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The Possibility and Desirability of Rule of Law Conditionality

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Abstract The paper claims that during the fight over the compliance with the core values of the EU pronounced in Article 2 TEU with backsliding Member States the EU institutions using both the traditional mechanism (infringement procedures and Article 7), and the newly established Rule of Law Framework have proven incapable of enforcing compliance, which considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of law oversight. Hence, new means of value conditionality should also be activated, such as cutting funds for member states that do not comply with certain basic institutional requirements of the rule of law. As the paper argues, this is possible through implementing the Common Provision Regulation, and can be carried out on a case-by-case basis. Putting conditionality into the Multiannual Financial Framework after the 2020 budget period is another potential avenue to enforce compliance with joint values.

1 Introduction

During the battle over the core values of the EU and its Member States pronounced in Article 2 TEU with the Hungarian and Polish governments, the EU institutions so far have proven incapable of enforcing compliance. After coming to the conclusion

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that the traditional mechanism of the infringement procedure[1] did not work, and in fear of the unanimity requirement for sanctions according to Article 7(2),[2] the Commission in 2014 tried to make the preventive mechanism of Article 7(1)[3] more effective by introducing the Rule of Law mechanism. Due to political considerations, it was not used against Hungary at all, and in the case of Poland, despite the very strongly worded successive Commission recommendations and their persistent disregard by the Polish government, nothing really happened. This considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of law oversight mechanism. The widely expected Hungarian veto in the case of Poland indicated for many that the desired oversight requires new tools or requirements.[4] One of these could be a rule of law conditionality requirement.

Conditionality in general and spending conditionality in particular is a long-standing EU policy tool.[5] The values of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still have to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (Article 49) and values (Article 6(2)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for, and protection of, minorities. The main tool used to enforce these values is the enlargement chapter system,[6] which governed the biggest enlargement in the Union's history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007, and concluded by the admission of Croatia in 2013.[7] As Dimitry Kochenov argues, the

[1] Article 258 of the Treaty on the Functioning of the European Union (TFEU): "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

[2] The European Council, acting by unanimity on a proposal by one-third of the Member States or by the European Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 after inviting the Member State in question to submit its observations.

[3] "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply".

[4] As formulated wittily and appositely by Israel Butler: "…the EU needs to respond with more than just warnings that it will deliver further warnings". https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros.

[5] About the history and the recent debates on spending conditionality in the EU see (Vita 2017a).

[6] See (Pech 2016).

[7] The Croatian enlargement was somewhat special, as it was part of the EU's Stabilization and Association Policy and the conditionality was different as well. It included, inter alia, collaboration with the ICTY. I am grateful to Elisabeth van Rijckevorsel for pointing this out.

assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria had been met.[8] In 2006, in response to the 2004 enlargement, chapters 23 and 24 on the judiciary and fundamental rights were introduced, which according to some have played certain role in the Croatian accession negotiations.[9] Others argue that only after Croatia's accession did the European Commission suggest various adjustments to the negotiation procedure.[10] Not only were the conditionality requirements not taken seriously prior to accession, their maintenance was also missing after accession.[11] The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion in the form of a post-accession monitoring system was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members.[12] During the 2012 Romanian constitutional crisis, the Commission successfully used the fact that the Mechanism had been expected to be discontinued in the middle of the crisis as leverage.[13] Considering the latest attempts of the Romanian government to dismantle judicial independence[14] it is understandable that the Commission's 2017 November progress report refers to its 2012 July report. and claims that the same problems persist 5 years later.[15]

The weakness of the Copenhagen criteria and the lack of their application after accession, which led the Commission to adopt a new rule of law conditionality approach towards Serbia's accession, caused a discrepancy between EU accession conditions and membership obligations, which made it easier for backsliding new Member States resist compliance with EU values and principles.

2 The Rule of Law Framework as a Reaction to the Failure of Traditional Mechanisms

In the case of Hungary, the EU did not use any of its available mechanisms until 2013, when the Fourth Amendment to the Fundamental Law was enacted. This was the change to the new Hungarian constitutional system that finally dismantled the

[8] (Kochenov 2004). A more positive evaluation claims that the EU's refusal to start negotiations with Slovakia under Meciar is a proof of political conditionality. See (Pridham 2002). Some political scientists, like Frank Schimmelfenning and Ulrich Sedelmeier were for a long time rather optimistic about the impact of EU political conditionality. See (Schimmelfenning and Sedelmeier 2004).

[9] See W. Nozar, 'The 100% Union: The Rise of Chapters 23 and 24', https://www.clingendael.org/sites/default/files/pdfs/The% 2010).

[10] See. (Hillion 2013).

[11] About the so-called 'Copenhagen dilemma' see (Closa 2016).

[12] (Vachudova and Spendzharova 2012).

[13] See (Bátori 2016).

[14] (Selejan-Gutan 2018).

[15] https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en.

Constitutional Court and other checks and balances on governmental power.[16] In March 2013, after the Fourth Amendment was introduced in the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure compliance, and for the Commission to take an increased role in it.[17] Later, upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment on the Fundamental Law of Hungary.[18] The report is named after Rui Tavares, a Portuguese MEP at that time, who was the rapporteur of this detailed study of Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of right-leaning lawmakers, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left. With its acceptance of the Tavares Report, the European Parliament has called for a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. 2 days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "the equal treatment due to Hungary". The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government "not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families". These

[16] On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. The most alarming change concerning the Constitutional Court annulled all Court decisions prior to when the Fundamental Law entered into force. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary.

[17] http://www.europarl.europa.eu/document/activities/cont/201310/20131021ATT73205/20131021ATT73205EN.pdf.

[18] http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN.

words very much reflect the Orbán-government's view of 'national freedom', the liberty of the state (or the nation) to determine its own laws: "This is why we are writing our own constitution…And we don't want any unsolicited help from strangers who are keen to guide us…Hungary must turn on its own axis".[19]

Encouraged by the Tavares report, then-Commission President Barroso also proposed a European mechanism to be "activated as in situations where there is a serious, systemic risk to the Rule of Law".[20] Commission Vice-President Reding, too, announced that the Commission would present a new policy communication.[21]

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes leave in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.[22] The government's reasoning states that the amendment aims to "finish the constitutional debates at international forum" (meaning with European Union—G.H.). A statement from the Prime Minister's Office said: "The government wants to do away with those… problems which have served as an excuse for attacks on Hungary,'' But this minor political

[19] For the original, Hungarian-language text of Orbán's speech, entitled Nem leszünk gyarmat! [We won't be a colony anymore!] see e.g. <http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>.

[20] (Barroso 2013).

[21] (Reding 2013).

[22] Here are the major elements of the amendment: (a) Regarding political campaigns on radio and television, commercial media broadcasters are able to air political ads, but they must operate similar to public media channels—i.e., distribution of air time for political ads should not be discriminatory and should be provided free of charge. But since commercial media cannot be obliged to air such ads, it is unlikely that commercial outlets would agree to run campaign ads without charge. (b) Regarding recognition of religious communities (in line with the relevant cardinal law), the amendment emphasizes that all communities are entitled to operate freely, but those who seek further cooperation with the state (the so-called 'established churches') must still be voted upon by Parliament to receive that status. This means that the amendment does not address discrimination against churches the government has not recognized. Parliament, instead of an independent body, confers recognition, which is necessary for a church to apply for government subsidies. (c) The provision that enabled the government to levy taxes to settle unforeseen financial expenses occurring after a court ruling against the country—such as the European Court of Justice—was also removed, but the reasoning adds that the government is always free to levy new taxes, and this amendment will cost Hungarian taxpayers at least 6 billion Forints over the next 5 years. "(d) One positive amendment removed the power of the president of the National Judicial Office to transfer cases between courts—a change already made on the statutory level, but since the head of the Office is already able to appoint new judges loyal to the government all over the country, the transfer power is no longer necessary to find politically reliable judges. Both the foreign and Hungarian Human Rights NGOs said that the'amendments show the government is not serious about fixing human rights and rule of law problems in the constitution'. See the assessment of Human Rights Watch: http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short, and the joint opinion of three Hungarian NGOs: http://helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-a-vege.

concession does not really mean that the Hungarian government demonstrated respect for the formal rule of law, as some commentators rightly argue.[23]

As none of the suggested elements have worked effectively in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States.[24] This framework is supposed to be complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed from office the most senior ten percent of the judiciary, including many court presidents and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in Commission v. Hungary established the violation of EU law,[25] but unfortunately the decision was not able to reinstate the dismissed judges into their original positions, nor could it stop the Hungarian government from further seriously undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms. Even though the Commission formulated the petition, the ECJ apparently wanted to stay away from Hungarian internal politics, or had an extremely conservative reading of EU competences and legal bases, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State.[26] This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action.[27]

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to the rule of law, and allows the Commission to enter into a structured dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 are used. The Framework process is designed as a three-step procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response of the member country to the Commission's recommendations.

[23] (Bogdandy 2016).

[24] Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, A new EU Framework to strengthen the Rule of Law.

[25] ECJ, 6 November 2012, Case C—286/12.

[26] For the detailed facts of the case and the assessment of the ECJ judgement see (Halmai 2017).

[27] (Scheppele 2016).

The first step to use the new Rule of Law Framework was taken by the European Commission against Poland in early January 2016. The Commission initiated a dialogue with Poland. Meanwhile, the Polish Foreign Minister asked the Venice Commission, the advisory body of the Council of Europe for an opinion on the legal solutions contained in the amendments to the Law on the Constitutional Tribunal. The Venice Commission issued its opinion in mid-March of 2016.[28] The report states that "Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections." Regarding the Constitutional Tribunal, it remarked: "as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights."

After the Polish government made clear that it did not intend to follow the recommendations of the Venice Commission, on 13 April 2016, the European Parliament voted overwhelmingly in support of a resolution declaring that the Polish government's confrontation with the Constitutional Tribunal posed a danger to 'democracy, human rights and the rule of law'. The resolution also called on the Polish government to end the crisis over the Tribunal, and if that did not happen, for the European Commission to activate the 'second stage' of the rule of law mechanism.

In early June 2016, the Commission sent its opinion[29] despite a furious statement of Jaroslaw Kaczyński, who warned that if the Commission continued to press its unprecedented rule of law procedure against Poland, the country could issue a challenge to the European Court of Justice "at any time", adding that the inquiry was 'dreamed up' and went beyond what is allowed by the EU treaties.[30] After

[28] Opinion no. 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland. Adopted by the Venice Commission at its 106th Plenary Adopted by the Venice Commission at its 10 Plenary Session (Venice, 11–12 March 2016).

[29] The full text of the opinion was not published, and a request by Laurent Pech, professor of Middlesex University was rejected by the Commission on the ground that the disclosure "would undermine the protection of the purpose of the ongoing investigation" as any disclosure "at this point in time would affect the climate of mutual trust between the authorities of the Member state and the Commission, which is required to enable them to find a solution and prevent the emergence of a system threat to the rule of law". The Commission's subsequent decision to publish a Rule of Law Recommendation on 27 July 2016 led Professor Pech to ask the Commission to review their initial refusal to disclose the Opinion, adopted on 1 June 2016. Having reviewed the application, the Secretariat General of the Commission finally accepted the disclosure of the full text of the Opinion. For the story of the FOI request and the full text see Laurent Pech's blogpost of 19 August, 2016. http://eulawanalysis.blogspot.it/2016/08/commission-opinion-of-1-june-2016.html.

[30] http://www.politico.eu/article/poland-and-commission-plan-crisis-talks/. Boyden Gray, former US ambassador to the EU in an op-ed article written in the Wall Street Journal also questioned the authority of the EU to use the Framework against Poland: "The European Union's current overreaching and meddling in Poland's legal affairs under the guise of its lawless, ironically named "Framework to Strengthen the Rule of law," provides a glimpse at some of the dynamics underlying last month's Brexit vote. The framework, announced in March 2014, did not directly factor into Brexit, but it demonstrates the EU's troubling propensity to harass its member states and dictate Brussels-based solutions for domestic prob-

the adoption of the opinion, Frans Timmermans said: "The rule of law is one of the foundations of the European Union. There have been constructive talks which should now be translated into concrete steps to resolve the systemic risk to the rule of law in Poland. The Opinion adopted today presents our assessment of the issues at stake, building on the dialogue, which started in January. On this basis we stand ready to continue the dialogue with the Polish authorities."[31]

The Polish parliamentary majority responded by adopting a new law on the Constitutional Tribunal on 7 July that left no doubts that they were not holding back. The law reintroduces the provisions that were already either disqualified by the Court as unconstitutional or criticized by the Venice Commission.

On 21 December 2016, the Commission adopted an additional Recommendation regarding the rule of law in Poland, because "there continues to be a systemic threat to the rule of law in Poland". The Commission invited the Polish government to solve these problems within 2 month, and if there was no satisfactory follow-up, it would decide "whether or not to resort to the procedure laid down in Article 7 TEU".[32] The concerns of the Commission were linked to the adoption of three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President to replace the outgoing head of the court. The new interim President's first action was to allow the three so-called 'anti-judges', unlawfully elected by the PiS majority in Sejm to assume their judicial duties suspended by the previous Tribunal President, and participate in the meeting to nominate a new President to the head of the state, who 2 days later appointed the temporary President as the new permanent President of the Tribunal.[33]

On 20 February 2017, the Polish government once again dismissed the European Commission's demands by insisting that the changes that Warsaw had implemented were "in line with European standards" and that it had created "the right conditions for a normal functioning" of the Constitutional Tribunal. On 26 July 2017, the Commission adopted its third Rule of Law Recommendation, justified by four new legislative acts rushed through the Polish Parliament that month:

(a) The law on the Supreme Court; (b) the Law on the National Council for the Judiciary; (c) the Law on the Ordinary Courts' Organisation; and (d) the Law on the

National School of Judiciary. In this Recommendation the Commission explicitly threatened to trigger Article 7(1) TEU immediately "should the Polish authorities take any measure of this kind".[34] Since the first two laws were vetoed by the Polish President, the Commission decided to initiate an infringement procedure regarding the Law on the Ordinary Courts Organisation on the grounds that this legislation would not only violate functioning EU gender discrimination rules by introducing

Footnote 30 (continued)
lems. If pursued, the framework could further destabilize the EU." http://www.wsj.com/articles/the-european-union-shows-poland-why-we-have-brexit-1467747768.

[31] http://europa.eu/rapid/press-release_IP-16-2015_en.htm.

[32] http://europa.eu/rapid/press-release_IP-16-4476_en.htm.

[33] See for a very comprehensive analysis of the government's package: (Pech and Scheppele 2017).

[34] Commission Recommendation of 26 July 2017 regarding the rule of law in Poland, C (2017) 5320 final, para 58.

a different retirement age for female and male judges, but would also undermine the independence of Polish courts by permitting the government to replace the leadership of the lower courts, the independence of which was required under Article 19(1)TEU and Article 47 of the EU Charter of Fundamental Rights.[35]

On 20 December 2017, the European Commission issued the fourth Rule of Law Recommendation, but this time accompanied by a Reasoned Proposal for a Decision of the Council on the determination of the clear risk of a serious breach of the rule of law by Poland under Article 7(1) TEU, and also referred the Polish Law on the Ordinary Courts Organisation to the Court of Justice under Article 258 TFEU.[36] The combined use of the fourth recommendation and the triggering of Article 7 means that should the Polish government finally decide to implement the Commission's recommendations within 3 months, the Commission has indicated its readiness to 'reconsider' its Article 7(1) proposal. Commissioner Vera Jourová justified the harsh reaction of the Commission regarding the independence of the courts with the argument that "if one national system of judiciary is broken, the EU system is broken,"[37] since Polish courts are EU courts as well. The other justification to initiate Article 7 in the case of a non-functioning judicial system is that it not only undermines separation of powers, but also makes it impossible to maintain a market economy.[38] In addition, since violations of the rule of law including judicial independence are direct and very visible in the EU criminal justice sector, where the emphasis is on national courts engaging in a dialogue, none of the instruments based on mutual trust can possible work without judicial independence.[39]

The key role of judicial independence in upholding the rule of law and EU values is not only emphasized in the EU Justice Scoreboard 2018, published by the European Commission in late May,[40] but indirectly by two recent court rulings. The first is the ground-breaking judgment of the European Court of Justice issued on 27 February 2018 in the case C 64/16 Associação Sindical dos Juízes Portugueses.[41] Here ECJ ruled that maintaining national courts or tribunals' independence is essential and inherent in the task of adjudication and made clear that Member States have a duty to ensure that their courts meet the requirements essential to effective judicial protection. This means that direct attacks on national courts and judges can now be directly challenged on the basis of EU law and in more specifically Article 19(1) TEU. The second decision is an important and unprecedented judgment adopted on 12 March 2018 by the Irish High Court in a European Arrest Warrant case concerning a Polish citizen

[35] European Commission acts to preserve the rule of law in Poland, Press release IP/17/2161, 26 July 2017.

[36] http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

[37] https://ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/speech-commissioner-jourova-high-level-seminar-finland-100-years-finnish-and-european-perspectives_en.

[38] See (Kochenov et al. 2017).

[39] (van Ballegooij and Bárd 2016)

[40] http://europa.eu/rapid/press-release_IP-18-3932_en.htm.

[41] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%253A62016CJ0064.

(Celmer).[42] The Court decided to raise preliminary questions with the ECJ, whether the cumulative effect of rule of law violations in Poland have reached such a level that the EU principles of mutual trust and mutual recognition ought to be set aside.

3 Can and Should Respect for Values be a Condition for Receiving EU Funds?

During the EU's long and mostly unsuccessful struggle to bring Viktor Orbán's government into compliance since he came to power in 2010, occasionally the European Commission has put on hold some EU funding to Hungary. This happened in 2013 after the Hungarian Parliament enacted the Fourth Amendment to the new Fundamental Law, finally dismantling the Constitutional Court and other checks and balances on governmental power. But the official reason for this suspension was not the grave violation of the rule of law, but some alleged irregularities in the way development subsidies had been managed by Budapest.[43]

Real financial sanctions were proposed against Poland and Hungary in mid-August 2016 by two German members of European Parliament. Ingeborg Grässle, a Christian-Democrat MEP and the head of the Parliament's committee on budgetary control suggested: "There needs to be stronger rules for the disbursement of funds… Countries that don't respect EU laws, or countries that don't participate enough in the resettlement of migrants or the registration of refugees, should be deprived of funds." Vice president of the Parliament, the Liberal Alexander Graf Lambsdorff, singled out Poland and Hungary as net recipients of EU funds that have been flouting EU values by saying: "The federal government must ensure, when the EU budget is reviewed this fall, that EU countries that are net recipients, such as Poland and Hungary, show more solidarity in [on] the issue of refugees and also respect European values."[44] Similarly, then-Austrian Chancellor, Christian Kern said that "If countries continue to duck away from resolving the issue of migration, they will no longer be able to receive net payments of billions from Brussels," arguing that "solidarity is not a one-way street."[45] Also, French presidential candidate Emmanuel Macron stated that "You cannot have a European Union which argues over every single decimal place on the issue of budgets with each country, and which, when you

[42] http://www.courts.ie/Judgments.nsf/768d83be24938e1180256ef30048ca51/578dd3a9a33247a38025824f0057e747?OpenDocument.

[43] https://www.ft.com/content/9b85c228-04f1-11e3-9e71-00144feab7de.

[44] http://www.welt.de/politik/ausland/article157586134/Deutschland-ist-Zahlmeister-in-Europa.html. Hungary has received enormous EU cohesion funds sums during the period Orbán has been in power. The country has received as much as 6–7% of its GDP as inflows from the various cohesion and structural funds of the Union since 2010. This has generated an average GDP growth of around 3%, which according to a KPMG study commissioned by the government, would have been zero without the EU transfers. This means that without the cohesion and structural fund transfers, Hungary would have no autonomous economic growth. See (Pogátsa 2017).

[45] 'Austria calls for less money for EU states opposing refugee distribution', Deutsche Welle, 8 March 2017. http://www.dw.com/en/austria-calls-for-less-money-for-eu-states-opposing-refugee-distribution/a-37848662

have an EU member which acts like Poland or Hungary on issues linked to universities and learning, or refugees, or fundamental values, decides to do nothing."[46] Vivian Reding, member of the European Parliament and former EU commissioner for justice and fundamental rights declared: "This would be the most effective way to influence the behavior of a government like the Polish one—making a link with the money. It's the only thing they understand."[47] Gajus Scheltema, then-ambassador of the Netherlands to Hungary, referring to the Hungarian government in an interview claimed: "The argument over what happens with our money is indeed growing ever fiercer. We can't finance corruption, and we can't keep a corrupt regime alive."[48]

First-hand proof of governmental corruption has been provided by OLAF, the EU's anti-fraud office, following an investigation in Hungary, which found serious irregularities related to street-lighting contracts awarded to a company that had been owned by Orbán's son-in-law, István Tiborcz. OLAF has called on the European Commission to claw back more than €40 m of EU funds spent on lighting projects.[49] But since Hungary was among the eight Member States that declined to take part in the EU prosecution service, which was created in 2017, the criminal investigation of the matters depends on the Hungarian prosecutors office, lead by Fidesz loyalist. Hence, one obvious measure would be to oblige Hungary to join the EU prosecutor service if it wants to continue to receive EU funds.

In 2017 the European Parliament linked the monitoring of EU funds in Hungary with the government's disrespect of EU values and policies, for instance on migration and refugees. After a debate on Hungary at the plenary session on 26 April 2017, the Parliament stated in a resolution that "recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU's ability to defend its founding values".[50] Therefore, the resolution calls for: "(a) the launching of Article 7(1). MEPs instruct the LIBE Committee to draw up a formal resolution for a plenary vote, (b) the Hungarian Government to repeal laws tightening rules against asylum-seekers and non-governmental organizations, and to reach an agreement with US authorities, making it possible for the Central European University to remain in Budapest as a free institution, and finally (c) the European Commission to strictly monitor the use of EU funds by the Hungarian Government".[51]

[46] (Bertrand 2017).

[47] (Stearns 2017).

[48] http://hungarianspectrum.org/2017/08/31/ambassador-scheltema-we-mustnt-keep-a-corrupt-regime-alive/.

[49] https://www.theguardian.com/world/2018/feb/12/orban-allies-could-use-eu-as-cash-register-meps-say.

[50] The resolution was adopted by 393 votes to 221 with 64 abstentions, which means some members of European Peoples Party (EPP), the party goup of Fidesz, the Hungarian governing party, did not vote against the resolution. Manfred Weber, the president of the EPP-group also harshly criticized the Lex CEU. According to its press-release "the EPP wants the CEU to remain open, deadlines suspended and dialogue with the US to begin". The EPP also stressed that "NGOs are an integral part of any healthy democracy, that they represent the civil society and that they must be respected". http://www.epp.eu/press-releases/prime-minister-orban-to-comply-with-eu-laws-and-epp-values-following-meeting-with-epp-presidency/.

[51] http://www.europarl.europa.eu/news/en/press-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7.

The Commission's Reflection Paper on the Future of EU Finances, published on 28 June 2017, states: "Respect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget."[52]

The German Government went even further regarding the latter call of the Parliament by suggesting to link receipt of EU cohesion funds to respect for democratic principles.[53] The proposal was drafted explicitly with the situation in Poland in mind, as it has been allocated a total of €86 billion from various EU cohesion funds for the period 2014-2020 and would, under normal circumstances, expect substantial funds in the next budget cycle as well.[54] Germany, together with Austria and Italy, has also repeatedly argued that spending conditionality should be used to discourage Member States' non-compliance with the EU migration and asylum acquis, in particular with the Council's refugee relocation plan.[55]

Also Günther Öttinger, the German budget commissioner of the European Commission, said that EU funds could become conditional after 2020, depending on the respect for the rule of law.[56] Similarly, Commissioner Jourová argued for such a new conditionality requirement: "We need to ensure that EU funds bring a positive impact and contribute more generally to promote the EU's fundamental rights and values. That is why I intend to explore the possibility to strengthen the 'fundamental rights and values conditionality' of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds."[57] In October 2017, Jourová linked again EU funds to rule of law, by saying that "[…] We need to make better use of EU funds for upholding the rule of law. […] In my personal view we should consider creating stronger conditionality between the rule of law and the cohesion funds."[58] On 23 November 2017, Hans Eichel, co-founder and former chairman of G20, former Minister of Finance of Germany, and Pascal Lamy, former European Commissioner, also on behalf of former European Commissioners Franz Fischler and Yannis Peleokrassas sent an open letter to Jean-Claude Juncker, President of the European Commission, asking the European Commission to temporarily suspend payment

[52] (Reflection Paper on the Future of EU Finances 2017).

[53] http://www.politico.eu/article/poland-rule-of-law-europe-germany-berlin-looks-into-freezing-funds-for-eu-rule-breakers/.

[54] See e.g. the data available here: https://cohesiondata.ec.europa.eu/. Poland has for instance been allocated ESIF funding of €86 billion representing an average of €2,265 per person over the period 2014–2020. Cited by Pech and Scheppele (2017).

[55] 'Germany supports cutting EU funds to countries that refuse refugee quotas', *Business Insider,* 15 September 2015; Austria Threatens EU Funding Cuts over Hungary's Hard Line on Refugees!, *The Guardian,* 8 March 2017; 'Italy Threatens Hungary: EU Countries Who Reject Migrant Quota Should Have Funding Cut', *Express.co.uk,* 12 October 2016.

[56] https://euobserver.com/institutional/138063.

[57] '10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law', Vienna, 28 February 2017, Speech/17/403.

[58] https://euobserver.com/political/139720.

of all EU funding to Hungary, with the exception of funding provided directly by the Commission, i.e. without the intermediary role of the Hungarian government.[59]

Similarly, a recent policy paper of the Centre for European reform suggests that for more serious breaches, the Commission could suspend disbursement of funds, and step up monitoring and verification. In doing so, it would have to ensure that the poorer regions and vulnerable groups did not suffer disproportionate harm from measures designed to have an impact on governments that ignore EU values and the rule of law. Funding, the Centre recommends, could be directed away from governments and go directly to enterprises or be disbursed by civil society organizations[60]—if there are still such independent organizations, I would add.

On the other hand, Commission President Juncker said that net recipients of EU funds may resent being penalized financially for actions that net contributors could carry out with impunity. Therefore, he expressed concerns about tying the rule of law to structural funds, which he claimed could be "poison for the continent", and "divide the European Union."[61] Even after the Commission decided to trigger Article 7 (1) procedure against Poland, which put the country on a path that could ultimately lead to sanctions, Juncker said that he preferred that the EU and Poland hold "sensible discussions with each other, without moving into threatening gestures."[62]

In mid-February 2018, the European Commission published its Communication on A New, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020 as a contribution to the Informal Leaders' meeting.[63] The Communication points out that "as part of the public debate, it has been suggested that the disbursement of EU budget funds could be linked to the respect for the values set out in Article 2 of the EU Treaty and in particular to the state of the rule of law in Member States". At the same time the German government has circulated a draft white paper to other EU Member States proposing to link cohesion funds to respect for EU solidarity principles.[64] Germany wants more of the EU's next multiannual budget to be tied to respect for core EU policies and values, including the rule of law and migration. This plan would be a big departure from traditional uses of the structural funds, which have had a heavy focus on infrastructure projects as well as education and training for EU nationals. The Polish government attacked the plan, "because it could lead to limitation of member states' rights guarded by the EU Treaty".[65]

In early May, the European Commission, along with its long-term budget proposal presented the plan to punish national governments, accused of undermining

[59] http://hungarianspectrum.org/2017/11/28/open-letter-to-jean-claude-juncker/.

[60] J. Selih with Ian Bond and Carl Dolan,'Can EU Funds Promote the Rule of Law in Europe?', Centre for European Reform, November 2017.

[61] http://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/.

[62] https://www.politico.eu/article/eu-commission-president-jean-claude-juncker-rejects-cutting-eu-funds-to-poland/amp/?utm_content=buffer9a7fd&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer&__twitter_impression=true.

[63] http://europa.eu/rapid/press-release_IP-18-745_en.htm.

[64] https://www.ft.com/content/abb50ada-1664-11e8-9376-4a6390addb44.

[65] https://www.ft.com/content/d6ef7412-157c-11e8-9376-4a6390addb44.

EU's core values, particularly the rule of law.[66] Although Commission President Jean-Claude Juncker insisted that the plan does not target any particular country, but the plan, which would be a separate measure from the budget itself, is clearly designed to send a strong signal both the Poland and Hungary.[67] The Commission proposes a new mechanism to protect the EU budget from financial risks linked to generalized deficiencies regarding the rule of law in the Member States. The new proposed tools would allow the Union to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule of law deficiencies. Such a decision would be proposed by the Commission and adopted by the Council through reverse qualified majority voting, which means that the Commission's proposal is deemed to be adopted by the Council, unless it decides by qualified majority to reject the Commission's proposal.[68] This procedure circumvents the 4/5 and unanimity requirements of Article 7(1) and (2) respectively.

The usual argument against cutting off EU structural funds for regional development or other forms of assistance would punish the people (of Poland or Hungary) instead of their leaders, pushing them further away from the EU, and into the arms of their illiberal governments.[69] Also academic critics point out that the proposal, if implemented, could undermine the European citizens' union by leaving behind those citizens who have the misfortune to live in a members state with an authoritarian national government.[70] But why not consider the scenario that those regions and citizens taken hostage by their own elected officials, and who do not want to suffer due to the loss of EU funds because of their authoritarian leaders, will be emboldened to stand up against such governments, and vote them out of office, provided that democratic elections still exist. Others argue against negative spending conditionalities by raising the usual concerns regarding every EU oversight measure and sanction, namely the absence of a correlative reform of EU's own democratic, human rights and rule of law performance.[71]

Since new Member States are very dependent on EU funding the threat of economic sanctions can be very effective. This might be the case also while using the most serious tools, like Article 7, even if Article 7(3) is unclear about the substance of sanctions. Here I support the interpretation of Leonard Besselink, who argues that

[66] http://europa.eu/rapid/press-release_IP-18-3570_en.htm#_ftn3.

[67] https://www.politico.eu/article/mff-commission-eu-budget-proposal-brussels-looks-to-link-eu-payouts-to-justice-standards/?utm_source=POLITICO.EU&utm_campaign=46f1fb959f-EMAIL_CAMPAIGN_2018_05_02&utm_medium=email&utm_term=0_10959edeb5-46f1fb959f-189089901.

[68] https://ec.europa.eu/commission/sites/beta-political/files/budget-proposals-financial-management-rule-law-may2018_en.pdf.

[69] See this argument by Danuta Hübner, Chair of the European Parliament's Committee on Constitutional Affairs. www.euronews.com/2017/12/29/view-eu-must-not-surrender-to-illiberal-forces. Similarly, former Commissioner László Andor argues that as a consequence of political conditionality, poorer regions would suffer because of their illiberal governments. http://www.progressiveeconomy.eu/sites/default/files/LA-cohesion-final.pdf.

[70] http://www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-strukturfonds-ungarn-polen.html.

[71] Cf. (Vita 2017b) Vita refers to Joseph Weiler's already mentioned objections towards the Rule of Law Framework.

in principle sanctions could concern any "right deriving from the application of the Treaties" to the Member State concerned.[72] This means that the suspension of EU funding without changing the treaties can be among the possible sanctions.

Outside the scope of an Article 7 procedure, Prime Minister Orbán claims that linking EU funds to political conditions goes against the EU treaties.[73] But one can argue that the Common Provision Regulation[74] that regulates the European Structural and Investment Funds (which combines five funds, including the Cohesion Fund) requires governments to respect the rule of law as a condition for receiving money.[75] Article 6 of the Regulation require governments to ensure that funds are spent in accordance with EU and national law. The provision reads: "Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application." Some scholars argue that the Regulation should expressly specify the rule of law as forming part of "applicable Union law".[76] Of course the Regulation can relatively easily be amended, but I do not think that is even necessary to acknowledge that the rule of law, as part of Article 2 TEU, is applicable primary Union law. In my view, if a member state does meet these requirements, it does not fulfil the legal conditions of the funds, and consequently cannot get them. Independent courts can be considered as essential institutions conditions, and one could certainly raise the question whether the captured courts in Poland qualify as 'courts' under Article 19 TEU.[77] Article 30 of the EU's Financial Regulation (966/2012) states, among other things, that EU "funds shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness." Also, according to this regulation, "The principle of efficiency concerns the best relationship between resources employed and results achieved." Furthermore, according to Financial Regulations, "The principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results". Finally, according to Article 59 (2) of the Financial Regulation, "When executing tasks relating to the implementation of the budget, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the Union's financial interests…"

According to the EU's Regulation on European code of conducts on partnership in the framework of the European Structural and Investment Funds (240/2014), the

[72] See (Besselink 2016).

[73] "The EU is based on treaties, and there is nothing in there that would create this possibility [of linking funds to the rule of law]," Viktor Orbán said in an interview. See https://berlinpolicyjournal.com/trouble-ahead/.

[74] Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303.

[75] See a similar argument I. Butler,'To Halt Poland's PiS, Go for the Euros', *LibertiesEU,* August 2, 2017. https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros.

[76] See (Waelbroeck and Oliver 2018).

[77] The judgment of the Grand Chamber of the Court of Justice of the EU from 27 February 2018 in Associação Sindical dos Juízes Portugueses v Tribunal de Contas suggests that the EU principle of judicial independence may be relied upon irrespective of whether the relevant national measure implements EU law. About the innovative nature of the judgment see (Ovádek 2018).

governments of the member states must closely cooperate with "bodies representing civil society at national, regional and local levels throughout the whole programme cycle consisting of preparation, implementation, monitoring and evaluation." They should also "examine the need to make use of technical assistance in order to support the strengthening of the institutional capacity of partners, in particular as regards small local authorities, economic and social partners and non-governmental organisations, in order to help them so that they can effectively participate in the preparation, implementation, monitoring and evaluation of the programmes."[78]

4 Conclusion

After coming to the conclusion that in the case of the backsliding Hungary and Poland the traditional mechanism of the infringement procedure did not work, and in fear of the unanimity requirement for sanctions according to Article 7(2) and (3), the European Commission duplicated the preventive mechanism of Article 7(1) by introducing the Rule of Law mechanism. The use of rule of law conditionality depends on the political will of the EU institutions, as well as on their vision for the future of the EU.

Due to political considerations, it was not used against Hungary at all, and in the case of Poland, despite the very strongly worded Commission recommendations and their disregard by the Polish government, nothing really happened. This considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of law oversight mechanism. In December 2017, the Commission finally triggered Article 7 against Poland, but not against Hungary, where the illiberal system is more entrenched.[79]

Regarding the future of the EU, the scenarios of the European Commission's White Paper on the Future of Europe,[80] published on 1 March 2017, neither the general oversight mechanisms, nor the more specific provisions regarding financial sanctions, seem to provide institutional guarantees against illiberal member states within the EU. Similarly, the Commission's Reflection paper on the deepening of the economic and monetary union[81] seems to advocate strengthening Eurozone governance, and leaving the rest, including Hungary and Poland with their rule of law, democracy and fundamental rights deficits behind. Commission President Juncker in his State of the Union 2017 speech seemed to go to the opposite direction by

[78] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0240&from=EN.

[79] In the case of Hungary, one must keep in mind first and foremost that the governing Fidesz party delivers votes to the EPP, the largest faction at EP, while PiS belongs to the smaller fraction of the European Conservatives and Reformists. See this conclusion in Kelemen (2017).

[80] White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025. European Commission COM (2017) 2025 of 1 March 2017. https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

[81] https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en.

saying that "Now is the time to build a more united, stronger and more democratic Europe for 2025."[82]

I think that this latter vision of Europe makes it inevitable to enforce the joint values of the rule of law, democracy and fundamental rights in every Member States. For this reason, the more consequent use of certain traditional tools, such as infringement procedures also for the breach of values enshrined in Article 2 TEU, or even triggering Article 7 for that matter are important. But at the same time, new means of value conditionality should also be activated, such as cutting funds for member states that do not comply with certain basic institutional requirements of the rule of law. As I have argued, this is possible through implementing the Common Provision Regulation, and can be carried out on a case-by-case basis. Putting conditionality into the Multiannual Financial Framework after the 2020 budget period is another potential avenue to enforce compliance with joint values. Nothing else is needed but political will.

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[82] https://ec.europa.eu/commission/state-union-2017_en.

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