Lex CEU: On the Commission's Refusal to Disclose its Letter of Formal Notice in the Name of Mutual Trust

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This post will offer a brief account of my unsuccessful attempts to gain access to the Commission's letter of formal notice addressed to Hungary on 26 April 2017, that is, the letter adopted by the Commission in response to the adoption by the Hungarian authorities of what has become known as the Lex CEU (a useful timeline of events is available here).

Before offering a critical assessment of the Commission's reasoning (a copy of the Commission's decision regarding my confirmatory application for access to documents is available here), a brief account of the relevant context will be offered. This post will end with some general remarks on the EU's repeated failed attempts to prevent illiberal not to say authoritarian regimes from consolidating within the EU.

Context

Speaking before the European Parliament on 26 April to discuss the situation in Hungary, First Vice-President Frans Timmermans announced the launch of an infringement action regarding the Lex CEU:

> *The recently adopted Hungarian Higher Education Law is perceived by many as an attempt to close down the Central European University, which I think is a pearl in the crown of post-divided, free and whole Europe. The Commission's analysis of the law confirmed our concerns with regard to its compatibility with internal market freedoms and the Charter of Fundamental Rights. The College has therefore decided today to launch infringement proceedings against Hungary, by sending a letter of formal notice, and we await a reaction from the Hungarian authorities within a month.*

With respect to what is informally known as Hungary's Lex NGO, Frans Timmermans made implicitly clear that the Commission would act similarly as soon as it the draft legislation is eventually adopted (it was adopted on 13 June 2017):

> *The draft legislation tabled to the Hungarian Parliament at the beginning of the month by members of the governing party on the funding of so-called 'foreign' Non-Governmental Organisations is also on our radar screen. If adopted, it could raise concerns as regard the compatibility with the EU's internal market rules, in particular the free movement of capital, and the EU Charter of Fundamental Rights, including the freedom of assembly.*

The Venice Commission has since issued an opinion regarding the Lex NGO and its main conclusion is that it 'will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination' (para 68). To the best of our knowledge, the European Commission is however yet to formally initiate another infringement action against Hungary on this basis (see here for a joint statement by the Hungarian Civil Liberties Union, Hungarian Helsinki Committee and Liberties on the Lex NGO and calling for the activation of the Commission's Rule of Law Framework).

With respect to the Lex CEU, two points should be emphasised: first, the First Vice President of the European Commission did explicitly refer to the 'Commission's analysis of the law' when addressing the directly elected representatives of the Union's citizens. Secondly, the European Parliament, in a subsequent resolution on the situation in Hungary adopted on 17 May 2017, also explicitly referred inter alia to the Commission's letter of formal notice ('having regard to

the Commission's decision to open infringement proceedings against Hungary concerning the act amending the National Higher Education Act, as well as other pending and forthcoming infringement procedures against Hungary') before rightly making clear that the adoption of a supposedly neutral piece of legislation regarding Hungarian Higher Education was just a pretext to push the CEU out of the country (to better understand the Hungarian government's legal tricks see Prof Halmai's analysis):

> *M. whereas the most recent developments in Hungary, namely the act amending certain acts related to increasing the strictness of procedures carried out in the areas of border management and asylum, the act amending the National Higher Education Act, which poses a direct threat to the Central European University and which has triggered large public disapproval, and the proposed Act on the Transparency of Organisations Receiving Support from Abroad (Hungarian Parliament Bill T/14967) have given rise to concerns regarding their compatibility with EU law and the Charter of Fundamental Rights;...4. Expresses its concerns at the latest declarations and initiatives by the Hungarian Government, in particular as regards maintaining the 'Stop Brussels' consultation campaign and the investigative measures targeting foreign employees of the Central European University, as well as the statements by the leaders of the ruling party opposing any legislative change addressing the recommendations made by EU institutions and international organisations; regrets that such signals do not demonstrate a clear commitment by the Hungarian authorities to fully ensuring that its actions comply with EU primary and secondary law;...6. Calls on the Hungarian Government in the meantime to repeal the act amending certain acts related to increasing the strictness of procedures carried out in the areas of border management and asylum and the act amending the National Higher Education Act, and to withdraw the proposed Act on the Transparency of Organisations Receiving Support from Abroad (Hungarian Parliament Bill T/14967);*
>
> *7. Urges the Hungarian Government to immediately suspend all deadlines in the act amending the National Higher Education Act, to start immediate dialogue with the relevant US authorities in order to guarantee the future operations of the Central European University issuing US-accredited degrees, and to make a public commitment that the university can remain in Budapest as a free institution;*

In light of these extensive developments dedicated to the Hungarian National Higher Education Act in a resolution which could lead to the first ever activation of the so-called 'nuclear option' (i.e. Article 7 TEU), one could have been forgiven to think that there has never been perhaps a more obvious case of an overriding public interest justifying the disclosure of a letter of formal notice. As will be shown below, this argument failed to convince the Commission, which also strongly emphasised the concept of mutual trust to justify its decision to reject my first request as well as my confirmation application for access to documents under Regulation 1049/2001.

The Commission's Reasoning

The Commission's reasoning may be summarised as follows: disclosure of the letter of formal notice in the Lex CEU infringement case would undermine the protection of the purpose of inspections, investigations and audits (an exception to the right of access to EU documents which is laid down in Regulation 1049/2001); and there is no overriding public interest in this instance that would outweigh the interest in safeguarding the protection of the purpose of investigations and justify the disclosure of the requested document.

This reasoning is not unusual and is regularly put forward to justify non-disclosure of documents produced in the context of infringement actions. I would however respectfully submit that that the Commission's refusal was wrong for the following reasons.

The 'Climate of Mutual Trust' Argument

To begin with, the Commission refers to the need to ensure and preserve a 'climate of mutual trust' and argues that any disclosure of the requested document 'would make the dialogue with Hungary even more difficult'. This reasoning suffers from two main problems: first, one cannot maintain or preserve a non-existing climate of mutual trust; and second, it confuses a monologue with a dialogue. The Commission's decision is also contradictory at times as it euphemistically admits that in the case at hand, 'it appears that [Hungary] is not willing to settle the dispute'. As for the argument that granting my request for access would 'hinder the Commission in taking a decision in this file … free from outside interference', it seems to suggest that I am more of a danger to the EU than Hungary…

To briefly demonstrate how much the Commission's reasoning is regrettably disconnected from reality, a 'best-of' of some of the Hungarian authorities' reactions to EU actions since last April may be enlightening:

- Speaking of the letter of formal notice publicly announced by Timmermans on 26 April 2017, Viktor Orbán's chief of staff, Janos Lazar, said that the 'Commission was unable to present a single, normal legal argument which could be taken seriously', using the same defiant and dismissive language which has characterised the Polish government's reactions to the Commission's Rule of Law recommendations;

- Speaking of the multiple pieces of legislation criticised by the European Parliament in its resolution of 17 May 2017, the Hungarian Foreign Minister publicly stated that Hungary would not 'backtrack' on any of them as 'these laws belong to national competence' and that Poland would in any case prevent the adoption of sanctions under Article 7 TEU should this provision be ever activated;

- The Hungarian Prime Minister himself went further on a radio interview and confirmed that he would neither suspend nor review the Lex CEU and that 'Hungary was willing to go all the way to the EU's top court … to prove that the CEU legislation did not breach EU law' (this statement also flies in the face of the promises he made to the EPP – more on this below);

- More recently, with reference to the infringement procedure launched against Hungary in the wake of the country's refusal to participate in the EU-wide relocation of refugees, Orbán said that George Soros is "giving the leaders of the EU instructions on a number of issues", and added that the infringement action had been initiated at his demand (the Hungarian government has since displayed disgraceful Soros billboards with the caption saying: 'Let's not let Soros have the last laugh!');

- When not busy attacking EU institutions and officials, Hungarian officials have also thought it useful to target Council of Europe officials, accusing for instance the Council of Europe Commissioner for Human Rights of promoting 'Soros's aim to bring as many migrants to Europe as possible'.

- Last but not least, Orbán went as far as accusing the EU of siding with "terrorists".

Hungarian authorities' reactions would have been no doubt even more outrageous had the EPP not demanded of Orbán last April that he suspend the application of the Lex CEU and stop demonising Brussels…

In light of the above, it is difficult to accept the argument that the EU should aim to preserve a (non-existing) climate of mutual trust and that a constructive dialogue with Hungary may lead to a satisfactory resolution of the situation regarding the CEU. The

Commission's application of the overriding public interest test in this instance may be similarly found unconvincing.

The Alleged Lack of an Overriding Public Interest

According to the Commission decision, my request failed to demonstrate the existence of an overriding public interest as it would not have demonstrated the existence of a pressing need that would 'outweigh the public interest in protecting the purpose of the ongoing investigation'. However, as highlighted above, it is difficult to see what 'public interest' is protected by the non-disclosure of a document publicly described by its recipient as one that does not contain a single legal argument which could be taken seriously.

More generally speaking, it is submitted that the existence of an overriding public interest should be presumed in a situation where the Commission has adopted a letter of formal notice regarding a national piece of legislation which forms part of a systemic attacks on EU values. This should be especially the case when this pattern of systemic attacks is established by the European Parliament in a resolution making an explicit reference to the Commission's letter in the aftermath of a debate which saw the First Vice President of the Commission publicly announced the launch of the infringement action. In this exceptional situation where the foundational values of the EU are under threat, there is no longer any harm to be expected from the disclosure of the letter of formal notice, especially when national authorities have repeatedly indicated their intention not to remedy any possible breach of EU law and publicly dare the Commission to initiate legal proceedings.

Pragmatically speaking, the Commission's decision to emphasise the need to preserve mutual trust in the face of overwhelming evidence of sustained and systemic attacks on EU values, not to mention the multiple and repeated instances of Hungarian's disloyal behaviour, only helps Orbán's Fidesz achieve its authoritarian objectives. This further allows Hungarian authorities to undermine the Commission's authority and legal assessment without any fear of being challenged by the Commission. At the very least, the Commission should have released the concluding part of its letter of formal notice so as to enable everyone to understand which provisions of EU law the Lex CEU may have breached.

Alternatively, the European Commission could seek to emulate the press releases issued by the Council of Europe's Venice Commission (see e.g. the one issued in relation to Hungary's Lex NGO). What is revealed is the rather paradoxical situation of being able to access the legal opinions of a non-EU body, the Venice Commission, regarding worrisome legislative developments in an EU country, while the legal opinions of an EU body, the European Commission, concerning the same issues, are not publicly available. I do realise that the Venice Commission does not possess the European Commission's infringement action powers and lacks any formal enforcement mechanism but it could be fruitful at the very least to seek better coordination between the European Commission and the Venice Commission and organise the latter's systemic involvement in situations where legislative developments in an EU Member State appear to indicate or form part of a systemic attempt to undermine the foundational values of both the EU and the Council of Europe.

Politically speaking, one may finally regret the Commission's refusal to disclose any meaningful details regarding its assessment of the Lex CEU to the extent that it has allowed EPP leaders such as Manfred Weber and Joseph Daul to claim adherence to high ideals while doing nothing about Orbán's party's membership of the EPP. To buy themselves time and offer some façade of action while pretending to care of academic freedom, the EPP indeed made the (empty) promise that Fidesz's future in the group would depend on the Commission's assessment of the situation in Hungary. For instance, Joseph Daul, the EPP president, said at the beginning of April that his group 'would wait to see if this act infringes EU law'. In the continuing absence of any disclosure (full or partial) of its legal assessment of the Lex CEU, the Commission has allowed the EPP to be able to continue to argue (albeit risibly) that the Hungarian Prime Minister is not in breach of the promise he made to the EPP on 29

April 2017 'to take all necessary steps to comply with the Commission's request.'

Remarkably, this line of reasoning has been since shamelessly recycled by some members of the EPP to prevent a possible activation of Article 7 against Hungary. In the words of Thomas Bickl, CDU spokesman, 'We cannot ask for the triggering of Article 7 as long as there is no reply yet on the part of the Hungarian government to the questions of the EU Commission.' This ludicrous logic has allowed Orbán to continue to benefit from EPP protection and escape time and again meaningful EU actions and sanctions by playing for time. And while the Commission prepares itself for long and protracted legal battles and ultimately futile ones even when the battles are won (see below for more details), Orbán is left in relative peace while he continues to launch scanting attacks on the EU and further strengthen the foundations of an authoritarian mafia state to paraphrase Bálint Magyar, a former Hungarian minister of education (see also his book available here).

Some general remarks on the current stalemate

In a previous post co-authored with Kim Scheppele, we noted that the Commission's rule of law probe of Poland had revealed a failure to learn 'the right lessons from its past dealings with Hungary'. The Commission's continuing faith in infringement actions to deal with Orbán's attacks on the last bastions of resistance to his autocratic regime further reveals an institution still in denial about how illiberal forces capture democratic regimes and unwilling to look at the cumulative and interconnected effects of the continuing state-sponsored attacks on the rule of law in Hungary. By consistently missing the wood for the trees, the Commission has proved unable to prevent constitutional capture in Hungary before failing again to do so in Poland (see here for a criticism of the Council's inaction in this are).

It was therefore dispiriting to see Timmermans disagreeing with the European Parliament's recent diagnosis that 'the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7(1) TEU procedure'. Faced with this renewed call for (real) action, the First Vice-President of the Commission offered however a new reason to justify the Commission's inaction when asked about whether it may have been easier to deal with the situation in Poland had the EU not turned 'a blind eye to Victor Orbán's actions' for so long:

> *Poland and Hungary are different. Orbán and the Hungarian government have never refused a dialogue with us. A constructive dialogue, not only pointing at divergent views, is the European way of solving such disputes. But the truth is that a few times we have opened procedures against Hungarian handling of the law. And this has stopped, for instance, decrease of the pension age for the judges [by this means Orbán tried to eliminate established judges and introduce his own].*

There are several problems with this 'defence'. First, the Hungarian's reactions to the infringement action initiated by the Commission with respect to the Lex CEU make Timmermans' 'constructive dialogue' thesis ring particularly hollow. Secondly, it is hard to reconcile with Jourová's recent statement suggesting that infringement actions are 'unlikely to result in any real change'. Thirdly, it suggests that would-be-autocrats would be left free to undermine the rule of law as long as they accept to enter into a dialogue (in name only) with the Commission. Fourthly, what the Commission may view as constructive dialogue with Orbán may be viewed as a façade of dialogue which, has shown by the multiple and recurrent violations of EU values listed by the European Parliament in its multiple resolutions on Hungary, has led to no meaningful changes whatsoever since the debate about Hungary's descent into authoritarianism has begun. In this respect, it may be apropos to cite a New York Times article from January 2012 to show that the Commission has repeated the same mistakes over and over again when confronting Orbán:

> *In an appearance before the European Parliament, Mr. Orban sought to defuse the mounting criticism of his government, including a decision on Tuesday by the European Commission, the bloc's executive arm, to start legal action against Hungary over the*

> *new laws. The issues raised by the commission "could swiftly be resolved and remedied," he told the Parliament, which was meeting in Strasbourg, France. ...[T]he commission's action against Hungary is based on technical issues rather than the wider concerns that Mr. Orban's government is undermining democracy, centralizing power and destroying pluralism. ... Mr. Orban has traveled this road before. After the commission objected last year to changes his government made in Hungary's media law, Mr. Orban retreated on several points but retained the general framework of the new regulations.*

Moving forward to 2017, nothing has changed: the Commission still refuses to admit that infringement actions cannot effectively counter modern authoritarians and in the case of the Lex CEU, time is of the essence. Indeed, by October, the new requirements imposed by the Lex CEU, which have been intentionally devised so to make sure the CEU cannot meet them (see here for a compelling analysis of the Lex CEU from a rule of law angle), will take effect blocking the CEU's operation and even if the Commission were to expedite its current infringement case, it will be decided too late by the Court of Justice to change facts on the ground.

Finally, as regards the reference to infringement proceedings and in particular the one targeting the forced retirement of judges, it beggars belief that Frans Timmermans still appears of the view that they have led to successful outcomes. As explained by Agnes Batory, a professor at the Central European University in a must-read piece entitled *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*:

> *The issue of the forced retirement of senior judges went all the way to the ECJ, with the Commission using age discrimination (Directive 2000/78) as legal grounds, and eventually won the case. The Court also ruled against the Hungarian government's sacking of the data protection commissioner in 2014, where the Commission had used the Data Protection Directive (95/46/EC) as legal base. In the meantime, however, the forcefully retired judges' positions had been filled with new appointments over which the new National Judicial Office (headed by the spouse of a prominent Fidesz MEP) had great influence. The Fidesz majority formally complied with the judgment by amending the relevant law on the judiciary with Act XX of 2013, which allowed for the reinstatement of the unlawfully retired judges as judges, but reappointment to previously held senior administrative positions only if those positions had not been filled in the meantime. The judges were given compensation only if they did not request their reinstatement....None of the concessions prevented the Hungarian government from achieving its partisan goals. Commission action amounted to little more than chipping away at the edges of a new constitutional order cementing a single political party's hold on political power in an EU member state.'*

The Commission's infringement actions against Hungary have therefore led to nothing more than Pyrrhus victories. As for the recent attempt by Manfred Weber, the chair of the EPP, to rewrite history – he recently argued 'that Hungary's government has taken into account recommendations by the European Commission on certain laws that have been identified as problematic, including changes to the constitution' – it is, as noted by Lydia Gall, a Human Rights Watch researcher, 'at best a half truth and at worst deliberate obfuscation' for the reasons highlighted above.

It is time for the Commission to stop missing the wood for the trees and for the Council and the EPP to stop acting as Orbán's enablers and appeasers. The time to trigger Article 7 against Hungary, not to forget Poland, was yesterday but as the saying goes, it is never too late to do the right thing.

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