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# Why the rule of law conditionality mechanism undermines the rule of law and confidence in the EU

*Tóth-Bíró Zsófia*

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**The introduction of a rule of law conditionality mechanism was agreed on by the European Council and the European Parliament in November 2020. The essence of the new system is that payments of EU funds could be withheld in the case of Member States that interfere with or violate the rule of law in their countries. As EU institutions can only act in accordance with the Treaties, the mechanism would initially only sanction wrongdoing that “affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU”. However, it is an obvious intention of several old Member States to extend the scope of the mechanism to other fields as well, such as broadly understood human rights violations. Because of a lack of a solid, commonly agreed baseline as to what the desirable quality of rule of law is, and the absence of a sound legal basis in the Treaties to justify the mechanism, those EU actors that are pushing for the full implementation of the system are on shaky ground.**

Stipulated in December 2020<sup>1</sup> in the wake of the agreement on the EU’s record Covid-induced budget, payments to an EU Member State may be cut or frozen if that country breaches principles of the rule of law. To ensure that the mechanism would not completely fail because of the veto of Poland and Hungary, the main targets of the new scheme, the European Council agreed on a compromise: Hungary and Poland

accepted an “interpretative declaration” laid down in the European Council summit conclusions.<sup>2</sup> Among other things, it was agreed that no measures were to be taken on the basis of the regulation until the Commission has finalised guidelines on the way the conditionality mechanism will be applied. Furthermore, the Member States can first ask the Court of Justice of the European Union (CJEU) to clarify whether the regulation is in line with EU law, and the Commission is obliged to incorporate any elements stemming from a potential CJEU judgment.

There has been a lot of heated debate in the EU’s institutions about the mechanism. Although this has not been articulated in a legal sense, it is clear that the main considerations behind the efforts to punish member states “guilty” of alleged rule of law breaches are essentially ideological. The Christian conservative governments in Central-Eastern Europe adopt an approach to social issues such as the protection of families or migration that differ from that of liberal Western governments.

But ideological differences aside, there are at least two serious concerns regarding the mechanism, voiced primarily by Hungary and Poland. The first is that it may well be that a certain type of rule of law is to be imposed or safeguarded through a blatant violation of EU law. The other concern is that because it is a fluid, malleable concept, the requirement of a certain “level” or “quality” of the rule of law may end up being applied in a partial way, with large, Western European EU member states held against a different standard than “troublemaking” new members like Hungary or Poland. The present analysis focuses on some examples that illustrate these concerns.

First of all, Poland and Hungary believe that the attempt to hold member states accountable for alleged rule of law failings is essentially unlawful. Consequently, on 11 March 2021, Poland and Hungary filed an action<sup>3</sup> with the CJEU seeking legal review of the so-called conditionality mechanism. Poland and Hungary oppose the conditionality mechanism on the grounds that there is a lack of legal basis for the mechanism in the EU Treaties; it interferes with the competence of the Member States; the disbursement of EU funds can only be linked to objective and concrete conditions unequivocally established in a regulation; and that the mechanism also infringes on the principle of legal certainty

Earlier, Budapest also argued that the vote in the European Parliament on starting rule of law proceedings against Hungary in September 2018, which first triggered the Article 7 procedure against the country, should not have been counted in the first place, as abstentions by a number of MEPs had not been factored into the two-thirds majority needed for the vote to pass. In Hungary's view, the vote was not only contrary to EU Treaties, but also to the EP's own Rules of Procedure which require that the abstentions of 48 MEPs should have been included in the vote counting. In fact, if abstentions had been taken into account, the two-thirds majority to adopt the Sargentini report would not have been reached. As minister Varga pointed out, "abstention means a tacit disagreement. It is the conscious political will of MEPs and not their unwillingness to vote. Otherwise, they wouldn't even go to the polls. The irregular way of counting votes thus also violated the principle of the free mandate of deputies, thereby "contributing" to the success of a decision against their will."<sup>4</sup>

The Hungarian government brought forward a case with the CJEU on this matter in 2018. The European Court of Justice, however, ruled on 3rd June that the European Parliament was within its rights to have started proceedings against Hungary, and declared that abstentions "do not have to be counted". In response to the ruling, Hungarian Justice Minister Judit Varga pointed out that Hungary is "ready for dialogue on issues related to the rule of law in the spirit of loyal cooperation", but the pursuit of rule of law violations against it are a "politically motivated witch hunt".<sup>5</sup>

It is worth noting that while the Court needed almost three years to decide on the procedural issue arising from the September 2018 EP vote, it only needed a few months to comply with the EP's request and order an expedited procedure regarding Hungary's and Poland's action challenging the decision on the rule of law conditionality mechanism.

While the Commission adopted a less adversarial stance, and, at least initially, decided to honour the limitations on its actions imposed by the Treaties, the EP, now dominated by a left-liberal majority, has kept fighting back against the legitimate concerns cited above. On 25 March 2021, the majority of MEPs, eager to penalize "unruly" EU countries, practically threatened the European Commission by adopting a resolution<sup>6</sup> in which they urged it to immediately start applying the Conditionality Regulation and "to take all appropriate measures to protect the EU budget." The EP

resolution stated that the Commission must draft any guidelines on the application of the mechanism it deems necessary by 1 June 2021 and consult the EP prior to their adoption. If the Commission does not fulfil its obligations, the EP will consider the launch of legal action<sup>7</sup> for failure to act before the CJEU.

The fact of the matter is that the alleged breaches of the rule of law by Hungary and Poland do not stand closer scrutiny.

Firstly, it is worth noting that neither country stands out in terms of the number of infringement procedures they are facing. If we look at the period between January 2015 and January 2021, we find that there are currently 63 active cases<sup>8</sup> brought against Hungary, while Poland is facing 85. By comparison, 86 proceedings have been brought against Belgium, 91 against Greece, and 77 against Austria in the same period.

As opposed to these countries, the Netherlands stands out as a seemingly very well performing, law-abiding member state, judging from the as few as 43 active infringement cases brought against it by the Commission over the past five years. Yet for anyone outside the Dutch political establishment, it is clear that the Netherlands is “one of the biggest conduits for tax avoidance in the world.” As Boris Kowalski of the German Marshall Fund reminded in a recent article on the Euractiv website, according to a 2017 study<sup>9</sup>, the Netherlands alone is responsible for channelling 23% of all corporate offshore investments into destinations such as the British Virgin Islands. A 2019 article the Foreign Affairs magazine<sup>10</sup> also highlighted that Holland is a de facto tax haven, as former President Obama himself had pointed out in 2009. even developed economies in the European Union that are hit hardest by the pandemic – such as France, Spain, and Italy – are estimated<sup>11</sup> to lose \$10bn in tax revenues annually due to corporate tax avoidance facilitated by the Netherlands.

Secondly, if we reflect on the popular but quite unsubstantiated recurring accusation that the freedom of the media and expression are in danger in both Hungary and Poland, we may come to interesting conclusions if we scrutinize other EU members states’ media landscapes. German media, for one, is dominated by three large media giants, Bertelsmann, Axel Springer and Funke. The country has a powerful public broadcast media that skews left-liberal, and often has disregard for journalistic integrity

and ethical standards in its programming. A recent example of controversial coverage of Hungary-related topics is the documentary<sup>12</sup> produced by the German public media channel Deutsche Welle. In the documentary, accusations of authoritarianism and anti-Semitism are made against the Government of Hungary in a one-sided report on the gentrification of the Buda Castle in the Hungarian capital under a complex government program. Although the documentary generated quite a backlash among viewers, with the large majority of commenters finding it biased and unprofessional, Deutsche Welle has insisted that the report meets all journalistic standards. This is of concern, as this medium is not a privately-owned venture but one financed from German taxpayer monies. If we follow the logic of the criticism levelled against Hungarian public media reports, the Deutsche Welle documentary may qualify as government-sponsored propaganda targeting a sovereign nation's democratically elected government.

Thirdly, in terms of its migration laws and policies, which allegedly demonstrate a lack of solidarity towards other members states, and constitute breaches of EU law, Fidesz MEP Enikő Győri pointed out poignantly in her remarks in the Hungarian Parliament on March 24 that Hungary had in fact shown solidarity towards fellow member states throughout the budget debate. Hungary joined the agreement on EU countries becoming collectively indebted in order to help out the Southern European Member States hit the hardest by Covid last year, despite the fact that Hungary itself was not in need of such a financial crutch. Referring to the EP's threatening resolution plans against the Commission, Ms. Győri also highlighted that the European Parliament is transgressing when it poses as the sole legitimate political actor among EU institutions, and by doing so, it breaches an important provision of the EU Treaties, namely the principle of institutional balance.<sup>13</sup> Moreover, the European Commission also behaves as a political actor in this case, she argued, albeit its primary role is to be the guardian of the treaties.

As Hungarian foreign minister Péter Szijjártó has reiterated on several occasions, the rule of law accusations against Poland and Hungary have no solid basis, and are political attacks rather than criticism rooted in reality. By ignoring blatant violations of EU norms and rules by powerful Western countries, while engaging in open confrontation against Eastern ones that refuse to toe the line regarding family, gender, sovereignty and culture, EU institutions complicit in the warfare against Poland and Hungary are not protecting the rule of law, as they claim, but are undermining it. The

crusade against the Christian conservative government, the most recent chapter of which is the massive pushback against Hungary's anti-paedophilia law, also undermine the confidence of many Europeans in the EU as a union of nations where the diversity of opinions and the sovereignty of member nations are self-evident.

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<sup>1</sup> [https://eucrim.eu/media/issue/pdf/eucrim\\_issue\\_2020-03.pdf#page=20](https://eucrim.eu/media/issue/pdf/eucrim_issue_2020-03.pdf#page=20)

<sup>2</sup> <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>

<sup>3</sup> <https://www.euractiv.com/section/justice-home-affairs/news/hungary-poland-refer-controversial-rule-of-law-mechanism-to-court/>

<sup>4</sup> <https://www.facebook.com/VargaJuditMinisterofJustice/posts/4465244183494503/>

<sup>5</sup> <https://www.euronews.com/2021/06/03/ecj-dismisses-attempt-by-hungary-to-reverse-meps-rule-of-law-vote>

<sup>6</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html)

<sup>7</sup> <https://eucrim.eu/news/disputes-over-budget-conditionality-mechanism/>

<sup>8</sup> [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/)

<sup>9</sup> <https://www.nature.com/articles/s41598-017-06322-9>

<sup>10</sup> <https://www.foreignaffairs.com/articles/netherlands/2019-11-06/how-netherlands-built-one-worlds-worst-tax-havens>

<sup>11</sup> <https://taxjustice.net/press/revealed-netherlands-blocking-eus-covid19-recovery-plan-has-cost-eu-countries-10bn-in-lost-corporate-tax-a-year-2/>

<sup>12</sup> <https://www.youtube.com/watch?v=HNbRlnNC3Fs>

<sup>13</sup> [https://eur-lex.europa.eu/summary/glossary/institutional\\_balance.html](https://eur-lex.europa.eu/summary/glossary/institutional_balance.html)