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# POLICY BRIEF

## *How the EU can and should protect democracy, the rule of law, and fundamental rights in defiant member states: the possibility and desirability of economic sanctions*

### *Abstract*

On 19 March 2018, the School of Transnational Governance and the Department of Law at the European University Institute organised a high-level policy dialogue on the possibility and the desirability of economic sanctions against so-called defiant member states of the European Union (EU). The event gathered academics, policy-makers and elected officials for one day to discuss possible answers to the ongoing systemic threat to the fundamental values enshrined in Article 2 TEU one may see growing in some EU countries. The dialogue took place under Chatham House Rules.

Speakers included professors in European affairs, constitutional law and comparative politics from various European and non-European universities. Representatives of some civil society groups, past or present elected officials, and EU officials, also participated in the discussion.

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*The opinions of the authors represent personal opinions and do not represent the position or opinion of the European University Institute*



## I. Background

When EU member states ratified the Lisbon Treaty, they all agreed to respect the fundamental values of the EU embodied in Article 2 of the Treaty on the European Union (TEU). These values are:

- Respect for human dignity;
- Freedom;
- Democracy;
- Equality;
- The rule of law ;
- Respect for human rights and minority rights

Despite this commitment, some member states have openly and repeatedly violated Article 2. What may be labelled democratic and rule of law backsliding represents one of the most serious threats currently faced by the EU.

Regarding the non-respect of European values, Hungary and Poland are among the most concerning cases. Since 2011, Viktor Orban's Fidesz party has repeatedly infringed minority rights, freedom of expression and independence of the judiciary. Fidesz continues to enjoy strong popular support, confirmed by the general election in April which gave it a two-third majority in the parliament (although it is important to note that these elections have taken place within a seriously compromised electoral framework, with the OSCE for instance concluding that the 2014 elections were free but not fair).

In Poland, the victory of the Law and Justice Party (PiS) in 2016 marked the beginning of a series of violations of European values. These violations have been coupled with a manipulation of the Polish constitutional order and ongoing attempts to capture the whole judiciary, the Constitution Tribunal having been captured in December 2016.

The two countries (often labelled, rightly or wrongly, as "illiberal democracies") are characterised by a reduction of democracy to the rule of majority as interpreted by the ruling party and its Great Leader, a devaluation of the rule of law and a systemic suppression of various forms of pluralism.

Because of the seriousness of the violations, the EU had to react but its various reactions were both fragile and

unbalanced. Fragile first because of the current legal framework symbolised by the so-called "nuclear option" of article 7 TEU.

Although Article 7 TEU was, in reality, written with the hope it would never have to be activated, it nevertheless remains the sole Treaty based instrument specifically designed to prevent serious violations of European values. Unbalanced also because the EU Commission only activated Article 7 procedure against Poland, whereas the situation in Hungary may be viewed as more problematic than the one in Poland. The main explanation is, seemingly, political opportunism. Fidesz is indeed part of the European People's Party – the majoritarian political group at the European Parliament (EP) – which is not the case for PiS.

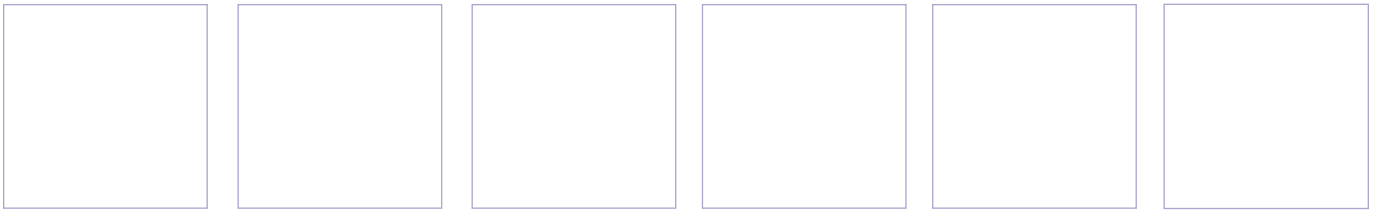
### TAKE AWAY

► *How to conciliate effective action within a limited legal framework and a highly sensitive political situation*

► *So far, the EU's reaction has been fragile and unbalanced*

The question of how to conciliate effective action within a limited legal framework and a highly sensitive political spectrum was at the core of the one-day roundtable. The participants presented and tested different possible actions against the defiant member states with a particular focus on economic sanctions. They also discussed:

- The legal basis of these economic sanctions;
- The possibility of concrete political actions;
- Potential remedies to the crisis



## II. Introduction

Preliminary talks first focused on the possible actions outside the framework of Article 7. Even though article 7 has been triggered against Poland, a successful outcome from a rule of law point of view remains highly uncertain. The acknowledgement of a “serious threat to European values” – article 7(1) – has, for instance, to be accepted by 4/5 of the Council and there will be most probably an opposition from the Baltic States. The adoption of sanctions – article 7(2) – must be unanimously agreed. With more than one “illiberal” regime in the EU, this appears virtually impossible.

Actions could be broadened in three directions:

1. **Imposition of financial sanctions**
2. **Cutting the access of specific EU funds**
3. **Adoption of a conditionality clause**

First the systemic violation of European values could be considered an infringement of European law per se. The activation of an infringement proceeding could open the way to a ruling from the European Court of Justice (ECJ). If the ruling of the Court is not respected by the government of the country having gone rogue, then the ECJ could fine the state based on article 260 TFEU. In other words, the infringement proceeding could lead to the imposition of financial sanctions on the basis of Article 2 TEU.

The second option is also a financial one since it consists of cutting the access of specific EU funds in case of violation of EU fundamental values. The third option is not a sanction but it may still carry financial consequences. The idea would be to use the renegotiation of the 2021 EU budget to adopt a conditionality clause, which would make continuing access to EU funding contingent on respect for Article 2 TEU. Whatever the solution(s) adopted, the first discussant concluded that policy-makers must bear in mind that financial sanctions can be damaging to the citizens of the defiant states.

The impact of three recent rulings were then discussed to see if they may open new avenues to sanction rule of law backslidings. The first decision is an order of the ECJ Court issued on 20 November 2017 which ordered Poland to immediately cease its “forest management operations” in a Natura 2000 site failing what it may be

subject to pay a penalty of at least €100,000 per day. What is particularly noteworthy according to the discussant is the fact that this ruling is based on a purposive, expansive interpretation of Article 279 TFEU – ECJ power to impose interim measures in order to ensure that its judgments are fully effective – which is justified on the basis of the principle of the rule of law.

### TAKE AWAY

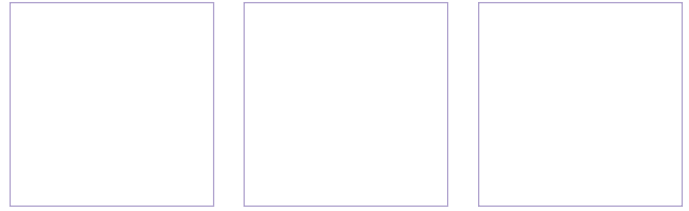
*Possible responses:*

- ▶ *Imposition of financial sanctions on the basis of Article 2 TEU*
- ▶ *Cutting the access of specific EU funds*
- ▶ *Renegotiation of the 2021 EU budget to adopt a conditionality clause, which would make continued access to EU funding contingent on respect for Article 2 TEU*

The second decision is a ground-breaking ECJ judgement issued on 27 February 2018. The 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 maintain the independence of their national courts and, more broadly, to ensure that their courts meet the requirements essential to effective judicial protection.

According to the discussant, this essentially means that direct attacks on national courts and judges can now be directly challenged on the basis of EU law and, more specifically, Article 19(1) TEU.

The third and last decision is an important and unprecedented judgement adopted on 12 March 2018 by the Irish High Court. The Court decided that the cumulative effect of rule of law violations in Poland have reached such a



level that the ECJ must now decide whether the EU principles of mutual trust and mutual recognition ought to be set aside. Similar judgements could be adopted by other national courts and could create a climate of mutual defiance against the Polish and Hungarian justice systems.

### III. Discussion

Based on the preliminary remarks, the discussion was articulated around three questions:

1. **The conditionality dimension:** how to assess a violation of the European values in practice?
2. **The sanction dimension:** what should be the nature of the sanctions and what are their limits?
3. **The rollback dimension:** which strategy to adopt in order to end and roll back the capture of checks and balances?

#### *The conditionality dimension*

Answering the question of conditionality is essential because it brings the discussion back to the Copenhagen criteria. Participants agreed to say that pre-enlargement and post accession compliance with these criteria was not taken as seriously as others such as the Maastricht ones.

The EU has functioned for too long without seeking to clearly formalise a common understanding of what European values are about. This lack of genuine self-reflection on the values was slightly corrected by some a posteriori initiatives. One participant, for example, observed that article 7 was introduced in order to counterbalance the weaknesses of the Copenhagen criteria.

The adoption by the European Commission of the rule of law framework in 2014 may be seen as evidence that a consensus on European values could emerge. While regretting that the framework was adopted after article 2 had been substantially and systematically violated in at least one EU Member State, the participants agreed that the framework could be used again in the framing of future European policies.

One area could be the EU's multiannual financial framework. Conditionality may also bring objectivity in the debate and may prevent double standards. Some participants however criticised the rigidity of rule of law criteria claiming that no member states would always fully respect all of them. The Commission's rule of law framework or

Article 7 TEU are however there to deal with exceptional situations rather than to address minor, non-systemic, non-serious threats or breaches of the rule of law.

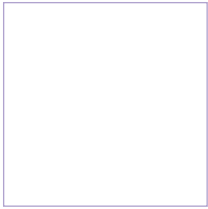
Conditionality and common agreement on the European values are essential but so is a common strategy regarding the institution in charge of monitoring and establishing any eventual violation of European values. For instance, the European Commission enjoys full discretion regarding the activation (or not) of the Rule of Law Framework.

This may be seen as problematic because it may politicise the debate. In that sense, the discussants acknowledged that the involvement of national courts could be an interesting solution but it would not come without limits. First Polish and Hungarian courts have been or are in the process of being "captured", which means that internal judicial "resistance" is unlikely in these countries. For instance, the likelihood of a preliminary question to the ECJ on issues of judicial independence is low.

The alternative of using other national courts to collectively assess violation of Article 2 in another country is another possibility. However, it requires coordinated action, a selection of test cases involving European law and the assurance that individual judges will act in the same direction. Moreover, it has been underlined that the overall message "we do not trust your judges anymore" is problematic. It could encourage business actors to turn to arbitration, which may be viewed as a process that suffers from a number of flaws from a rule-of-law point of view.

#### *The sanction dimension*

The recourse to financial sanctions was then widely discussed, especially the linkage between conditionality and economic sanctions. Some have argued that this linkage already exists in the area of EU external relations and that a similar linkage could or should be envisaged for internal policies. Economic sanctions must however be carefully thought and contextualised before being applied. A fine or a suspension of EU funds should be designed so as to not to affect the population who cannot be held responsible for the violations of European values by their governments. This would also prevent any "rally-around-the-flag" campaigns by the targeted governments. This may however tempt rogue governments to court non-EU authoritarian powers.



Instead of direct economic sanctions, some participants advocated for indirect economic sanctions or direct economic incentives. The EU could, for example, put more emphasis on the connection between respect of European values and safeguard of external investments. Another option could be to provide direct financial support to civil society actors. The proposal to set up a European Values Instrument may be viewed in this respect as a positive step.

**TAKE AWAY**

- ▶ *Which actor: could national courts play a role in monitoring and establishing any eventual violation of European values, instead of this being the sole discretion of the Commission?*
- ▶ *Which method: indirect economic sanctions or direct economic incentives (rather than direct economic sanctions?)*
- ▶ *How can the EU effectively communicate its own values and counteract anti EU narratives?*

If economic actions are triggered, the particular economic context of Poland and Hungary ought to be taken into account. If the illiberal path the two countries follow is broadly similar, their motivation is different. Considering the features of Orbán’s regime, financial sanctions may indeed have an impact if they target the right persons. In Poland, however, financial sanctions may not work considering the more ideology-driven nature of the ongoing process of constitutional capture we are witnessing there.

**The way forward**

A genuine reflection is also needed for stronger political actions. The constant support of EPP leaders towards Orbán’s policies may be viewed as unwise if not shameful. Political pressure and even shaming strategy could be used in the forthcoming of the 2019 European elections so as to prevent authoritarian forces hiding behind mainstream allegedly pro-European parties while implementing actions and policies which are in obvious breach of Article 2.

More largely, a coordination of the different EU institutions is needed to ensure that European values are respected. This must come with full transparency whenever a decision to act – or not to act – against a defiant government is taken. Finally, more radical options such as a two-speed Europe or a suspension of Schengen should be considered notwithstanding their high political costs.

Within the defiant states, EU actors should reflect on how best communicate the importance of the values laid down in Article 2 and counteract anti-EU narratives promoted by the “illiberal” governments which however receive substantial EU funding.

A new narrative about the rule of law must be put together and promoted. The EU should strongly support civil society actors but also judges in countries where the independence of the judiciary is under attack. A discussant suggested to work on a European news channel in order to reach out directly the population without going through captured national media.

**IV. Concluding Remarks**

The final round of the debate was dedicated to the concrete actions the participants could take in order to help national judiciaries in countries where their independence is attacked. Numerous initiatives involving different actors in different domains were discussed such as:

- A strategic litigation strategy;
- A strategic litigation fund;
- Targeted communications to key actors so that they become more familiar with the nature of the threats to the rule of law we are witnessing;

- The need for the rapid publication of counter-arguments when authoritarian governments justify attacks on the rule of law on the basis of misleading legal analysis

It was emphasised that the actions cannot be limited to a top-down approach and they must reach out the people. Engagement of civil society can have a direct impact on the political. In this perspective, it was suggested that many networks could be used, such as the European ombudsman.

*Endnotes:*

1. Case C-441/17 R, Order of the Court (Grand Chamber) of 20 November 2017, European Commission v Republic of Poland, EU:C:2017:877.
2. Case C 64/16, Judgement of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses v Tribunal de Contas, EU:C:2018:117.
3. The Minister for Justice and Equality -v- Celmer [2018] IEHC 119
4. <http://www.europarl.europa.eu/news/en/press-room/20180412IPR01607/eu-must-support-civil-society-organisations-promoting-european-values>

## The School of Transnational Governance

The European University Institute’s School of Transnational Governance (STG) brings the worlds of academia and policy-making together in an effort to navigate a context, both inside and outside Europe, where the challenges of governance extend beyond the state.

The STG policy brief series, published by the School of Transnational Governance at the European University Institute, provides topical perspectives on thematic issues of relevance to transnational governance. The contributions result from the proceedings of events hosted or sponsored by the STG. The briefs are policy-oriented and diverse in terms of the disciplines represented. They are authored by STG staff or guest authors invited to contribute on particular issues.

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