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#DEMOCRACY

#RULE OF LAW

#ARTICLE 7

VISEGRAD COUNTRIES: HOW CAN EUROPE REPAIR BREACHES OF THE RULE OF LAW ?

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Summary

With the deterioration of the rule of law, particularly in Poland and Hungary, the EU must deal with a new and hitherto inconceivable situation, as the foundations of European governance are being shaken from the inside by at least two Member States. Against this backdrop, it is very difficult for the EU to take action because the legislative tools at its disposal have proven to be poorly suited. The Commission's decision of December 2017 to trigger the first phase of Article 7 of the TEU, which could ultimately deprive Poland of its voting rights within the EU Council, has for example turned out to be ineffective in the short term, as the punitive phase requires a unanimous decision of the Council and Warsaw can rely on a veto from Hungary.

To overcome these difficulties, the idea of linking compliance with the rule of law and the delivery of European structural funds in the next Multiannual Financial Framework has been put forward by many Heads of State and European commissioners. Such a suspension comes with political risks and its effectiveness raises questions. It does, however, convey the need to develop a range of resources which are broader, more sophisticated and fiercer than Article 7.

The solution can't come only from the European Commission or the Council, but rather from other institutions such as the European Court of Justice. Civil society organisations in these countries must also be supported. The roles of the Agency for fundamental rights and the Venice Commission are also to be incorporated. All these instruments must be used to prevent these Member States from going further with reforms which run counter to the rule of law. The Commission and Member States concerned must also now be clear on the fact that these measures are intended to heighten their deterrent effect.

INTRODUCTION

It is an understatement to say that European construction is a complex process, which did not account for all the possibilities that would come to derail some its key foundations. The example of Eurozone governance is the most obvious one in illustrating how European governance could be derailed and shaken to its foundations, and it seems today that the debates around infringement of rule of law are taking on the same strength. The examples of Hungary and Poland are at the heart of this debate which will be a key in defining the future of the EU, when the Franco-German engine seems to finally be able to reignite after the signature of the coalition agreement in Germany.

Much like a potential Eurozone collapse was not considered, a backsliding on rule of law was not thought of as a possibility that would require a legal framework to manage. This "ancestral sin" of European construction explains why there is today such a sense of toothlessness of the EU institutions to sanction the member states that endanger rule of law and the whole EU legal framework. These discussions take place at a moment when Central European countries have never been so prosperous and demanding of a full part in defining the future of Europe. As Hungarian Prime Minister Viktor Orban has put it, "I want to make it clear that Central Europe, now that it has stood on its own feet, is successful and plays a stabilizing role in Europe, and thus we want to have suitable weight in debates over the future of Europe"[1]. Heeding to this message and at the same time ensuring that the rule of law is not degraded is a delicate exercise for European political leaders.

This paper will attempt to explain the complexities behind the enforcement of the protection of rule of law by exploring the legal mechanisms at the disposal of the EU. Using the future negotiations on the next Multiannual Financial Framework as a key sequence in the future of Europe, the paper will also explore the positions of the actors and discuss the difficulties, as seen from a Central European perspective, to implement a pure conditionality between respect of the rule of law and the delivery of European structural and cohesion funding, while not outruling this possibility on principle either.

1 . ARTICLE 7 – BYPASSING LIMITATIONS IN THE LONG-TERM ONLY

It is after a year and a half of a fruitless dialogue with Poland, a timeframe during which the European Commission issued three "Rule of Law Recommendations"[2], that the Commission decided to initiate the process of determining that there "is a clear risk of a serious breach of the rule of law in Poland"[3]. On December 20th 2017, the Commission therefore proposed to the Council to adopt a decision under Article 7(1) of the Treaty on the European Union, on top of issuing a fourth recommendation to which the Polish government has three months to react by implementing the recommended actions.

1. Bayer Lili, "Hungary and Poland to EU: Don't shut us out", *Politico*, 2018/03/01
2. Pursuant to the "Rule of Law framework". See : https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en
3. "Rule of Law: European Commission acts to defend judicial independence in Poland", European Commission, 2017/12/20

A certain amount of EU constitutional scholars had called for this step to be taken earlier[4] in order to prevent the further backsliding witnessed in Poland even after the first three recommendations were published and despite the ongoing dialogue between Warsaw and the Commission. In addition, it must be mentioned that it is rather surprising that it is article 7(1) that was proposed here, which states "a clear risk of a serious breach by a Member State of the values referred to in Article 2" rather than the more obvious 7(2) which applies in the case of "a clear and persistent breach of values referred to in Article 2", a statement that seems to clearly characterize the state of play regarding the lack of independence of Poland judiciary, as various European officials and independent reports have confirmed[5]. The "pre-preventive" measures (infringement procedures, recommendations) having been exhausted, the Commission decided to offer Warsaw a last chance to dialogue, however putting itself in an awkward situation regarding the understanding of its foundational texts.

If Poland does not implement the recommendations in the required timeframe of three months and the dispositions of Article 7(1) are eventually applied, the next step will be for the Council to organize a hearing of Poland on the case; this procedure can take place at the earliest in late March 2018. After that, the European Parliament shall, "by a two-thirds majority of the votes cast, representing the majority of its component Members"[6], give its consent to the procedure before it can adopt a Decision by a four-fifths majority (without Poland) determining there is a serious breach of the rule of law. It is unlikely that the first phase of this process could be concluded by mid-summer 2018, and it will represent a true test case as to the actual "deterrence" nature of Article 7(1), as some scholars have said[7]. The measure of success will be not only to see whether 22 out of 27 member states vote together on this issue, which represents at this point an uncertain issue[8], but also whether the eventual adoption of 7(1) will cause Warsaw to backtrack on reforms of the judiciary that are so far very advanced in their implementation process. A lack of the Polish position – a likely scenario at this point – would open the possibility for the Commission to move to Article 7(2) and (3) – the so-called "nuclear option". The former governs the proceedings of determining "the existence of a serious and persistent breach by a Member State" which, if it is found to exist, can lead to the suspension "of certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".

As has been noted by every observer last December, the fact that adopting 7(2) requires unanimity in the Council, and Hungary's principled solidarity towards Poland in this case (and vice-versa in the hypothetical reverse case) closes the door to any possibility of arriving at sanctions. Legal scholars have noted[9] that the only option to bypass Budapest's veto would be for the Commission to invoke Article 7(1) against Poland and Hungary at the same time, therefore depriving them of veto power on 7(2). In addition, the discussions between Poland and Commissioner Frans Timmermans, hailing from the social-democratic side, are also not devoid of simple left-right political cleavages, the conservative leaders in Warsaw being emboldened to oppose instructions given by a liberal West-European political opponent.

4. See e.g.: Pech Laurent, "Systemic Threat to the Rule of Law in Poland: What should the Commission do next?", *VerfBlog*, 2016/10/31
5. See §3 for an exhaustive list: Kochenov Dimitry et al., "The European Commission's Activation of Article 7: Better Late than Never?", *EU Law Analysis*, 2017/12/23
6. The Lisbon Treaty: Article 354
7. Pech Laurent and Scheppele Kim Lane, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 2017/08/23, p.2.
8. Hungary, but also Lithuania, Romania: "President: Lithuania will support Poland in dispute with EC", *The Baltic Course*, 2018/03/09, and Peel Michael, "Romania corruption battle exposes the limits of EU's influence", *Financial Times*, 2018/02/22
9. Scheppele Kim Lane, "Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too", *VerfBlog*, 2016/10/24

The other stumbling block in this context remains the (well-documented[10]) support of the EPP group MEPs, and especially the dominant German group, towards the majority grouping of Hungarian MEPs which is also part of EPP. The leadership of EPP maintains a strong voting discipline in preventing any proceedings regarding infringement procedures against Hungary from moving forward, and it is not unrealistic to consider that nothing would change until a new Parliament is formed in the spring of 2019.

Therefore, any sort of common action against Poland and Hungary is imaginable only in the long term, and will not influence the current procedures against Poland. A weakened Orban after unsuccessful elections this spring could also provide an extra impetus within the EPP group to move forward with sanctions against Hungary, which are set to be discussed under the framework of 7(1) in September 2018 at the Parliament's initiative[11].

BOX 1 ▪ Reform of the judiciary in Poland

Reform of the judiciary ranked high on the agenda of the Law and Justice party when it was received the majority of votes in October 2015. Party leader Jarosław Kaczyński oft repeated that the judiciary was the institution that was preventing Poland from implementing reforms, and President Andrzej Duda blocked the nomination of three judges chosen by the outgoing Civic Platform to the Constitutional Court. After a failed first attempt, President Duda introduced the reform that plans for an increase of the amount of judges on the court, giving the Justice Minister the power to dismiss judges, and lowering their retirement age in late 2016. The reform also allows the Law and Justice party to control the National Judiciary Council (the body that decides of judicial appointments) via the Parliament and creates an "extraordinary appeal" mechanism whereby cases anterior to 1997 can be reopened with the support of the prosecutor general, who also serves as Minister of Justice.

2 ▪ THE DESIRABILITY AND FEASIBILITY OF EU FUNDS CONDITIONALITY

An other way to exert political pressure has been largely discussed these last few weeks by political leaders: linking the availability and delivery of EU structural funds, in the next Multiannual Financial Framework (2021-2027), to respect of the rule of law. The idea was first floated by Budget Commissionner Günther Öttinger in May 2017[12], and has since then gained traction by receiving the support of[13] a series of European leaders and commissioners, most importantly Vera Jourova. The topic was put on the agenda of the informal meetings of EU heads of state and government of February 23, and the outcomes of the discussions show the difficulties and challenges in implementing such a measure. The question here, much like for Article 7, is whether conditionality is in the first place desired by leaders of the EU, and second of all whether the threat of conditionality will be efficient in stopping Warsaw from implementing the reforms of the judiciary.

2.1 Conditionality: risks and rewards for the EU

The idea of linking the delivery of certain EU funds to the respect of the rule of law is not new. In 2013, Hungary was sanctioned "due to significant deficiencies identified by commission

10. Kelemen R. Daniel, "EPP ♥ Orbán", *Politico*, 2015/06/18
11. "Hungary: MEPs to assess whether there is a risk of seriously breaching EU values", European Parliament, 2017/10/11
12. Maurice Eric, "Commission hints at political conditions for EU funds", *euobserver*, 2017/05/30
13. Delamaide Darrell et al., "EU mulls financial threat for Poland on judicial reform", *Handelsblatt*, 2018/03/7; Zalan Eszter, "Commission urges EU countries to pay more into budget", *euobserver*, 2018/02/14; Zalan Ezster, "Eastern states push back at rule of law conditions on funds", *euobserver*, 2018/02/20

audits in the management and control systems of eight operational programmes"[14], and the delivery of a tranche of structural funds was suspended. Therefore, the possibility is now open for Poland, under different criteria, to also be on the receiving end of such a procedure both in the short term – before the end of the current financial framework – and in the long term, if an actionable principle of conditionality were to be agreed upon.

The idea to go for the wallet is tempting on paper: Poland is currently the largest benefactor of the EU's cohesion funds, destined to help member states with investing in infrastructure and employment schemes. Poland is set to receive 86,1 billion euro over the 2014-2020, of which €23,2B from the cohesion funds[15], which represents almost 19% of the total funds available for the financing period.

The economic impact of any sort of suspension of delivery of the funds is however hard to assess in precise economic terms, both the current and next financing periods, and can be measured on the impact on potential growth prospects. The Capital Economics consultancy, an international independent economic research company, has reacted to the news of the triggering of Article 7 by stating that the judicial reforms "have soured Poland's image among foreign investors. The country's investment rate is already among the lowest of any major emerging market and the economy is now at the stage of the cycle where labor market constraints are starting to build and investment is critical to sustaining growth."[16]

Poland's important domestic market means it relies less on foreign direct investments compared to its Visegrad partners (Hungary, Slovakia, Czech Republic).

The threat to withhold structural funds, the very ones that are destined to provide the poorer regions of Europe the possibility to reach average European levels for infrastructure and employment, would also have a political impact that must be taken into consideration. The President of the Commission Jean-Claude Juncker himself has said that this idea "would be poison for the Continent" and that it would further divide the European Union[17], certainly expressing the reluctance expressed by some countries to see this plan go forward. Maximilian Steinbeis, a renowned EU constitutional lawyer, says that creating "a link between structural funding and sanctions for rule of law issues implies that the latter remain primarily a problem of the poorer states"[18]. It is clear that there is **a risk in sanctioning only the regions that need these funds the most,** and indirectly to have the citizens and businesses of these regions pay for the actions of their government.

Additionally, it is worth noting that **the very use of these funds has often been controversial in V4 countries**. Frequent accusations of misappropriation of funds (the most obvious recent case being the one of putative Czech Prime Minister Andrej Babis, accused of embezzling €2M of cohesion funding) have led to the fact that communication about the "benefits" of these funds is often negatively linked to undue personal enrichment those operating them, or otherwise to communication about the fact that the country or region was not able to appropriately draw all the funds available or use them according to the rules. The parliamentary election campaign in Poland in 2015 partially focused on the supposed economic regional imbalances that had been created by the use of these funds, and therefore the question of EU funding has either entered the realm of demagogic or technocratic (the "running the government like a business" mantra) politics. In this context, the ability to regain the control of the messaging about the funds is perhaps the thorniest for local politicians.

14. Kester Eddy, "Brussels suspends funding to Hungary over alleged irregularities", *Financial Times*, 2013/08/14
15. "European Structural and Investment Funds: Country Data for: Poland", European Commission, March 2018
16. Carson Liam, "Emerging Europe Economics Update: EC triggers Article 7 against Poland: what next?", *Capital Economics*, 2017/12/20, 2 p.
17. Eder Florian, "Juncker: German plan to link funds and rules would be 'poison'", *Politico*, 2017/01/06
18. Steinbeis Maximilian, "The Hand on the Faucet", *VerfBlog*, 2017/06/03

The risks of political recuperation by the government is also high, especially given that France and Germany are believed to be active in this process. The debate can add another layer of **tension to the "East-West" opposition**, already deepened by President Emmanuel Macron's statements linking lower wages, social dumping and rule of law[19], and at a moment when discussions in favour of a multi-speed Europe has created a certain amount of concerns in central and eastern Europe. Certain Polish politicians have for example echoed the fact that imposing such a conditionality would simply be a roundabout way for France to regain its economic competitiveness vis-à-vis Poland, by disincentivizing business from moving their production lines to the country and casting doubts about the safety of their investments. This also plays into an oft-repeated argument, according to which the one-way direction of European integration, whereby Central Eastern Europe (CEE) countries take on norms and funds, has not changed, and that "the West" still overwhelmingly perceives CEE as a low-cost production base for its companies to maximize their profits rather than relevant interlocutors for serious discussions about the future of the EU.

The risk of polarization of a process driven by Western countries is therefore a cause for concern that needs to be weighed carefully against the possibility of an intensification of the "rally round the flag" effect in Poland (and Hungary, eventually). Steinbeis describes this potential state of play as assuming "a position of righteousness which entitles us to bring the sinner back to the path of virtue by force: make amends or pay!" and of creating a fertile ground for further anti-German and eurosceptical feelings in Poland.

The questions asked by Steinbeis reflect the deep contradiction, and at heart the impossibility of devising a mechanism of sanction that would preserve the EU's institutional interests without unnecessarily risking the continent's fragile unity. Indeed, while levels of satisfaction with EU membership in Poland and Hungary are very high[20], there is a clear risk that any sort of move to, in the short term, sanction Poland and Hungary could backfire. There is evidence, such as was recently put in an article by Bernd Schlipphak and Oliver Treib, that the experience of the EU's imposed sanctions against Austria in 2000 has colored Brussels' ability to react to concerns about the rule of law in Poland and Hungary. The authors' hypothesis is that "EU interventions might actually provoke an increase un public support for the accused government instead of politically weakening its support base and delegitimizing its authoritarian policies" and that "interventions provide opportunities for domestic actors to play the blame game on Brussels" since they "are able to shift the blame to external actors and to frame negative events as being induced by the outside, thus sustaining citizens' confidence in their competence and trustworthiness".

The Hungarian example proves to be an interesting case study in this **dichotomy between high confidence levels towards the EU and the ability to continue to go against the EU**. Budapest has, since 2010, been at odds with the EU's (cautious) attempts to highlight continued flouting of rule of law and Prime Minister Viktor Orban a vocal critic of the EU's "dictate," Euro-colonialism" and lack of democratic legitimacy. However, it seems clear that the main results of these attacks, rather than increasing Hungarian Euroscepticism, has instead consolidated trust in national institutions that was before that extremely low (the corollary being to facilitate the rise of the Jobbik party). On the one hand, it seems clear that the fact that the EU was never able to push Hungary on rule of law abuses has emboldened the leaders of PiS to test Europe's resolve, allowing them to escalate in implementing the reforms of the judiciary (and jeopardizing the independence of the press) in the face of infringement procedures. On the other, the situation described above regarding Hungary can also easily apply to Poland,

19. "Emmanuel Macron hausse le ton contre la Pologne, en plein dossier Whirpool", Europe1.fr, 2017/04/27 and Lasserre Isabelle, "Emmanuel Macron au Figaro : 'L'Europe n'est pas un supermarché'", *Le Figaro*, 2017/06/21
20. Daniel Debomy, "Public opinions on EU in the Visegrad countries", Policy Paper, Jacques Delors Institute, April 2018

whereby PiS' end-goal could well be to reinforce the trust in national institutions rather than fostering further Euroscepticism. In this context, aggressive statements by Polish leaders shall not be taken at face value, but rather be understood in a domestic context.

There is therefore a clear need to address the issue of conditionality at face value and set realistic expectations of what its contents would be. More importantly however, the main task of negotiations will be to put in place enforcing mechanisms to ensure that conditionality acts as a deterrent, and not leave the door open for escalation and the creation of a *fait accompli* by member states, such as in the case of Poland and Hungary.

As very often in European negotiations, the compromise will come from discussions rather than from a member state – or a group of them – imposing its views. It is likely therefore that any discussion about conditionality in the context of the next MFF will not end exactly in line with the German plan, but rather closer to the existing system in which the respect of rule of law is already a condition for receiving structural funds. In addition, given the need for the next legal framework (the next "Common Provisions Agreement") to be agreed upon unanimously, including any sort of conditionality mechanism, it is unlikely that any too strict criteria will be set. Finally, it would be a mistake to link the delivery of funds to respecting solidarity concerning the reception of migrants: discussions in all the V4 countries about migration have shown that the issue has become hystericized and cannot be the starting point of any discussion on the rule of law.

2.2 Conditionality: what and who is behind a name?

The informal meeting of Heads of State and Government on February 23rd has put the idea of conditionality on the agenda. Reports emerged in following that President of the Council Donald Tusk "had only heard "positive reactions", and that the concept was not questioned by any leader who spoke", with Polish Prime Minister Mateusz Morawiecki adding that "it should be built on very objective criteria"[21].

In reality, as has been mentioned above, conditionalities in EU structural funds do already exist, as shown in the case of funds destined to Hungary that were frozen in 2012. A recent report by the Center for European Reform[22] explains the use of "ex-ante and ex-post conditionalities" by the Commission and the Council as a symbol of their willingness "to use structural and investment funds to push for reform in beneficiary states". The paper also relates that the "increased use of ex-ante conditionality has resulted in positive policy reforms and more efficient use of EU funding", prompting the German government to suggest "the possibility of linking cohesion funds to compliance with the basic principles underpinning the rule of law".[23]

The will expressed by PM Morawiecki to count on "objective criteria" acts as an opportunity for Poland to derail the process that was put forward by Germany and others. The Polish PM seeks to give himself some time to reach an agreement with the Commission regarding the latest recommendations and not to further degrade the country's image of isolation in an Article 7(2) vote. Therefore, by undercutting this initiative and in the near future proposing criteria that would likely exclude certain dispositions of Article 2, Poland is giving itself to set the tone of the discussions, and will make clear that any sort of linkage between the disbursement of funds and migration is a clear non-starter. Besides Poland, Hungary, the country with the highest European ratio of GDP depending on structural funds (around 3%) and 5th largest benefactor of European funds, will also oppose any linkage between funding and migration, as it would here be without the safety net of the EPP group.

21. Zalan Eszter, "EU agrees budget to focus on defence, security and migration", *euobserver*, 2018/02/23
22. Šelih Jasna, Bond Ian and Dolan Carl, "Can EU funds promote the rule of law in Europe?", Center for European Reform (CER), 2017/11/21, 14 p.
23. Ibid., p. 7.

BOX 2 ■ Article 2 of the Treaty on the European Union

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The other countries of the V4, the Czech Republic and Slovakia, seem to be on the fence regarding this issue, alongside the other countries of the informal "Friends of Cohesion" grouping[24] that could also be impacted by new conditionalities. Given the current state of the V4 and the lack of unity regarding "future of Europe" issues, Prague and Bratislava, who have expressed some unease with the value of the V4 format, may be tempted to use this issue signal their proximity to Paris and Berlin rather than Warsaw and Budapest.

With the Czech Republic set to become a net contributor to the EU budget during the course of the next MFF, the growing convergence of some its regions[25] towards EU average, and a potentially diminished envelope for cohesion funding, **the Czech Republic could be one of the countries that would drop a strong reluctance to such conditionalities being impose**d, especially given that its sources of financing are healthily diversified, and investor trust is at higher levels than in neighboring countries.

The fact that V4 countries and the Friends of Cohesion group could find themselves at odds with one another represents an opportunity for Paris, Berlin, and the other countries that have supported this agenda to create a strong momentum and coalition. The same countries that proposed in 2013 to withhold funding (Germany, the Netherlands, Finland, Denmark) will likely remain on board, *a fortiori* the Netherlands since the new Dutch coalition agreement explicitly commits the new government to reaching that goal.

As is the case for a lot of European dossiers, all sights will be set on Germany to provide the balance on this issue. The interim coalition agreement "said delicately that the rule of law inside the EU should be "enforced more consistently than has been the case""[26]; this reflects the careful German position due to **the deep interdependence that has been created between the German industry and the Central European basis of production**. A recent *Handelsblatt* article[27] highlighted the silent, rational support German business owners maintaining interests (production and/or market shares) in Poland and Hungary have given to the local governments, citing stability and "full order books" as a reason for content. Interestingly, a German industry representative is also quoted as "hailing new public investment in infrastructure, digitalization and e-mobility" as one of the reasons of the region's attractiveness. It is in fact these fields which may be the most affected by a decrease in structural funding (either because of a lower budget or because of a scheme stopping the funds from being delivered) but also from a decrease in the attractiveness and investor confidence in these countries. These perspectives for long-term growth will certainly play a role in where Germany lands on defining the compromise on conditionality for the next MFF. It is one that should not entirely escape the minds of decision-makers in Paris, who also maintain relatively strong interests in the region. Creating a strong momentum to establish conditionality rules could therefore be easier said than done, in keeping in mind the current realities of the internal market.

24. Bulgaria, the Czech Republic, Croatia, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.
25. See: Bayer Lili, "Europe's poor regions fear cuts in budget battle", *Politico*, 2018/02/20
26. Charlemagne, "The European Union's budget may soon be weaponised", *The Economist*, 2018/01/18
27. Book Simon, "German Mittelstand reaps dividend of Eastern European autocracy", *Handelsblatt*, 2018/02/09

Besides the risk, discussed above, of further splitting of the EU, any sort of tension around structural funds could further move certain central European countries, most especially Hungary, towards **opening up strategic sectors of their economy to Russian and Chinese investments**. All the CEE countries are part of the 16+1 format with China and have expressed various levels of interest towards cooperation with China. Chinese companies are for example building a strategic Budapest-Belgrade highway (in support of the Belt and Road initiative), and have taken control of stakes in small sectors of the Czech economy (airlines, for example) among others in the region. Concerns about the ramifications of Chinese influence in the region have become important at the EU level, which is now considering setting up investment screening programs, but CEE countries are still open, in the need to pursue the development of their economies, to benefitting from investments from abroad.

Similarly, economic links with Russia are also a matter of concern in the region, especially as regards energy policy. The decision by Hungary to award Rosatom the contract to build the Paks II nuclear power plant, and the ongoing struggle between the Czech Republic and the European Commission for the replacement of the Dukovany power plant in which a government-to-government deal could be struck with Rosatom[28], are a serious cause of concern regarding Russian investments in strategic sectors of EU member states' critical infrastructure. Both the potential loss for Western companies operating in CEE and the identified risk of a stronger role of third countries in CEE will be part of the very tough conversation around the use of conditionality.

2.3 The other means to enforce the rule of law

The context of the negotiations of the next MFF is already very difficult due to tensions regarding the financial hole that will be left by Great Britain's departure, and how to finance the new priorities with a potentially decreased, or somewhat similar, budget. This will make it harder for the agenda of discussions to contain a strong discussion about conditionality earlier on, as the member states are still in the stage of presenting their priorities. This means that in the short term, the idea of linking respect of the rule of law and delivery of funds can only serve as a deterrent and an extra step, in parallel with Article 7, to prevent Warsaw from completing its reforms. As this concerns the post-2020 budget, the effects will only become tangible after this deadline.

For now, there exist other legal alternatives to enforce the rule of law, which need to be explored given the difficulties that could be encountered in linking rule of law with the delivery of funds, as demonstrated above. Their main premise is the need to create an enforcement mechanism that would be separate from the Common Provisions Regulation. However, it should be made clear that **the end goal is to "go for the wallet"**, given the strong unlikelihood of an Article 7(3) suspension of rights seeing the light of day, thereby reinforcing the deterrent value of Brussels' actions.

If Poland were to continue to ignore the recommendations of the Commission, the European Court of Justice could, if seized of a relevant case, declare that the principle of mutual trust no longer applies to the Polish judiciary and stop recognizing the judiciary's decisions as being valid in the EU framework. This could be the initial trigger to stop the disbursement of funds: the Common Provisions Regulation, the framework document for the delivery of EU funds, requires member states to have a certain amount of bodies to ensure that funds are spent in accordance with the text of the Regulation. Since courts are the final guarantor of this process, any doubt about the independence of Polish courts, or even worse the suspension of mutual trust, could provide ground for **a suspension of funds. This could also be applicable for the next financial period**.

28. Watson Nicholas, "Czech risk wrath of EU over nuclear power project", *Politico*, 2018/02/22

An other option would be for one or more member states to use the Articles 259 of TFEU, which allow for the opening of an infringement action directly against an other member state for violating EU law, which automatically brings the matter before the European Court of Justice. This option can be used to bypass the frequent objections of member states who do not wish their rule of law records to be reviewed and monitored by the Commission. Finally, the procedure also has the advantage of being able to overcome easily any sort of lack of consensus as described above regarding unanimity for the next MFF; the contra argument being that one third of member states have the possibility of triggering Article 7 (1) but never chose to do so. It would also push the Commission to take a stance since the article states that it must first be informed of any 259 TFEU procedure in case it wishes to partake in the action (thus turning into an Article 258 TFEU procedure). This would trigger a very interesting debate within the Commission, as we can see that President Juncker and some of his commissioners (especially Öttinger and Vera Jourova) hold different positions about linking rule of law and disbursement of funds.

If such an action is intended, the Court of Justice would be offered a key opportunity, as was described earlier in this paper, to rule whether the systemic abuses on the independence of the judiciary and other institutions ensuring the application of EU law in Poland and/or Hungary should lead to the suspension of the principle of mutual trust. While Article 7 is often dubbed the "nuclear option", this scenario may in reality deserve this moniker: appropriate "messaging" would be put in place before the action is initiated and it could also, once underway, cross a point of no-return in terms of European division and tensions with the member state that is cited in the case.

If the Court of Justice rules in favor of the plaintiff, the Commission would then be, under the provisions of article 260 TFEU, habilitated to request a large fine and even seek payments of penalties, possibly deducted from the structural funding planned for the state. Down the line, this would also allow, in the words of Marek Grela, the Commission "to declare that the absence of independent judicial scrutiny and the sacking of experts means it can no longer certify that EU funds are being properly spent", thus justifying "additional safeguards before structural or agricultural funds are disbursed."[29] The question is to know whether there would automaticity between the ruling of the Court of Justice and the following procedure of suspension of funds by the Commission, or whether it would require another political dialogue with the member state.

There are also debates within constitutional scholars about **the opportunity of revising the mandate and expanding the monitoring role of the EU Fundamental Rights Agency** (FRA). Currently, the Agency reports on a limited amount of thematic fundamental rights issues to EU Institutions and member states but is not allowed to carry out monitoring of the member states themselves (in the case of an activation of Article 7) in order to justify whether there is a serious and persistent breach of European values and the rule of law. Any reform of the mandate of the FRA would likely have to be part of treaty change, a step that is not desired by any of the countries that desire to uphold the rule of law, or would have to be passed by unanimity at the Council. In the shorter term, one option could be for an enhanced cooperation to be launched that would voluntarily subject the "core" to independent monitoring by the FRA; this would however only be useful if membership in this grouping were linked to clear incentives for participation or if it were linked to compromises on other dossiers central to these countries' interests.

The FRA could be tasked with carrying out, for example, a review of the "Copenhagen criteria" that govern accession to the EU; these criteria no longer are enforceable on a regular basis towards member states since they are no longer monitored by an official EU agency once the accession process is finalized. The idea of creating an independent "Copenhagen Com-

29. Taylor Paul, "For EU, Poland is not yet lost", *Politico*, 2016/11/28

mission" was floated by Jan-Werner Müller, Professor of Politics at Princeton University, in 2013[30] following the publication of the Tavares report[31]; the "agency would be empowered to investigate the situation [of respect of Copenhagen criteria]" and empower the Commission "to be required to cut subsidies for infrastructure projects, for instance, or impose significant fines". Criticism towards the idea focused on the fact that creating another institution composed of unelected representatives is not necessarily the proper answer to reinforce the rule of law, and asked the question of whether all the Copenhagen Criteria should be monitored, or a select few only. Several lists of "monitorable" criteria have been issued to help this process; the European Parliament published its own in October 2016, related to democracy, the rule of law and human rights.

Such independent bodies would provide, much like the Court of Justice, a cover for the Commission and member states to justify moving forward with measures such as Article 7. This idea seems to work largely on a preventive scale rather than adding an efficient tool in the European toolbox of sanctions. In this sense, it is useful to consider the long-term deterrent effect of such a grouping to prevent future abuses of the rule of law, and to consider it as an extra corrective mechanism that could be used to enforce the respect of the rule of law in the EU.

Other actors can play a role in upholding and monitoring potential abuses to rule of law, most especially civil society groups and the media. Popular protests in Poland and in Hungary have shown that there is a potential for mobilization when fundamental rights are being endangered (abortion law and judicial independence in Poland, foreign ownership of banks and CEU Law in Hungary), but both countries have also shown a willingness to crack down on the work of NGOs, especially if they receive funding from foreign sources. The "anti-Soros" movement in Hungary but also in Poland plays on the "true Hungarian versus foreigners" rhetoric and is now part of a larger regional conversation: the ex-Slovak Prime Minister Robert Fico openly questioned whether groups that receive support from Soros' Open Society Foundation did not organize the anti-government protests that led to his resignation. In order to embolden the NGOs and the media to continue to act as watchdogs of politicians, the Commission could for example **increase its programs supporting civil society** in order to ensure that such organizations can continue to do their work in the absence even of national financing.

CONCLUSION: IS THE EU ANY GOOD AT SETTING EXAMPLES?

As such, the rule of law mechanism in the EU seems strong, with the existence of pre-preventive, preventive, and corrective mechanisms, and a balanced exercise of these powers between the three EU institutions and a healthy role devoted to dialogue between these institutions and the member states. The potential development of EU case law on systematic infringements (Articles 258 through 260 TFEU) and mutual trust, as well as the possibility for Article 7(2) and 7(3) to be operationalized in the case of a common procedure brought forward against Hungary and Poland offer a fairly positive outlook, in absolute, on the possibility of the EU to link coercive mechanisms with the disbursement of structural and cohesion funding.

30. Müller Jan-Werner, "Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission", *VerfBlog*, 2013/03/13

31. This European Parliament report, authored by MEP Rui Tavares (Greens-European Free Alliance Group), highlighted the state of rule of law in Hungary and abuses by the Hungarian Fundamental Law in relation to the values of Article 2. It was adopted by a 31 to 19 margin by the Committee on Civil Liberties, Justice and Home Affairs on 25 June 2013.

This of course does not take into account the very delicate potential political fallouts that may arise from these procedures; and even if these possibilities serve the goal of restoring deterrence towards future actions, there still lacks a blanket mechanism that could immediately restore the damaged elements of rule of law rather than only the ones named in the limited scope of the infringement procedure. Similarly, there remains **uncertainty on what a follow-up mechanism would look like**, and whether a "rule of law troika" - akin the financial and monetary one operating in Greece – would be established to follow up on the restoration of the judiciary in Poland.

Hand in hand, this evaluation of the mechanisms at the EU's disposal to control the application and abuses of rule of law begs the question of whether these mechanisms are sufficient to prevent any backtracking in other countries, or prevent the further degradation in currently problematic countries. **The current dissuasive dialogue linking rule of law and delivery of funds should serve as a strong warning** to countries that are engaged on a path to infringe on certain key aspects of the rule of law and values of Article 2 that a clear process exists to defend and uphold the EU's interests.

The current debates about multi-speed Europe could also touch upon this dimension: its proponents should **make clear that any lack of change or further backsliding of the rule of law should mean that deeper integration in the framework of the Eurozone would be pursued**. In this case, Central European member states (except for Slovakia) would certainly face a very strong choice to make as regards their European orientation. This is true especially for the Czech Republic and Hungary, which are vastly dependent on the internal market and the four freedoms for their prosperity, and which continue to need foreign investment (and potentially, the stability of a reinforced, rules-bound Eurozone) to pursue their development. The real question mark remains here Poland and the extent to which Jaroslaw Kaszczynski is put his Europhile country at odds with the internal market and how long its clientilist policies can be sustained.

The upcoming Austrian presidency of the Council of the EU, due to the very cool relations between Vienna and Warsaw, will provide interesting to follow. The new chancellor Sebastian Kurz has already said he would support conditionality in the next MFF signal the possibility of heated negotiations in the fall, especially if the Commission's proposal for the MFF (released in May) heeds the idea of conditionality. Vienna will certainly want to tightly control the messaging on these issues given the country's strong footprint in the Western Balkans, in the context of the further enlargement of the European Union.

KEY RECOMMENDATIONS AND CONSIDERATIONS

1. It is essential for **any discussions about upholding the rule of law not be seen as an East v. West opposition**, and therefore to use mechanisms that depoliticize the process. CEE politicians have trumpeted this divide in public speeches in order to delegitimize the value of the message that is being transmitted, in the process also painting the idea that the EU values are different in the West and the East. The use of legal mechanisms that would exert pressure, or sanctions if need be, will therefore need to **come from an overall European political consensus, or from an independent body such as the European Court of Justice.**
2. The question of migration shall in no way be linked to the delivery of structural funds in the next Multiannual financial framework (MFF), as some countries have tentatively expressed it. Not only is the legal basis for this tenuous at best, but it would risk provoking

a very strong political backlash in countries that have opposed relocation mechanisms, where this question is an absolute red line. **Arrangements to deal with future migratory flows should be part of a different conversation**, which will in any case be closed before the entry into force of the next MFF in 2020.

3. When considering financial sanctions, the proponents of this option should **conduct a proper and in-depth evaluation of the political and economic consequences** they may have on public opinions in the sanctioned member states. They should also understand the economic ramifications for some of their domestic actors who depend on CEE countries for their production lines (or who maintain strong economic assets, such as in the banking sector), and the extent to which the single market may be irremediably damaged by such a move. At the same time, if push comes to shove and sanctions are agreed upon, **an effort is required to ensure that civil society is not harmed by these,** and that they can continue to provide necessary watchdog functions in order not to "lose" sanctioned countries.
4. **Sanctions must not focus on the cohesion policy alone.** Warning mechanisms have been used in the case of Poland and Hungary and if used more forcefully, can allow to create the conditions to reestablish a productive dialogue. Other, more pointed sanctions, such as freezing the delivery of Common Agricultural Policy funds, can also serve as a deterrent and show offending member states of the resolve of the Commission.
5. In parallel of any process, civil society organizations, **NGOs, key stakeholders, the main media, trade unions, the Church, should be involved** in order not to give the impression that this is a purely top-down political process. Given the likelihood that citizens may be affected by sanctions, there is a clear need to count on relays of opinion inside the member states that could prevent further polarization of the situation.

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