

# DEFYING THE COMMISSION: CREATIVE COMPLIANCE AND RESPECT FOR THE RULE OF LAW IN THE EU

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This article investigates how and to what extent member states comply with EU obligations in terms of process and outcome. The aim is to demonstrate how norm-conform behaviour unfolds, or fails to unfold, in an interaction between a member state and the European Commission. The empirical focus is on recent rule of law crises in France, Hungary and Romania. The argument is that member states engage in symbolic and/or creative compliance, designed to create the appearance of norm-conform behaviour without giving up their original objectives. The cases illustrate that creative and symbolic compliance strategies may be successfully employed by member states because they enable the Commission to disengage from conflicts it judges too costly and yet maintain its credibility, and are conditioned by the visibility of failure to change facts on the ground. The implication is that, at times, not only is compliance symbolic, but also to some extent is enforcement.

## INTRODUCTION

Compliance with EU norms is a hot topic in both academic and policy circles. Do member states generally implement and uphold the laws and values of the Union, or does the EU face a compliance problem? Opinion is divided on the matter. Some scholars clearly see the EU as a 'success story in terms of compliance' (Zürn 2005, p. 38), and argue that its compliance record is 'extraordinary' by standards of international law and 'appropriately comparable' to national legal systems (Conant 2012, p. 1). Others believe that not only does the EU face a compliance problem, but violations of EU norms are increasing in frequency, levels, and visibility, to the extent that the EU might be nearing a tipping point of losing credibility (Falkner 2013, p. 14). Yet others point out that the answer to this question is simply not known, since particularly on the application of EU law researchers lack appropriate data (e.g. Börzel 2001; Treib 2014, p. 15).

Although this article clearly cannot – nor does it seek to – settle this dispute, it contributes to the discussion by suggesting that in order to get a fuller picture of the observance of EU obligations we need a more nuanced understanding of what compliance might mean in practice. Thus, the principal question investigated below is not why member states (do not) comply, which has been extensively studied in the literature, but rather how and to what extent compliance takes place in one particular area of interventions. Moving beyond a static dichotomy of compliance/non-compliance, the aim is to demonstrate how norm-conform behaviour unfolds, or fails to unfold, in an interaction between a member state and the European Commission, the EU institution chiefly tasked with ensuring the observance of obligations as guardian of the Treaties. To the extent that member states fail to comply, how do they defy the Commission – and get away with it? Rather than correct transposition, the benchmark is actual goal achievement, i.e. change on the ground prompted by Commission action, which is a better indicator of the 'effectiveness of EU law' (Snyder 1993, p. 19).

The empirical focus of the article is the Commission's responses to (alleged) violations of the rule of law in the member states: the French government's expulsions of Roma migrants in summer 2010; Hungary's constitutional crisis reaching its height in 2012–13;

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and the Romanian government's attempt to remove the incumbent president through emergency decrees in 2012. There is no suggestion that the three cases were equally 'grave' from a normative point of view, but the Commission itself framed them as 'systemic rule of law problems' (Reding 2013). Indeed, Commission Vice-President for Justice, Fundamental Rights and Citizenship Viviane Reding justified the need for a new rule of law mechanism in 2013 by making explicit reference to these 'crisis events' (Reding 2013). This is an important benchmark since the Commission has complete discretion in deciding which battles to pick: it responds to violations it is 'able to detect and ... willing to enforce' (Treib 2014, p. 19). At the same time, in terms of research design, the three cases offer suitable variation in the mix of instruments used, forms of compliance attained, and member state strategies.

The argument in brief is that member states evaded (further) Commission action by engaging in symbolic and/or creative compliance, designed to create the *appearance* of norm-conform behaviour. Conceptually, these terms build on the dual character of compliance in the EU context: on the one hand, aligning national law with EU law (in the case of directives, transposition) and, on the other, applying the norms to reach the intended policy objective (e.g. Falkner and Treib 2008; Conant 2012). Creative and symbolic compliance clear the first of these hurdles, but not the second – yet, depending on the Commission's ability and willingness to go beyond demanding legal alignment, they may satisfy requirements. By breaking down the dependent variable, creative and symbolic compliance usefully complement existing EU scholarship and more broadly implementation research. Furthermore, the case studies demonstrate that creative and symbolic compliance may be successfully employed because they enable the Commission to disengage from conflicts it judges too costly and yet maintain credibility. The Commission may go along with and even applaud the outcome because it shares an interest with the offending member state in avoiding a compliance crisis, even though the intended change is not achieved on the ground.

The salience of this issue in policy terms is beyond doubt. Concern over 'democratic backsliding' in Hungary and Romania, two of the cases reviewed below, has been widespread. The topic is also relatively under-studied, with implementation scholarship traditionally focusing on the application of EU law in market-making, regulatory or redistributive policies (Angelova *et al.* 2012). Unlike in the latter cases, rule of law protection rests on the foundational values of the Union, which are more open to interpretation and where Commission action is more circumscribed, to the extent that may amount to a justice deficit (Kochenov *et al.* 2014). These specific properties of the policy area may allow a greater than usual scope for member state defiance. Arguably, this field of activity is nonetheless relevant for studying (non-)compliance strategies more broadly. Although there exists a specific mechanism for dealing with rule of law violations (Article 7, further discussed below), in practice the Commission is left with its regular tools for bringing errant member states into line: political persuasion and enforcement action in the form of infringement procedures with potential referral to the European Court of Justice (ECJ).

Studying creative/symbolic compliance has its methodological challenges. General methods for confirming the authenticity of statements, i.e. that member state representatives mean to comply as claimed, such as anonymized surveys or comparing public statements with interview data (Müller 2004, p. 417), are not practicable: the 'population' of key officials is too small for quantitative methods such as surveys, whereas key government officials cannot be expected to disclose intention to circumvent Commission

action, since this would defeat the objective. Rather than looking for admissions of creative/symbolic strategies, the analysis thus traces the sequence of events and contrasts changing rhetoric with outcomes on the ground. For this, the article relies on a wide range of sources: Commission official documents, the Commissioners' and national leaders' speeches, coverage from Agence Europe, and news reports. The article begins with a section on the literature on implementation in the EU context which also discusses specific rule of law mechanisms. It then moves to a section conceptualizing compliance. The third section introduces and reviews the three cases. Finally the conclusion summarizes the argument and spells out the implications of the findings.

## RULE OF LAW MECHANISMS AND IMPLEMENTATION POLICY TOOLS IN THE EU

Article 2 TEU (the Treaty on the European Union) refers to the rule of law, together with respect for human dignity, freedom, democracy, equality, and for human rights as foundational values of the Union. The Commission considers the rule of law to encompass 'legality, ... legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law' (European Commission 2014, p. 4). Justice Commissioner Reding further defined the concept as 'a system where laws are applied and enforced (so not only "black letter of the law") but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws' (Reding 2013, p. 4).

The protection of fundamental rights and values *within* the EU has become 'a significant plank of EU policy' relatively recently (Dawson and Muir 2012). The incorporation of a value protection mechanism into the Amsterdam Treaty and its extension with a preventive dimension in the Nice Treaty were widely seen to reflect, first, a concern with potential instability in the EU's then only prospective Eastern members and, second, reactions to the 2000 'Haider affair' in Austria. In the latter case, involving the inclusion of the extreme-right Freedom Party in the Austrian government coalition, action from the 14 other member states took place largely outside EU frameworks, and was widely seen as a failure (Merlingen *et al.* 2001). The result, Article 7 TEU, allows for the suspension of voting rights in the Council in the case of a 'serious and persistent breach' of the EU's foundational values embodied in Article 2, and for an alert procedure in the case of 'a clear risk of a serious breach' that may trigger 'recommendations'. However, the required political support by the member states is so high – unanimity for sanctioning and four-fifths for the alert procedure – that the Article 7 procedures are widely seen to be impracticable (e.g. Dawson and Muir 2012; Closa *et al.* 2014).

This widely recognized unworkability of Article 7 resulted in a search for new instruments in scholarly as well as policy circles. The Commission launched a new rule of law framework in 2014. It creates a procedure in which, in a case of a threat to the rule of law 'of a systemic nature', the Commission enters into a dialogue with the member state, issues a recommendation and ultimately 'assess[es] the possibility of activating one of the mechanisms set out in Article 7 TEU' (European Commission 2014, p. 8). Although the framework has not yet been tested (and was not in place at the time of the crises reviewed below), the above limitations will likely also apply here, given that it merely creates an 'ante-room' to a possible Article 7 procedure. Thus, the Commission is effectively left with making the best of its regular implementation policy tools – designed for tackling specific violations of EU law rather than systemic problems – for putting pressure on errant member states.

These tools include formal instruments, notably the infringement procedure, and informal instruments such as shaming in press releases, scoreboards and other communication for creating social or normative pressure (e.g. Hartlapp 2007). All of these involve negotiation, since the Commission always attempts to resolve a case through a structured dialogue with the member state in question. But even when an infringement procedure is launched, the ‘processing of a case from one legal step … to the next [letter of formal notice; reasoned opinion; referral to the ECJ] entails a considerable degree of choice for the Commission’ (Mendrinou 1996, p. 12). The importance of the interaction and of Commission discretion in pursuing the matter (or otherwise) is shown by the high proportion of infringement procedures that never reach the stage of referral to the ECJ. As for variation in member state compliance without enforcement action, a wide range of variables have been identified, including ‘goodness of fit’ with national regulatory traditions; degree and cost of national adjustment to EU policies; member state (government) preferences; degree of formal EU powers in enforcement and monitoring in the given policy area; administrative efficiency; the need for coordination; the complexity of EU policy; learning effects; elite socialization; and culture of compliance (e.g. Neyer and Wolf 2005; Haverland and Romeijn 2007; Angelova *et al.* 2012; Conant 2012; Treib 2014).

As for prompting compliance, existing scholarship identifies, with some variation, the enforcement approach (working through incentives, primarily the threat of sanctions); the management approach (similarly building on incentives, but of the ‘enabling’ kind); and the persuasion approach (drawing on shared normative commitment; e.g. Checkel 2001; Tallberg 2002; Hartlapp 2007). This literature is grounded in the study of compliance in multi-level settings and more broadly the international relations literature, since both contexts share the absence of a central authority that would be able to enforce legal obligations through force – however, with the EU set apart by its unique features in institutionalizing supranational judicial and executive powers (e.g. Andersen 2012, pp. 6–9).

In practice, the Commission’s implementation strategy relies on a combination of formal and informal, and coercive and problem-solving instruments, bundled together to maximize leverage (Sedelmeier 2014, p. 113). The nature of the mix of tools varies from case to case, and from policy area to policy area, but legal formalism, in the sense of a focus on conformity with the letter of the law, and a preference for consensual tools over coercive action are common features of the Commission’s strategy. With respect to the infringement procedure, Rawlings (2000, pp. 8, 10) observes that the whole, elongated decision-making chain, from structured dialogue to steps within the infringement procedure, is designed to achieve ‘quiet accommodation with the member state’, with the Commission consistently emphasizing ‘the need to preserve the cooperative model of decision-making … [invoking] [m]utual trust and confidence’. Importantly, this preference for ‘quiet accommodation’ also allows the Commission to backtrack without too much external pressure, should it decide to do so.

## CONCEPTUALIZING COMPLIANCE IN THE EU CONTEXT

In policy studies (non-)compliance tends to come up as a problem of implementation, although the two terms are conceptually distinct (e.g. Hogwood and Gunn 1984, p. 197). In the simplest terms, compliance denotes the conformity of behaviour with a prescribed rule or objective, which is usually, but not necessarily, the outcome of policy implementation (e.g. Mazmanian and Sabatier 1989; Versluis 2007; Weaver 2014). The problem is that such conformity is often difficult to establish in practice: responses to requirements ‘challenge

simple dichotomies between compliance/non-compliance', at least in part because they are, 'at least at the margins, perpetually contested notions' (Zürn 2005, p. 9; Barnes and Burke 2006, p. 493). Recognizing this process of contestation which may or may not lead to rule conform behaviour enables a more nuanced mapping of reactions to obligations. In the EU, these may include 'recalcitrant compliance' (substantive compliance with a contested rule); 'initial non-compliance' when the addressee aligns its behaviour with the rule only following enforcement action; and stubborn refusal to conform with the rule even in the face of enforcement action, leading to a 'compliance crisis' (Zürn 2005). Viewing compliance as an iterative, relational, and contested process also points to the importance of framing and rhetorical action allowing either or both parties in a dispute to claim victory.

However, in the EU context substantive compliance (rule conform behaviour) itself can also be specified further, as putting (or having) EU laws in the book and/or as applying them on the ground. As Versluis (2007, p. 51) points out, 'a directive can be perfectly transposed into national legislation, but this does not necessarily lead to practical implementation as well'. Indeed, research showing that transposition may result in 'dead letters' or 'empty shells' problematizes this distinction (Falkner and Treib 2008; Dimitrova 2010). At least some of the resulting ambiguity can be captured by including two, partially overlapping, additional forms of (non-)compliance: symbolic and creative compliance.

Symbolic and creative compliance occur when an addressee, in this case a member state, pretends to align its behaviour with the prescribed rule or changes its behaviour in superficial ways that leave the addressee's original objective intact. The two strategies differ somewhat in that in the former the addressee puts legislative change in the books which, however, is never put into action, while in the latter the addressee accepts measures that, in their totality, render enforcement action inconsequential. Symbolic compliance is a gesture, adopted, like symbolic policy, 'because there is a need to *be seen* to be doing something' (Hill and Hupe 2012, p. 140). Creative compliance manipulates formal legal obligations so that they fail in 'capturing and controlling the substance rather than the form of a real life transaction or relationship' (McBarnet and Whelan 1991, p. 854). In Moran's (2002, p. 400) terms, it is 'ingenious obedience that ignores the spirit of regulation if it happens to get in the way'. Analogous concepts in implementation scholarship include Bardach's (1977) 'tokenism', and in the EU context 'tick the boxes implementation' whereby implementation requirements are fulfilled only 'nominally' by member states (Dimitrakopoulos and Richardson 2001) as well as 'fake compliance', observed by Noutcheva (2009, p. 1075) in the context of Western Balkans countries' response to EU foreign policy.

Symbolic and creative compliance, however, overlap in the most important aspect: producing an outcome that is aligned with the objectives of the violators, and defies the objectives of those establishing the rule or seeking redress against the breach of obligation. In both cases, compliance takes place on paper but not in spirit; EU law is put on the books, at least to the extent demanded, but its purpose is lost in practice. What distinguishes symbolic and creative compliance from, for instance, incorrect application is intentionality: they are 'conscious attempts by member states to dilute or undermine EU policy' (Dimitrakopoulos and Richardson 2001). Regarding under what circumstances symbolic and/or creative compliance is most likely to occur, the following case studies point to the importance of two factors: the political salience of the substantive issue at stake and the visibility of the discrepancy between the intended EU objective and real life developments on the ground.

## RULE OF LAW CRISES IN THE EU

To illustrate different patterns of compliance, the article now turns to the three cases described by Commissioner Reding (2013) as recent instances of 'true "rule of law" crisis': the French government's expulsions of Roma migrants in summer 2010; Hungary's constitutional crisis reaching its height in 2012–13; and the Romanian government's attempt to remove the incumbent president through emergency decrees in 2012. The French case has been subject primarily to legal analysis so far (e.g. Bennett 2011; Carrera 2013), while Hungary and Romania have mostly received attention as 'two of a kind', that is, as both cases showing the weakness of the EU's tools to enforce fundamental values (e.g. Dawson and Muir 2012; Falkner 2013; Müller 2013). A recent study by Sedelmeier (2014) compares the two country cases and finds that EU intervention was less effective in Hungary than in Romania, where both the Union's leverage and social pressure had a greater impact. Romania does indeed stand out, since the country was subject to the Cooperation and Verification Mechanism (CVM), although it should be noted that the CVM is rather 'toothless' when it comes to possible sanctions (Gateva 2010).

As will be shown, Romania also stands out as the only case where Commission action turned initial non-compliance into compliance, without the Romanian government being able to engage in symbolic/creative compliance strategies. As the following discussion argues, this is not only due to different degrees of pressure conditioned by the legal basis and political dynamics, but also the nature of the interaction between the Commission and the member state and of the changes sought by Commission action, principally the visibility of changes on the ground as prompted by the intervention.

### The 2010 expulsions of the Roma by the French government

The first case has a clear starting point: in a speech in July 2010, President Nicolas Sarkozy kicked off his election campaign by declaring a war on crime, entailing, among other things, a crack-down on Roma camps. In effect, the speech announced a policy of systematically removing settlements inhabited mainly by Romanian and Bulgarian nationals of Roma origin. The following contemporary commentary graphically described the practice that ensued:

Crews are showing up in shantytowns with bulldozers and backhoes, destroying the roofs of shacks or demolishing them completely. Before the demolition crews arrive, the residents are driven out by canine squads, often provided by private security firms. Then the police units arrive, together with teams wearing white overalls and facemasks, suggesting a need for disinfection ... [The government then releases] official statements to the effect that 700 Romanians were 'evacuated' from one location, 160 Bulgarians from another and 130 Roma from yet another camp. (Fichtner 2010)

Within a few months, about 300 or half the camps were eliminated but, since residents were offered monetary compensation for leaving, the French government claimed that the Roma departed voluntarily.

Although the expulsions continued throughout the summer, EU institutions stepped up action against the French authorities only in September. The European Parliament (EP) called for the expulsions to stop and, in an exceptionally strongly worded statement, also Justice Commissioner Reding. On 14 September she said she was 'appalled by a situation which gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority. This is a situation I had thought Europe would not have to witness again after the Second World War' (Reding 2010a). By then, the College of Commissioners had discussed a preliminary legal analysis of the situation and asked for clarification from France. In response, the

Commission was assured by two French ministers at a meeting that the policy had not targeted any ethnic group. Shortly before Reding's statement, however, a French interior ministry document revealed the disingenuousness of these assurances. An August circular to the police was leaked to the press, referring to the 'specific objective' of the President to remove 300 camps, 'particularly those of the Roma' (Ministry of Interior 2010). After the leak, the ministry quickly re-issued the same circular without the incriminating reference to the Roma, in an evident attempt at damage control – which, however, came too late. The Commissioner called the open contradiction between the formal reassurance given to the Commission and the ministry's instructions to the police a 'disgrace', adding that her 'patience was wearing thin: enough is enough' (Reding 2010a).

Reding (2010a) also announced that she 'was convinced that the Commission will have no choice but to initiate infringement action against France' on grounds of discriminatory application and lack of transposition of procedural and substantive guarantees of the Citizens 2004/38 Directive, thus framing the issue of Roma expulsions as a violation of freedom of movement within the EU rather than of human rights. Yet, Sarkozy decided to further escalate the conflict when, at a European Council summit on 16 September, he demanded that Commission President Barroso distance himself from, and apologize for, Reding's statements (*Euractiv* 17 September 2010). This did not happen, but neither did Sarkozy back down, and indicated his government's intention to continue dismantling the camps and expelling the Roma. At the end of September the Commission decided to start an infringement procedure unless France submitted by 15 October evidence, in the form of draft measures, of its intention to fully transpose the Directive (European Commission 2010).

This the French government did, hours before the deadline, thereby averting the risk of formal enforcement action. Two weeks later, French Interior Minister Eric Besson reported to the National Assembly that the government decided to 'make a gesture' to the Commission and formally fully transpose the Directive (quoted in Carrera 2013, p. 10). On her part, Viviane Reding noted that while '[t]he situation of Roma in France over this summer has raised substantial concerns' – the situation she was earlier 'appalled' by – she was now pleased that 'France has responded positively, constructively and in time to the Commission's request. ... France has thus done what the Commission had asked for', which has to be seen as 'proof of the good functioning of the European Union as a Community governed by the rule of law' (Reding 2010b). With this, the matter seems to have been brought to a satisfactory end for both parties involved – although perhaps not for the Roma. A year later Human Rights Watch (2011) warned that 'France has not fulfilled the commitments it undertook with the Commission in October 2010 ... French authorities have continued to pursue a policy that targets Roma from Eastern Europe for camp or squat evictions associated with removal orders.' The European Roma Rights Centre (2012) also found that France continued to engage in 'disguised forms of forced collective expulsions'.

### **Hungary's constitutional crisis (2011–13)**

The starting point for the next major test case for the Commission is the overwhelming electoral victory of Viktor Orbán's Fidesz in the April 2010 Hungarian elections. Having won a two-thirds majority, the new government proceeded, in several now widely known steps, to 'disable' the country's existing constitution and introduce a new basic law supported solely by Fidesz (see e.g. Bánkuti *et al.* 2012). The process involved systematically removing checks and balances by curbing the power of independent institutions – including those of the country's formerly formidable Constitutional

Court – and/or appointing Fidesz loyalists into key positions, such as that of the president of the republic, the head of the State Audit Office, the Electoral Commission and a newly created Media Council. The steps utilized loopholes and weaknesses in existing institutions leading to ‘a profound reshuffling and abuse of power’ through means that disregarded the spirit of existing constitutional frameworks without violating the letter of the law (Closa *et al.* 2014). In front of the EU, each new law was defended with the argument that ‘there was some law just like it somewhere in Europe’ (Scheppele 2013, p. 561).

Arguably, the EU was taken by surprise by the boldness of Orbán’s actions, and relatively slow to catch on. The first confrontation involved media legislation rather than the rule of law: a new law adopted at the end of 2010 introduced vague content requirements open to (partisan) interpretation and a Fidesz-controlled Media Council vested with wide-ranging sanctioning powers. The law was subject to widespread international criticism, notably from the Council of Europe and also the EP, as an attack on the freedom of the media. The Commission’s intervention framed the problem in terms of correct transposition of the Audiovisual Media Services Directive, i.e. as an issue to do with the single market rather than with civil and political rights. This allowed the Hungarian government to introduce a number of corrections that formally brought the legislation into line with Commission requirements yet left government control of the media regulator (chiefly through appointments already made) intact. At this point, the Commission went along with this, foregoing possible infringement procedures, which may well have been connected with the fact that Hungary held the rotating presidency of the Council in the first half of 2011 – making it difficult for the Commission to balance its role as guardian of the Treaties with its political role, especially as initiator of legislation, which requires a good working relationship with the member state managing the Council’s agenda (Batory 2014).

In April 2011 the new Hungarian basic law was adopted – replacing the old constitution without support from a single opposition MP in parliament and without confirmation through a referendum. The basic law was severely criticized by a number of forums including the Venice Commission of the Council of Europe, and was subject to heated debate in the European Parliament on the occasion of the conclusion of the Hungarian presidency, where, however, Fidesz continued to enjoy the support of its transnational party, the European People’s Party (Batory 2014). Finally, following the adoption of so-called cardinal laws implementing the basic law in December, in many respects disregarding the Commission’s criticisms raised at draft law stage, the body also stepped up action against the Hungarian government.

Initially, this took the form of political pressure. In February media commissioner Neelie Kroes raised the possibility that she would suggest to the Commission to resort to Article 7 if Hungary’s media legislation was not brought into line with Council of Europe standards (*EUobserver* 9 February 2012). But the Commission initiated infringement proceedings only with respect to specific measures affecting the independence of the Central Bank (namely that the law allowed the minister of finance to participate in Monetary Council meetings); the replacement of the Hungarian data protection commissioner, before his term expired, with a data protection authority; and the radical lowering of the compulsory retirement age of judges with immediate effect. The latter resulted in the removal of approximately 10 per cent of judges in one fell swoop.

The Commission’s picking on these specific issues gave the opportunity to the Hungarian government to present the problem as routine exchange, going as far as welcoming ‘an opportunity to engage in a technical dialogue’ with the Commission (*European Voice*

18 January 2012; Jenne and Mudde 2012, p. 150). Moreover, even with respect to these narrow goals, the Commission achieved at best mixed results. The Orbán government gave way on the Central Bank issue, since the Commission indicated that without it Hungary would not be allowed to start negotiations for requested EU/IMF financial assistance (Barroso 2012), knowing, however, that in two years' time the Central Bank governor's term would expire and the two-thirds majority would be able to appoint a more sympathetic successor. In the event, Orbán's minister of finance got the job in 2013.

The issue of the forced retirement of senior judges went all the way to the ECJ, with the Commission using age discrimination (Directive 2000/78) as legal grounds, and eventually won the case. The Court also ruled against the Hungarian government's sacking of the data protection commissioner in 2014, where the Commission had used the Data Protection Directive (95/46/EC) as legal base. In the meantime, however, the forcefully retired judges' positions had been filled with new appointments over which the new National Judicial Office (headed by the spouse of a prominent Fidesz MEP) had great influence. The Fidesz majority formally complied with the judgment by amending the relevant law on the judiciary with Act XX of 2013, which allowed for the reinstatement of the unlawfully retired judges as judges, but reappointment to previously held senior administrative positions only if those positions had not been filled in the meantime. The judges were given compensation only if they did not request their reinstatement. The data protection commissioner was given compensation but not reinstated.

Even before this skirmish was over, Viktor Orbán proceeded with his radical domestic agenda. On 11 March 2013, the super-majority adopted the fourth amendment to the basic law which, among others, reintroduced a number of provisions previously struck down by the Hungarian Constitutional Court. The Secretary-General of the Council of Europe and Commission President Barroso commented in a joint statement that this 'raise[d] concerns with respect to the principle of the rule of law, EU law and Council of Europe standards' (European Commission 2013). The Venice Commission (2013, p. 32) concluded that 'the Fourth Amendment perpetuates the problematic position of the President of the National Judicial Office, seriously undermines the possibilities of constitutional review in Hungary and endangers the constitutional system of checks and balances'. Commissioner Reding said in an interview that a constitution was not a 'plaything', it 'should not be changed every few months', and that the Commission would 'not hesitate to use all instruments at its disposal ... unless Hungary complies with EU law and the rule of law norms of the Council of Europe' (*Nepszava* 6 April 2013).

In the event, the Commission threatened infringement action over three issues – first, the possibility to transfer pending court cases by administrative decision, another regarding political campaign advertising and a third regarding the possibility for the government to introduce a special tax in case a court ruling resulted in a payment obligation for Hungary. Viktor Orbán dismissed the Commission's criticisms as politically motivated, and made it clear to a domestic audience that, since 'two [of the issues] have no significance, it causes us no pain to accept his [Barroso's], in my view, mistaken point of view' (*Vilaggazdaság* 19 April 2013). The 'offending' provisions were duly removed with yet another amendment of the basic law in September 2013. In all the cases, however, the changes had little impact in terms of reversing Fidesz' successful campaign to tailor the country's constitutional order to the party's partisan interests. Viviane Reding (2013, p. 6) nonetheless expressed satisfaction with the outcome: 'Hungary has respected the legal views of the Commission and has brought its constitution back in line with EU law with regard to all the points raised by the Commission.'

### The 2012 constitutional crisis in Romania

Like the two previous cases, the Romanian constitutional crisis too had its roots in domestic politics – the Social Liberal Union taking office (without an election) in May 2012, after which Prime Minister Victor Ponta's long-standing conflict with the incumbent president Traian Băsescu quickly escalated. The new government accused the president of abuse of powers and swiftly used its parliamentary majority to pass emergency decrees facilitating his removal from office. This included lowering the participation threshold for a referendum which would be required to impeach the president and, in response to the Constitutional Court's objection to this, also curbing the Court's powers. In July, parliament suspended Băsescu and removed the speakers of both houses who would have been next in line for the office of acting president, as well as the ombudsman who would have been in a position to petition the Constitutional Court. In just a few weeks, Ponta appeared to have rid himself of his main political opponent, having set aside all institutional constraints, and set the scene for a referendum which, given the president's unpopularity, would most likely endorse the impeachment.

The reaction from Brussels was swift and, crucially, explicitly framed as protecting respect for the rule of law. Barroso and Council President Van Rompuy issued strongly worded statements and Ponta was summoned to Brussels to explain himself. The timing was particularly conducive for EU action: the Cooperation and Verification Mechanism had been expected to be discontinued in the summer of 2012, but in the wake of these events the Commission used the publication of its report as leverage (Sedelmeier 2014, p. 117). On 18 July the report announced the prolongation of the Mechanism in light of the Romanian government's 'recent steps' which had 'raised serious doubts about the commitment to the respect of the rule of law or the understanding of the meaning of the rule of law in a pluralist democratic system' (European Commission 2012, pp. 2–3). The report also 'invited' the Romanian government to revoke the emergency decrees curtailing the Constitutional Court's powers; respect the Court's ruling on the quorum requirement for an impeachment referendum (which the Court had held was 50 per cent); and respect judicial independence. With this, the Commission effectively also demanded the restoration of a demanding participation threshold for the removal of Băsescu in a popular vote.

The Ponta government almost immediately backed down, and the Commission's January 2013 follow-up report found that most of its demands had indeed been complied with, including the requirement to restore the Constitutional Court's powers to review decisions adopted by parliament. But already much earlier, the, for Ponta, costliest concession was in evidence: the government accepted the Constitutional Court's ruling rendering the impeachment referendum invalid, and Băsescu was reinstated. (In the referendum, the vast majority of voters endorsed the president's impeachment, but turnout was well below the required 50 per cent.) In this case, Commission intervention indeed helped, as Viviane Reding (2013) commented, 'to bring the constitutional crisis to an end' in Romania.

### DISCUSSION AND CONCLUSIONS

The three rule of law crises reviewed here obviously differ in terms of the scale of challenge they presented for the EU's normative order. While France's expulsions of the Roma demarcated a narrow set of issues as problematic, both the Romanian and particularly Hungarian cases involved systemic, frontal attacks on the values embodied in Article 2. In terms of a temporal dimension, the Hungarian crisis stands out as long drawn out to the

extent that it is perhaps better described as a series of crises, whereas events in France and Romania were seen as one-offs. The range and repeated nature of norm violations mark out the Hungarian case as one where the Commission's task to induce norm-conform behaviour was most difficult: the Commission responded with the same mix of instruments which seemed to have less and less of a dampening effect on the Hungarian government's actions – Viktor Orbán having evidently evaluated Commission action as presenting no more than manageable risk. The Hungarian government was also very resistant to political pressure: the Commission had to resort to enforcement action in the form of infringement procedures (and the threat of withholding financial assistance, although not formally used as sanction), whereas vis-à-vis the French government infringement was merely threatened and in the Romanian case monitoring under the CVM was used.

As to how effective Commission intervention was, at least two interpretations are possible. In one, the body can be seen as taking action boldly and successfully until it reached the limits of its legal capacities. This interpretation is close to the Commission's own: Viviane Reding (2013, p. 6) felt that they were 'rather successful in dealing with these often very difficult and complex cases', intervening 'partly with strong words, sometimes with letters, and sometimes with Treaty infringement actions'. The benchmark for success was change in the relevant provisions of national legislation – and, indeed, in this respect all three member state governments ticked the box. However, in another interpretation the Commission's track record is considerably less impressive: in two of the cases, the outcome was symbolic compliance (France) or a mixture of symbolic and creative compliance (Hungary), whereas substantive compliance was achieved only with respect to Romania.

In the case of France, the Commission framed the issue of Roma expulsions as a violation of freedom of movement within the EU, and not as racial discrimination, and gradually relaxed the requirement to see evidence of change on the ground to seeing evidence of correct transposition. Despite this lowering of the bar, the French government first provided false information, then hoped that a cosmetic change in an incriminating administrative circular would satisfy the body, and finally agreed to fully transpose the relevant directive, but without actually ceasing the practice of eliminating Roma camps.

With respect to the Hungarian government, the Commission's framing of the removal of senior judges as age discrimination at the workplace, or objecting to the premature termination of the ombudsman as violation of EU law on data protection authorities, transformed broad normative concerns about weakening checks and balances into a series of technicalities. Even with respect to these specific issues, however, compliance was creative (the judges were allowed to return to the courts, but not to the high administrative positions they had been removed from, since those had been filled during their forced early retirement; the ombudsman was given compensation but his position was not reinstated) or symbolic (with the government backing off only to appoint a Fidesz loyalist as Central Bank governor down the line). None of the concessions prevented the Hungarian government from achieving its partisan goals. Commission action amounted to little more than chipping away at the edges of a new constitutional order cementing a single political party's hold on political power in an EU member state.

Only with respect to Romania did the Commission indeed prompt significant change. The crucial difference in this case was that merely creating the appearance of compliance was not possible: it would have been difficult for the Ponta government to pretend to have accepted the Constitutional Court's ruling while actually not doing so, given that this meant reinstating the president in office. In contrast, in the cases of France and Hungary what compliance means was obfuscated: member states affected legal alignment that

was not put into action or amounted to little more than a façade of change that could nonetheless be argued, and accepted by the Commission, as satisfying requirements.

In addition to the visibility of outcomes on the ground (the ease with which a particular outcome can be portrayed as being compliant), the cases reviewed also point to the importance of Commission leverage, conditioned by the legal basis of action and the salience and interplay of the issue with political dynamics on the EU level. In the case of Romania, the CVM afforded influence to the Commission that it did not possess vis-à-vis other member states. In the case of Hungary, the sweeping domestic changes gained momentum while the country occupied the rotating presidency, which, together with continued support for Fidesz within its transnational party federation, curtailed the Commission's freedom of manoeuvre and weakened the possibility of creating political support for action on the EU level.

Viewed together, the three cases suggest several conclusions about the adequacy of rule of law protection mechanisms in the EU, the way the Commission uses the tools at its disposal, and about compliance seen as a dynamic process of interaction. First, the Commission's tendency is to move away from its initial indications of a possible Article 2 (rule of law) violation to framing its actions in terms of secondary law. This is understandable since it cannot autonomously activate an Article 7 procedure and is thus reliant on enforcing EU legislation. However, while this allows the institution to base its actions on strong legal grounds in cases where an infringement procedure is launched, it also normalizes or even trivializes the offence, limits the political scope of action and introduces predictability and formalism into the exchange that member states may abuse. Violators' strategies may include rushing through wide-scale changes all at once, knowing that the Commission would pinpoint only a small number of the most controversial changes. Member states may also cherry pick, making concessions that are inconsequential from the point of view of the measure(s)' intended aim, yet allow the member state to claim to have been flexible. Member state governments may also simply pretend to comply and in practice ignore the spirit of the agreement reached with the Commission.

Second, it is worth spelling out that these practices mean that the member state in question acts with the purpose of circumventing and/or undermining Commission action – which is in itself a violation of an EU norm, the principle of sincere cooperation (embodied in Article 4 TEU). This also clearly points to the limits of the Commission's preferred soft tools: reaching an accommodation with member states hinges upon mutual trust, which in the cases reviewed was manifestly absent. Symbolic and creative compliance practices also put the Commission at a disadvantage since it remains bound by the formal and informal rules member states opt out of, at least from time to time.

Yet, even in this position of disadvantage the Commission cannot be seen to lose in the enforcement battles it picks. Law-abiding member states need to be reassured that the guardian of the Treaties is able to perform its role, otherwise, as Falkner (2013, p. 13) comments, the EU's entire legal order might 'degenerate'. And herein lies the other half of the explanation of why symbolic and creative compliance may carry the day. The Commission goes along with what is, essentially, the subversion of its authority because in the short term it shares an interest with the offender in creating the appearance of compliance in order to avert a broad compliance crisis. This is the main reason why, in recent high-profile cases of rule of law violations, the member state and the Commission both claimed victory – in practice, at least in two of the cases, allowing the former to defy the Commission and get away with it.

In the long run, however, this sort of pragmatism carries grave risks for the EU, particularly with respect to Article 2 violations: each instance of symbolic compliance being allowed to carry the day opens the door a little wider for future violations. The policy implications are clear: as Commission First Vice-President Frans Timmermans (2015) said, '[c]ompromising on values is compromising on the EU, weakening it and [eventually] bringing it to a standstill'. In this light, the search for workable mechanisms to safeguard the fundamental values of the EU is a pressing issue. Unfortunately, as discussed above, the Commission's (2014) Framework on the Rule of Law is unlikely to reinforce Article 7 mechanisms significantly, while other, potentially more productive proposals from outside the EU institutions, such as Scheppele's (2013) idea of systemic infringement action (bundling together several infringement actions under the banner of Article 2) have not yet gained traction.

The rule of law crises reviewed admittedly posed a difficult test for the Commission's ability to bring errant member states into line. In areas where obligations are more clearly spelled out, member states are likely to be less able to defy the guardian of the Treaties; indeed systematic comparison across issue and policy areas would be a fruitful avenue for further research. Conversely, comparison to other multi-level settings which lack the supranational features of the EU system, chiefly the enforcement powers of the Commission, may well find much greater scope for member states circumventing obligations. Nonetheless, in conceptual terms this discussion demonstrates that creative and symbolic compliance are useful categories for breaking down the dependent variable in implementation research. In the EU context, going beyond a static dichotomy of compliance/non-compliance allows for providing a fuller picture of member state responses, one that acknowledges a dimension of contestation in which substantive compliance unfolds or fails to unfold. Last but not least, the notions of symbolic and creative compliance draw attention to the, sometimes, wide gap between the spirit of (European) law and practices on the ground. Prompting formal change in particular pieces of national legislation, which is at the centre of the Commission's efforts as guardian of the Treaties, seems woefully insufficient for safeguarding the foundational values of the Union, particularly when faced with member state governments failing to act in the spirit of sincere cooperation.

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