Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too

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On Thursday, 27 October, the deadline set by the European Commission for Poland to comply with the Commission's Rule of Law Recommendation expires. The Recommendation requires the Polish government to publish all decisions of the Constitutional Court and follow them. As of this writing, the two key judgments nullifying laws that were designed to cripple the Court remain unpublished. And the fight over which judges may legitimately sit on the Court continues.

If the deadline passes Thursday and the Polish government is still defiantly insisting that it has the right to seize control over the Constitutional Court, the Commission must invoke Article 7 TEU as it has threatened to do. Article 7 is the mechanism in the EU Treaties that leads to sanctioning a Member State for violating basic principles of the EU. As of now, a few days before the deadline, Poland seems to have no intention of doing what the Commission requires.

The reason for Poland's noncompliance is clear: It can see ahead to the endgame. The Polish government knows that it will be impossible for Article 7 sanctions to be mustered against it even if there is a widespread political will to do so.

The reason lies in the procedure for adopting sanctions outlined in Article 7(2) TEU. This article requires a unanimous vote in the European Council, minus the state under review, for sanctions to be authorized. But Viktor Orbán, Hungary's pugnacious prime minister, announced on 8 January 2016 that Hungary would block any Article 7 sanctions that the EU might propose against Poland. Why should Poland back down when nothing will come of standing up to the EU? Without sanctions to back up the Commission's demands, Poland can simply thumb its nose at the Commission.

Given Polish intransigence, the Commission may be tempted to stall for time or to retreat, which would be disastrous for the rule of law in the European Union. But the power to levy Article 7 sanctions can be restored. The Commission should do now what it should have done long ago. It should begin by triggering Article 7 (1) not only against Poland, but against Hungary as well. If sanctions are pending against both at the same time, neither should have the legal capacity to veto sanctions against the other. This would effectively remove the fellow-traveler veto.

Article 7(1), the warning stage of the sanctions process, can be launched by a four-fifths majority of the Council (together with a two-thirds majority of the Parliament), which means that neither Hungary nor Poland could veto the use of Article 7(1) against the other.

If Article 7(1) is invoked against both Hungary and Poland at the same time, neither should be able to vote if Article 7(2), the section that concretely authorizes sanctions, is invoked against either one. The language of Article 7(2) says that a "unanimous" vote of the Member States in the European Council is required, and everyone has assumed – even though the treaty doesn't say so – that the Member State in question has no veto power over sanctions against itself. But presumably that same logic extends to any other Member State that has been determined to be a trouble case under any part of Article 7. No state that has already been warned under Article 7(1) should be able to vote against sanctions raised against any other state under Article 7(2). To permit a state that has been already warned that it risks breaching European values to vote on whether another state should be sanctioned for the same thing would make a mockery of European values.

Invoking Article 7(1) against Hungary now is not just a means to the end of sanctioning Poland. In fact, Article 7 should have been invoked against Hungary long ago. When Viktor Orbán was busily consolidating power in Hungary, the Commission occasionally threatened to use Article 7 against Hungary, before it put its Rule of Law Framework in place to guide its action in the run-up to such a move. The European Parliament called for invoking Article 7 against Hungary with the Tavares Report in July 2013 when it warned of the risk of serious breach of European values. The Venice Commission wrote a dozen reports explaining in detail what Hungary's violations were. Not only has Hungary not complied with the vast majority of these earlier recommendations, but new abuses against EU values surface daily in Hungary.

In fact, the Orbán government has just begun a new offensive against European values, which makes now a good time to invoke Article 7(1).

The Hungarian referendum on 3 October to bar resettlement of refugees in Hungary under the program agreed by the European Council is just the latest effort by Prime Minister Orbán to block the operation of EU law in Hungary. As I write, the government seeks to amend the Hungarian constitution to refuse any participation in this European solidarity program while its hate campaign against refugees continues. The Commission has launched an infringement action against Hungary for its treatment of refugees, but so far this has only strengthened the resolve of the Hungarian government to resist EU solidarity. The UN High Commissioner for Refugees found that five months after the Commission filed its infringement action, Hungary's abuses against refugees continued.

Just two weeks ago, the largest daily newspaper in Hungary was closed down under suspicious circumstances, and its archive of articles documenting corruption in the government and fraud in the awarding of EU contracts was instantly removed from the internet. This followed the revelation that a journalist for the independent news website 444.hu had been approached by the security services and threatened with the disclosure of personal data gained by "malicious" surveillance if he did not agree to spy for the government inside the website's newsroom. Press freedom in Hungary has been repeatedly criticized for years, and these new abuses show that Hungary continues to attack media pluralism, a value that EU law requires be respected.

In addition, legislation is pending before the Hungarian parliament at the moment that will further restrict the operation of independent NGOs and will create a new system of administrative courts that will deal the final death blow to the independence of the judiciary. The restriction of Hungary's NGO sector has already been criticized by the OSCE and by Norway when Hungarian NGOs funded pursuant to an agreement with the EU were raided by the police. The proposed new law gives the public prosecutor – an official who has already shown substantial solidarity with the ruling party – the power to supervise "the legality of the civil sector" with aggressive new tools that allow him to search financial records and an organization's computers, compel disclosure of all internal operations of the NGOs and ultimately seek to have NGOs dissolved for "illegal activity." The new system of administrative courts will allow the government to channel the judicial review of all executive action and many key areas of public law to courts that will not have professional judges at the helm but instead will be staffed by civil servants without job security. The judiciary was already under serious threat from judicial reforms criticized years ago and made worse, not better, by later government action. These pending laws on NGOs and the judiciary would, if passed, solidify Orbán's control over both.

So now, Article 7 is on the table in Brussels for use against Poland. But it is already too late for sanctions to be a real threat. By letting Hungary slide, EU Member States squandered their ability to act collectively to sanction Poland. If sanctions are proposed against Poland, the Hungarians have a veto. And vice versa.

EU institutions must stand up to these threats to the rule of law. The EU cannot start by disciplining only Poland. Without also addressing the Hungarian threat that the Polish government openly followed as a

model, the EU sanctions mechanisms cannot work. It's time to invoke Article 7(1) against *both* Poland and Hungary.

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