How to Stop Funding Autocracy in the EU

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In last week's *Verfassungsblog* editorial, Max Steinbeis expressed some skepticism that the EU could enforce a judgment that a Member State simply refused to honor. True, the EU is not a Weberian, coercion-wielding state and cannot compel compliance with force of arms. But the EU may have a very effective weapon at its disposal, one that befits its status as a voluntary Union: refusing to pay for budding autocracies that violate the rule of law.

At the moment, the EU finds itself in the perverse situation of providing some of the largest transfers of funds precisely to those governments who most prominently thumb their nose at its democratic and rule-of-law norms. Within the EU, both Hungary and Poland are huge beneficiaries of EU fiscal transfers. Poland is the largest overall recipient, taking in 86 billion euros from various European Structural and Investment Funds (ESIFs) in the current funding period (2014-2020).Hungary meanwhile is the largest recipient of EU funds on a per capita basis, and more than 95 per cent of all public investments in Hungary in recent years have been co-financed by the EU. A significant chunk of this EU largesse in Hungary has found its way into the pockets of a set of new oligarchs created by the current governing party, helping sustain Orbán's sprawling, corrupt patronage network. The Economist captured the essence of the irony an April 2018 article titled, "The EU is tolerating – and enabling – an authoritarian kleptocracy in Hungary," observing, "Viktor Orbán campaigns against the EU from Monday to Friday, and collects its subsidies at weekends." Ultimately, many of the other sanctions discussed for democratic backsliders – such as the suspension of voting rights under Article 7 – may matter very little to leaders of these regimes so long as the money keeps flowing.

Many observers recognize the irony of this situation in which the EU subsidizes autocracies, but have concluded that there is little the EU can do because, in their view, the EU lacks the legal grounds to suspend the flow of European Structural and Investment Funds (ESIFs) in response to democratic backsliding. More recently, with an eye to the EU's next multi-annual budget that will run from 2021-2027, however, politicians and academics have advanced a series of proposals (such as ones from the European Parliament, the German government, and European Commissioner for Justice Vera Jourová) to strengthen the rule-of-law conditionality attached to EU funding.A heated debate has ensued, with governments who see themselves as the potential targets of such conditionality – not only Poland and Hungary, but other states with problematic judicial systems such as Romania and Bulgaria – adamantly denouncing these proposals.Likewise, debate has raged within the Commission, with some EU leaders such as Justice Commissioner Jourová defending conditionality, while others such as Commission President Jean-Claude Juncker adamantly opposing it.But these proposals and the entire debate surrounding them misses the fact that the EU already has a sufficient legal basis to suspend the flow of funds to states in which rule-of-law norms are systematically violated. The real problem to date has not been the lack of adequate legal tools, but the lack of political will on the part of the European Commission to use the tools that already exist.

The Common Provisions Regulation, or CPR, currently regulates the administration of ESIFs.As Israel Butler of the Civil Liberties Union for Europe argued in a recent report, "the CPR, read in light of the Charter of Fundamental Rights and the case law of the Court of Justice, already allows the Commission to suspend ESIFs where a Member State does not uphold the rule of law." Article 142(a) of the CPR provides that payments of ESIFs may be suspended if, "there is a serious deficiency in the effective functioning of the

management and control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken." Surely, a country without the rule of law cannot generate effective management and control systems.The Commission itself has already noted that a requisite management and control system must "ensure that effective arrangements for the examination of complaints concerning the ESI Funds are in place" (Article 74(3), CPR), and must ensure that natural and legal persons have the right to an effective remedy from an independent and impartial tribunal as required under Article 47 of the Charter of Fundamental Rights. The European Court of Justice, too, has already affirmed these principles (for example in Case C-562/12, *Liivimaa Lihaveis MTÜ*, 17 September 2014, paras. 67- 75), and emphasized that the framework for remedies must meet the requirements of Article 19(1) TEU for effective legal protection in fields covered by Union law (for example in Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, 27 February 2018, paras. 31-45) This seems to us to be plenty of authority to use to suspend the flow of funds to states that cannot guarantee the rule of law. But so far, the CPR has not been used to discipline rogue Member States. That said, the Commission has initiated new two measures that, if adopted, could give the Commission additional powers to suspend or claw back structural funds flowing to Member States.

First, the Commission has supported the creation of a European Public Prosecutor's Office with jurisdiction over corruption in the use of EU funds. At the moment, OLAF, the EU's anti-fraud office, has the power to investigate corruption in the use of EU funds, but upon conclusion of its investigations, it hands over the results to the Member States for further action, prosecution if necessary.Not surprisingly, these files often go nowhere. The Member States most likely to abuse EU funds often have governments implicated in these corruption schemes at the highest levels and, not surprisingly, these governments are not likely to prosecute themselves when OLAF hands them the evidence to do so.Some tougher mechanism, not dependent on the Member States themselves, was called for.

The creation of a European Public Prosecutor to scrutinize and prosecute corrupt uses of EU funds was authorized in June2017,when 20 Member States in the Council agreed to set up this new institution under the enhanced cooperation mechanism, which permits a substantial subset of Member States to agree to increased integration without waiting for all Member States to join.The regulation establishing this new office was passed in October 2017.Not surprisingly, neither Hungary nor Poland decided to sign up, nor did other Member States that are considered among the most thoroughly corrupt.Since the initial set of states agreed to move forward with the European Public Prosecutor, only the Netherlands has joined.

But a proposal is now circulating to tie EU funding to the agreement by Member States to accept the jurisdiction of the European Public Prosecutor.If a Member State will not allow its uses of funds to be scrutinized, then – the theory goes – the Member State should not be entrusted with such funds. Justice Commissioner Vera Jourová first made the proposaland the call has since been picked up by critics of the Orbán government as a way for the EU to avoid subsidizing Member States that do not play by the rules. This could emerge as a new way to withhold ESIFs to rogue states.

Second, the Commission has proposed a new regulation to accompany the Multi-annual Financial Framework for the next five-year period that, if adopted, would make the distribution of ESIFs conditional on a Member State's compliance with the rule of law.But already a fight has emerged over the legal basis of this regulation.While the regulation itself announces that it is based on Article 322 TFEU which uses the ordinary legislative procedure for implementing legislation that carries out the budget and therefore allows the rogue states to be outvoted, some critics have argued that the new proposal belongs instead under Article 312 TFEU, on the multi-annual financial framework itself, which requires unanimity in the Council. Given this resistance, the difficulty of the legal questions involved and the short time European institutions have to enact conditionality rules before

the budget must go into effect, the regulation may well not pass.

But even though these new proposals would certainly be desirable and explicit recognition of conditionality would be a step in the right direction, the new proposals are – strictly speaking – unnecessary. We believe that a legal ground for cutting ESIFs to rogue Member States already exists in the CPR but note with disappointment that the Commission has not yet had the will to use the power already in its hands.

Why has the Commission so far (eight years into the Orbán regime and three years into the PiS government) refused to suspend the flow of funds to its nascent autocracies? Again, as with its failure to impose Article 7 sanctions, all indications point to a lack of political will as the principal explanation. Resistance starts at the top.Commission President Jean-Claude Juncker, when asked during a conference in Berlin if he supported Germany's proposals to attach rule of law and democracy conditions to EU funds, said: "I am of the opinion that one should not do that." He added that the proposal would be "poison for the continent."In arguing this, he joins other critics who say that suspending funds to the poorer Member States will simply drive them into the arms of other powers with no interest in democracy or the rule of law, like China. Whether Juncker's refusal to support funding conditionality stems from hispartisan loyalty to EPP ally Viktor Orbán – a sure target of any such sanctions – or from a sincere belief that sanctions would prompt destructive fissures within the EU, the fact remains that the Commission lacks the unified political will to deploy the tools it has.

Perhaps the proposals to make the flow of European funds conditional on either signing onto the European Public Prosecutor or complying with the rule of law are trial balloons.If there is strong support for one or both, then the Commission would know that it has backing to use the CPR to stop the flow of funds to offending Member States. But if other Member States cast doubt on the wisdom or the legality of these proposals to make funds conditional on a Member State remaining democratic, human-rights-protecting and committed to the rule-of-law, then the Commission may see no reason to summon the political will to act under its existing authority.

In just the last few days, however, the tide seems to be turning. Some new voices have spoken up for limiting the budget to countries that support EU priorities and values. French Foreign Minister Jean-Yves Le Drian has said that France no longer wants to fund governments that do not act in solidarity with the rest of Europe.EU Budget Commissioner Günther Oettinger struck out at Italy after it threatened to withhold its payments to the EU because it got little assistance on migration. In the middle of tensions building over the link between compliance with European values and the EU budget, President Juncker admitted for the first time that Hungary's membership in the European People's Party is a problem. Now that the rule-of-law disease seems to be spreading to more and more Member States, perhaps the Commission will see that funding rogue Member States is dangerous to the future of the EU and it will summon the will to act. It doesn't need to wait for new authorization; it already has the tools it needs to act now.

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