

United or Divided We Stand? Perspectives on the EU's Challenges

Brussels, 9-10 May 2016

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Member State particularism within the EU: an analysis based on the most recent developments of the “Hungarian affair”

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Budapest, April 2016

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Abstract

The phenomenon of Member State particularism within the European Union is an interesting topic to examine as it gives insight into country behavioural patterns, preference formation tactics and interest articulation methods. The so-called ‘Hungarian affair’, referring to the current Hungarian government’s debatable constitutional reforms, EU policy and governmental rhetoric, has been a widely researched area in the past years and it is a textbook case for particularism. The Hungarian government’s actions regarding its foreign policy, economic priorities and the European refugee crisis are worth analysing from several aspects, such as the constitutional principles Member States should abide according to the Treaties. Whether a country’s unconventional strategy within the EU can be characterized as legitimate diversity or illegitimate particularism is yet another question to be answered. This paper aims at discovering the above mentioned aspects of particularist Member State conduct. It argues that there has been a clear U-turn in Hungary’s strategy towards the European Union in 2010, so it describes the most recent elements of this strategy. Regarding the broader implications of the study, it tries to draw **some conclusions about the nature and the limits of Member State particularism in Europe, and the ways the EU can and is willing to address this phenomenon**, which is not unique to Hungary and is clearly posing a challenge for European integration itself.

Introduction

Hungary's behaviour as a Member State within the EU can serve us to demonstrate the difficulties in finding the boundaries of particularism, which is a strategy that has been followed by more and more Member States within the EU lately. Particularism in the EU, from the perspective of this study, means that a country is willing to take an autonomous, conflict-seeking behaviour, or even risk violating EU law or rules of conduct in order to achieve its alleged national interests. With its Treaty of Accession Hungary undertook the obligations of an EU Member State which, as in case of other Member States, greatly restricted its political and legal manoeuvrability even in cases which are of high importance to the local economy and society, making it a generally compliant Member State. However, in the last few years, Hungary has adopted a particular strategy as a Member State in the EU which is significantly different from its previously pursued strategy. Since 2010, Hungary has been in the centre of political attention as it began to embrace a markedly more self-centred and autonomous behaviour which is more conscious about Member State opportunities, and not afraid of taking up legal and political conflicts with the EU by claiming more room for manoeuvring and freedom to act individually. This can be seen as a realist turn in Hungary's policy-making within the EU: from 2010 onwards the country's behaviour can be characterised with a sort of 'thematic realism,' which means that in some policy areas considered crucial for the country's national interest the government takes a hard-stance, not shying away from going against mainstream EU preferences, but in other areas, and in legal terms, the compliance of the country with EU law and policy guidelines remains unchanged.

This paper examines the relationship of Hungary with the European Union, more specifically the dialogue between the Hungarian government and the European political sphere from 2010. The main argument of this study is that Hungary has been conducting a 'particularist' behaviour within the EU in the past few years. Although the European Union does not always react to these Member State strategies in a coordinated way, at some point it has to address the misconduct of countries. In relation to Hungary, some of the concerns of EU institutions about the government's actions were framed in terms of rule of law and democracy considerations, while others were directed against matters of constitutional importance or more technical, legal questions. These critiques appeared in several forms, such as institutional reports, statements and opinions, infringement procedures, parliamentary debates, or more lately a consultation involving citizens. The aim of this paper is twofold. Firstly, it gives *an assessment of the latest developments of the 'Hungarian-case'*, meaning Hungary's political manoeuvring within the EU, and tries to find out whether we can talk about a specific 'Hungarian affair' or not. Secondly, it aims at *discovering what kind of tools the EU can use against such Member State non-compliance*. In order to answer these questions, the analysis will go through the most important aspects of the Hungary-EU dialogue in the past few years, including profound constitutional changes, political pressure from EU institutions, the reform of the rule of law mechanism, infringement procedures and Hungarian cases before the European Court of Justice. Moreover, the most recent developments of Hungary's EU strategy will be presented, such as the country's stance in the refugee crisis, and its sovereignty oriented rhetoric.

The Hungarian Affair – an assessment from 2010 and the EU’s reactions

After the parliamentary elections of 2010, the centre-right Fidesz party (Alliance of Young Democrats) obtained a 2/3 majority of the seats in the Hungarian Parliament by forming a coalition with the KDNP (Christian Democratic People’s Party). With this victory, the new government was given the possibility to enact fundamental changes to the country’s constitution and legislation as a whole, within a short period of time. Many of these changes generated heated debates in Europe, and were considered to endanger the principle of checks and balances and even the democratic values of the EU. These acts resulted in a tense relationship and discussions with Brussels, including warning messages coming from different EU institutions and infringement proceedings against Hungary.

The determined defence of national positions in the EU, which has been the main characteristic of Hungary’s EU-policy since the Fidesz-KDNP coalition came to power in 2010, was not expressed and articulated so openly by any other Hungarian government before. This change is clearly visible if we compare the current foreign policy strategy of Hungary to that of the 1990s, when a determined commitment towards European values and the trans-Atlantic relationship was present by all ruling governments¹ and the 2000s, when the main goal was to accommodate to EU membership as smoothly as possible.² However, in the official foreign policy strategy of the second Orbán-government (2011) a much bigger emphasis has been put on achieving the country’s national and economic interests than in the previous documents, moreover the strategy mentions Hungary’s sovereignty and territorial integrity as the most important national values of the country’s foreign policy.³ The main goal of the Hungarian EU policy in the period of 2010-2014 (and also since then) lies in exerting the Hungarian interests as effectively as possible.⁴ One could even say that “Hungary went through a process from EUphoria to EUphobia since its accession to the Union.”⁵ The EU became the tool of gaining votes for Hungarian internal politics; moreover it started to become depicted in a dual role: as a resource for money and as a strict supervisor enforcing unwanted rules and norms on the Hungarian society.⁶

This strategy dragged Hungary into false conflicts,⁷ which appeared in many different forms and reached their peak in the conflict with the EU over the country’s comprehensive constitutional and legal reforms. However, despite the particularist behaviour of Hungary that has led to several conflicts with Brussels, a general legal compliance with the agreed commitments was present from the part of Hungary during the course of these events, which stands in contrast with the political manoeuvring of the country. The following subchapters will present the different aspects of Hungary’s political dialogue with Brussels in the past years, grouped mainly based on how the EU reacted to the upcoming issues.

¹ János Terényi, ‘1989-2009: Húsz év a Magyar Külpolitikában’, *Website of the Hungarian Ministry of Foreign Affairs*, January 2009, http://www.mfa.gov.hu/kulkepvisolet/DE/hu/20_eves_jubileum/terenyi.htm.

² ‘Magyarország Külkapcsolati Stratégiája’ (Hungarian Ministry of Ministry of Foreign Affairs, 21 April 2008).

³ ‘Magyar Külpolitika Az Unió Elnökség Után’ (Hungarian Ministry of Ministry of Foreign Affairs, 2011), http://eu.kormany.hu/download/4/c6/20000/kulpolitikai_strategia_20111219.pdf.

⁴ Bálint Ódor and László Sinka, ‘Magyar Európa-Politika 2010–2014: Kihívások És Eredmények’, *Európai Tükör* 19, no. 1 (February 2014): 4.

⁵ Anna Molnár, ‘Ideas of Europe in Hungarian Political Discourse’, in *Ideas of Europe in National Political Discourse*, ed. Cláudia Toriz Ramos, *Fonti E Studi Sul Federalismo E Sull’integrazione Europea* (Bologna: Il Mulino, 2011), 232.

⁶ Péter Balázs, ‘Közeledés Vagy Távolodás?’, *Közgazdasági Szemle* LXI., no. 20014. április (April 2014): 357.

⁷ *Ibid.*

Constitutional changes

The changes brought by the Fidesz government had legal consequences, such as the reduction of the retirement age of judges or appointing a new media-supervising authority, while others had symbolic importance, such as modifying the country's official name to Hungary (instead of the Republic of Hungary) and defining the concept of family in a way which could be seen as discriminatory against persons based on their sexual orientations. Many of these changes were added to the Hungarian Fundamental law (formerly called Constitution), which was amended four times in a short period of time since the spring of 2010. It is a widely accepted argument that "the constitutional regime that operated in Hungary from the end of communist rule until January 2012 represented a broadly satisfactory framework for the consolidation of liberal democracy, the rule of law and the protection of human and minority rights."⁸ However, the new Fundamental Law and other related legal instruments and policies of the Hungarian government have endangered fundamental democratic freedoms and the principle of checks and balances that previously characterised the Hungarian constitutional system.⁹ Some of the most widely criticised elements of the Hungarian Fundamental law include the 'ethnification' of the Constitution, changes concerning the role of the President, the perceived threat to judicial independence and restrictions on the independence and freedom of Hungary's print and electronic media.¹⁰ The Fundamental Law clearly represents a rupture and a certain kind of self-actualization of the Hungarian nation in comparison to the pre-2010 period,¹¹ and it protects traditional values which do not necessarily reflect the values of EU law.¹² Moreover, not only the content of the new Fundamental Law, but the method of the making of the new constitution raised concerns: such profound changes in as turbulent times as the years 2010 and 2011 has been for Hungary would have required a slow and very thorough preparation for a new constitution.¹³

These subjects generated heated debates in Europe, not only involving different Member States, but also international organizations, such as the Venice Commission. The Venice Commission issued several different opinions regarding specific changes which happened to the Hungarian legal system and the Fundamental Law itself as well. The first such opinion came in March 2011 and it reacted to some legal questions arising in the process of drafting the new Hungarian Constitution.¹⁴ A few months later this was followed by another Opinion on the new Constitution itself,¹⁵ in which the Venice Commission found it regrettable that the constitution-making process had been affected by a lack of transparency and had some worrisome consequences regarding accountability and sustainability. Two years later, in 2013, the Venice Commission issued its opinion on the fourth amendment of the Fundamental Law

⁸ István Pogány, 'The Crisis of Democracy in East Central Europe: The "New Constitutionalism" in Hungary', *European Public Law* 19, no. 2 (2013): 341.

⁹ *Ibid.*, 357.

¹⁰ *Ibid.*

¹¹ 'Editorial Comments - Hungary's New Constitutional Order and "European Unity"', *Common Market Law Review* 49, no. 3 (2012): 874.

¹² *Ibid.*, 876.

¹³ Attila Vincze and Márton Varju, 'Hungary The New Fundamental Law', *European Public Law* 18, no. 3 (2012): 438.

¹⁴ 'Draft Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary' (Council of Europe, 17 March 2011), [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2011\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)016-e).

¹⁵ 'Opinion on the New Constitution of Hungary' (Council of Europe, 20 June 2011), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e).

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and concluded that the modifications were very problematic because they contradicted principles of the Fundamental Law and European Standards.¹⁶

The Hungarian political elite, mainly represented by János Martonyi, Minister of Foreign Affairs that time, reacted to these critiques by stating that the Venice Commission had overstepped its authority and made observations motivated by political standpoints, thus reflecting political judgments.¹⁷ It should also be noted here that after two and the half years of investigation of the Council of Europe Parliamentary Assembly, the body decided not to launch a monitoring procedure against Hungary.¹⁸ This decision was unsurprisingly praised by the Hungarian government and made it possible for Martonyi to evaluate the Hungarian foreign policy after 2010 to be successful and to ask not to overestimate the importance of political debates (e.g. Tavares-report), but to look at the results Hungary has achieved within the EU.¹⁹

Political pressure from EU institutions

After the introduction of the Hungarian constitutional reforms, the discussion was the most intense between Hungary and the European Commission, namely its Vice President and Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding. Reding warned Hungary on several occasions about her concerns with the recent changes in Hungary, such as the reduction of the retirement age of judges or the consistency of the new Hungarian Fundamental Law with EU law and the spirit of the Treaties. She did so, for example, in a letter addressed to Tibor Navracsics, Minister of Justice and Public Administration in 2011.²⁰ On 11 March 2013, a Statement from the President of the European Commission and the Secretary General of the Council of Europe has been adopted as a reaction to the Fourth Amendment to the Hungarian Fundamental Law. It considered the newly introduced measures to raise concerns with respect to the principle of rule of law, EU law and Council of Europe Standards. However, the statement welcomed the Hungarian Prime Minister's confirmation about the Hungarian government's commitment to European norms and values.²¹

The European Parliament also voiced its discontent with the situation of fundamental rights in Hungary. First, the Parliament issued a resolution in February 2012 about the 'recent political developments in Hungary' which suggested the possibility of resorting to Article 7(1) of TEU against Hungary if the country's authorities do not respond to the concerns of the EU.²² This

¹⁶ 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at Its 95th Plenary Session, Venice, 14-15 June 2013', *Council of Europe Website*, June 2013, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e).

¹⁷ 'Martonyi János a Velencei Bizottság Véleményéről', *Website of the Hungarian Ministry of Foreign Affairs*, 17 June 2013, <http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/martonyi-janos-a-velencei-bizottsag-velemenyerol>.

¹⁸ Bálint Ódor, 'A Tagállami Működés Keretei – Magyar érdekvénesítés', in *Magyarország Első évtizede Az Európai Unióban 2004-2014*, ed. Attila Marján (Budapest: Nemzeti Közzolgálati Egyetem, 2014), 123.

¹⁹ 'Három év Alatt Látványos Eredményeket ért El a Magyar Külpolitika', *Website of the Hungarian Ministry of Foreign Affairs*, Spring 2013, <http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedek-publikaciok-interjuk/harom-ev-alatt-latvanyos-eredmenyeket-ert-el-a-magyar-kulpolitika>.

²⁰ 'Viviane Reding's Letter to Tibor Navracsics' (European Commission, 12 December 2011), http://ec.europa.eu/commission_2010-2014/reding/pdf/news/20120109_1_en.pdf.

²¹ 'Statement from the President of the European Commission and the Secretary General of the Council of Europe on the Vote by the Hungarian Parliament of the Fourth Amendment to the Hungarian Fundamental Law' (European Commission, 11 March 2013), http://europa.eu/rapid/press-release_MEMO-13-201_en.htm.

²² 'European Parliament Resolution of 16 February 2012 on the Recent Political Developments in Hungary (2012/2511(RSP))' (European Parliament, 16 February 2012),

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resolution was followed by perhaps the harshest and most controversial report on Hungary, namely the motion of MEP Rui Tavares in the summer of 2013. The Tavares Report regarded the reforms of the Hungarian government as unprecedented and incompatible with several EU values and TEU Articles.²³ It provided a detailed assessment of the main concerns in several different political areas, such as the Fundamental law of Hungary and its implementation, the democratic system of checks and balances, the independence of the judiciary, the electoral reform, media pluralism, the rights of persons belonging to minorities, the freedom of religion or belief and recognition of churches. The resolution concluded with resorting to Article 7(1) of TEU “in case the replies from the Hungarian authorities appear not to comply with the requirements of Article 2 TEU.”²⁴

As a response to this document, one day before the Report was put up for vote at the European Parliament, Hungarian Prime Minister Viktor Orbán paid an unexpected visit in Brussels, and he sharply criticized the report in front of the European Parliament for being ‘insulting’ and ‘unfair’ towards the Hungarian people.²⁵ Moreover, he declared the proposal set forth in the report to be in “serious breach of the Founding Treaties” because it “would bring one of the Member States of the European Union under control and guardianship.”²⁶ According to Orbán, the European Parliament’s support for such a report would “mean a real danger for the future of Europe.”²⁷ Despite the Prime Minister’s efforts, on 3 July 2013, the European Parliament issued its resolution on the Hungarian situation which reiterated most of Tavares’s concerns.²⁸ The legislative body reacted to Orbán’s accusations by denying that it applied double standards, and by reminding that its opinion about basic values and principles of the EU was valid to all Member States of the European Union, not just to Hungary. Moreover, it urged Hungary to implement all the measures the European Commission found necessary in order to comply with EU law and the decisions of the Hungarian Constitutional Court.²⁹

The Hungarian government reacted with its own parliamentary resolution accusing the European Parliament of overstepping its authority and calling the EU to treat Hungary on equal footing with other Member States and to respect its sovereignty.³⁰ Foreign Minister Martonyi reacted to this debate between his government and the EU institutions by urging not to mix legal issues with political ones. He argued that the EU refers to the protection of rule of

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0053+0+DOC+PDF+V0//EN>.

²³ ‘Report by Rui Tavares on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012)’ (European Parliament, 25 June 2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN#title1>.

²⁴ *Ibid.*, 37.

²⁵ ‘Prime Minister Orbán’s Speech in the European Parliament’, *Website of the Hungarian Government*, 7 February 2013, <http://www.kormany.hu/en/prime-minister-s-office/the-prime-ministers-speeches/prime-minister-orban-s-opening-speech-in-the-european-parliament>.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ ‘European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI))’ (European Parliament, 3 July 2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN>.

²⁹ *Ibid.*, 3.

³⁰ “Resolution 69/2013. of the Hungarian Parliament,” accessed January 15, 2014, <http://www.complex.hu/kzldat/o13h0069.htm/o13h0069.htm>.

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law and democratic rights, but in the meantime it criticises political issues. He also condemned the Hungarian opposition for bringing a domestic political debate to the European political scene. His proof for this was the standpoint of the European People's Party, which defended Hungary from the attacks coming from the leftist European political parties. He saw the reason behind the 'campaign' against Hungary in the fact that the new Hungarian foreign and economic policy harmed many foreign economic interests, quite a few influential investors and companies suffered from it.³¹

Rule of law mechanism

The most difficult part of analysing the Hungarian situation, or any similar interaction between EU institutions and a Member State, is deciding whether there is a real problem lying behind the seemingly politically sensitive discussions of the country and the EU. The cases mentioned above show that the answer can be yes and no as well, depending on from which political side one is evaluating the situation. However, the European Commission's recent activity aiming at appearing as the guardian of the rule of law and the Treaties shows that the Commission might have indeed had some serious concerns about the rule of law in some EU Member States, assumedly Hungary as well. On 11 March 2014, the Commission presented a new Framework to Safeguard the Rule of Law in the European Union.³² The Framework serves as a "tool to deal, at the EU level, with systemic threats to the rule of law" and it is to be complementary to infringement procedures and the preceding mechanism of the already existing Article 7 process. The most important feature of the new procedure is its early warning mechanism which allows the Commission to enter into a dialogue with the Member State in question as early as possible. The introduction of this mechanism suggests that the concerns of the European Union about the state of rule of law in some EU countries were legitimate. This Framework can be advantageous for the future because it clarifies the authority of the Commission and could hopefully prevent politically heated discussions and accusations about the EU overstepping its authority, such as the ones surrounding the Tavares Report. However, instead of supporting the Commission's proposal, in December 2014 the Council decided to establish an annual rule of law "dialogue among all Member States within the Council" based "on the principles of objectivity, non-discrimination and equal treatment of all Member States" and to be "conducted on a non-partisan and evidence-based approach."³³

The tendency to mention Hungary in the context of threatening democracy and the rule of law has increased in the past years. The 'Hungarian question' was put on schedule in more than one EP plenary sessions. On 19 May 2015, for instance, the European Parliament's plenary session discussed the Hungarian PM's statement about a possible introduction of death penalty (which he later moderated) and about the national consultation launched by Hungary about immigration. On the debate both the Council and the Commission issued a statement about the recent developments in Hungary. The latter referred to the principle of loyalty and solidarity as the guiding sources of the Member States when finding common solutions to

³¹ 'Martonyi János Miniszter Az Elmúlt Időszak Magyar Diplomáciájáról', *Website of the Hungarian Ministry of Foreign Affairs*, 6 July 2013, <http://2010-2014.kormany.hu/hu/kulugyminiszterium/a-miniszter/beszedekek-publikaciok-interjuk/martonyi-janos-miniszter-az-elmult-idoszak-magyar-diplomaciajarol>.

³² 'European Commission Presents a Framework to Safeguard the Rule of Law in the European Union', *Europa.eu*, 11 March 2014, http://europa.eu/rapid/press-release_IP-14-237_en.htm.

³³ 'Press Release of the 3362nd General Affairs Council Meeting' (Council of the European Union, 16 December 2014), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146348.pdf.

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pressing European issues.³⁴ As a follow up, the European Parliament issued a report in June and MEPs asked the Commission to intervene in the case of Hungary.³⁵ In autumn the EP's liberal ALDE group started a campaign for applying Article 7 against Hungary despite the opposition of S&D which party is usually on the same side with the liberals when it comes to reviewing the precedents in Hungary. This call came after the escalation of the refugee crisis in Europe resulted in quite a hostile policy from the Hungarian government including building a fence on Hungary's southern borders and refusing to participate in the common EU attempts to reform the European migration policy.³⁶ However, the EP's Civil Liberties, Justice and Home Affairs Committee rejected the ALDE MEPs' initiative. As the Council and the Commission remained silent in the matter, another form of initiative appeared as a demand for reaction to the Hungarian events: a citizens' initiative. The initiative called 'Wake up Europe!' was launched by the European Humanist Federation³⁷ and the European Commission registered it on 30 November 2015, which means that if 1 million signatures from seven EU Member States will be collected, then the Commission will have an obligation to investigate the Hungarian events.³⁸ The EP's 2 December Plenary Session also dealt with the Hungarian question. It was stated that the Commission sees no systemic threat to the state of democracy on Hungary, but concerns remain. Commissioner Jurova "listed several recent contentious issues that the Commission monitored in Hungary, including the treatment of asylum seekers, segregated education and discrimination of the Roma, the treatment of non-governmental organisations managing Norwegian funds, questionable judgments by the judiciary, state aid to media and for the construction of a nuclear plant, as well as corruption affecting public procurement."³⁹ This came as a follow-up to the European Parliament's summer resolution.

The fact that the Article 7 rule of law procedure has not been applied against Hungary yet indicated that the European institutions are themselves hesitating in how to address rogue Member State behaviour. However, in January 2016 the Commission has taken an unprecedented step and launched a structured dialogue under the Rule of Law Framework with another Member State, Poland. The Commission decided to act because of some concerns raised by deep and comprehensive constitutional changes and a new media bill which was initiated at the end of the year 2015 by the right-wing conservative government of Poland.⁴⁰ Although many organizations and political bodies have welcomed the

³⁴ 'Commission Statement on the Situation in Hungary First Vice-President Timmermans Strasbourg, 19 May 2015', *Europa.eu*, 19 May 2015, http://europa.eu/rapid/press-release_SPEECH-15-5010_en.htm.

³⁵ 'European Parliament Resolution of 10 June 2015 on the Situation in Hungary', 10 June 2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+V0//EN>.

³⁶ 'Hungarian Laws to Hunt down Refugees Are a Reminder of Europe's Dark Past - ALDE Group to Maintain Demand for 7.1 Procedure', *Ceciliawikstrom.eu*, 7 October 2015, <http://ceciliawikstrom.eu/en/hungarian-laws-to-hunt-down-refugees-are-a-reminder-of-europes-dark-past-alde-group-to-maintain-demand-for-7-1-procedure/>.

³⁷ 'Wake up Europe! Stop the Authoritarian Drift in Europe', *act4democracy.eu*, accessed 17 January 2016, <http://act4democracy.eu/>.

³⁸ 'Commission Registers European Citizens' Initiative on EU Fundamental Values in Hungary', 30 November 2015, http://europa.eu/rapid/press-release_IP-15-6189_en.htm.

³⁹ 'European Parliament Press Release - Hungary: No Systemic Threat to Democracy, Says Commission, but Concerns Remain', *European Parliament Website*, 12 February 2015, <http://www.europarl.europa.eu/news/en/news-room/20151201IPR05554/Hungary-no-systemic-threat-to-democracy-says-Commission-but-concerns-remain>.

⁴⁰ 'Rule of Law in Poland: Commission Starts Dialogue', *European Commission Website*, 13 January 2016, http://ec.europa.eu/news/2016/01/20160113_en.htm.

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Commission's involvement in the Polish case, others, such as the organizers of the citizens' initiative against the Hungarian government, have criticised the Commission for failing to take an equally hard stance on Hungary as well.

Infringements and Hungarian cases before the ECJ

Besides being a constant protagonist of the Brussels based discussion (either in the form of resolutions, or sometimes in a more informal way) some legal action have also been taken against Hungary. One of these 'formal' procedures against Hungary was the Excessive Deficit Procedure that the country has been under since 2004. The resolution of this issue was among the biggest aims of the Hungarian government since 2010, and finally the European Commission recommended the abrogation of the Procedure in May 2013, and the Ecofin agreed to lift it in June.⁴¹ The case was interesting because of the divergent interpretations of the events on the level of politics: the Hungarian government evaluated lifting the Procedure as a success and stated that with this step the Commission acknowledged the economic achievement of the country,⁴² meanwhile members of the opposition and some experts warned that this was only a result of the EU's pressure on Hungary to which the government could only comply with introducing austerity measures and increasing poverty within the country.⁴³

Another type of legal proceeding launched against the country several times was the infringement procedure. Already in 2010, the Commission declared to bring Hungary, along with Portugal, before the European Court of Justice over introducing controversial taxes, which will be elaborated later.⁴⁴ In January 2012, the European Commission launched politically highly sensitive infringement proceedings against Hungary over the independence of its central bank and data protection authorities, as well as over measures affecting the judiciary. The Commission stated that the "Hungarian legislation conflicts with EU law" at several points.⁴⁵ In November 2013, two new infringement procedures were launched against Hungary, one concerning waste management problem, and another about alleged market distortions of mobile payment services.⁴⁶ Other significant cases include the so-called "golden share" case, the one about the Hungarian cafeteria system and the restriction of acacia in Hungary.⁴⁷ However, not all cases resulted in retorsions against the country. Some of them, for example the procedure against telecommunications taxes, were dropped because the

⁴¹ 'EU Frees Hungary from Excessive Deficit Procedure after Nine Years', *Politics.hu*, 21 June 2013, <http://www.politics.hu/20130621/eu-frees-hungary-from-excessive-deficit-procedure-after-nine-years/>.

⁴² 'Hungary's Economic Performance Is Acknowledged: Excessive Deficit Procedure Lifted', *Website of the Hungarian Government*, 29 May 2013, <http://www.kormany.hu/en/news/hungary-s-economic-performance-is-acknowledged-excessive-deficit-procedure-lifted>.

⁴³ 'Excessive Deficit Procedure against Hungary to Be Lifted', *Budapest - A Hungarian Press Review*, 31 May 2013, <http://budapest.eu/2013/05/excessive-deficit-procedure-against-hungary-to-be-lifted/>.

⁴⁴ 'Commission Takes Portugal and Hungary to Court and Asks France to Modify Its VAT Legislation', *European Commission Website*, 18 March 2010, http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/factsheet/2010/03/2010-03-296-hu-vat_en.pdf.

⁴⁵ 'EUROPA - PRESS RELEASES - Press Release - European Commission Launches Accelerated Infringement Proceedings against Hungary over the Independence of Its Central Bank and Data Protection Authorities as Well as over Measures Affecting the Judiciary', *Europa.eu*, 17 January 2012, http://europa.eu/rapid/press-release_IP-12-24_en.htm?locale=en.

⁴⁶ 'EU Launches Two New Infringement Procedures against Hungary', *Politics.hu*, 22 November 2013, <http://www.politics.hu/20131122/eu-launches-two-new-infringement-procedures-against-hungary/>.

⁴⁷ Gábor Baranyai, 'Magyarország Uniós Jogi Integrációja: Főbb Tendenciák és Kiemelt Jogi ügyek', in *Magyarország Első évtizede Az Európai Unióban 2004-2014*, ed. Attila Marján (Budapest: Nemzeti Közszerzői Egység, 2014), 155.

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European Court of Justice decided that they are in line with EU legislation. In other cases Hungary promised to act and modified the parts of its laws criticized by the Commission. In April 2012, the Commission expressed its satisfaction about the measures which Hungary promised to take in the case of its central bank statute.⁴⁸ The Central Bank case was closed by the European Commission after modifications were made to the Fundamental Law of Hungary.⁴⁹ Some of the most significant cases will be presented in detail below.

One of the most prominent cases from 2012 was Case C-286/12 European Commission v Hungary about the “forced retirement of judges”: the Hungarian Parliament introduced a radical decrease in the retirement age for judges, prosecutors, and notaries from 70 to 62 years of age. The ECJ’s judgement which evaluated the law as a discrimination based on age came in November 2012 after the Hungarian Constitutional Court also struck down the law in July 2012.⁵⁰ The First Chamber of the Luxembourg Court ruled that Hungary “has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.”⁵¹ In October 2012 the Venice Commission welcomed the Hungarian Constitutional Court’s ruling on the case, but called for an action from the legislator’s part to reinstate dismissed judges.⁵² Hungary introduced a law in 2013 to replace the involved judges in the system and compensated them, however, not all of them wanted to come back to their offices. Finally, the procedure was closed in November 2013.

In Case C-288/12 European Commission v Hungary the ECJ ruled that Hungary violated EU law concerning the abolishment of the Ombudsman for Data Protection and obliged Hungary to pay the costs.⁵³ The Court’s decision emphasized the importance of the role data protection supervisory authorities fulfil in the protection of privacy and personal data and argued that with ending the mandate of the Ombudsman before the expiry of his term, the government undermined the independence of the data protection authority. The Hungarian government accepted the decision, apologized to Ombudsman András Jóri and also provided a financial compensation to him, as it was indicated in the Court’s decision.

About Hungary’s tax-exemption on pálinka (Case C-115/13) the Commission argued that Hungary does not comply with Directive 92/83/ECC which allows a maximum of 50% tax

⁴⁸ ‘Hungary - Infringements: European Commission Satisfied with Changes to Central Bank Statute, but Refers Hungary to the Court of Justice on the Independence of the Data Protection Authority and Measures Affecting the Judiciary’, *Europa.eu*, 25 April 2012, http://europa.eu/rapid/press-release_IP-12-395_en.htm.

⁴⁹ Baranyai, ‘Magyarország Uniós Jogi Integrációja: Főbb Tendenciák és Kiemelt Jogi ügyek’, 154.

⁵⁰ ‘Decision of the Constitutional Court of Hungary No. 33/2012’ (Official Gazette (Magyar Közlöny), 16 July 2012), http://mkab.hu/letoltesek/en_0033_2012.pdf.

⁵¹ ‘Judgement of the Court in Case C- 286/12 European Commission v Hungary’ (curia.europa.eu, 6 November 2012), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d51bcfd1c72b0544d092ada02f855fcf27.e34KaxiLc3eQc40LaxqMbN4Oc3ePe0?text=&docid=129324&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=775214>.

⁵² ‘Opinion on the Cardinal Acts on the Judiciary That Were Amended Following the Adoption of Opinion CDL-AD(2012)001 on Hungary’ (Council of Europe, 15 October 2012), <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29020-e>.

⁵³ ‘Judgment of the Court in Case C-288/12 European Commission v Hungary’ (curia.europa.eu, 8 April 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153035&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=458513>.

reduction.⁵⁴ The Court of Justice determined that Hungary violated community law with exempting the home production of pálinka from taxation. An interesting addition to this case is that the introduction of the possibility of tax-free pálinka production was a politically motivated decision by the government. This specific type of alcoholic beverage is considered a ‘Hungaricum’ and part of the Hungarian culture, so the possibility of its tax-free production was enthusiastically welcomed by Hungarian citizens in general. Yet another feature of such politically motivated moves by the Hungarian government is backing off and exerting the necessary modifications in the legislation when a warning from an EU institution comes, and this is exactly what happened in the pálinka case as well.

A 2012 tax regulation change in Hungary introduced a system which favours national cafeteria vouchers and cards to the previously applied paper-based vouchers by different distributors. The companies affected by the new rule turned to the European Commission which appealed to the ECJ in June 2013 on grounds of discrimination and the freedom to provide services.⁵⁵ The clear aim of Hungarian foreign and economic policy since 2010 was favouring Hungarian companies, investors and producers to foreign ones. In line with this policy, the distributors of vouchers negatively affected by the “nationalization” of the Hungarian cafeteria system were mainly foreign, namely French investors. In September 2015 Advocate General Yves Bot argued in his motion that this Hungarian regulation violates EU law from several aspects, such as the freedom of establishment for companies.⁵⁶ The Court’s ruling came on 23 February 2016, in which they declared the Hungarian cafeteria system reform to be contrary to EU law based on the freedom of establishment and to provide services.⁵⁷

Hungary was not only the respondent of cases before the EU Court of Justice, but it also appeared as claimant on some cases. One of these cases was the one launched by Hungary against Slovakia in 2010. The motive for Hungary to turn towards the ECJ was the refusal of Slovakia in 2008 to let the Hungarian President of the Republic László Sólyom through its border when he was up to an official visit in Slovakia. As the date of the visit coincided with a historically sensitive Slovakian event (the anniversary of the occupation of Czechoslovakia by countries of the Warsaw Pact), Slovakia refused to provide entry to the President referring to security risks. Hungary argued that Slovakia violated the directive about the free movement of citizens within borders. As the Commission was not willing to launch a proceeding against Slovakia in the matter Hungary did it itself, but without any success. In its October 2012 decision the Court ruled that the rules derived from international law which regulate the rights and obligations/treatment of heads of states overrides the directive about the free movement of people, so it was justified for Slovakia not to let Sólyom past the border due to security

⁵⁴ ‘Judgement of the Court in Case C-115/13. European Commission v Hungary’ (curia.europa.eu, 10 April 2014),

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=150788&pageIndex=0&doclang=HU&mode=lst&dir=&occ=first&part=1&cid=363936>.

⁵⁵ ‘Action Brought on 10 April 2014 — European Commission v Hungary (Case C-179/14)’ (eur-lex.europa.eu, 30 June 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CN0179>.

⁵⁶ ‘Opinion of AG Yves Bot on Case C-179/14’ (curia.europa.eu, 17 October 2015),

<http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5bd46fbc382844f56b63ad1bdd9c2e95d.e34KaxiLc3eQc40LaxqMbN4Oc3yRe0?text=&docid=167903&pageIndex=0&doclang=SK&mode=req&dir=&occ=first&part=1&cid=172223>.

⁵⁷ ‘Judgement of the Court in Case C- 179/14. European Commission v Hungary’ (curia.europa.eu, 23 February 2016),

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=174524&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=434795>.

concerns, because the visit had an official nature, so Sólyom did not want to enter the country as a regular citizen.⁵⁸ An interesting aspect of the case is that in its decision the Court did not consider the implications of loyalty, even though, as argued by AG Yves Bot, Article 4(3) TEU obliges Member States to refrain from any activity which would jeopardize European integration and this loyal cooperation has to be binding in bilateral relations as well.⁵⁹ Moreover, the Court did not take into consideration the concept of neighbourliness, or good relationship between Member States, which Hungary did not respect when filing a case against Slovakia. Some researchers argue that such negligence from the part of the ECJ questions the commitment of the body to European integration as a value which is essential in the European Union.⁶⁰

All in all, these legal cases before the European Commission or the Court of Justice should be regarded taking into account the fact that the overall legal compliance of Hungary is satisfactory.⁶¹ Based on the data from the European Commission's latest (2014) document monitoring the application of EU Law, "the number of new complaints made against Hungary rose slightly in 2014 after two years of decline. (...) The overall number of pending infringement cases has fluctuated to some extent over the last five years. New infringement cases for late transposition rose back to their 2012 level but were still considerably lower than in 2010 and 2011."⁶² In 2014, the European Commission launched 893 new procedures by sending a letter of formal notice out of which 38 were directed against Hungary. With this number, Hungary is in the upper-middle half of the Member State ranking.⁶³

The defence of Member State sovereignty as the Hungarian trump-card: the most recent developments

After assessing the different means through which the EU handled the political-legal disputes with Hungary, let us go through some of the most recent events related to the particularist Member State. The already mentioned Minister of Foreign Affairs, János Martonyi ended his political career as Minister of Foreign Affairs in 2014. The former secretary of state for foreign affairs, Péter Szijjártó inherited his post, which was also renamed to Minister of Foreign Affairs and Trade. The new minister did not shy away from emphasising that the nature of the Hungarian foreign policy has changed, and the main motives behind Hungary's foreign actions are clearly economic. This notion was reinforced by him when he said in an interview that Hungary conducts a 'Hungarian friendly' policy which is relevant to Hungarian interests. The government sees the success of its Europe-policy in harmonizing domestic, foreign, security and national goals and interests.⁶⁴ The need for rephrasing Hungary's EU

⁵⁸ Ernő Várnay, 'Az Európai Bíróság ítélete a Magyarország Kontra Szlovákia ügyben - Sólyom László Uniós Polgár és/vagy államfő?', *Jogesetek Magyarázata*, no. 4 (2013): 80–91.

⁵⁹ Lucia Serena Rossi, 'EU Citizenship and the Free Movement of Heads of State: Hungary v. Slovak Republic', *Common Market Law Review* 50 (2013): 1461–1462.

⁶⁰ Béatrice Delzangles, 'Les Affaires Hongroises Ou La Disparition Du Valeur "Intégration" Dans La Jurisprudence de La Cour de Justice', *Revue Trimestrielle de Droit Européen* 2013, no. avril-juin (n.d.): 201–15.

⁶¹ 'Internal Market Scoreboard 26' (European Commission, February 2013), http://ec.europa.eu/internal_market/score/docs/score26_en.pdf.

⁶² 'Monitoring of Application of Union Law - Annual Report on Hungary 2014' (European Commission, July 2015), http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_32/country_sheet_hu_en.pdf.

⁶³ 'Report from the Commission - Monitoring the Application of Union Law: 2014 Annual Report' (European Commission, 9 July 2015), 13, http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_32/com_2015_329_en.pdf.

⁶⁴ Ódor, 'A Tagállami Működés Keretei – Magyar érdekvényesítés', 95.

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policy was increased by the economic crisis, so the Hungarian interest-promotion had to be inserted in a crisis context.⁶⁵ This strategy is mainly manifested in Hungary's recent economic and political approach to Russia, despite the deteriorating relationship between the EU and its giant Eastern neighbour.

Besides Hungary's 'Eastern opening' strategy, it was the refugee crisis of 2015 which has brought the country in the European spotlight due to its controversial political standpoint on the issue. As the Charlie Hebdo incident at the beginning of 2015 has brought the topic of migration to the forefront of EU politics, the Hungarian government started to adopt quite a hostile rhetoric towards immigrants. Prime Minister Orbán repeatedly claimed that Hungary belongs to the Hungarians and the country will not welcome everybody who wants to settle down within its territory. Moreover, Hungary was among the harshest critiques of the EU's new agenda for handling migration as a response to the tragic accidents happening to refugees at the Mediterranean Sea and the increasing flow of immigrants arriving at the EU bordering countries. The conflict reached its peak point when Hungary has started to build a fence on its southern Serbian border. Moreover, the country has been the leader of the Visegrád countries in criticising the EU's quota plan. These events clearly indicate that Hungary is ready to question the EU's values when the government considers them to be harmful for the alleged national interest. This is proven by the fact that Prime Minister Orbán said it outright that solidarity cannot be the main driving force of the consultation about reforming EU migration policy, and Member State sovereignty has to be protected above all. The Hungarian government is using the migration crisis to appear as the only responsible Member State, who is not willing to let an uncontrolled influx of people enter the country, but is trying to defend the borders of the EU. Moreover, the terrorist attacks on Paris and Brussels in November 2015 and March 2016 resulted in an even more hostile rhetoric against foreigners and people coming from Islamic countries.

In connection with the migration crisis Hungary was willing to go as far as organizing a referendum on the legitimacy of the EU's quota system and bringing an EU institution before Court which can be understood as a new method of interest articulation for the Hungarian government.⁶⁶ Hungary's particularist stance in the question of European migration policy did not only manifest in a hostile rhetoric and domestic actions against the refugees, but the country also tried its best to withhold the EU's attempts to reform its migration and refugee policy. On its Justice and Home Affairs Council meeting on 22 September 2015, EU ministers adopted a Decision about the distribution of 120.000 persons in clear need of international protection among 26 Member States of the EU in order to release the pressure from Greece and Italy in this matter.⁶⁷ However, some Member States were not entirely satisfied with the idea of this so-called quota system.

The Hungarian governing party had serious doubts about the legitimacy of the content of the Council Decision, mostly because they considered the whole idea of the quota system to be senseless and dangerous. Fidesz politicians considered the Decision to be against EU law because it was not approved through a just legal process, leaving national parliaments out of

⁶⁵ Ibid., 118.

⁶⁶ Márton Varju and Veronika Czina, 'Hitting Where It Hurts the Most: Hungary's Legal Challenge against the EU's Refugee Quota System', *Verfassungsblog*, 17 February 2016, <http://verfassungsblog.de/hitting-where-it-hurts-the-most-hungarys-legal-challenge-against-the-eus-refugee-quota-system/>.

⁶⁷ 'Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (Council of the European Union, 22 September 2015), <http://data.consilium.europa.eu/doc/document/ST-12098-2015-INIT/en/pdf>.

it.⁶⁸ On 6 November, due to the motion of Fidesz, the Hungarian Parliament accepted a resolution which considered the Council's Decision to be illegitimate and in breach of the principle of subsidiarity.⁶⁹ On 17 November the Parliament enacted a law "About acting against the compulsory settlement quota in defence of Hungary and Europe." The law confirms the illegitimacy of the September Council Decision based on the principle of subsidiarity and calls the Hungarian government to launch a legal proceeding in front of the European Court of Justice based on Article 263 TEU.⁷⁰ The law argues that the EU's quota plan would increase crime, spread terrorism and endanger Hungary's cultural values. Hungary's Minister of Justice László Trócsányi emphasized that although Member States have agreed to give up their sovereignty to a certain extent in return for EU membership, they still kept some rights to themselves, such as regulating who they allow to enter their country and who they want to keep out.⁷¹

As a result, on 3 December 2015 Hungary filed a lawsuit against the Council before the ECJ (Hungary v Council Case C-647/15).⁷² In the motion Hungary claims that the Court should annul the contested Council Decision, or as an alternative annul it in so far as it refers to Hungary. Moreover the country would order the Council to pay the costs. The Hungarian motion refers to several legal backgrounds in its argumentation, such as Article 78(3) TFEU which „does not provide the Council with an adequate legal basis for the adoption of the contested decision” or Article 293(1) TFEU which the Council also violated by departing from the Commission's proposal without reaching unanimity. Hungary also finds it worrying that „after consulting the European Parliament, the Council substantially amended the text of the proposal, despite which it did not consult the European Parliament again.” Moreover, the motion considers the September Council Decision to be contrary to the Conclusions of the European Council meeting of 25-26 June 2015. With choosing to turn to the ECJ, Hungary wished to set a precedent in protecting an EU Member State's sovereignty. Nevertheless, Hungary was not the only EU Member State who chose the path of law to contest an EU decision. Robert Fico, Slovakian prime minister announced already in October that his country will file a complaint against the Council on the subject of handling the migration crisis. The Slovak politician claimed that the EC decision should have been taken unanimously.⁷³ Finally, Slovakia initiated legal action before the ECJ on 2 December (Slovakia v Council, Case C-643/15) which also calls for the annulment of the September Council Decision.⁷⁴ In April 2016, the Polish Minister of Justice has also announced that

⁶⁸ 'Törvényjavaslat a Kötelező Betelepítési Kvóta Ellen', *Fidesz.hu*, 6 November 2015, <http://www.fidesz.hu/hirek/2015-11-06/torvenyjavaslat-a-kotelezo-betelepitesi-kvota-ellen/>.

⁶⁹ '55/2015. (XI. 6.) OGY Határozat' (Magyar Országgyűlés, 6 November 2015), <http://mkogy.jogtar.hu/?page=show&docid=A15H0055.OGY>.

⁷⁰ '2015. évi CLXXV. Törvény Magyarország és Európa Védelmében a Kötelező Betelepítési Kvóta Elleni Fellépésről' (Magyar Országgyűlés, 26 November 2015), <http://mkogy.jogtar.hu/?page=show&docid=A1500175.TV>.

⁷¹ 'Pert Indítunk a Kvótarendszer Ellen', *Magyar Idők*, 18 November 2015, <http://magyaridok.hu/belfold/trocsanyi-precendenserteku-perre-keszulunk-155890/>.

⁷² 'Action Brought on 3 December 2015 — Hungary v Council of the European Union (Case C-647/15)', 3 December 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=174029&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=190692>.

⁷³ 'Hungary Prepares to Back Slovak Legal Challenge against EU Refugee Deal', *Euractiv*, 6 November 2015, <http://www.euractiv.com/section/europe-s-east/news/hungary-prepares-to-back-slovak-legal-challenge-against-eu-refugee-deal/>.

⁷⁴ 'Action Brought on 2 December 2015 — Slovak Republic v Council of the European Union (Case C-643/15)' (curia.europa.eu, 2 December 2015),

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Poland will back Hungary and Slovakia in their legal challenge against the EU's resettlement quota, but it will not file a separate lawsuit against the Council regarding this question.⁷⁵ The Budapest-Brussels opposition on the question of handling the migration crisis was also manifested by the infringement procedure which the European Commission launched against Hungary in December 2015 concerning its new asylum law.⁷⁶

These events mark a new strategic element in Hungary's Europe-policy, which is the recurring reference to the Member States' right to sovereignty. This might be in connection with Hungary's growing distance from the West and approach to the East: Prime Minister Orbán has openly expressed his admiration about Vladimir Putin's leadership style and concept of sovereignty.⁷⁷

Concluding remarks

The picture depicted above clearly shows that the 'Hungarian affair' is an existent and real conflict currently present in the European Union political scene. The country's manoeuvring in its domestic and foreign policy strategy poses some challenges to Europe which should be handled. Nevertheless, this does not mean, that Hungary is unique in its non-conformist behaviour and there is no such other Member State. If one considers the new Polish government's recent acts about media freedom, or the Slovak stance on the migration crisis, it is easy to conclude that other Member States also diverge from the commonly acknowledged European path. However, Hungary has been "monitored" by various European institutions due to its particularism for a while now, so examining the Hungarian case can give very useful insights about how the EU can handle rogue Member State behaviour.

The EU has more than one tool to address a rogue Member State when a breach of EU law is detected. It is very hard to define however, which tool is the most effective in which scenario. In today's academic discussion there is a growing tendency to push and argue for the more effective implementation or further development of the Commission's Rule of Law Framework, as it is seen as the only way to protect fundamental constitutional and democratic values in the EU.⁷⁸ Kochenov and Pech praise the Commissions early 2014 willingness to reform the rule of law procedure of Article 7 and they condemn the Council for not being supportive in this matter but wanting to hold an annual rule of law dialogue among all Member States within the Council itself.⁷⁹ They also "encourage the European Parliament to endorse the Commission's Rule of Law Framework and the Commission to undertake some additional work to make its 'pre-Article 7 procedure' more workable and effective."⁸⁰ They

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=173998&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=190931>.

⁷⁵ 'Poland to Back Hungary's Legal Challenge to the EU's Mandatory Migrant Resettlement Quota', *Abouthungary.hu*, 11 April 2016, <http://abouthungary.hu/news-in-brief/poland-to-back-hungarys-legal-challenge-to-the-eus-mandatory-migrant-resettlement-quota/>.

⁷⁶ 'Commission Opens Infringement Procedure against Hungary Concerning Its Asylum Law', *Europa.eu*, 10 December 2015, http://europa.eu/rapid/press-release_IP-15-6228_en.htm.

⁷⁷ Rosa Balfour et al., 'Europe's Troublemakers: The Populist Challenge to Foreign Policy' (European Policy Centre, February 2016), 32, http://www.epc.eu/pub_details.php?cat_id=17&pub_id=6377.

⁷⁸ Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?', *European Law Journal* 21, no. 2 (March 2015): 150.

⁷⁹ Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's "Pre-Article 7 Procedure" as a Timid Step in the Right Direction Dimitry Kochenov', April 2015, http://cadmus.eui.eu/bitstream/handle/1814/35437/RSCAS_2015_24.pdf?sequence=3.

⁸⁰ *Ibid.*, 14.

also argue that the effect of infringements is limited because non-specific violations of EU law cannot be punished through them.⁸¹ Some scholars came up with alternatives or rather complementary methods for the protection of the rule of law and fundamental rights. Jan Werner Müller insists on keeping the Article 7 procedure as a rule of law mechanism, but suggests some reforms to it, for example creating a separate Commission responsible for the continuous monitoring of the state of rule of law in Member States, or adding the possibility of Member State exclusion to the toolkit of the mechanism.⁸² Kim Lane Scheppele, on the other hand, calls for the creation of a systemic infringement action mechanism, which would allow the Commission to file systemic complaints against a Member State by tying a group of infringements together under the banner of Article 2 and the values it presents.⁸³ Another attempt to reform the protection of rule of law in the EU is the concept of ‘reverse Solange’ introduced by von Bogdandy et al. which proposes that “a violation by a Member State, even in purely internal situations, can be considered an infringement of the substance of Union citizenship.” This means that essentially Member States are responsible for fundamental rights protection, but in case of a systemic violation of fundamental rights, „individuals can rely on their status as Union citizens to seek redress before national courts.”⁸⁴

The Hungarian example shows that the ‘alternative’ ways to address a rogue or non-compliant Member State can work too. This paper does not argue that the rule of law procedure is useless, or that it would not be useful to further develop/reform it in the future. The Polish case, and how it will be handled will tell us a lot about the current state and effectiveness of the rule of law procedure. However it is clear that until that happens, the EU has an abundant amount of tools to effectively tackle rule-breaking behaviour. Infringement proceedings, for instance, can be very effective in indirectly tackling political issues, as they did in the triple infringement cases of 2012. The European Commission might have a political and tactical motivation behind its lack of enthusiasm to boost the rule of law mechanism further or to address each and every complaint which comes directed against Hungary. If drastic, or much stronger measures were applied against Hungary, the danger of forcing the country to an even more hostile rhetoric and political stance would emerge. Moreover, in most cases Hungary reacts positively to the more practical, systemic warnings it gets for instance in the form of infringement procedures, whereas the government gets offended when it is explicitly criticised through the rule of law mechanism. So, it does not only seem easier to transmit the EU’s expectations about fundamental rights, values and democratic standards through infringement proceedings and institutional reports, but it also seems more reasonable for the time being. It is also interesting to see that recently these issues have been made more political and they are not only mentioned in a legal context, as the latest citizens’ initiative shows. However, it should be duly noted that in case a rogue Member State, such as Hungary, stopped answering to the alternative warning methods of the EU, then a comprehensive reform of the Rule of Law Framework would be unavoidable.

⁸¹ Ibid., 4.

⁸² Jan-Werner Müller, ‘Safeguarding Democracy inside the EU - Brussels and the Future of Liberal Order’, *Transatlantic Academy Paper Series* 2012–13, no. 3 (February 2013): 1–27.

⁸³ Kim Lane Scheppele, ‘What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions’ (Princeton University, November 2013), http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf.

⁸⁴ Armin Von Bogdandy et al., ‘Reverse Solange - Protecting the Essence of Fundamental Rights Against EU Member States’, *Common Market Law Review* 49 (2012): 491.

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