strategic change in the infringement strategy of the Commission as well.

Observing the Commission's "purposeful opportunist" strategy from a realist perspective, the policy learning and policy innovations of the European Commission were not aimed at the developing of effective policy responses to the challenge of intra-EU autocratization. Instead of that the Commission developed policy responses that emulated the protection of EU values with minimal political cost and reduced the risks of an open political conflict with the respective Member States and the Council.

This "purposeful opportunist" policy entrepreneur strategy is the unique institutional approach of the European Commission that represents the fourth dimension of the conceptual policy learning framework in the Commission's case. Until 2021 the Commission only deviated from this strategy in partial and sectoral manner when external developments reduced political risks. This happened for example after the CJEU rulings in the Portuguese Judges and Celmer cases which allowed the Commission to directly address developments related to the independence of the judiciary in Poland through Article 19 (1) TEU. In this case the Commission was at the receiving end of a hierarchical learning process with the CJEU. Characteristically to the risk avoiding approach of the Commission, prior to these CJEU rulings the Guardian of the Treaties was not ready to test the applicability of Article 19 (1) TEU in infringement procedures. The legal and policy innovation was triggered in both cases via preliminary ruling procedures by national courts which didn't shy away from the political and legal risk of a potentially lost CJEU case, underlining the Commission's refusal of innovation via experimental learning.

### ***The Council of the European Union***

The behavior of the Council in addressing Member States' autocratization in the European Union is subject to intense criticism. (Kochenov et al 2016, Pech & Scheppele 2017, Hegedus 2019) Although some coordinated initiatives were put forward by Member States in protection of rule of law and democracy in Hungary and Poland, like the letter of the four foreign ministers in 2013<sup>1</sup> or the attempt by the Belgian MFA in 2018-2019 to succeed with the rule of law peer review in the Council, the Council's approach remained dominantly passive or even outrightly dismissive. This was mirrored by the stagnation of the Article 7 hearings in the Council, their intransparency, the lack of interest on the part of the Member States (Pech 2019), the prohibition of the Parliament's representation on the hearings, and the refusal to accept the Sargentini Report as reasoned proposal for the procedure against Hungary (Hegedus 2019). Furthermore, the Council seriously opposed and questioned the legality of the Commission's 2014 Rule of Law Framework (Kochenov & Pech 2015) and the Conditionality Regulation. (Scheppele et al 2018) As a single institutional innovation, in 2015 the Council launched its Rule of Law Dialogue Procedure (later Rule of Law Peer Review; Kochenov & Pech 2015), only to undermine the positions of the Rule of Law Framework according to the critics.

In the processual dimension of learning, concerning information acquisition and translation, apart from the Commission's reasoned opinion in the Article 7 procedure against Poland, the Council has solely relied on internal sources, the opinions of its Legal Service, and the information provided by the affected Member States during the Article 7 hearings. This situation is especially noteworthy in light of the abysmal legal track record of the Council's Legal Service in cases with Article 2 relevance (Scheppele et al 2018) and the sheer fact that the Article 7 hearings rather provided stages

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<sup>1</sup> Letter to Commission President José Manuel Barroso from 6 March 2013 signed by the foreign ministers of Denmark, Finland, Germany and The Netherlands. To its evaluation see: Scheppele – Kochenov – Grabowska-Moroz 2021.

for autocratizing governments to mislead and spread disinformation than to acquire genuine information about relevant developments.

A critical light is shed on the information acquisition practice of the Council also by the arguments mostly used by national governments against inter-state litigation to protect the rule of law and democracy through triggering Article 259 TFEU. According to these arguments, friends of the rule of law Member States cannot rely on relevant internal knowledge as they don't dispose of appropriate information about the democracy and rule of law situation in other Member States. (Hegedus 2022) So Member States themselves deem the information available to them unsatisfactory to make well-informed decisions about the quality of rule of law and democracy in autocratizing Member States, a rather straightforward criticism toward the information acquisition and management practice of the Council with regard to its Article 7 hearings.

In spite of the Council's obvious underperformance in this field and the related criticism, no steps are known by Member States to remedy the above situation. In a similar way to the European Commission, but in a more extreme manner, the Council consequently refused and refuses to rely on external academic or policy expertise, resulting in the total lack of epistemic learning on its part.

Regarding learning modalities, in conformity with the political realities of New Intergovernmentalism, the Council's dominant (and perhaps only) learning modality is learning as bargaining through intergovernmental and interinstitutional dialogue. While this interaction modality practically blocked the Commission from developing effective strategies to enforce Member States' compliance with democracy and rule of law—and thus fulfilled the Council's strategic political goal—it performed poorly in the dimension of instrumental learning. The obvious failure of the Council's dialogue-based (learning as bargaining) approach to constrain the autocratization of Hungary and Poland contributed to the emergence of 'friends of rule of law countries'<sup>2</sup> (Hegedüs 2022) group among the Member States which started to demand a harder, more enforcement-centered approach by the European Commission and created a critical cleavage between Member States in the rule of law debate.

Nevertheless, on the level of learning outcomes, political learning still appears to be the dominant outcome of the Council's learning process over the past 12 years. Although instrumental learning has obviously been present in Member States, most prominently in the friends of rule of law countries, at the level of the Council it is dominantly blocked. The policy innovations introduced by the Council, like the Rule of Law Peer-Review among the Member States, were primarily aimed at the strengthening of the Council's legitimacy and institutional position vis-à-vis the other members of the institutional triangle, hence can be considered as an outcome of political learning. It is overall questionable, whether this instrument contributed in any form to an improved protection of Article 2 TEU values in the European Union. (Kochenov-Pech 2015)

In light of the above developments, the Council's main political aim over the past decade appeared to be the protection of Member States' sovereignty from any "federalist" intervention of the European Commission or the Parliament into fields of competences which were widely perceived as domestic issues under national sovereignty. According to the understanding of the Council's Legal Service, the Treaties only envisage the Article 7 procedure as a tool to investigate and sanction Member States' non-compliance with Article 2 TEU, hence other mechanisms are not covered by the principle of conferral and hence can be considered as illegal. (Scheppele et al 2018) This approach of the Council seriously limited instrumental learning both at EU-level and in intergovernmental settings. Whether this approach might change through hierarchical learning in

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<sup>2</sup> The „Friends of Rule of Law Countries” is an informal political grouping of EU Member States committed to the enhancement of rule of law protection in the EU. The group is mostly dominated by the Benelux and Scandinavian countries.

light of the CJEU ruling in case C-156/21 on the legality of the Conditionality Regulation is at least questionable.

Regarding the unique characteristics of the Council's policy and institutional learning processes, decision making and policy formulation in the Council is caught in the Joint Decision Trap (JDT), caused by the opportunity of Member States to act as veto players. (Scharpf 1988, Radaelli & Dunlop 2013) As Scharpf argues, the direct representation of Member States and the unanimity principle as decision making modality make it impossible to override the concentrated interest of individual Member States in the Council, which in this case equates to the protection of Member States' sovereignty from supranational/federal interventions into their constitutional issues. (Scharpf 1988)

JDT offers a convincing explanation of the Council's passivity, its indecisiveness in the Article 7 proceedings and its destructive blocking role at the system level, within the EU's institutional triangle. However, Scharpf's original thesis has to be amended at two points. First, JDT is also present in the lack of unanimity provisions. This phenomenon has been visible at least on two occasions. First, in case of the Article 7 proceedings, where only Article 7 (2) would require unanimity, but the Council also refrained from decision making at the level of Article 7 (1) with 4/5 majority. Second, during the 2020 legislative saga of the Conditionality Regulation. The reason behind this phenomenon is that several issues which could be decided by qualified (or in case of Article 7 TEU with 4/5) majority in fact can be escalated to levels where unanimity is required, for example in the European Council. This has happened with the question of the Conditionality Regulation twice, during the July and December EUCOs in 2020, due to the fact that the regulation has been part of the MFF framework, and Hungary and Poland threatened to veto the whole MFF and Next Generation EU financial package.<sup>3</sup> Hence the presence of JDT is not dependent on the formal decision making modalities in a given situation, but from the obvious issue linkage and escalation potential present in the Council.

Second, it appears to be a kind of exaggeration that no learning is the default option under the conditions of JDT. (Scharpf 1988) Instrumental policy learning is indeed paralyzed, but political learning prevails. Unfortunately, this political learning results in a situation that in some respects the Council has become increasingly innovative and effective in protecting the sovereign rights of Member States'—including autocratizing Member States as well—and in blocking the policy innovations of other EU institutions. Ultimately, this behavior of the Council triggered and determined the risk and conflict avoiding strategy of the European Commission as well.

### ***The European Parliament***

Aside of the European Commission, the European Parliament has been the other EU institution that addressed the autocratization of Member States on a rather active and committed way. With regard to its toolkit, the European Parliament adopted numerous resolutions (non-binding political documents) about the democracy, rule of law and human rights situation in Poland and Hungary. In September 2018 it triggered Article 7 (1) TEU against the Hungarian government. Furthermore, the Parliament supported all policy innovations of the European Commission, and in the 2013 Tavares and 2016 in't Veld reports it also made its own proposals of institutional innovations to enhance the protection of democracy and rule of law in the EU.

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<sup>3</sup> On the December 2020 EUCO compromise that neutralized the Hungarian-Polish veto threat through the de facto temporal suspension of the application of the conditionality regulation see: Alemanno & Chamon 2020.

In the Tavares Report<sup>4</sup> it called for a comprehensive monitoring mechanism of fundamental EU values—a predecessor of the Rule of Law Review Cycle with much broader scope—and suggested to establish an “Article 2 Trilogue” between the Commission, the Parliament and the Council. Subsequently, in the later in’t Veld Report<sup>5</sup> the Parliament proposed the create a “Union Pact for democracy, the rule of law and fundamental rights” (in short: “DRF Pact”) via interinstitutional agreement and called the Commission to submit an elaborated proposal for a comprehensive monitoring mechanism of democracy, rule of law and fundamental rights in the European Union. None of these initiatives were supported either by the Commission or the Council.

The main reason behind the rejection by the other two institutions was the desire to preserve the status quo within the institutional triangle. Being a per se federalist institution and as such a challenger of the integration logic behind New Intergovernmentalism, the European Parliament also used its policy proposals and its activities aimed at the protection of democracy and rule of law in autocratizing Member States to strengthen its power position within the institutional triangle and potentially to gain new competences. Hence at the outcome side the above-mentioned policy innovations were also products of political learning.

However, the European Parliament has been the only institution within the institutional triangle until 2021 in case of which political learning supported and not undermined instrumental learning. Switching from a dialogue-based compliance strategy at EU level to an enforcement-based one—which was repeatedly demanded by the Parliament—has been and is the primal prerequisite of effectively containing autocratization in Hungary and Poland. While the strategic political interests of the European Parliament postulated a weakening of the logic of New Intergovernmentalism, they also inherently supported instrumental learning with regard to the effective protection of Article 2 TEU values.

Concerning the processual dimension of institutional learning, the Parliament has been the only institution which has been heavily relying on external academic and expert knowledge in the information acquisition and transformation phases. The respective committees of the parliament, and especially the LIBE committee, have regularly held expert hearing, the information service of the Parliament commissioned external analyses and reports on developments in autocratizing Member States (like Bayer et al 2019), and both crucial rapporteurs like Rui Tavares, Sophie in’t Veld or Judith Sargentini and the European political groups (see Scheppele et a 2021) actively liaised with and have built on the expertise of external academic and policy experts. In the dimension of translation, the utilization of expert knowledge resulted in the fact that the political resolutions of the Parliament focusing on the situation in Hungary and Poland demonstrated the best understanding of the systemic nature of authoritarian dynamics in these two countries, especially in comparison with the analysis presented in Commission and Council documents.

Regarding the modalities of learning, in a strongly related way the Parliament has been the only EU institution which appeared to be open to epistemical learning and the incorporation of external, scholarly and policy expertise in its learning processes. The presence of epistemical learning and the use of external, scholarly expertise appear to be partially responsible for the apparently better analytical performance (“translation performance”) of the Parliament. Furthermore, the Parliament is the only EU institution which shows some signs of social learning as well. The learning via bargaining and reflexive learning among MEPs and political groups and the openness to epistemical learning triggered a change of perception and understanding within the Parliament, among others

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<sup>4</sup> P7\_TA(2013)0315 – Report on the situation of fundamental rights: standards and practices in Hungary, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN>

<sup>5</sup> P8\_TA(2016)0409 – European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+0+DOC+XML+V0//EN>

also among former political allies of autocratizing governments, like the European People's Party. This change of perception in the EPP group became obvious through the triggering of the Article 7 procedure against Hungary which was supported by a large part of EPP MEPs. (Herman et al 2021)

Following the Commission's and the Council's refusal of the Parliament's policy proposals and thus also the horizontal learning and policy diffusion between the institutions, the European Parliament was also ready to establish hierarchical relations with its institutional peers. During the MFF negotiations in the summer and autumn of 2020 the Parliament made clear that it is also ready to veto the whole MFF package if the Council is not ready compromise on a hardened version of the Conditionality Regulation. In a similar manner, following the December 2020 EUCO compromise, the Parliament triggered a failure to act procedure against the European Commission due to the practical non-implementation of the Conditionality Regulation. Aside of the growing pressure from 'friends of the rule of law group', this later action of the Parliament might have been crucial to convince the European Commission to imitate more commitment as "Guardian of the Treaties" and make a further step away from the dialogue-based compliance strategy into the direction of an enforcement-based one that challenges the presuppositions of New Intergovernmentalism. The suspension of the European Recovery Fund for Hungary and Poland and the refusal to sign the cohesion policy framework agreement with Hungary in 2021-early 2022 by the Commission definitely point in this direction and demonstrate the Parliament's impact on the European Commission.

Concerning the output dimension of institutional learning, as mentioned above political and instrumental learning are both strongly present in case of the European Parliament. It is the specific institutional characteristic of the European Parliament that political and institutional interest of the Parliament are not weakening or undermining the policy innovations and strategies which are intended to enhance Member States' compliance with Article 2 TEU values, but are actually supporting them, in strong contrast to the case of the Commission and the Council. Hence instrumental and political learning processes are mutually supportive in the Parliament's case, usually culminating in a single policy strategy.

Despite the European Parliament's more constructive and ambitious approach to contain Member States' autocratization in the EU and its more positive policy learning performance, the EP's overall impact on how the European Union addresses autocratization in its Member States remains limited. This is mainly the consequence of the EU's actual institutional balance as established in the Treaties, the distribution of power and competences within the institutional triangle, the integration logic imposed by the rules of New Intergovernmentalism, and consequently the fact that the European Parliament has very limited competences to act on its own with a legal impact in defense of Article 2 TEU values.

## **Conclusion**

As the paper demonstrated, policy learning theory allows the construction of a conceptual framework that provides a comprehensive explanation of the EU responses to the threat of autocratizing Member States. Policy learning might even perform better than available theories, as it allows to reflect on the different functional logics of the individual EU institutions, while it also provides a holistic, comprehensive picture of the EU as a system through analyzing both the horizontal and vertical interactions among the three key institutions and the autocratizing Member States.

The four-dimensional conceptual framework of institutional learning developed for the purpose of this paper allows a fairly precise modelling of the policy and learning strategies of the European Commission, the Council, and the European Parliament, and demonstrates convincing explanatory

power to reveal the causal mechanism behind the institutions' policy formulation and implementation decisions.

The main reason behind the EU's policy failure to effectively respond to the autocratization of Hungary and Poland and to contain their democratic demise appears to be the inadequacy of the Commission's and the Council's policy learning characteristics and their policy strategies toward the authoritarian challenge. This inadequacy does not only resulted in flawed instrumental learning processes which ultimately produced deficient policy innovations and strategies. Due to the subordination of instrumental learning to policy learning, between 2010 and 2021 the preservation of the Commission's and the Council's institutional interests, power position and institutional prerogatives has had a clear primacy over providing adequate policy answers to the authoritarian challenge. Enforcing Member States' compliance with the founding values of the European Union appeared to be a second-ranking policy priority after all. Nevertheless since 2021 the Commission has shown certain signs that it gradually alters its dialogue-based compliance strategy to a rather enforcement-based one, which may be seen as an important sign of instrumental learning and as first step toward the liberation of the protection of EU fundamental values from the shackles imposed by the integration logic of New Intergovernmentalism.

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