

re:constitution

WORKING PAPER

Daniel Hegedüs

**Exploring the
Potential and Political
Feasibility of 'Biting
Intergovernmentalism'
in the EU**

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
c/o Forum Transregionale Studien e. V., Wallotstr. 14, 14193 Berlin

Daniel Hegedüs

Exploring the Potential and Political Feasibility of 'Biting Intergovernmentalism' in the EU
Working Papers, Forum Transregionale Studien 15/2023

DOI: <https://doi.org/10.25360/01-2023-00023>

Design: Plural | Severin Wucher

© Forum Transregionale Studien under CC BY-SA 4.0

The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health, Long-term Care and Gender Equality.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.

Abstract

The paper explores the potentials and political feasibility of intergovernmental measures aiming at the protection of democracy and the rule of law in the European Union. It pays special attention to the potential application of Article 259 of the Treaty on the Functioning of the European Union (TFEU) that allows autocratizing Member States to be referred to the Court of Justice of the European Union (CJEU) by another Member State ('biting intergovernmentalism').

Using an explorative, theory building approach based on the analysis of semi-structured stakeholder interviews, the paper concludes that 'biting intergovernmentalism' is subject to a collective action trap that withholds even the most committed 'friends of rule of law' countries from its application. According to the stakeholders' ruling perception of 'biting intergovernmentalism', Article 259 TFEU provides a secondary, complementary legal venue for Member States to protect the common good of EU law and uphold European values if the European Commission is unable to live up to its role as guardian of the treaties. Hence, due its perceived complementary role, the legal potentials enshrined in Article 259 TFEU cannot be fully realized under the given political conditions. Nevertheless, 'biting intergovernmentalism' can serve as a leverage over the European Commission through which Member States can influence the Commission's litigation strategy in direction of a more committed protection of democracy and the rule of law in the EU.

Based on the case studies of The Netherlands, Denmark, Belgium, Finland, Germany, and Sweden, the paper investigates the main variables that determine the approach of 'friends of rule of law' countries to 'biting intergovernmentalism' and argues that the protection of democracy and the rule of law by Member States is primarily a domestic bottom-up political process highly dependent from the existence and level of agenda setting and political entrepreneurship at the domestic stage.

Keywords: rule of law, 'biting internationalism', 'friends of rule of law', European Union, new intergovernmentalism

Suggested Citation:

Daniel Hegedüs, "Exploring the Potential and Political Feasibility of 'Biting Intergovernmentalism' in the EU", re:constitution Working Paper, Forum Transregionale Studien 15/2023, available at <https://reconstitution.eu/working-papers.html>

Exploring the Potential and Political Feasibility of 'Biting Intergovernmentalism' in the EU

Daniel Hegedüs¹

Introduction

During the past decade, the autocratization and rule of law demise of EU Member States evolved to one of the EU's key agenda items. As it has been demonstrated by the conclusions of the European Commission's rule of law review cycle², most Member States struggle with rule of law related challenges. However, the autocratization of two Member States – Hungary and Poland – clearly stands out, the extent of democratic decay being unique and unprecedented in these two countries in a European comparison.

For political and legal reasons, the findings of democracy measuring projects are recurrently disregarded by the European Commission and the Council of the EU when it comes to presenting and framing the anti-democratic dynamics in Hungary and Poland. Nevertheless, it must be noted that neither Freedom House³, nor V-Dem⁴ consider Hungary to be governed by a democratic regime anymore, while the autocratization of Poland is the fastest ever recorded since the start of the global authoritarian tide around 2005.⁵

However, the demolition of constitutional checks and balances, the homogenization of the media landscape and curtailing fundamental rights—especially those of vulnerable minority groups—through authoritarian policies did not only alter the face of Hungarian and Polish politics, but also left their mark on the European Union too. The Commission's institutional innovations and its struggle to live up to its role as guardian of the treaties are authoritarianism induced political and institutional dynamics. The triggering (and lapsing) of the Article 7 procedure, the European People's Party's years long hassle with its autocratizing

¹ The author serves as Senior Fellow at the German Marshall Fund of the United States. This research project was supported by the re:constitution Fellowship program, co-managed by Forum Transregionale Studien and Democracy Reporting International, funded by the Mercator Foundation.

² 2020 Rule of law report - Communication and country chapters, https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en [accessed: 05.12.2021].

2021 Rule of law report - Communication and country chapters, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en [accessed: 05.12.2021].

³ *The Antidemocratic Turn – Nations in Transit 2021*, Freedom House, <https://freedomhouse.org/report/nations-transit/2021/antidemocratic-turn> [accessed: 05.12.2021].

⁴ *Autocratization Turns Viral*, *V-Dem Democracy Report 2021*, <https://www.v-dem.net/files/25/DR%202021.pdf> [accessed: 05.12.2021].

⁵ Diamond, Larry (2015) 'Facing Up to the Democratic Recession', *Journal of Democracy* 26:1 (2015), 141-155.

Hungarian member party Fidesz, the rule of law conditionality regulation⁶ and the institutional conflicts around it can also be considered as authoritarianism induced dynamics in the political and legal framework of the European Union.

During the past decade, policy innovations⁷ and academic proposals⁸ mainly revolved around the question how the monitoring and enforcement of Member States' compliance with the rule of law could be improved through institutional and legal reforms at the level of the EU institutions. This strong focus mainly on the European Commission, the Court of Justice of the EU (CJEU) and the European Parliament has been fairly understandable in light of lacking intergovernmental engagement to protect the Union's founding values enshrined in Article 2 of the Treaty on European Union (TEU).⁹ Although some coordinated initiatives were put forward by Member States, like the letter of four foreign ministers in 2013¹⁰ or the attempt by the Belgian Ministry of Foreign Affairs 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 latter has been highlighted by the stalling Article 7 procedures, the Council's outright attacks on the Commission's various initiatives,¹¹ or by watering down the conditionality

⁶ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

⁷ Like the European Commission's 2014 Rule of Law Framework, the Rule of Law Review Cycle, Regulation 2020/2092 on the general regime of conditionality for the protection of the Union budget (the 'conditionality regulation') or the European Parliament's rule of law trilogue and DRF Expert Panel proposals put forward by the Tavares and in't Veld reports.

⁸ Without the list being exhaustive, one could mention Kim-Lane Scheppele's 'systemic infringement' (Scheppele 2013), Jan-Werner Müller's 'Copenhagen Commission' (Müller 2013) or Armin von Bogdandy's 'reverse Solange' (von Bogdandy et al 2012) proposals. See: Scheppele, Kim Lane (2013) 'EU Commission v. Hungary: The Case for the "Systemic Infringement Action"', *Verfassungsblog* 2013/11/22, <https://verfassungsblog.de/eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/>, Müller, Jan-Werner (2013) 'Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission', *Verfassungsblog* 2013/3/13, <https://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/> and von Bogdandy, Armin et al (2012) 'Reverse Solange—Protecting the essence of fundamental rights against EU Member States', *Common Market Law Review* 49:2, 489-519. [accessed: 05.12.2021].

⁹ According to Article 2 TEU, "*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.*"

¹⁰ 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, Kim Lane – Kochenov, Dimitry Vladimirovich – Grabowska-Moroz, Barbara (2021), 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European Law*, Volume 39, 2020, 106.

¹¹ Like questioning the legal base of the 2014 Rule of Law Framework and of the draft conditionality regulation with the highly restrictive and barely convincing legal argument that according to EU law issues related to the alleged violations of Article 2 TEU values can only be addressed via Article 7 TEU. To the critical analysis of the argumentation of the Council's Legal service see: Scheppele, Kim Lane – Pech, Laurent - Kelemen, R. Daniel (2018) 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism', *Verfassungsblog* 2018/11/12, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/> [accessed: 05.12.2021].

regulation under the German Council Presidency in 2020.¹² Ultimately, the rule of law peer review process established in the Council has also failed to produce positive developments regarding the monitoring of member states' compliance with the rule of law, hence it is fair to say that the initiative was rather instrumentalized to weaken the Commission's rule of law review cycle.¹³ Against this backdrop, it is no wonder that—with certain notable exceptions¹⁴—scholars mostly ignored the intergovernmental dimension of rule of law protection in the EU and literature on the topic remained scarce.

Nevertheless, in light of the Commission's rather obvious reluctance and inability to use all the available tools to contain the rule of law demise in autocratizing Member States until the deployment of the Conditionality Regulation against Hungary in 2022¹⁵, the intergovernmental dimension of rule of law protection once again started to gain importance after 2020. The process was set in motion by the strong and coordinated action of the 'Friends of the Rule of Law Countries'¹⁶ in support of the rule of law conditionality regulation during the Multiannual Financial Framework (MFF) negotiations and culminated in the 2021 motions of the Dutch and Danish parliaments asking their respective governments to trigger Article 259 TFEU¹⁷ and file a lawsuit at the CJEU against the Polish government.

¹² *EU budget conditionality: Is the rule of law being sold short?*, Democracy Reporting International, 30 September 2020, <https://democracy-reporting.org/en/office/EU/news/eu-budget-conditionality-is-the-rule-of-law-being-sold-short> [accessed: 05.12.2021].

¹³ Kochenov, Dimitry – Pech, Laurent (2015b) 'From bad to worse? On the Commission and the Council's rule of law initiatives', *Verfassungsblog* 2015/1/20, <https://verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/> [accessed: 05.12.2021].

¹⁴ One of the most remarkable attempts to explore the merits of Article 259 TFEU and the opportunities enshrined in the intergovernmental approach to the protection of the rule of law is definitely Dimitry Kochenov's pioneering work on 'Biting Intergovernmentalism: Kochenov, Dimitry (2015) 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', *Hague Journal on the Rule of Law* 7, 153–174.

¹⁵ See for example: Kochenov, Dimitry & Pech, Laurent (2015a) 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', *European Constitutional Law Review* 11, 512–540 or Scheppe – Kochenov – Grabowska-Moroz 2021.

¹⁶ Although member states most committed to the protection of the rule of law in the EU—The Netherlands, Denmark, Sweden and Finland—often refers to themselves as 'frugals', this paper uses the 'friends of the rule of law' label to refer to the group of countries actively engaged to promote (and enforce) compliance with Article 2 TEU values. The reason is that Austria, one of the most vocal proponents of the frugals, is obviously not part of the friends of the rule of law group, while other, definitely not frugal countries are, even if their engagement level remains below those of the four champions mentioned above. According to the understanding of this paper, Belgium, Denmark, Finland, Luxembourg, Germany, Portugal, Sweden and The Netherlands compose the "friends of the rule of law group", with France supporting their positions on case by case basis, but officially not identifying itself with the group.

¹⁷ According to Article 259 TFEU

„A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union. Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission. The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.”

This paper aims to fill a niche in the existing scholarly and policy literature. It focuses on the neglected intergovernmental dimension of rule of law protection, and instead of considering the opportunities provided by the legal tools available for member states to enhance their peers' compliance with EU values, it aims its attention at the political drivers that determine Member States' behavior with regard to the protection of rule of law in the EU.

In form of an explorative policy research based on semi-structured expert interviews¹⁸, the paper maps out what role do arguments of European law, European institutional politics, economy and geopolitics play in the policy formulation of 'friends of rule of law' countries with regard to the intergovernmental protection of EU law and European values.

The empirical research covers the case studies of The Netherlands, Denmark, Belgium, Finland, Germany and Sweden and these countries' considerations regarding the deployment of measures of 'biting intergovernmentalism'.

Within the scope of this paper, 'biting intergovernmentalism' is defined as the potential triggering of Article 259 TFEU and the deployment of other bilateral or coordinated multilateral intergovernmental measures aimed at autocratizing EU Member States in general, and at Hungary and Poland in particular. The political positions of the Member States in the Council with regard to the Article 7 procedures and various legislative processes in the EU with rule of law relevance lay outside of the scope of the definition and hence the focus of this study as well.

1. Testing the practical applicability of 'biting intergovernmentalism'

In his paper,¹⁹ exploring the legal merits of Article 259 TFEU, Dimitry Kochenov convincingly argues that from a legal perspective nothing stands in the way of Member States stepping in the place of the reluctant European Commission by referring autocratizing Member States to the CJEU in order to enforce compliance with European law and Article 2 TEU values.

Furthermore, Kochenov also claims that bringing breaches of the rule of law before the CJEU via Article 259 TFEU offers some distinct advantages over the dominant, infringement procedure (Article 258 TFEU) based enforcement praxis of the European Commission. He argues that for two reasons, Member States are less bound in their litigation strategies by the institutional realities of European politics than the European Commission is.

First, according to Kochenov, Member States are allegedly not so deeply dependent on the requirement of constant, genuine cooperation with an autocratizing Member State as the European Commission, which is in charge of the implementation and supervision of practically all EU policies. Second, allegedly Member States can take more risk before the CJEU in order

¹⁸ Overall 36 anonymous semi-structured stakeholder interviews were conducted in 2021 with experts working in the Prime Minister's Offices, Ministries of Foreign or European Affairs, the Permanent Representations to the European Union, in the national parliaments, academia and think tanks of the six countries covered by the geographical focus of the research.

¹⁹ Kochenov 2015.

to achieve a meaningful protection of the rule of law or democratic values, in contrast to the until 2022 usually risk-avoiding approach of the European Commission.

As it is convincingly documented, the European Commission has often refrained from escalating cases with rule of law relevance in order to preserve the 'dialogue'²⁰ with respective Member States and not to risk cooperation in other important policy fields. Regarding the sustained autocratization of Hungary and Poland, the Commission frequently refrained from triggering Article 260 and asking the CJEU to impose penalty payments in various cases or abstained from asking the Court to impose interim measures and suspend the implementation of the national laws being in the focus of the Commission's own infringement procedures and allegedly violating EU law.

Furthermore, the Commission often used merits that promised a comparably easy win of the respective cases before the CJEU but leaved the real core of the violation of EU law and EU values unaddressed and unrectified.²¹ The reason and motivation behind that litigation strategy was to maintain the Commission's track record of court cases won and to protect the narrative that 'the guardian of the treaties' practically wins all infringement cases brought before the CJEU.²² This risk minimizing approach resulted in the fact that the Commission became resistant and dismissive to legal innovations and—until the triggering of the Conditionality Regulations against Hungary in 2022—it refrained from following uncharted legal paths, even if those might have significantly contributed to the development of EU law and the protection of European values. The Commission practically never referred to Article 2 TEU in infringement merits. Furthermore, it only started to use Article 19 TEU in cases related to the governmental attacks against judicial independence in Poland when the CJEU already embraced the direct connection between Article 19 TEU and judicial independence in its Portuguese Judges²³ and Celmer²⁴ rulings. These two facts served as obvious evidence for the Commission's conservative and restrictive approach to EU law and its dismissive attitude toward potential legal innovations.

In order to overcome these intrinsic shortcomings of the Commission's enforcement policy, Kochenov suggests that an Article 259 TFEU based Member State action can be bolder and more experimental²⁵ than the Commission's infringement strategy and has the capacity to develop to a new, important venue of enforcing compliance with the rule of law. Nevertheless,

²⁰ Batory, Agnes (2016) 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration* 94:3, 685-699., Closa, Carlos (2019) 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance', *Journal of European Public Policy* 26:5, 696-716., and Hegedüs, Daniel (2019) *What Role for EU Institutions in Confronting Europe's Democracy and Rule of Law Crisis?*, The German Marshall Fund of the United States, 2019. <https://www.gmfus.org/publications/what-role-eu-institutions-confronting-europes-democracy-and-rule-law-crisis> [accessed: 05.12.2021].

²¹ See for example the case of forced early retirement of Hungarian judges, solely framed by the Commission as a case of age discrimination. C-286/12.

²² See details in Hegedüs 2019.

²³ C-64/16 Associação Sindical dos Juizes Portugueses.

²⁴ C-216/18 PPU.

²⁵ Kochenov also recommends to apply Kim Lane Scheppele's systemic infringement approach by the member states triggering Article 259 TFEU in order to address the systemic violation of Article 2 TEU values. Kochenov 2015.

he also notes that certain political changes are necessary to pave the way for a more widespread application of ‘biting intergovernmentalism’ in the European Union.

In order to test the political applicability of the ‘biting intergovernmentalism’ concept, one has to scrutinize the political dynamics of intergovernmental legal actions, the Member States’ own role concept regarding the protection of EU law and Article 2 TEU values, and ultimately, how they perceive ‘legal experimentalism’ before the CJEU.

Based on the aggregated data of the interview research conducted for the purpose of this study, there appears to be a broad consensus among stakeholders that the perceptions and political positions of the respective national elites in the ‘friends of rule of law’ countries are not necessarily supportive toward the ‘biting intergovernmentalism’ strategy.

Starting with the intergovernmental political dynamics, ‘biting intergovernmentalism’ appears to suffer from a collective action trap similar to the game theory model ‘tragedy of the commons’. A Member State intervening through Article 259 TFEU in the domestic politics of another, autocratizing EU Member State in order to uphold compliance with EU law and EU values, acts in the interest of the European Union as a whole to maintain the ‘common goods’ of the integration. However, it bears the costs of such an action (the negative repercussions on the bilateral relations, on issues of interest in the Council, on investors active in the autocratizing country, etc.) alone.

While the negative implications of the action could be mitigated via burden sharing, for example if likeminded countries join together in triggering Article 259 TFEU, an important aspect of the procedure works against burden sharing. The sheer fact that Article 259 TFEU can be activated by a single Member State, without any need to demonstrate individual harm or concern, solely in protection of the EU’s common good (Member States’ compliance with EU law), motivates other, potentially supportive Member States to pursue a free rider strategy.

Theoretically, they can benefit from the procedure if it results in enhanced compliance with EU law and constrains that way authoritarian dynamics in the EU, while they can avoid the negative repercussions of the litigation. This trap of collective action has an obvious chilling effect on the activation of Article 259 TFEU in defense of EU law and Article 2 TEU values. A potential plaintiff committed to act may be discouraged by the lack of burden sharing, while potential allies may be dissuaded by the availability of the free rider option. This model perfectly matches the dynamics behind the recent initiative of the Dutch parliament to refer the Polish government to the CJEU, as were highlighted by interview partners. In its answer²⁶ explaining why it refused to comply with the Tweede Kamer’s motion, the Dutch government underlined the lack of diplomatic support even under likeminded countries to join the litigation. Apparently not even the Hague’s closest allies, Denmark, Finland and Sweden were

²⁶ Reactie op de motie van het lid Groothuizen c.s. over onderzoek om Polen voor het Europese Hof van Justitie te dagen (Kamerstuk 35570-VI-58), https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z01938&did=2021D04274 [accessed: 05.12.2021].

ready to embrace the Dutch initiative, which—through the obvious lack of burden sharing—dissuaded the Dutch government from going alone.

In the history of European integration, Article 259 TFEU has only been activated nine times so far.²⁷ There are indeed some obscure cases among them, lacking any real connections to the compliance with EU law, as Dimitry Kochenov underlined.²⁸ However, as even the latest case—Czechia versus Poland on the lignite extraction activities in the Turów mine²⁹—suggests, Member States are ready to take well-founded legal actions against each other, even if they are close neighbors and regional allies, if their particular, objective national interests are at stake. However, being rational players, until now, EU Member States have refrained from referring each other to the CJEU without compelling objective national interest, solely in defense of the EU's common good, the compliance with EU law and Article 2 TEU values. Although the readiness to do so is definitely growing in light of the Dutch and Danish parliaments' Article 259 motions, but the collective action trap of 'biting intergovernmentalism' appears to be a significant hurdle to any such actions.

Concerning the Member States' own role concept with regard to the protection of democracy and the rule of law in the EU, there appears to be an overwhelming consensus, even in the torchbearer countries of the 'friends of rule of law' group, that Member States' actions always play a secondary, complementary role to the Commission's activities. Hence Member States' preferred way of action is providing support to the European Commission, for example by joining infringement cases with particularly high relevance in their court stages. That happened, among others, in the infringement case regarding the disciplinary chamber of the Polish Supreme Court³⁰, when Belgium, Denmark, the Netherlands, Finland and Sweden joined the Commission before the CJEU, or in case of the Hungarian NGO law³¹, when Sweden intervened in support of the Commission.

Member States undoubtedly perceive the application of Article 259 TFEU as an interference into the competences of the European Commission as guardian of the treaties, even if different Member States come to different conclusions about the practical applications of the legal tool. Belgian stakeholders, sharing a rather federalist and idealist attitude to the European integration, dominantly perceived any form of 'biting intergovernmentalism' as an attack on the prerogatives of the Commission and hence, excluded the option that the Belgian government would perform any such actions. In contrast, Dutch and Danish stakeholders mostly shared the opinion that Article 259 TFEU provides optional ways for the protection of democracy and rule of law in the EU in case of the Commission's negligence or inaction.

Consequently, there appears to be little political appetite to the application of 'biting intergovernmentalism' even apart of friend of rule of law countries as long as— according to the dominant perception—the Commission observes its role as guardian of the treaties. The fact that in the case C-791/19 the Commission ultimately asked the CJEU to order the

²⁷ As of December 2021.

²⁸ Kochenov 2015.

²⁹ Czechia v Poland C-121/21.

³⁰ Commission v Poland C-791/19.

³¹ Commission v Hungary C-78/18.

suspension of the Polish Disciplinary Chamber's activities in an interim measure deeply influenced the Dutch government's decision not to comply with the Tweede Kamer's Article 259 motion. The move successfully convinced the Dutch government that after playing softball with Warsaw for a long time, the Commission finally decided to pursue a litigation strategy more committed to the enforcement of the European values.

Unsurprisingly, legal experimentalism enjoys very limited support among stakeholders as well. According to the national stakeholders' perspectives in the 'friends of the rule of law' countries, Member States can take even less risk before the CJEU in potential Article 259 cases than the Commission can in its infringement procedures. Due to the negative repercussions on the bilateral relations, economic ties, and potential cooperation in the Council, "Member States only go to court if they are fully convinced that they will win" as a Dutch stakeholder set the record straight. In democracy and rule of law related cases, when Member States practically protect the European common good while bearing the negative consequences alone, this rule applies even more. Hence, it appears to be unrealistic to expect that Member States will embrace unproven legal innovations in their litigation strategies, like the systemic infringement approach³² or direct reference to Article 2 TEU in the merits.

These explorative findings of the interview research fit well to the broader theoretical frame of New Intergovernmentalism.³³ 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.³⁴ Enforcing compliance with Article 2 TEU values does not appear to be an exception from these general rules either. Member States adherence to deliberation and consent building is well-mirrored by the desire to maintain dialogue-based instruments, like the Council's rule of law peer review process or by the overall dynamics and bottlenecks of the Article 7 proceedings against Poland and Hungary. Any deviation from this main modus operandi towards more enforcement-based approaches, like the deployment of 'biting intergovernmentalism', entails significant political costs in exchange for questionable benefits for national governments.

However, deliberation and consent building are not only determining the intergovernmental dynamics related to the compliance with Article 2 TEU values, but apparently also the approach of the European Commission. From the perspective of New Intergovernmentalism, the above discussed shortcomings that frustrated the Commission's efforts to constrain the autocratization of Hungary and Poland are not bugs in the system, but features. When it comes to questions related to Article 2 TEU, the Commission is not behaving like a self-confident and independent supranational institution, authorized to enforce compliance with European law, but like a *primus inter pares* player in the institutional concert that has to

³² The acceptance of systemic infringements may alter very soon in the case law of CJEU and hence also in the litigation praxis of the Commission in light of the recent opinion of Advocate General Bobek in case C-55/20. See:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=243109&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=14845596> [accessed: 05.12.2021].

³³ Bickerton, Christopher J. – Hodson, Dermot – Puetter, Uwe (2015) *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*. Oxford University Press.

³⁴ Bickerton – Hodson – Puetter 2015, 30.

deliberate, garner political support and make political compromises according to the general rules of New Intergovernmentalism.

Concluding the section on the practical applicability of ‘biting intergovernmentalism’, the question emerges what role can Article 259 TFEU eventually play in the legal and institutional system of the European Union? In light of the stakeholders’ perception about its applicability, Article 259 TFEU rather appears to be a tool of leverage over the European Commission, through which Member States committed to Article 2 TEU values can adjust (and hopefully maintain) the Commission’s level and form of engagement as guardian of the treaties.

‘Biting intergovernmentalism’ indeed offers a legal venue to circumvent an idle or ill-faithed European Commission not ready to live up to its duties. But under the actual political conditions and ruling perceptions at Member States’ level, it appears to be nearly impossible to set up Article 259 TFEU as an independent legal venue of rule of law enforcement. Even if—as Dimitry Kochenov has proven—Article 259 TFEU harbors unexplored legal potentials, due to the political perceptions and dynamics that shape Member States’ approach to ‘biting intergovernmentalism’, that potentials will most likely remain unexplored also in the near future.

2. The drivers of state behavior behind ‘biting intergovernmentalism’

Following the overview of the main features of potential intergovernmental enforcement of EU law and Article 2 TEU values in the previous section, it is necessary to identify and conceptualize what political drivers influence Member States’ actions regarding the potential application of intergovernmental measures.

Using an explorative, theory-building approach and following the aggregation of the semi-structured expert interviews conducted with Belgian, Danish, Dutch, Finnish, German and Swedish stakeholders, domestic politicization, social attitudes, the main approach toward the European integration, and the intensity of bilateral ties appear to be the key drivers that determine the national positions of the ‘friends of rule of law’ countries.

Based on these macro drivers, the following driver matrix can be constructed.

Macro Driver	Driver	Trigger	Hurdle
Domestic politicization	Domestic agenda setting	X	
	Political entrepreneurship	X	
Social attitudes	High-level commitment to human rights and freedoms in the society	X	
Attitude/approach toward the European integration	Transactionalist approach	X	

	Federalist approach		X
Intensity of bilateral political and social ties	Distant relations with low level of social exchange	X	
	Close/neighbourly relations		X
Strength of economic ties		ambiguous	

2.1 Domestic Politicization, Agenda Setting and Political Entrepreneurship

As the Danish and Dutch cases demonstrate, ‘biting intergovernmentalism’ is far from being only a singular legal decision of a national government to trigger Article 259 TFEU; it is primarily a long, bottom-up political process at the domestic stage instead. Considered as a domestic political process, ‘biting intergovernmentalism’ has two necessary preconditions: public agenda setting; and political entrepreneurship. While the task of agenda setting can also be fulfilled by non-political actors, like media outlets or civil society watchdogs, ultimately the requirement to build a political project at national level in order to protect the rule of law in another EU member states definitely requires the activism of political players. In other words, it needs political entrepreneurship.

With regard to domestic politicization, one can see a distinct structural difference between Denmark and the Netherlands on the one hand, and the other ‘friends of rule of law’ countries on the other. In the Dutch case political parties, media, civil society, national courts, and the government of Prime Minister Rutte all played an important role in transforming the attacks on the rule of law and the abuse of EU funds in Hungary and Poland to a political issue, an agenda item in Dutch public debate and politics. Even if the term ‘rule of law’ seldom appears in the Danish media reporting on the EU’s autocratizing twins, a similar agenda setting coalition has emerged due to harsh discrimination of the LGBT+ community in Poland between Danish civil watchdogs, the media and politicians representing a large segment of the political spectrum. Most importantly, the idea to intervene in another EU country in order to protect fundamental EU values—judicial independence and the rule of law in the Dutch case and non-discrimination and LGBT+ rights in the Danish one—was transformed into a political project by a coalition of MPs and political parties. This kind of political entrepreneurship resulted in the two parliamentary motions³⁵ that asked the respective national governments to trigger Article 259 TFEU against Poland.

In the other ‘friends of rule of law’ countries, although different forms of agenda setting have been indeed present and even if national MPs and MEPs have participated in the agenda setting as well, no political players made the decision to invest resources in organized political action. Political entrepreneurship related to the issue of protection of fundamental rights or

³⁵ Motie van het lid Groothuizen c.s. over onderzoek om Polen voor het Europese Hof van Justitie te dagen, 26 November 2020, <https://www.tweedekamer.nl/kamerstukken/detail?id=2020Z22968&did=2020D48543>
 Forslag til folketingsbeslutning om dansk traktatkrænkelssag ved EU-Domstolen mod Polens indførsel af lgbtq-frie zoner, 9 March 2021, https://www.ft.dk/ripdf/samling/20201/beslutningsforslag/b266/20201_b266_som_fremsat.pdf [accessed: 05.12.2021].

the rule of law in other EU Member State has largely been absent in Belgium, Finland, Germany, and Sweden, although especially in Sweden certain potential on the political stage is definitely given. In light of the coalition agreement³⁶ of the German ‘traffic light’ coalition, the German political environment might be turning to be more supportive to political entrepreneurship as well.

In its current form, ‘biting intergovernmentalism’ remained stuck at the level of national parliaments. Nevertheless, the politicization of the violations of EU law and values in the domestic politics of ‘friends of rule of law’ countries appears to be a sine qua non, a necessary condition of any form of ‘biting intergovernmentalism’. Hence the existence and level of domestic political entrepreneurship can also serve as a litmus test for the future probability of intergovernmental actions. In the available cases, political entrepreneurship demonstrates very high correlation with intergovernmental activism for the protection of EU law and EU values, thus it may have a good predictive value for future developments.

As the cases of various ‘friends of rule of law’ countries demonstrate, rather different aspects of the authoritarian violations of EU law may resonate in the particular national contexts. This may be influenced by the dominant agenda setting actor, constitutional characteristics of the country, and social attitude structures. In Belgium, the Hungarian government’s attacks on media freedom have grabbed the headlines for a long time, as primarily the main Belgian media outlets fulfilled the agenda setting role, uploading their own sensitivities and preferences into the Belgian public debate on Hungary’s autocratization. In Denmark, a majoritarian democracy with a political tradition that puts few emphases on institutional and judicial constrains of popular will, the question of judicial independence resonated much less than in the Netherlands. However, the establishment of LGBTQ-free zones in Poland was able to mobilize Danish citizens and politicians as it was perceived as a straightforward attack on individual rights and freedoms which occupy an uncontested high position in the value hierarchy of the Danish society.

As these examples demonstrate, behind the façade of a unified block of ‘frugal countries’ concerned due to the potential abuse of EU funds in countries with systemic rule of law deficiencies, a multitude of domestic factors influence the dynamics of agenda setting and political entrepreneurship which may determine whether these countries are ready to deploy ‘biting intergovernmentalism’ one day or not.

2.2 Social value structure

In European comparison, the Dutch and Scandinavian societies demonstrate the highest social support for individual human rights and pluralist democracy according to European Social Survey (ESS) data.³⁷ As a general rule, this attitude structure may serve as a sociological explanation why Denmark, Finland, The Netherlands, and Sweden serve as the backbone of the ‘friends of rule of law’ group in the EU. As it was demonstrated in the section on domestic

³⁶ ‘Mehr Fortschritt wagen’ Koalitionsvertrag 2021-2025 zwischen der SPD, Bündnis90/Die Grünen und FDP, <https://www.spd.de/koalitionsvertrag2021/> [accessed: 05.12.2021].

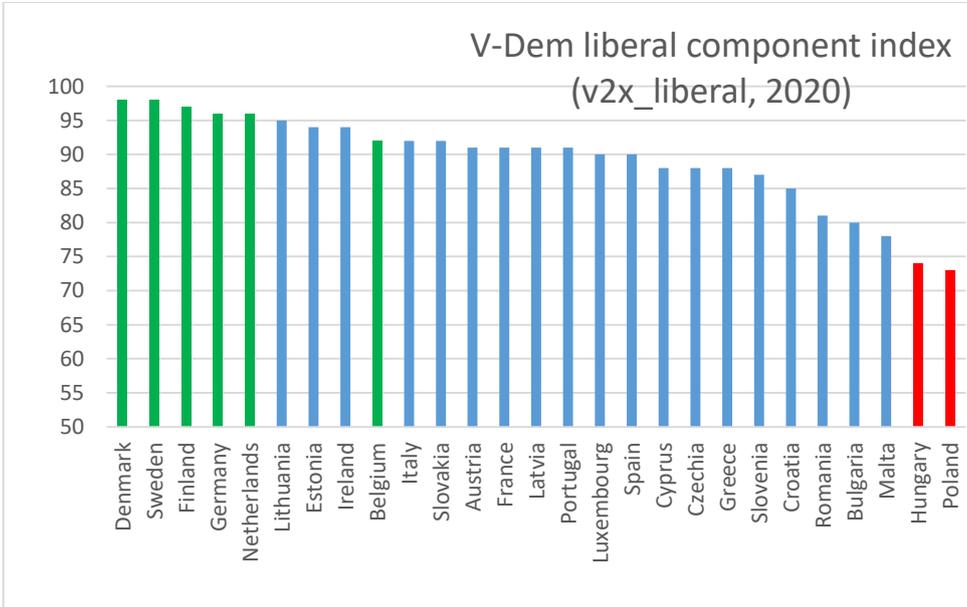
³⁷ ESS9 – European Social Survey 2018, <https://www.europeansocialsurvey.org/data/download.html?r=9> [accessed: 05.12.2021].

politicization, social attitudes determine the discursive and sociological environment in which the agenda setting dynamics and political entrepreneurship projects take place, offering either a fertile soil for them or dooming them to fail if the respective messages do not resonate in the social context.

However, considering the complexity of issues behind the deployment of ‘biting intergovernmentalism’, explanations based on social attitudes have their intrinsic limitations. It is difficult to address and explain with the help of social value surveys the existing differences among the ‘friends of the rule of law’ countries themselves, for example why the Netherlands and Denmark are potentially more open to undertake intergovernmental measures in protection of EU values than Sweden, Finland or even Germany. Furthermore, it is also challenging to identify particular attitudes or social values within ESS and similar surveys that might be sufficiently closely and directly linked to the active protection of the rule of law and other EU values. Nevertheless, membership in the group of the ‘friends of rule of law’ countries appears to show high correlation with two sets of attitudinal variables.

First, while social support for democracy alone is a highly volatile variable, with citizens of authoritarian countries or defective democracies (like Belarus or Poland) often showing more support to democracy than those of some established old democracies (like France e.g.), ‘friends of rule of law’ countries are distinguished by the fact that they are both the most liberal polities and democracies among the European countries³⁸ and their citizens are the most satisfied with the way how democracy works in the country³⁹.

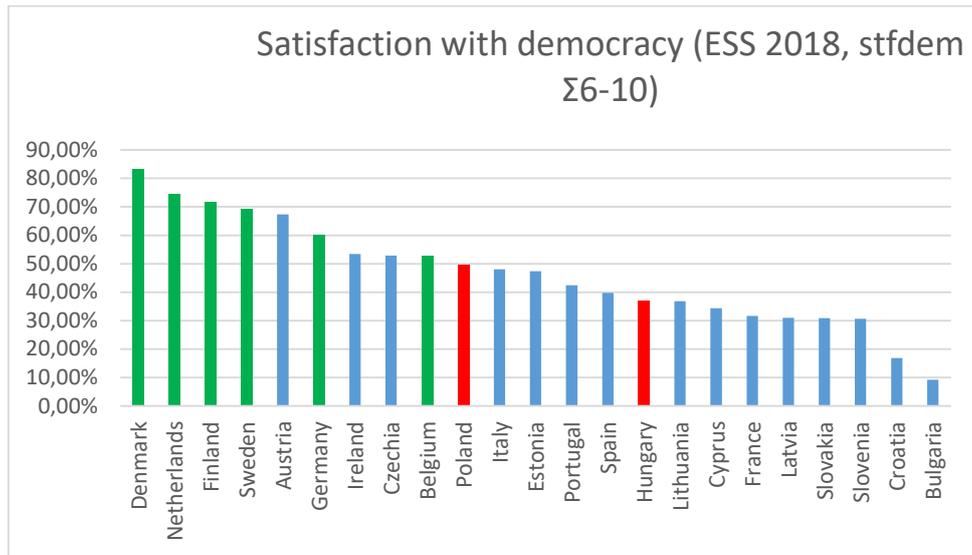
Quality of liberal democracy



³⁸ Measured with help of the V-Dem Liberal Component Index (v2x_liberal, 2020).

³⁹ Measured with help of the ESS Satisfaction with Democracy Index (stfdem, ESS 2018).

Satisfaction with democracy



Unfortunately, the stable, long-term coexistence of these two features is rather rare, hinting on the fact that the informal exclusivity of the ‘friends of the rule of law’ group is not an accident at all, but it has rather social structural determinants. These social determinants might be temporarily relativized by conscious policy choices of certain EU governments, like the socialist governments of António Costa did through shaping Portugal’s image as the Southern member of the ‘friends of rule of law’ group. However, even in such cases, the crucial role of the social determinants is often highlighted after certain time by choices of preference made by the same governments under the pressure of externalities. (Like it happened in case of Costa’s sudden agreement with Hungarian Prime Minister Orbán in July 2020 that linking the disbursement of EU funds to rule of law criteria would be a fatal mistake.⁴⁰)

Aside of the six countries in the focus of this study, there are only two further EU Member States which show the coexistence of both the high quality of liberal democracy and high support for the existing form of democracy in the society: Ireland and Austria. Against this background, Ireland’s actual rapprochement to the ‘friend of rule of law’ group⁴¹ and its growing activism in defense of EU values seems to be a rather natural development. In contrast, in Austria’s case—similarly to Germany under the Merkel Era—the dominance of the conservative people’s party ÖVP over the executive and especially the country’s close neighborhood relations to Hungary may damper similar developments.

Any other countries with high V-Dem liberal component values, like the Baltic States, France, Italy, Portugal or Slovakia, perform poorly with regard to the social support of democracy. Hence, the chance of political entrepreneurship in favor of the protection of EU values is much

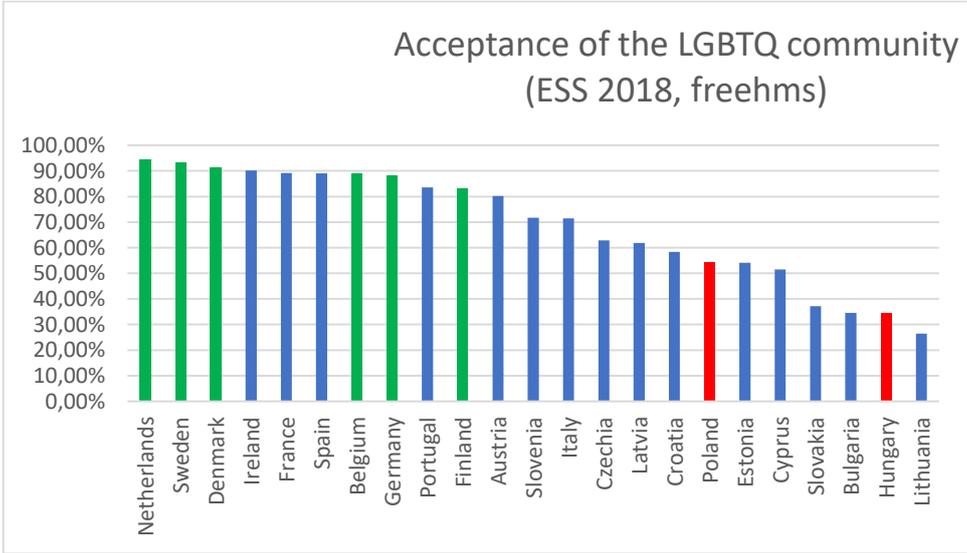
⁴⁰ Costa visita Orbán e defende que Estado de Direito não deve ser critério para fundos europeus, *Observador*, 14 July 2020, <https://observador.pt/2020/07/14/costa-visita-orban-e-defende-que-estado-de-direito-nao-deve-ser-criterio-para-fundos-europeus/> [accessed: 05.12.2021].

⁴¹ Is the EU’s rule-of-law report still relevant?, *Politico.eu*, 19 July 2021, <https://www.politico.eu/article/is-eu-rule-of-law-report-still-relevant-hungary-anti-lgbtq-poland/> [accessed: 05.12.2021].

more limited in these countries, as the likeliness of electoral reward for such actions appears to be much lower as well.

ESS does not provide social attitude variables that could be directly linked to the liberal values embraced in Article 2 TEU (like rule of law or individual freedoms) and in the same time would demonstrate a high degree of correlation with membership in the ‘friends of the rule of law’ group, except one. The acceptance of the LGBTQ community (freehms) variable deserves our attention also for two further reasons. First, due to the deliberate instrumentalization of the LGBTQ community as public enemy by the Polish and Hungarian governments, demonstrated by the Polish ‘LGBT Free Zone’ movement and the repeated legislative acts to curtail LGBTQ rights in Hungary.⁴² Second, due to the fact that the situation of the LGBTQ community in autocratizing EU Member States is high on the political agenda of the ‘friends of rule of law’ countries, and was the single key issue behind the Article 259 TFEU motion of the Danish parliament.

Acceptance of the LGBTQ community



The acceptance of the LGBTQ community variable once again demonstrates that there are only a handful of further countries in the EU where the existing social attitudes would create a favorable social context for political entrepreneurship confronting the violation of human rights and EU values in countries like Hungary or Poland. The list is nearly identical to those of above: Ireland, France, Spain, Portugal and Austria.

Summing this section up, social attitude structures should be rather seen as structural determinants that may create favorable environment for agenda setting and political entrepreneurship and not as a driver that may directly determine the potential of ‘biting intergovernmentalism’ in Member States. Nevertheless, the analysis of social values provides us an important conclusion. While Member States often emphasize the importance of collective action in larger groups and establishing cooperation beyond the circle of usual

⁴² EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people. European Commission – Press Release, 15 July 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668 [accessed: 05.12.2021].

suspects when it comes to the protection of the rule of law and other EU values, the potential to extend the group of ‘friends of the rule of law’ countries appears to be rather limited, if we consider social value preferences being important—even if indirect—determinants.

2.3 Approach to the European integration

Based on the game theory model of the collective action trap used in the first section above, one could expect that Member States highly committed to the idea of a federalist Europe may be more ready to bear the costs and negative consequences of ‘biting intergovernmentalism’ in order to safeguard the ‘common good’ of the European integration, the full compliance with the funding values like democracy or the rule of law.

Compared to this expectation, it appears to be rather counter-intuitive that those countries which went the farthest down the road to Article 259 TFEU—The Netherlands and Denmark—obviously belong to the Member States with rather pragmatic, if not even slightly Eurosceptic attitudes toward the integration. How can this contradiction be solved?

Based on the aggregated interview data, the domestic approach to the European integration appears to be a key enabling or blocking driver in a couple of countries subject to this analysis. In the case of Belgium, clearly the most federalist Member State in the ‘friends of rule of law’ group, critical attitudes among relevant stakeholders toward the European Commission (and its performance regarding the protection of democracy and rule of law) are extraordinarily rare. Measures that may be perceived as harmful toward the institutional position of the Commission, like circumventing the ‘guardian of the treaties’ and referring other Member States before the CJEU—an unquestioned institutional prerogative of the Commission—enjoy very low political support.

In contrast, the pragmatic and perhaps even slightly transactionalist approach to the EU—which characterizes the Danish, Dutch but also the Swedish politics—allows a more critical and more performance-centered look on the European integration and the role of the European Commission. This alone may not necessarily serve as a trigger for ‘biting intergovernmentalism’, but together with the social attitude structure of the Scandinavian countries and The Netherlands, it definitely does. More specifically, it allows a critical, performance-based stance toward the role of the Commission as guardian of the treaties and in case of the Commission’s perceived inaction it supports political strategies that may look for alternative routes to enforce compliance with EU law and Article 2 TEU values.

From the perspective of our game theory model, ‘biting intergovernmentalism’ appears to be a kind of altruistic action that protects the EU’s common good. However, in the given context the transactionalist and pragmatic—hence slightly self-interest driven—approach to the European integration may rather surprisingly serve as the door opener for exactly that kind of altruistic action.

2.4 Close links and neighborhood relations

The key role of political entrepreneurship in the bottom-up process of deploying biting intergovernmentalism may suggest that close social, cultural, historical, and political links between societies may serve as an important resource for political mobilization. However, empirical interview data once again points in the opposite direction.

Although Polish citizens play an increasingly important role on the Danish and Swedish labor markets, the intensity of people-to-people contacts, social and cultural links can be considered rather weak between the Scandinavian nations and Poland. Although Poland shares sea borders with both Denmark and Sweden, Poland is not necessarily considered to be a neighboring country. Relations to Hungary are even more distant—except in case of Finland which shares a common Finno-Ugric linguistic and cultural heritage with Hungary. In spite of the fact that The Netherlands houses a significant Hungarian and Polish diaspora, the perception of the intensity of social interaction with Hungary and Poland appears to be also weak from the Dutch perspective.

In strong contrast, historical, cultural and people to people ties between Germany, Hungary and Poland are perceivably much stronger, although the historical traumas of the 20th Century lay a significant burden on those relationships. Furthermore, Germany and Poland are neighboring countries with intense cross-border cooperation and exchange, twin-city management and significant horizontal Europeanization.⁴³ However, as a ‘friend of the rule of law country’, Germany focuses its—not always convincing⁴⁴—efforts on the level of European institutions. While usually vocal during the Article 7 hearings of Poland and Hungary in the Council, in its bilateral relations Berlin pursues a dialogue oriented and conflict-minimizing approach toward the autocratizing Hungarian and Polish governments, in which the toolkit of ‘biting intergovernmentalism’ has definitely no space at all. German stakeholders typically justify the country’s approach with arguments of historical responsibility, good neighborhood relations, the desire to maintain a constructive dialogue and not to cut ties to Budapest and Warsaw in the spirit of ‘speaking with and not about each other’. Against this background, it appears to be rather convincing that distance and the low-level of social exchange facilitate ‘biting intergovernmentalism’, while neighborhood relations and close cultural or historical ties may be hurdles to a more enforcement-centric approach toward autocratizing Member States.

This hypothesis is further supported by the position of several Central and Eastern European countries toward Poland and Hungary. Although democratic demise in the EU is often presented as a Central and Eastern European malaise, in fact certain countries and governments in the region are keen to demonstrate their commitment toward the rule of law and democratic values, like the Baltic States or typically the center-right coalition governments

⁴³ See for example: Sarmiento-Mirwaldt, Katja & Roman-Kamphaus, Urszula (2013) ‘Cross-border Cooperation in Central Europe: A Comparison of Culture and Policy Effectiveness in the Polish–German and Polish–Slovak Border Regions’, *Europe-Asia Studies* 65:8, 1621-1641.

⁴⁴ EU budget conditionality: Is the rule of law being sold short?, Democracy Reporting International, 30 September 2020, <https://democracy-reporting.org/en/office/EU/news/eu-budget-conditionality-is-the-rule-of-law-being-sold-short><https://democracy-reporting.org/eu-budget-conditionality-is-the-rule-of-law-being-sold-short/> [accessed: 05.12.2021].

of Czechia and Slovakia. In spite of that commitments, none of these countries ever joined the ‘friend of rule of law group’ or took a position before 2022 in the European-level political discussions about democratic demise that could have been interpreted by Budapest or Warsaw as unfriendly moves. The reason behind this is obviously the prioritization of good neighborhood relations and the intense, multifaceted ties between these countries and societies. On the one hand, Slovakia is not only neighboring both Hungary and Poland, but is part of the regional Visegrad cooperation and maintains intense economic exchange and cross-border cooperation with the autocratizing twins. The Baltic States, on the other hand, do not only consider Poland as one of their key foreign policy and economic partners, but they are also seriously dependent on Poland as security provider in face of the Russian threat on the Eastern Flank of NATO.

Summing up, close ties and intense relations between countries act as hurdle to ‘biting intergovernmentalism’ and the protection of democracy and the rule of law, if Member States do not have compelling national interest to refer a neighboring country to the court.

2.5 Economic and investment ties and Geopolitical concerns

There are two further important drivers that may influence the deployment of ‘biting intergovernmentalism’—economic and investment ties and geopolitical considerations—but based on the results of the empirical research, their impact on the subject appears to be rather ambiguous.

Concerning economic and investment ties, The Netherlands is one of the most important country of origin of foreign direct investment (FDI) for Poland and Hungary and has a considerable trade volume with both autocratizing countries, at least from a Hungarian and Polish perspective. All Scandinavian countries maintain non-neglectable trade relations and investment ties to Poland, while Sweden’s Saab is one of key defense contractors of the Hungarian armed forces. Germany is the number one trading partner and top country of origin of FDI in case of both autocratizing countries.

However, while Dutch interview partners dominantly reflect to the existing economic and investment ties as key triggers behind the Dutch politics’ rather critical approach toward the state of judicial independence and the rule of law in Poland and Hungary, in case of Germany, business circles and the industry serve as the last lines of defense for both Budapest and Warsaw, often softening up the German diplomatic positions and influencing them in favor of the autocratizing twins.⁴⁵

How can this discrepancy between the characteristics of the Dutch and German cases be explained? The political lobby power of key business groups appears to be the crucial sub-variable that determines the impact of economic and investment ties on the readiness to use the toolkit of ‘biting intergovernmentalism’. The manufacturing companies that dominate the perception of the German business community on the investment climate of Hungary and Poland are highly welcome in both countries and enjoy the benefits of direct political channels

⁴⁵ To the mutually protective relationship between the German industry and the Hungarian government see: Szabolcs Panyi: ‘How Orbán played Germany, Europe’s great power’, *Direkt36*, <https://www.direkt36.hu/en/a-magyar-nemet-kapcsolatok-rejtett-tortenete/> [accessed: 05.12.2021].

to regulatory authorities or the governments themselves. This is especially the case in the relationship between the German automotive industry and the Hungarian government. As a German stakeholder put it straight in one of the research interviews: “Rule of law is good. But red carpet is better”. Economic sectors, where German capital is unwelcomed in Hungary and Poland, like the media market, are largely unable to shape the rather positive German perceptions on the investment environment.

In contrast, Dutch investors and companies operating on the Polish and Hungarian markets seldom dispose about close ties to the respective governments. Nor can they enjoy the effective political protection of the Dutch government, as—due to the lack of effective leverage—this latter is barely in the position to safeguard Dutch investors from arbitrary actions in Hungary or Poland. Against this backdrop, Dutch companies are fundamentally interested in predictable investment environment, in a well-functioning, independent judiciary and compliance with the rule of law. In order to maintain the legal environment essential to their operations in Hungary and Poland, where arbitrary regulatory actions against foreign investors are becoming increasingly common, Dutch companies intensely lobby their government to reinforce the institutional framework of rule of law compliance—and its enforcement—at EU level. This way, they are obviously contributing to a climate in Dutch politics that may be ultimately supportive toward the concept of ‘biting intergovernmentalism’ as well.

The positions of the Belgian, Danish, Finnish and Swedish business communities are situated between the two extremes of Germany and the Netherlands, the Belgian position being closer to the German, while the Swedish, Danish and Finnish position to the Dutch one. Nevertheless, due to the less intense trade and investment ties, their motivation to influence government policies is definitely lower, with the notable exception of Sweden’s Saab.

Overall, trade relations of the six ‘friends of rule of law’ countries with Hungary and Poland are largely asymmetric and have much higher importance for Hungary and Poland than for their trading partners.⁴⁶ Regarding foreign direct investment, the relationship is even more one-sided. Both Germany and The Netherlands are among the top countries of origin of foreign direct investment in both Hungary and Poland, underlining the source of motivation for Dutch business to raise its voice with regard to the protection of the rule of law in the European Union.⁴⁷

In contrast to the unambiguous effect of trade and investment relations on the potential of ‘biting intergovernmentalism’, the impact of geopolitical considerations on the subject appeared to be simply irrelevant in light of the interview data gathered and aggregated in 2021. Practically all interviews and case studies pointed in the surprising direction that

⁴⁶ With the notable exception of Finnish-Hungarian trade relations which are practically non-existent.

⁴⁷ The statistics showcasing the trade and investment ties between Hungary, Poland, and the six ‘friends of the rule of law’ countries subject to this study are available in the Annex. As neither the Scandinavian central banks nor the Polish National Bank provides appropriate and comparable outgoing/incoming FDI stock data, in case of Poland solely incoming FDI flow statistics are used to demonstrate the weight of these six countries as FDI sources for Poland. (Hungarian FDI flow statistics are provided for the sake of comparison.) The author is well aware of the limitations of this approach. In case of Hungary, where appropriate FDI stock statistics are available, stock data is also provided in the Annex.

geopolitical considerations appear to be of very limited importance to ‘biting intergovernmentalism’. Dominantly, Dutch stakeholders expressed concerns over Hungary’s overly cordial relations to Russia and China. However, they also underlined that it is extremely difficult to anchor geopolitical concerns in legal reasoning intended to focus on particular features of domestic autocratization, even if the link between the authoritarian developments and the country’s relationship with Beijing and the Kremlin appears to be obvious in Hungary’s case.

In contrast, Poland’s dominantly positive geopolitical and security provider role on the Eastern Flank of NATO appeared to be rather unnoticed, hence in the past it has not constituted a considerable hurdle to ‘biting intergovernmentalism’ measures either. Surprisingly, Danish, Swedish and Finnish stakeholders dominantly has not considered Poland as an important security provider in the Baltic region, irrespectively of the fact whether they represented a NATO Member State (Denmark) or neutral countries (Sweden, Finland).

These results might have been partially biased through the fact that the interviews were mostly conducted with EU policy and legal experts, often lacking expertise in defense matters. Nevertheless, Russia’s full scale invasion of Ukraine in February 2022 has obviously changed the importance of geopolitical considerations regarding the protection of rule of law and Article 2 TEU values within the European Union. Hungary’s pro-Russian foreign policy and its obstruction to measures supporting Ukraine has obviously played a key role in alienating the country’s Central European allies and in forging the necessary minorities in the Council to impose financial sanctions over the Hungarian government in frame of the Conditionality Regulation.⁴⁸ However, this political shift cannot be reflected in the interview research this paper is based on due to the time sequence of the events.

Summary and Policy Recommendations

In light of the above presented empirical results, it appears to be convincing that 1) domestic politicization, including the strength/presence of agenda setting and political entrepreneurship; 2) the social attitude structure; 3) the domestic attitudes and dominant national approach toward the European integration and 4) the strength of bilateral social, cultural, historical and political ties are the most important drivers that determine the plausibility whether the government of an EU member state is ready to deploy the toolkit of ‘biting intergovernmentalism’ in order to refer another EU Member State before the CJEU due to the alleged violations of EU law and Article 2 TEU values.

Based on the aggregated interview data, ‘biting intergovernmentalism’ appears to be a rather secondary, supplementary tool to the Commission’s role as guardian of the treaties, even from the perspective of the most committed ‘friends or the rule of law’ countries. Hence, the political context does not support the realization of the legal potentials enshrined in Article

⁴⁸ Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary. Council of the EU – Press Release, 12 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/> [accessed: 30.01.2023].

259 TFEU. The concept of ‘biting intergovernmentalism’ should be rather perceived as an auxiliary legal and political tool. It may allow ‘friends of rule of law’ countries to put leverage on the European Commission and influence the litigation strategy of the guardian of the treaties toward a more committed protection of democracy and the rule of law in the EU.

A more widespread application of ‘biting intergovernmentalism’ would require a solution to the collective action trap that hampers the triggering of Article 259 TFEU. In the actual political context, the trap could be overcome by coordinated domestic agenda setting and political entrepreneurship in a larger number of ‘friends of rule of law’ countries, anchoring the issue of authoritarian developments in the EU in the domestic political arena and building political projects around them.

In this spirit, the ‘burden sharing’ challenge to ‘biting intergovernmentalism’ could be mitigated for example by coordinated actions of the national parliaments. Appointing rapporteurs, adopting political resolutions, and submitting Article 259 motions simultaneously, in a coordinated way in several national parliaments, could be the way how governments of the ‘friends of the rule of law’ countries could potentially be convinced to abandon their free rider strategy and share the costs and burdens of ‘biting intergovernmentalism’ with each other. The protection of EU law and EU values by the Member States is a bottom-up political process that is actually stuck in a ‘biting parliamentarism’ stage. The last step to real ‘biting intergovernmentalism’ and the activation of Article 259 TFEU against autocratizing Member States can be overcome by increased coordination among likeminded ‘friends of the rule of law’ countries and their respective national parliaments.

Bibliography

Batory, Agnes (2016) 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration* 94:3, 685-699.

Bickerton, Christopher J. – Hodson, Dermot – Puetter, Uwe (2015) *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*. Oxford University Press.

von Bogdandy, Armin et al (2012) 'Reverse Solange—Protecting the essence of fundamental rights against EU Member States', *Common Market Law Review* 49:2, 489-519.

Closa, Carlos (2019) 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance', *Journal of European Public Policy* 26:5, 696-716.

Diamond, Larry (2015) 'Facing Up to the Democratic Recession', *Journal of Democracy* 26:1 (2015), 141-155.

Hegedüs, Daniel (2019) *What Role for EU Institutions in Confronting Europe's Democracy and Rule of Law Crisis?*, The German Marshall Fund of the United States, 2019. <https://www.gmfus.org/publications/what-role-eu-institutions-confronting-europes-democracy-and-rule-law-crisis>

Kochenov, Dimitry (2015) 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', *Hague Journal on the Rule Law* 7, 153–174.

Kochenov, Dimitry & Pech, Laurent (2015a) 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', *European Constitutional Law Review* 11, 512–540.

Kochenov, Dimitry – Pech, Laurent (2015b) 'From bad to worse? On the Commission and the Council's rule of law initiatives', *Verfassungsblog* 2015/1/20, <https://verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/>.

Müller, Jan-Werner (2013) 'Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission', *Verfassungsblog* 2013/3/13, <https://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/>.

Sarmiento-Mirwaldt, Katja & Roman-Kamphaus, Urszula (2013) 'Cross-border Cooperation in Central Europe: A Comparison of Culture and Policy Effectiveness in the Polish–German and Polish–Slovak Border Regions', *Europe-Asia Studies* 65:8, 1621-1641.

Scheppele, Kim Lane (2013) 'EU Commission v. Hungary: The Case for the "Systemic Infringement Action"', *Verfassungsblog* 2013/11/22, <https://verfassungsblog.de/eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/>, DOI: 10.17176/20171006-142028.

Scheppele, Kim Lane – Pech, Laurent - Kelemen, R. Daniel (2018) 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's

EU budget-related rule of law mechanism', *Verfassungsblog* 2018/11/12, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

Scheppele, Kim Lane – Kochenov, Dimitry Vladimirovich – Grabowska-Moroz, Barbara (2021), 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European Law*, Volume 39, 2020, 3–121.

Hungary as trading partner for the 'friends of the rule of law' countries - 2019				
	Export %	Export ranking	Import %	Import ranking
Belgium	0,73	22	0,77	21
Denmark	0,6	28	0,87	20
Finland	0,39	36	0,64	25
Germany	2,01	14	2,8	13
Netherlands	0,98	18	0,69	30
Sweden	0,46	34	1,15	17

Poland as trading partner for the 'friends of the rule of law' countries - 2019				
	Export %	Export ranking	Import %	Import ranking
Belgium	2,14	8	1,53	14
Denmark	3,29	9	4,2	6
Finland	2,53	11	2,98	9
Germany	4,84	7	5,88	5
Netherlands	2,46	10	1,9	9
Sweden	3,2	11	4,56	8

Incoming Foreign Direct Investment - Poland, 2019		
Country of origin	Total FDI inflow (million EUR; 2019)	% of FDI inflow in 2019
Total World	9694,5	100,00%
Germany	2795,3	28,83%
Netherlands	2492,4	25,71%
Korea, Republic of (South Korea)	884,5	9,12%
Belgium	712,3	7,35%
United States	564,3	5,82%
Italy	453,9	4,68%
Hungary	430,2	4,44%
Denmark	331,7	3,42%
Austria	285,1	2,94%
Hong Kong	221,1	2,28%

⁴⁹ The source of trade statistics is <https://oec.world/en>.

FDI statistics are provided by the Polish National Bank

(<https://www.nbp.pl/homen.aspx?f=en/publikacje/ziben/ziben.html>) and the Hungarian National Bank (<https://statisztika.mnb.hu/idosor-783>).

Finland	211,6	2,18%
Czech Republic	200,9	2,07%
France	153,5	1,58%
Norway	151,4	1,56%
India	83,9	0,87%
China	80,6	0,83%
Switzerland	76,8	0,79%
Portugal	73,4	0,76%
Slovakia	56,6	0,58%
Latvia	39,4	0,41%
Japan	26,5	0,27%
Iceland	-5,6	-0,06%
Spain	-43,7	-0,45%
Ireland	-97,1	-1,00%
Russian Federation	-211,4	-2,18%
Sweden	-268,6	-2,77%
United Kingdom	-907,4	-9,36%

Foreign Direct Investment stock - Hungary, 2018		
Country of origin	Total FDI stock (million EUR; 2018)	% of the total FDI stock in 2018
Total World	80 392,1	100,00%
Germany	17 015,9	21,17%
Netherlands	15 130,6	18,82%
Austria	8 869,4	11,03%
Ireland	4 258,5	5,30%
Switzerland	4 126,7	5,13%
France	3 542,7	4,41%
Italy	2 752,9	3,42%
South Korea	2 469,3	3,07%
Belgium	1 859,1	2,31%
Cyprus	1 803,9	2,24%
Japan	1 139,3	1,42%
Poland	1 103,2	1,37%
Spain	957,4	1,19%
Denmark	938,3	1,17%
Russia	655,5	0,82%
United Kingdom	579,1	0,72%
Czech Republic	515,0	0,64%
Hong Kong	498,6	0,62%
Sweden	463,3	0,58%
United States	142,2	0,18%
China	126,8	0,16%
Norway	117,9	0,15%
Romania	117,5	0,15%

Finland	70,9	0,09%
India	2,3	0,00%

Forum Transregionale Studien e.V.
Wallotstraße 14
14193 Berlin
T: +49 (0) 30 89001-430
office@trafo-berlin.de
www.forum-transregionale-studien.de