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Hungary and the Rule of Law - What is the best way to restore compliance with the EU core values?

The EU has watched the Hungarian Prime Minister Orbán carefully for the last years: while he was systematically undermining the rule of law, while he was gradually weakening the judiciary, while he was taking more and more control of local media outlets and while he was limiting academic freedom. His power offensive in March 2020 during the COVID-19 pandemic just seemed like another step towards accumulating more power in his hands and further shrinking the space for independent media outlets and foreign businesses. Orbán's emergency measures were heavily criticized as they were not restricted to those that could be considered absolutely necessary, were not proportionate, not limited in time and nor were they subject to regular scrutiny. The Covid-19 pandemic made the bigger picture of the Prime Minister's governing style more visible. The end of his rule by decree, which is now foreseeable, is therefore not synonymous with a return to *normality*, a return to democracy and rule of law, to European core values. During the state of emergency, Orbán was able to curtail certain rights and introduce taxes that will not cease to exist by the end of the emergency period. Even after that, Orbán will certainly continue to play the power game with the EU. Therefore, we have to make sure we carefully monitor what is happening in Hungary and react promptly to any further steps the government takes. That is why different actors – and especially the EU – should have suitable instruments available to effectively protect and defend its core values. But who are *these actors* who have the power and indeed the competence to convince Hungary to comply to EU core values? And *what exactly* can be done?

Who can step up to defend EU core values?

The Hungarian government has managed to limit the response to the Prime Minister's accumulation of power from inside the country: Many media outlets have submitted to the influence of government in recent years, the newly introduced fake-news paragraph has made it even harder for individual news outlets and civil society organizations to raise their voices and the constitutional court, another actor which might otherwise have stood in opposition, is now staffed with supporters

of the ruling party Fidesz, ensuring that the court acts in line with the government.

The action of other EU member states has been limited to showing their dissatisfaction in informal ways: 20 EU member states signed a *Joint Statement on the Principles of the Rule of Law in Times of Covid-19*, calling on Hungary – without naming it – to stick to the common values of the European Union. However, the statement was so loosely formulated that even Hungary itself joined the signatories. An important number of member states did not join the call, among them Hungary's closest allies, the *Visegrad states*. That shows that countries are acting carefully when “naming and shaming” their partners, as harsh actions directly affect bilateral relations.

Much leverage in convincing Hungary to comply with European core values is attributed to the response of the *European People's Party (EPP)*, of which the Hungarian ruling party Fidesz is a member, albeit a suspended one. The suspension was first imposed in March 2019 as a response to Hungary's violations of European values and its anti-EU rhetoric and indefinitely prolonged after an in-depth assessment, realized by an EPP committee in February 2020. As a suspended member, Fidesz is not allowed to attend any party meeting, nor have speaking time, nor voting rights, nor the right to propose candidates for posts.

There have already been increased calls from EPP members to go one step further: In early April, Tusk called for members to reconsider the expulsion of Fidesz and called it “politically dangerous, and morally unacceptable” to use the pandemic as a reason to strengthen “power over the citizens”. As a response, 13 EPP members recommended to exclude Fidesz from their party network. In any case, the EPP can only decide on an expulsion of a member on the occasion of their next political assembly which, due to Covid-19, possibly won't be held until mid-June.

Possible EU response measures to rule of law breaches.

Many member states, especially those that are very

cautious about entering into bilateral conflicts with Hungary and therefore did not sign the joint statement, claim that *the EU* should act. According to the Treaties, these are the following response measures that different EU institutions could refer to in order to force Hungary to comply with EU core values:

Article-7-Procedure, Art. 7 TEU

The Article-7-procedure is seen as the remedy against rule of law breaches in the EU. It includes far reaching political consequences, which can go as far as suspending the voting rights for the respective country in the European Council (Art. 7(3) TEU) when a state does not act in line with the European values laid down in Art. 2 TEU. All three big European actors are involved in this political instrument: the European Commission, the European Parliament and the European Council. The *preventive mechanism* (Art. 7(1) TEU) starts with a structured dialogue with the respective country. But the real stumbling block lies with the European Council insofar as the treaty asks for a unanimous declaration (Art. 7(2) TEU) that a serious and persistent breach of European values (Art. 2 TEU) exists in order to activate the *sanctioning mechanism*. The deadlock of an Article-7-procedure mostly lies with the need for unanimity in the European Council: if several countries are under scrutiny for not complying with EU values, they are very likely to veto each other's decision in the European Council. Since member states and the EU institutions fear that the procedure would be blocked before being able to impose sanctions, there is a tendency not to even start it (cf. Schneemelcher/ Haas 2019). Nevertheless, even if this political instrument is harder to enforce compared to the judicial infringement procedure (see below), if successfully applied, Art. 7 TEU would indeed be a suitable means to restore compliance with EU core values in Hungary.

Until now, only two Article-7-procedures got started, but none of them went further than the preventive mechanism (Art. 7(1) TEU). The first one was initiated in December 2017 against Poland, triggered by the Commission as a reaction to its contested judicial reform. The second one followed in September 2018 against Hungary for curbing media and academic freedom, and because of concerns over judicial independence, the rights of minorities and migrants and corruption, initiated by the European Parliament. Since then, three hearings under Art. 7 (1) TEU have taken place in the General Affairs Council, one with Poland and two with Hungary.

The serious lack of progress in the proceedings has been subject to criticism. There is a push for holding hearings on a more regular basis. The topic was on the agenda for the General Affairs Council in March but has since silently disappeared again. It seems that the EU is afraid of taking the current procedures to the next level in fear of a possible blocking of the unanimity decision in the European Council by the two countries. The same threat exists for a newly initiated procedure against Hungary.

Infringement Procedure, Art. 258 TFEU

Another possibility to proceed against Hungary's non-compliance with EU core values would be an infringement procedure according to Art. 258 TFEU: The European Commission, as Guardian of the Treaties, can take legal action against a member state by bringing it before the European Court of Justice (ECJ) after a specific violation of EU primary or secondary law. If successfully applied, the ECJ can impose penalties, such as a lump sum or a penalty payment (Art. 260 (3) TFEU) and request the restoration of compliance with EU law.

However, the breach of a *specific* EU law provision may present an obstacle to the application of the infringement procedure to the current situation and probably to any similar transgressions in the future. Some scholars argue that Art. 2 TEU is not a *specific* provision and that Art. 7 TEU refers explicitly to the European values laid down in Art. 2 TEU. That is why they consider an Article-7-procedure as the only instrument applicable to non-compliance with EU core values. For the same reason, they doubt that an infringement procedure targeting a violation of the general Art. 2 TEU would be considered a proper use of Art. 258 TFEU by the ECJ (cf. De Schutter 2017).

On the other hand, for want of a suitable instrument to effectively take action against serious rule of law breaches, other scholars push the idea forward that Art. 7 TEU and Art. 258 TFEU need to be seen on an equal footing and used in parallel. As a judicial instrument within the jurisdiction of the ECJ, Art. 258 TFEU is more easily enforceable than an Article-7-procedure, a political instrument, in the hands of the Council. To have a more effective instrument for rule of law breaches, Scheppele proposed a *systematic infringement procedure* based on Art. 2 TEU. With this approach, a combination of different violations, without linking them to a specific EU law provision but the general Art. 2 TEU, could initiate an infringement procedure according

to Art. 258 TFEU. This would have the advantage of tackling the bigger picture of a problem instead of a single smaller and more specific issue. The impact on the member state in question would be significantly more far-reaching: in addition to paying a penalty fee, at the end of the process the state would have to comply with *European core values*, particularly *democracy and the rule of law*, instead of only restoring compliance with any *specific* EU law provision (cf. Scheppele 2016, Schmidt/Bogdanowicz 2018).

In this context, Scheppele refers to a prior infringement procedure against Hungary in the matter of the sudden change of retirement age for Hungarian judges in 2012. The issue was successfully brought before the ECJ under the Employment Equality Directive, which resulted in the retired judges being eligible for compensation, but only a few were reinstated. Furthermore, the overall problem could not be addressed, namely the threat to the independence of the judiciary by arbitrarily forcing a large number of judges to retire, giving the government the possibility to assign new judges who are close to the ruling party. The same applies to another infringement procedure in 2017 which was treated under the restriction of freedom of capital and could not prevent the expulsion of the Central European University from Hungary.

The claim that infringement procedures related to rule of law topics are simply not possible, as some scholars argue, has already been proved wrong: in 2018 and 2020, the European Commission initiated infringement procedures under Art. 19 (1) to protect the independence of the judiciary in Poland and put it under the *heading of rule of law infringement procedure*. Even if this would mean further legal action to really initiate an infringement procedure based on an Art. 2 TEU violation, it would indeed seem to bear fruit: the framework would equip the EU with an efficient instrument to effectively address the overall problem of non-compliance with EU core values. Besides the mere financial sanctions the court can impose, a condemnation by the ECJ, based on a *systemic infringement procedure*, which would shed light on Hungary's *systemic* non-compliance with EU core values, would be a powerful political signal that the Hungarian government could no longer ignore.

Budget conditionality, proposal COM (2018)324

Budget conditionality is a means that the EU has used since the 1990s to influence member states'

behaviour to implement policies. Payments to governments are used as a tool: they are increased as an incentive or suspended as a punishment. It covers diverse policy areas and is already an established instrument for enforcing economic governance. As the EU's weak position vis-à-vis national government became increasingly apparent in the area of democratic standards or external migration, the European Commission drafted a proposal in 2018 to better address this issue (cf. Schneemelcher/Haas 2019). The proposal COM (2018) 324 aims to link member states' compliance with the rule of law standards to the next multiannual financial framework (MFF), starting in 2021. Until now, the different institutions have not yet fully agreed on a common procedure for budget conditionality: In the initial proposal, after an infringement by a member state has been established, the Commission can independently initiate a suspension or reduction of payments from the EU budget and prohibit the state from entering into any new legal commitments. Besides the primacy of the Commission, the methodology itself is also contested: The Commission's sanctions would now be approved unless a qualified majority in the Council reject them, a process known as reverse qualified majority voting (RQMV). This approach would, indeed, make a major difference to the limping Article-7-procedure: RQMV would make it harder to block the sanctioning system and would therefore transform this procedure into a credible threat for non-complying states. Since especially Hungary and Poland have already indicated that they will not agree with the draft proposal, the President of the European Council, Charles Michel, tried to reach out for a compromise in February 2020. Michel proposed getting rid of the RQMV which, on the other hand, brought him a lot of criticism from countries that want to have an efficient instrument that works in practice to counter rule of law breaches.

The final adoption of the proposal is still a long way off, as an accord between two opposing camps has to be reached: the countries that want harsher restrictions against rule of law breaches and the countries that directly see themselves confronted with it and do not have an interest in losing considerable parts of their budget.

For Hungary, as a net recipient country from the EU budget, this instrument would be especially painful.

Which way to go

Even if the EU member states' action is mostly limited to naming and shaming, it is important that they show a clear sign of disapproval towards Hungary's disproportionate measures and general non-compliance to EU core values. Concerning the EPP's response, as several members have already expressed themselves in favour of excluding Fidesz, the discussion on this issue will surely be on the agenda of the next political assembly. However, much will depend on the positioning of powerful representatives, like the German CDU/CSU or the French *Les Républicains*. It is important for the EPP that their values are not undermined, and it is essential for the whole community that the party group itself gives a clear sign to their (suspended) member. Nonetheless, the positive impact on Hungary of Fidesz' expulsion is questionable: It is very likely that Prime Minister Orbán will continue his autocratic way or may even become more extreme after losing his *last European allies*. Certainly, the Fidesz party will not become a softer party through the exclusion. The EPP must react, for sure, but it seems like a possible expulsion would act rather as a means to protect the reputation of the EPP than have a positive impact on Hungary's future.

Orbán has repeatedly proved himself immune to criticism about his governing style. But when it comes to financial pressure, he becomes weak as well. That is why the most painful responses for the net recipient country would be, without doubt, a loss of EU financial support, very high penalty payments or a suspension of voting rights in the powerful European Council. Many eyes will therefore be on the European Commission and on the instrument it decides to use.

Although the Article-7-procedure is seen as *the* instrument against rule of law breaches, the current procedures show how slowly and how carefully the involved EU institutions are advancing. Two and a half years after initiating the first Article-7-procedure, the actors are still tackling the preventive mechanism (Art. 7(1) TEU): the fear of a stalemate appears too big in the European Council, which would make it unable to bring the procedure to a conclusion. At the moment, the prospects for a newly initiated procedure do not look like changing anytime soon.

That is why budget conditionality and the *systemic* infringement procedure – even if the instruments

are not ready to be used yet – seem like the more promising strategies that are also well suited to tackling the overall problem of a systemic non-compliance with EU core values.

Concerning budget conditionality, there is still a way to go until a compromise in the design of the link between compliance with rule of law standards and the next MFF can be found. In order to assure that budget conditionality will be a highly powerful instrument to counter rule of law breaches, especially for net recipients like Hungary, RQMV absolutely must be included. With a compromise other than RQMV, the instrument would probably be worthless and face a similar deadlock as the Article-7-procedure. Linking compliance with EU core values and EU financial support only seems like an urgently needed instrument that would be in line with pre-accession conditionality. Budget conditionality has until now been the missing tool for the EU to monitor compliance and sanction non-compliance once the countries are part of the Union.

An infringement procedure under Art. 258 TFEU based on an Art. 2 TEU violation still requires judicial activism. Instead of the EU creating new, more powerful instruments to successfully tackle a breach of EU core values, it should use the ones already at its disposal and adapt them to the current circumstances, which would be easily feasible by pushing for a *systematic infringement procedure*. These systematic procedures do not only have the power to change the behaviour of the government in any specific policy area but to change the governmental system as a whole. Besides the financial sanctions that the ECJ could impose, as the first infringement procedure based on Art. 2 TEU, this instrument would have far-reaching political effects which the Hungarian government could no longer ignore.

Even after Hungary retracts its emergency measures, which is likely to happen in the weeks to come, the overall problem of an undemocratic system not acting in line with rule of law principles remains and therefore, the need for efficient instruments does not disappear. That is why it is essential that the EU adapts its instruments to today's challenges within the Union.

To conclude, it is crucial that the EU responds to Hungary, especially as non-compliance with EU core values is, unfortunately, not a problem solely observed in this member state. Moreover, the

erosion of rule of law and democracy is not simply a domestic issue within the respective country but is threatening the functioning of the EU as a whole. As Vice-President Jourova stated “those who don’t understand the values, might understand the value of money”, financial pressure seems to be the method that the Commission is opting for. A harsh reaction from the EU to Hungary is crucial, in the form of budget conditionality or systemic infringement procedures, in order to protect and defend its core values and to serve as a deterrent against other countries imitating Hungary’s behaviour. The EU defines itself as a community of values. Therefore, it cannot close its eyes without losing its credibility when important core values in a member state are strategically undermined.

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