

Hungary's One-way Ticket to the EU

Hungary and the Copenhagen Criteria

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Although its action tends to be perceived as undemocratic by fellow EU member states, Hungary's right-wing conservative party Fidesz has just been confirmed in power by a large majority. Hungary has become a test case for the Copenhagen Criteria, according to which the stability of democratic institutions is a condition for EU accession, but not for continued EU membership.

Since the landslide victory of conservative right-wing party Fidesz in the April 2010 Hungarian elections, multiple commentators have been urging the European Union (EU) to take a stand against Hungary's newly confirmed majority, accused of undermining the integrity of democracy. European institutions have been faced with what is commonly referred to as the 'Copenhagen dilemma'.¹ This expression designates a paradoxical situation: while only formally democratic states can become EU members, little can be done against the undemocratic tendencies of an existing Member State. Indeed, under the Copenhagen criteria established in 1993, the opening of accession negotiations with a candidate country is conditioned by the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'². Once countries have accessed membership, however, the tools that would allow the EU to ensure continued respect for these norms are rather scarce. This essay offers an analysis of the legal challenges the EU faces in resolving this dilemma.

Concerns for democracy within the EU

The Hungarian case is neither isolated nor idiosyncratic. Not only have developments in Austria and Poland raised concern in the past, but the fragility of democracy has more recently become apparent in Romania and Bulgaria.

In October 1999, the radical right Freedom Party (FPO), led by Joerg Haider, became the second largest electorally supported party in Austria. This election, like the 2010 Hungarian national elections, dissolved the previously bipolar political stability between the centre-right Austrian People's Party (OVP) and centre-left Social Democratic Party (SPO). Within months of national elections the radical right FPO and the centre right OVP formed a new coalition government, heightening international concern. In February 2000 European Union Member States issued diplomatic sanctions against Austria, a decision based on moral intentions rather than on the legally defined procedures in

¹ See for example: <http://www.socialplatform.org/news/european-parliaments-rapporteur-on-fundamental-rights-calls-for-a-new-mechanism-tackling-the-copenhagen-dilemma/>.

² See Website of the European Commission's DG Enlargement: http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm.

Article 7 of the Treaty on European Union (TEU). While Austria argued against the sanctions on the basis of the nation's own safeguards against extremism, the sanctions, nevertheless, led to the resignation of FPÖ leader Jörg Haider on 28 February 2000. These were only lifted after a committee from the European Court of Human Rights recommended such actions to the President of the European Council in September 2000. The Austrian case led to the amendment of Article 7 of the TEU under the Nice Treaty. A preventive mechanism was added to address cases in which there is a "clear risk of a serious breach by a Member State of the values referred to in Article 2" (Article 7.1 TEU), without the breach itself being explicitly established.

Other countries have more recently caused concern. In Poland, between 2005 and 2007, the conservative Law and Justice Party (PiS) led a government coalition with two radical populist parties; the left-agrarian Self Defence Party (SO) and the radical nationalist and ultra-Catholic League of Polish Families (LPR). In August 2006 the PiS government put forth a major civil service reform that compromised the administration's independence, allowing the government to substantially restructure institutions solidified under previous governments. Following the vote of a new lustration law on 21 July 2006, the government attempted to remove a Polish Solidarity leader and former political prisoner of the Communist regime, Bronisław Geremek, from his seat in the EP. This led to an open confrontation with the European Union in the spring of 2007. These tensions only found a resolution when, in May, Poland's Constitutional Court deemed the new lustration law unconstitutional.

Since the summer of 2012, the Romanian USL (*Social Liberal Union*) seems to be tempted by a similar path, with direct government interferences in the Constitutional Court's functioning. Conversely in Bulgaria, GERB (Citizens for the European Development of Bulgaria), the centre-right party in power since 2009, has been accused of attempted electoral fraud in the last parliamentary elections of May 2013.

Recent developments in Hungary have nevertheless constituted the most serious source of concern for the European Union to date. During the 2010 national elections, right-wing party Fidesz won a two-third majority in parliament, and the radical right Jobbik became the third largest party in Hungary. Since then the Fidesz majority spurred controversy by initiating large legislative changes. Among these, the adoption of a new Constitution by the Hungarian Parliament on 18 April 2011, a document drafted by Fidesz and adopted by Parliament with one month for debate. The main argument for a new Hungarian Constitution is that the previous one had reminiscences from Hungary's communist past: although the Constitution was heavily amended in 1989, an entirely new Constitution had not been developed.

The new Constitution has already been amended five times since its initial instatement. While many of these amendments were spurred by EU scrutiny, the changes have been seen as lenient and not fully tackling the European targeted issues. This new constitutional system has been accused of centralising regulating bodies, and hindering institutions from checking the powers of the one-party government. US and EU bodies have specifically questioned the state of the rule of law in Hungary due to the fifteen-page 4th Amendment added to the forty-five-page Constitution on 11 March 2013. The 4th Amendment over-rides numerous policies that the Hungarian Constitutional Court had declared unconstitutional, and has also reversed many of the concessions Hungary made previously to the European Union, Council of Europe and the US State Department. Examples of such constitutional reversals include making homelessness a potentially criminal offense (Article 8, 4th Amendment) and requiring students on state financial aid to remain working in Hungary for a decided period of time after graduation (Article 7, 4th Amendment).

The 2010 New Media Law, passed 21 December 2010, has also been criticized for challenging public freedoms. The most contentious measures include the creation of the Hungarian Media Authority, a centralised structure regulating all media sectors. The Media Council heading this new authority has a potential role in appointing directors to public media outlets, and managing the funding body of Hungary's public media. It also has the power to levy heavy fines based on the content of both public and private media, including print, broadcast and Internet-based media. The new Media Council chairman is appointed directly by the Prime Minister, and council members are elected by two-third

government vote for a nine-year term. Furthermore, political neutrality of public broadcasting, originally ensured through a Court decision, is not overtly guaranteed in the new Constitution. The Fifth Amendment to the Constitution, instated 1 October 2013, has added even further media restrictions. Political campaign ads will now be allowed to broadcast on public as well as commercial TV and radio free of charge, raising concerns that free expression could be curtailed during electoral campaigns.

The judicial system has also been affected by wide legislative changes. The 4th Amendment not only overrides a Constitutional Court's previous decision to declare certain Fidesz propositions unconstitutional, it also nullifies all previous decisions of the Hungarian Constitutional Court developed prior to 1 January 2012, thus erasing twenty years of rights-protecting case law. The 4th Constitutional Amendment has also centralized judiciary power significantly. As defined in Article 13 of this Amendment, the National Judicial Office, a body lacking independence from the government in its nomination process, has the power to centrally manage administrative affairs of the courts, potentially limiting the self-governing of judges.

Finally, the Fidesz government has introduced new national value-based policies and legislation into Hungary, some of which have been accused of challenging individual freedoms. The secular character of the Hungarian state, especially, appears compromised. The first paragraphs of the preamble to the Constitution include 'God bless Hungary', and locate Hungary's identity as an integral part of Christian Europe. Similarly, Paragraph 13 designates faith as one of the most fundamental values of national solidarity. Religious entities have also been affected by the new Constitution. In 2012 the legal status of over 300 churches was revoked, and the freedom to create new churches supported by the government is no longer explicitly ensured. While the 4th Amendment establishes a new status for so-called 'organizations with a religious intent', European concern lies in the grey area left for churches that do not explicitly collaborate with the government.

Developments similar to those taking place in Hungary are unlikely to be the last the European Union confronts. Not only are the democracies of Central Eastern Europe and the Balkans revealing themselves to be more unstable than was once envisaged, but also protest votes and abstention levels reveal the current fragility of democracy even in the historical members of the European Union. In this context, it is important to analyse the EU's reactions to Hungary, and the legal tools it has tried to use. This analysis reveals Europe's limitations when faced with such situations.

Insufficient legal tools for the European Commission

In the case of Hungary, infringement procedures have been the main route by which European institutions have sought to intervene. In accordance with Article 258 of the Treaty on the Functioning of the European Union (TFEU), such procedures are instigated by the European Commission (EC) to ensure Member States' compliance with areas of EU law that fall under community competence. Among the many legal provisions introduced by the Fidesz majority, the European Commission has found a number that it considers contradictory with EU law. On 17 January 2012, it launched three separate accelerated infringement procedures. Two of them targeted measures that the Commission found compromising of the independence of the Central Bank, and the independence of Data Protection Authorities, both of which are guaranteed under EU law (Article 130 TFEU and Article 16 TFEU). The third infringement procedure challenged the new retirement age for judges, prosecutors and public notaries, on the legal basis that it contradicts EU rules on equal treatment in employment (Directive 2000/78/EC). Since then, the EC has also been involved in examining the compatibility of Hungarian law with EU legislation following the 4th Amendment to Hungary's new Constitution in March 2013. The EC has also sought to strengthen its bargaining power by making Hungary's access to an IMF loan conditional on full cooperation. However, the end of Hungary's negotiation with the IMF in January 2013, as well as Hungary's recent compliance with the conditions of the Stability and Growth Pact, have reduced the EC's potential leverage.

Actions for non-compliance can be a means for the EU to address certain challenges to the integrity of Member States' democratic institutions. In the specific case of Hungary, these procedures have contributed to several controversial measures being repealed or amended. For example, Constitutional revisions in Hungary and legal modifications concerning the Central Bank brought the Commission to drop the first of these infringement procedures. The pressure that has resulted from the examination of the Fourth Amendment has also encouraged the Hungarian government to address potentially contentious issues. The Fifth Amendment was thus voted in on 1 October 2013, in part to annul the newly found power of the National Judicial Agency, Hungary's highest judiciary authority, to re-assign cases from one lower court to another.

As an instrument for verifying Member States' conformity with human rights and democratic principles however, infringement procedures remain ill adapted. Indeed, rights and principles such as those enshrined in the preamble of a constitution remain within the *exclusive competence* of Member States. This means that the EC cannot *directly* instigate an infringement procedure against a Member State for non-compliance in this field, nor can the Court of Justice of the European Union (CJEU) be seized directly on these matters. Therefore, only controversial measures that are related to domains of EU competence can fall under the coup of an infringement procedure. For instance, potential challenges to the independence of the judiciary in Hungary are not being targeted directly. Instead the CJEU is currently examining the new retirement age for judges, prosecutors and public notaries, on the legal basis that it contradicts EU rules on equal treatment in employment (Directive 2000/78/EC).

The main problem here, is that infringement procedures can only selectively address potential concerns with regard to the respect of human rights and democratic principles. In the particular case of Hungary, many decisions that commentators have considered problematic are likely to remain unconcerned by actions for non-compliance, because they fall outside of EU competence. One example includes the new Constitution associating 'parties that became legal successors to the Hungarian Communist Party in the democratic transition' to the crimes of the Hungarian Communist party itself. While this provision potentially opens the door to the criminalization of Fidesz's main political opponent, MSzP (see Article 3 of the 4th Amendment to the Hungarian Constitution), there is no legal basis to target it under EU law. Another example concerns the fact that policy areas, such as family law and fiscal policy, are now part of cardinal laws rather than ordinary legislation, a measure that will considerably restrict legislative manoeuvring for future majorities (see Article L and Article 40 of the new Constitution). Here again, there are no legal grounds upon which the EC could challenge these measures.

Another issue is that the EU is more likely to address challenges to democracy that are related to economic freedoms. This is because EU competence remains far more prominent in issues touching upon the functioning of the Single Market. For instance, the free movement of workers, non-discrimination in employment, or freedom to broadcast for private media during electoral campaigns, fall under EU competence because they relate to Single Market Law. While these rights are fundamental, their defence at the exclusion of other freedoms may be problematic. Targeted Member States may selectively choose to address issues related to the economy to escape more politically sensitive matters. It is noteworthy that the contentious points the Hungarian government most rapidly and fully addressed were on the one hand those concerning the independence of the Central Bank and on the other hand those concerning respect for the Stability and Growth Pact. Since Hungary has been successful in both of these endeavours the bargaining power of the EU has significantly diminished in matters less directly linked to the economy.

Finally, targeted countries may argue that resorting to infringement procedures to address politically sensitive issues, for instance defending civil and political freedoms under cover of economic ones, is an arbitrary misuse of these instruments, as well as an over-extensive interpretation of the EC's power. In the case of Hungary this appears to be a particularly important point, as the Hungarian government repeatedly argues that it is a victim of the EU's malevolent obstinacy. While this may be read partly as a strategy of communication, it is nevertheless likely to negatively influence the way in which Hungarian citizens view the EU's interaction with their state, undermining potential popular support towards democratic reform.

Pressure from the European Parliament and the Council of Europe

Given the lack of legal basis for action upon Member State shortcomings in the fields of human rights and democratic principles, European institutions have exercised more informal and political forms of pressure on Hungarian officials. The most visible signs of this have been coming from the European Parliament, where several debates have been organised and statements issued on the questions raised by the Hungarian situation. European Members of Parliament adopted a first resolution on 16 February 2012, expressing ‘serious concern at the situation in Hungary in relation to the exercise of democracy, the rule of law, the respect and protection of human and social rights, the system of checks and balances, equality and non-discrimination’ (point 1 of EP resolution 2012/2511).

In the past year, the European Parliament’s activism has intensified, with a second debate organized on 17 April 2013. On 3 July 2013, the EP adopted a second resolution in a plenary session on Hungary, based on a report drafted by rapporteur Rui Tavares, and initially discussed in the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs. This resolution provides a far more detailed description of institutional transformations in Hungary, and recommends specific courses of action for different EU institutions. Among other things, it appeals to Member States and the European Council to express more vocally their concern over the situation in Hungary, and for the Commission to ‘adopt a more comprehensive approach to addressing any potential risks of serious breaching of fundamental values in a given Member State’ (point 70 of resolution 2012/2130 (INI)).

Pressures from the European Parliament are also coordinated with the Council of Europe, an international organization separate from the European Union, created in 1946 to encourage cooperation of its members in the fields of human rights and democratic standards. The Venice Commission (or European Commission for Democracy through Law), an advisory body of the Council of Europe composed of independent experts in the field of constitutional law, has been particularly active in this regard. In April 2013, after the 4th Amendment to the Hungarian Constitution, the Venice Commission recommended that Hungary be subject to a monitoring procedure. This procedure would have involved the appointment of a Monitoring Committee to verify the compliance of Hungary with its obligation under the terms of the Statute of the Council of Europe and the European Convention on Human Rights. In the end, the proposal was rejected by the Bureau of the Council of Europe’s Assembly on 25 June 2013. The means disposed by the Council of Europe to enforce compliance either of the decisions of the Monitoring Committee or the European Court of Human rights are limited. Given the Council of Europe’s incapacity to impose financial sanctions, suspension or expulsion from this institution is the more extreme solution that could be imposed on Hungary. But even countries that have repeatedly been prosecuted for violations of the Convention, the Russian Federation for instance, are still full members of the Council.

Ultimately, political pressures could resort to the so-called ‘nuclear option’ of Article 7 of the Treaty on the European Union (TEU). Article 7 was integrated in EU law with the 1997 Treaty of Amsterdam precisely in order to address potential or actual threats to democracy and human rights within Member States. This provision grants the Commission or a voted one-third of Member States the possibility to ask the European Council (composed of the Heads of State or Government) to determine whether a Member State still complies with the broad respect for human rights and democratic principles the Union is founded on (as laid down in Article 2 TEU)³. If the Council pronounces itself *unanimously* on the existence of a serious and persistent breach of these principles,

³ Article 2 TEU: “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”.

then it can vote by a qualified majority to suspend a Member States voting rights (Article 7.2 and 7.3 TEU).

The 1999 Austrian crisis, outlined previously, revealed the shortcomings of this instrument, when Member States resorted to a coordinated diplomatic isolation of Austria with no legal basis. Learning from this situation, the Nice Treaty added a preventive mechanism to the above-mentioned provisions of Article 7, to address cases in which there is a "*clear risk* of a serious breach by a Member State of the values referred to in Article 2", without the breach itself being explicitly established (Article 7.1 TEU). This decision is slightly easier to reach, as it can also be proposed to the Council on a reasoned proposal from the EP, and requires four-fifths of the Council's votes, rather than full unanimity. It does not, however, lead to any concrete sanctions, but only acts as a 'warning' which, if the issues at stake were not subsequently addressed, could in turn lead to the 'nuclear option' of voting suspension being triggered. In the case of Hungary it is noteworthy that neither the Council of Ministers, nor the EC, nor individual heads of states, have alluded to the possibility of resorting to Article 7, even in its more toned-down and preventive use.

While in principle it may be justified for European institutions to exert such forms of diplomatic pressure on the Hungarian government, in practice the existing institutional mechanisms appear inappropriate. With regard to the application of Article 7 TEU in particular, what appears to be missing is a series of clear criteria to determine risk of a 'clear and serious breach' of democratic principles. The only existing guidelines are set out in a 2003 Communication of the EC (COM 2003), a document that is not sufficiently detailed to be directly applicable by European institutions. By considerably widening margins of interpretation, this lack of clarity and progressivity makes resorting to Article 7 a highly sensitive and political decision, rather than a strictly legal one.

This has two main negative consequences. The first is that Article 7 has become so heavily charged with negative connotations that it is unlikely to serve in the EU's treatment of Hungary, despite the fact this instrument was put in place precisely to address these types of situations. In other words, it facilitates the inertia, rather than the action, of EU institutions. Effectively it is no more than a coordinated expression of concern from both Member States and European Institution. Nevertheless, even the European Parliament, most active in addressing the Hungarian situation, does not refer directly in its last resolution to the possibility of initiating such a procedure.⁴ In fact, recommendations to resort to Article 7 in previous versions of the Rui Tavares report have been removed in the final European Parliament resolution.⁵ The politically sensitive nature of this procedure is likely to have spurred resistance against it at many levels. The European Parliament willingness to address the Hungarian situation is unequally shared between different political groups. For instance, while both the Greens and the Alliance of Liberals and Democrats for Europe (ALDE) have been particularly vocal in opposing the Hungarian government's actions, the European People's Party (EPP), the largest in the EP, has been much more reluctant to take action. This can easily be explained, considering that Fidesz is part of this group, and Viktor Orban has been vice-president of the EPP since 2002.

Arguably, Member States have an even weaker short-term interest in initiating such a procedure. For a number of European governments, creating a precedent out of the Hungarian situation could result in their own parties being targeted by this procedure in the near future. More generally, 'normalizing' Article 7 would represent a loss of national sovereignty that few governments consider they can politically afford. As a result, while it could be imagined that these obstacles would be removed in extreme and exceptional circumstances, a military coup for instance, Article 7 is nevertheless likely to remain an empty and inefficient threat in more ambiguous cases.

The lack of clear criteria and over-politicization of this process raises a second fundamental problem. Not only is it inefficient in the absence of defined targets and political will to sanction individual Member states, it is also likely to be perceived as an arbitrary form of persecution by political majorities countries. Infringement procedures at the very least concern specific provisions of

⁴ It only refers to Article 7 in general terms in its preamble (point H and I).

⁵ See point 51 of a draft version of the Rui Tavares report from 2 May 2013:

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/935/935253/935253en.pdf

EU law that Member States have committed themselves to. On the other hand, respect for the far more general ‘values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ enshrined in Article 2 (TEU) offer far wider margins of interpretation. It is noteworthy that Hungary’s current government often argues its position *in the name of democracy*, personifying EU pressure as an authoritarian imposition on a very comfortably elected majority. East of the former iron curtain, the EU is also frequently accused of holding double standards for the old EU 15 and the new Member States of the last rounds of accession. More generally, while there is no shared definition of democracy or accepted criteria to evaluate its quality, what constitutes a democratic regime will most likely remain a matter of political dispute between individual Member States and European Institutions.

Economic integration versus political cooperation

The European Union has little scope for action against breaches to democratic principles and Human rights within the existing legal framework. Infringement procedures only very partially allow targeting those Fidesz-led measures that commentators have deemed undemocratic. As for more general forms of diplomatic pressures coming from EU institutions, including the threat of resorting to Article 7, the absence of clear benchmarks has over-politicized a process that has become both ineffective and impractical.

Effectively addressing these situations in the longer run would require a reform of the Treaties. Several public statements seem to demonstrate that the European Commission is seriously considering this option. On 11 September 2013, in his State of the Union Speech, EC President Manuel Barroso declared that ‘the need to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states’ rights’,⁶ and promised that the Commission would issue a new communication on this matter in the spring of 2014. Vice-President of the European Commission and EU Justice Commissioner, Viviane Redding, was far more explicit in what this could involve.⁷ In a speech given at the Centre for European Policy Studies on 4 September 2013, she alluded to ‘lowering the very high thresholds for triggering at least the first stage of the Article 7 procedure’, as well as extending the powers of the Fundamental Rights Agency.

Her most ambitious proposal, however, refers to abolishing Article 51 of the Charter of Fundamental Rights, a measure that would effectively, according to Ms. Redding, ‘make all fundamental rights directly applicable in the Member States, including the right to effective judicial review’. Concretely, this reform would provide a new legal basis for the Commission to bring an infringement procedure in front of the Court of Justice of the European Union for non-compliance in the field of Human Rights and democratic principles. As for other fields of EU law, while general principles would be established in the Treaties, Directives and Regulations could subsequently detail more specific provisions. It is noteworthy that Member States have already drafted a document that could serve as a basis for this new competence, the Charter of Fundamental Rights for the European Union. Proclaimed on 7 December 2000, the Charter was only mentioned in the 2007 Treaty of Lisbon at the condition that it ‘does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the Treaties’ (Article 52.1 of the Charter).

Ultimately, the decision of whether or not to enshrine democratic principles in the competences of the EU is highly political, and will require Member States to reach greater agreement on the nature of the European project. This project was first conceived by its founders as one that would reach political goals through economic means. The EU's current confrontation with Hungary is demonstrating that economic integration does not necessarily lead to political cooperation, or to linear democratic development. While a complicated dynamic has always existed between the economic and

⁶ See Europa.eu press release: http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

⁷ See Europa.eu press release: http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm

political aspects of the EU, today it finds itself at a critical juncture. Admitting impotence, rather than acquiring new means to act, would likely reduce the EU to a single market with a democratic varnish. Through inaction, the EU runs the risk of discrediting itself, losing what is left of its legitimacy in the eyes of its citizens, its partners and, potentially, future Member States. Instead, Member States should recognise their real interest in re-orienting the European project towards its initial ideal, a political space where respect for democracy and human rights is non-negotiable.

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