Efforts to Disrupt the Authoritarian Equilibrium within the EU. Effects and Counter-effects[1]

KRISZTINA JUHÁSZ

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Abstract: *The study, leaning on the concept of 'authoritarian equilibrium' introduced by R. Daniel Kelemen on the one hand, and new intergovernmentalism as a fresh theoretical approach of the European integration on the other hand, investigates if we can talk about the disruption of the 'authoritarian equilibrium' as a consequence of the split up between Fidesz and the EPP, and the adoption of the rule of law conditionality mechanism. In other words, whether we can talk about an initial authoritarian disequilibrium? Or can we rather talk about a converse process due to the mechanisms of new intergovernmentalism resulting in the further stabilisation of authoritarian governments and the ineffectiveness of the EU measures devoted to the protection of rule of law? Using qualitative resource analysis of the relevant secondary literature and the documents and legal acts of the EU and its institutions the paper comes to the conclusion that while we have witnessed efforts to disrupt the partisan and the financial support of the Hungarian governing party, these efforts were neutralised by the mechanisms of new intergovernmentalism and as a consequence we still cannot talk about an initial authoritarian disequilibrium in the EU.*

Keywords: ***European Union, authoritarian equilibrium, new intergovernmentalism, rule of law conditionality, Hungary***

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Introduction

Systematic breaches of the rule of law in Hungary since 2010 and in Poland since 2015 have generated a heated rule of law debate among the Member States and the EU institutions, as well as among scholars. Different angles of the rule of law issue have been discussed in the relevant literature, starting from the conceptualisation and definition of the rule of law (Magen 2016), through the grouping and the evaluation of the protecting measures available at the EU level (Sedelmeier 2016; Blauberger – Kelemen 2016; Sargentini – Dimitrovs 2016; Kochenov – Pech, 2016; Oliver – Stefanelli, 2016), to the explanations of the factors supporting the survival of authoritarian regimes within the EU on one hand and undermining the effective use of the EU rule of law tools on the other hand (Kelemen 2017; 2020). The article aims to give a contribution to the last one using a dual theoretical framework, namely the *concept of authoritarian equilibrium* and the *theory of new intergovernmentalism*, to investigate the efficiency of the newest tool, the rule of law conditionality mechanism.

The concept of *authoritarian equilibrium* elaborated by R. Daniel Kelemen traces back the rise and the consolidation of authoritarian member states within the EU to three factors: the partial politicisation of the EU, especially its party politics, the EU funds, and finally migration within the EU. Due to recent events, such as the split between the European People's Party (EPP) and Fidesz, as well as the introduction of the newest rule of law tool, the conditionality mechanism which connects the EU budget and funds with the requirement of respect for the rule of law, the question has arisen whether we can talk about an initial *authoritarian disequilibrium?*

At the same time, we have witnessed certain circumstances in connection with the rule of law conditionality mechanism, both regarding its adoption and the lack of its application, which pose a different possibility, notably the counter--effects of *new intergovernmentalism* which may result in further stabilisation of authoritarian governments and the ineffectiveness of the EU measures devoted to the protection of the rule of law.

My hypothesis is that while there have been changes in the partisan and financial support of governing Fidesz, considered the only real authoritarian ruling power in the EU, these changes haven't resulted in an initial authoritarian disequilibrium, at least for now, because of the counter-effects of the mechanisms of new intergovernmentalism.

The rest of the paper focuses on a detailed exploration of the theoretical background, namely the concept of authoritarian equilibrium and the theory of new intergovernmentalism. The empirical chapters investigate the efforts that have been made to disrupt the authoritarian equilibrium, namely the process of the split between the EPP and Fidesz as well as the adoption of the conditionality mechanism. Regarding the latter, mechanisms of new intergovernmentalism

and their counter-effects to the disruption of the authoritarian equilibrium are examined. The last chapter includes the conclusions.

Theoretical background

R. Daniel Kelemen has elaborated the concept of 'authoritarian equilibrium' in connection with the EU based on the findings of comparative politics literature on democratisation which reveal those circumstances and conditions in which authoritarian enclaves may rise and fall within democratic federations. His starting point is, similarly to many others, that the European Union is founded on the values set out in Article 2 of the Treaty of the European Union (TEU), such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Additionally, guaranteeing rule of law is one of the preconditions for the candidate countries to access the EU prescribed by the Copenhagen EU Summit in 1993. At the same time, despite this stated commitment to democracy and rule of law, as Kelemen phrases, 'the EU has in recent years shown itself to be a hospitable environment for the emergence of increasingly autocratic member governments' (Kelemen 2020: 481). In other words, there is 'an authoritarian equilibrium in which the EU paradoxically supports the survival of authoritarian member governments' (Kelemen 2017: 214). According to him this authoritarian equilibrium in the EU is due to three factors. Firstly, partial politicisation of the EU and the underdeveloped party politics which on the one hand allow Europarties to defend their authoritarian members for the votes and seats provided by the latter (partisan support), but on the other hand Europarties cannot intervene and directly support the local opposition financially. Secondly, EU funds and the authoritarian governments' control over them help them stay in power. Thirdly, emigration of deeply disappointed voters to other EU member states serve as a 'kind of pressure release valve' resulting in a further decrease in the chances for the opposition. Kelemen concludes that this authoritarian equilibrium played a crucial role in the stabilisation of the power of Viktor Orbán who established the first non-democratic government in the EU, and that there is little indication that this equilibrium will be demolished soon (Kelemen 2020: 483–487).

At the same time, some of the most recent events have posed the question as to whether we can witness the erosion of the authoritarian equilibrium since the split up of Fidesz and EPP has resulted in changes in the partisan support, and the adoption of the rule of law conditionality regulation has possibly paved the way for cutting the financial sources of the Orbán regime. Regarding the third supporting element of the authoritarian equilibrium, namely emigration, we cannot speak about any significant shift so far.

Kelemen himself has mentioned another circumstance which helps to maintain the authoritarian equilibrium, namely the intergovernmental ele-

ments of governance of the European Union, but he hasn't paid special attention to the issue, not handling it as an independent fourth contributing pillar of the authoritarian equilibrium. He claims, drawing a connection among the partial politicisation of the EU and its intergovernmental characteristics as well as national sovereignty, that authoritarian equilibrium is sustained because member states play a much more powerful role in EU decision-making than they do in a fully developed federation, which usually don't use decision-making procedures that require unanimity among the member states, while the EU does on several important issues, including for sanctioning the breaches of the EU values envisaged by Article 7 of the Treaty on the European Union (TEU). Additionally, since the EU governance is based on norms of respect, national sovereignty, mutual trust and the assumption that member states take any appropriate measure to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union, as it is set out in Article 4 of the TEU, the EU's authority to intervene in domestic politics of its member states is much more limited than in the case of a fully developed federation (Kelemen 2020: 484–485).

In my view, especially considering the latest developments of the rule of law issue within the EU, certain intergovernmental characteristics of the EU governance, which are highlighted by the theory of new intergovernmentalism, play a crucial role in the rule of law crisis and in the contribution of authoritarian governments besides the three above-mentioned factors identified by Kelemen. Especially, new intergovernmentalism can give an interpretation framework for the rule of law debate and the newest development of the issue.

New intergovernmentalism (NIG) was set out in the 2010s with the aim to give an alternative explanation about the Post-Maastricht era of the European integration which can be characterised as an integrational paradox because while the basic constitutional features of the EU have not changed, EU activity has expanded to an unprecedented degree on certain policy areas such as financial supervision, labour market reforms, migration, asylum and border control, police and judicial cooperation as well as the foreign and security policy. In other words, member states preferred integration without supranationalism, avoiding further significant transfer of competencies to supranational institutions (Bickerton – Hodson – Puetter 2015: 1). Even in those cases when legislative competences have been delegated to supranational actors such as in the area of justice and home affairs, it happened with an important modification of the community method governance, due to the European Council's special oversight power and the Commission's modified right of initiative (Wolff 2015).

Bickerton, Hodson and Puetter have determined a set of hypotheses in connection with the NIG such as that deliberation and consensus have become the guiding norms of the day-to-day decision making at all levels (Bickerton – Hodson – Puetter 2015: 29). Puetter highlights the role of the European Council

in deliberation and consensus-seeking, defining it as a centre of new intergovernmentalism, and emphasising its changing role since the middle of the 1990s. Since then the European Council has been getting involved in detailed policy decisions and formation via initiation and overseeing implementation in the new domains of EU activity. Additionally, the European Council also gives instructions regularly to the European Commission and to the EU Council regarding concrete policy-making and implementation (Puetter 2015: 165–167).

Another claim of the NIG is that supranational institutions such as the European Commission, the Court of Justice and the European Parliament are not hard-wired to seek an ever closer union anymore, but they are rather 'complicit' in the ever-growing role of the European Council in the new areas of EU activity (Bickerton – Hodson – Puetter 2015: 31). However, there is no consensus about the 'complicity' of the supranational institutions or its origins. While Puetter traces back the 'complicity' of the European Commission to the fact that the President of the Commission is the member of the European Council and the High Representative who is one of the Vice-Presidents of the Commission to take part in its work as well (Puetter 2015: 175), Peterson claims that the European Commission has only adjusted to the new political reality of the integration in the Post-Maastricht era, which doesn't mean that the European Commission is not committed for an ever closer union anymore (Peterson 2015: 186).

Efforts to disrupt the authoritarian equilibrium within the EU

Changes in the partisan politics in the European Parliament

March 2021 meant a turning point in the Fidesz-European People Party saga. On 3 March the political group of the EPP in the European Parliament passed, with an 84-percent majority, the amendment to its rules of procedure that enables the suspension of the whole delegation's membership and the connecting rights (Hegedűs 2021). As a response, Viktor Orbán announced that he was leaving the EPP group in the European Parliament (EP) immediately, labelling the decision of the EPP group as a 'clearly hostile move against Fidesz and our voters' (Orbán 2021). At the same time, leaving the group constituted a breach of Article 3 of the EPP party statutes pinning down that EPP members are obliged to join the EPP group in the EP with their representatives (EPP 2015). Consequently, on 18 March on behalf of Fidesz, Katalin Novák announced leaving the European People Party itself (Novák 2021). With the breakup, the EPP has lost 12 seats[2] and possible votes in the EP while Fidesz has lost its strong partisan support and shield in the rule of law debate as well as the possibility of a broader field of political manoeuvre as a member of the largest EP party group.

2 György Hölvényi remained the member of the European People's Party group as member of the Christian Democratic People's Party.

But what has led to the eventual split up? What kind of circumstances resulted in this outcome after two years of suspension of Fidesz membership? Has the 'political and reputational cost' become too high for the EPP to maintain the alliance with Fidesz?

To be able to get closer to the possible answers to the above-mentioned questions, it is worth starting with the findings of comparative politics literature on democratisation, namely that authoritarian enclaves may exist on the subnational level in democratic federations (Benton 2012; Gervasoni,2010; Gibson 2005, 2012; Giraudy 2015). Research has revealed what kind of authoritarian enclaves may emerge and what kind of circumstances usually support them or on the contrary undermine their existence. Firstly, the authoritarian enclaves are usually not repressive dictatorships, but rather some kind of hybrid regimes that scholars variously refer to as 'illiberal democracies', 'competitive authoritarianisms' and 'electoral authoritarianisms' in which elections are held and ballots are counted fairly, but incumbents massively outspend challengers and the local media are formally independent but are bought off to bias coverage in favour of the ruling party (Gervasoni 2010: 314).

Basically, two factors support the persistence of authoritarian enclaves within democratic federations. On the one hand, according to party politics, democratic leaders at the federal level may overlook concerns about the authoritarian nature of governance in member states as long as the local authoritarian delivers needed votes to their coalition in the federal legislature (Gibson 2005: 107). On the other hand, fiscal dynamics within multi-level polities may serve as a supportive factor as well since local authoritarian leaders can use federal financial transfers to support and perpetuate their power (Gervasoni 2010: 303).

At the same time, under certain circumstances actors of the federal level may intervene to dislodge subnational authoritarian leaders. One option is when federal parties that oppose the local authoritarian party intervene to support local opposition parties providing resources the opposition needs to break the local authoritarian's grip on power (Gibson 2005: 108). Another scenario is when federal leaders who had supported a local authoritarian withdraw their support if the local autocrat's behaviour becomes so intolerable that it imposes political and reputational costs on the federal leaders (Giraudy 2010: 72).

As the comparative analyses of democratisation show, under certain circumstances political actors of the federal level may act in two different ways to dislodge local authoritarian rulers. In case of the EU a similar process has started, since the EPP, after several years of non-acting, has created such a circumstance which made Fidesz leave the party federation ceasing the strong partisan support in the EP. Additionally, EU-level actors and primary MEPs from party groups opposing the ruling style of the Orbán government and the European Commission paved the way for a new rule of law measure which may

cut the access to the EU transfers in case of breaches of the rule of law by the member states that have financial consequences on the EU budget. Nevertheless, in the case of the EU we can rather speak about some efforts to disrupt the authoritarian equilibrium rather than dislodge the Orbán government. This is due to the fact, as Kelemen points it out, mostly that the European Union is not a real federation and any kind of direct effort to dislodge the Orbán government would trigger the charge that the EU or its institutions intervene in the domestic affairs of a member state (Kelemen 2017: 2018).

Turning back to the issue of the long-standing partisan support provided by the European People's Party, it seems that the political and reputational costs became too high by the end of 2020 and beginning of 2021 for the EPP. If we take a look at the reactions and responses of the EPP to the controversial steps of the Orbán Government and the ruling Fidesz, we can observe that until 2017 the EPP conceived the critiques as political attacks and accusations from the political left. Then, as Kelemen and Pech point out, since 2017 EPP leadership has laid down 'red lines' in several cases such as the Lex Central European University, the repressive ruling of the NGOs or the anti-EU and György Soros campaign, but every time has let the Orbán Government cross these red lines without any consequences. The main explanation of the EPP leadership was based on the hypothesis that keeping Fidesz in the EPP would have a restraining effect on the Orbán regime (Kelemen – Pech 2019). As we know, this assumption lacked any reality. On the contrary, the Hungarian Government continued the illiberal way of governance breaching the rule of law over and over again amongst other infractions with the non-implementation of the European Court of Justice decisions on international protection (Maximov,2021; Keller-Alánt 2021).

At the same time, by the end of 2020 and beginning of 2021 the continuous breach of the rule of law on behalf of the Fidesz Government, and other dividing issues such as migration, or the future of the EU, as well as the handling of the COVID-crisis caused an irreversible gap between the EPP and Fidesz. Furthermore, along with these substantial topics, other rather personal issues have burdened the Fidesz-EPP relationship as well. In December 2020 due to the scandal and resignation of József Szájer, Fidesz lost its central mediator in the EPP-Fidesz struggle. Right after the Szájer-affair Tamás Deutsch was suspended in the EPP group in the European Parliament because of the Hungarian MEP's comments comparing the group's German leader, Manfred Weber, to the Gestapo. After the meeting to discuss the affair, the EPP issued a statement in which the party group called on all Fidesz MEPs 'to reflect on whether their fundamental political convictions still are compatible with the values and core content of the EPP and to act consistently with these EPP core values or draw the necessary conclusions' (Banks 2020). This statement has basically paved the way for the amendment of the EPP Rules of Procedure regarding the suspension of the whole delegation's membership and the connecting rights.

Efforts to cut the financial source of the authoritarian governments – the birth of the conditionality regulation

As the comparative politics literature on democratisation and the EU-specific concept of the authoritarian equilibrium reveal, besides the partisan support that came from the EPP, EU funds have been providing the other supportive factor of the authoritarian equilibrium within the EU in the case of Hungary. Bozóki and Hegedűs have also identified EU transfers as a contributing element of the 'only completely developed hybrid regime within the EU', at least so far (Bozóki – Hegedűs 2018: 1176).

Hungary is one of the biggest net beneficiaries of the EU budget. Twenty five billion euros have been allocated under the European Structural and Investment Funds for Hungary in the 2014–2020 multiannual financial framework (European Commission 2016). At the same time, a significant proportion of the EU transfers is affected by corruption and fraud as it has been emphasised not only by the Hungarian opposition, but by the European Anti-Fraud Office (OLAF) or NGOs such as Transparency International for years. According to the OLAF, between 2015 and 2019 2,697 fraudulent and non-fraudulent irregularities were detected, and the Office has recommended to the EU Commission that they recover some 3.93 percent of payments made to Hungary under the bloc's structural and independent funds and agriculture funds, which is by far the highest in the EU, since in the case of EU-28 this proportion was 0.34 percent (OLAF 2020: 39). Experts from Transparency International Hungary identified the typical methods of fraud and corruption in the use of EU funds such as exercising influence in the process of project selection; positive tender evaluations in exchange for using overpriced services; public procurement tailored to a specific bidder; 'fine-tuning' a public procurement invitation in order to restrict the market (Kállay 2015: 5).

As a reaction to the misuse of EU funds the European Commission proposed a new rule of law measure in 2018 known as the rule of law conditionality mechanism to complement the existing tools to protect the rule of law in the EU, such as the infringement procedure, the rule of law framework or the Article 7 procedure of the TEU. The European Commission's proposal highlights that 'the very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts. Maintaining the independence of the courts is essential [...] in particular, for the judicial review of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, inter alia in the context of public procurement procedures which may also be brought before the courts. There is hence a clear relationship between respect for the rule of law and an efficient implementation of the Union budget in accordance with the principles of sound financial management. Generalised deficiencies in the Member States

as regards the rule of law which affect in particular the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union' (European Commission 2018: 6–7).

The Commission originally proposed a conditionality mechanism in which if the Commission finds that generalised deficiency as regards the rule of law is established in a Member State, it shall submit a proposal for an implementing act on the appropriate measures to the Council. The decision shall be deemed to have been adopted by the Council, unless it decides, by qualified majority, to reject the Commission proposal (European Commission 2018: 10).

The strength of the proposed procedure was the so-called reversed qualified majority voting in the Council which would have provided the opportunity only to dismiss the measures proposed to be introduced by the Commission. Nevertheless, it is worth emphasising that the Commission didn't intend to involve the European Parliament in the mechanism except for that 'the Commission shall immediately inform the European Parliament of any measures proposed or adopted' (European Commission 2018: 11). Considering that the European Parliament co-decides with the Council over the annual budget of the EU and approves the multiannual financial framework, as well as scrutinises the EU budget spending through the discharge procedure, the ignorance of the EP is salient.

The European Parliament has given a voice to its critique in its first reading legislative resolution in which it has proposed amendments putting the Parliament and the Council on the same footing. According to Amendments 57 and 58 at the same time as the European Commission adopts its decision about the measures in case of generalised deficiency as regards the rule of law is established, 'the Commission shall simultaneously submit to the European Parliament and to the Council a proposal to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted. [...] the European Parliament and the Council shall deliberate upon the transfer proposal within four weeks of its receipt by both institutions. The transfer proposal shall be considered to be approved unless, within the four-week period, the European Parliament, acting by majority of the votes cast, or the Council, acting by qualified majority, amend or reject it' (European Parliament 2019).

As it is known, neither reversed majority voting in the Council, nor the involvement of the European Parliament were realised in the final version of the conditionality regulation which was adopted 16 December 2020 after long-lasting wrestling of the EU institutions and the Member States as is highlighted in the next part of the study.

The role of new intergovernmentalism in the neutralisation of the conditionality regulation

As we could see above, there has been a change in the partisan support of Fidesz and an effort to cut the financial support of those governments which cause generalised deficiencies as regards to the rule of law that have financial consequences. At the same time, we still cannot speak about a breakthrough in the area of protection of the rule of law, since there are several circumstances which aim to neutralise the conditionality mechanism. These circumstances seem to confirm some of the hypotheses of new intergovernmentalism, such as the growing role of deliberation and consensus-seeking and of the European Council in the new regulatory area of the EU, as well as the complicity of those supranational institutions which are devoted to struggling for an ever closer union and for the interests of the EU.

As regards the adoption of the regulation, we can actually talk about the victory of the mechanisms of new intergovernmentalism over the mechanism of 'old' intergovernmentalism, namely the victory of consensus-seeking over hard--bargaining and veto. The Hungarian and Polish governments were hostile to the idea connecting the issue of rule of law to the financial transfers from the very beginning. However, the European Council held between 17 and 21 July 2020 underlined the importance of the protection of the Union's financial interests and the respect for the rule of law. As a result, heads of state and government decided that 'a regime of conditionality to protect the budget and Next Generation EU will be introduced'. At the same time, Member States started to water down the Commission's original proposal according to the testimony of the issued conclusion stating 'the Commission will propose measures in case of breaches for adoption by the Council by qualified majority' (European Council 2020a: 15–16).

On 16 November 2020 the session of the EU Council at the ambassadorial level (COREPER) meant a twist in the process since two Member States, Hungary and Poland, opposed the rule of law conditionality mechanism, threatening to veto the whole financial package (MFF and Next Generation). Threatening with veto is part of hard bargaining and it is a central feature of traditional intergovernmental policy-making. Additionally, harsh communication was coupled with the political veto. Viktor Orbán told the Hungarian public broadcaster Kossuth Radio that the EU saw only pro-migration Member States as adhering to the rule of law, who were ready to 'turn their homelands into countries of immigration'. He added that Hungary will 'resist and we will not accept financial repercussions. Our position is set in stone. I don't want to compromise… it's about finding a solution' (Hungary Today 2020).

In the next few weeks vivid political debate emerged among the member states and the European institutions with the consideration of possible solutions of the political stalemate.

The European Commission was assessing options to circumvent Hungary and Poland's veto of the EU budget and the recovery fund. On one hand, as a transitive solution based on EU law, the Next Generation EU recovery fund could have been made available for Member States in the framework of enhanced cooperation. On the other hand, due to the lack of the new MFF, the Commission could have put forward a new draft budget for 2021 based on the budgetary ceilings of the previous MFF according to Article 312 of the TFEU. This scenario would have been feasible since enhanced cooperation could have been established by a minimum of nine Member States and the budget for 2021 could have been adopted by qualified majority of the EU Council, leaving no prospect of any vetoes. This way the EU could have insisted on the rule of law conditionality mechanism, even if it had been watered down compared to the original proposal of the European Commission, circumventing the Hungarian and Polish veto.

Nevertheless, this solution would have been far from optimal from a financial point of view as each chapter of the budget would have been funded monthly, up to a maximum of one twelfth of its appropriations of the previous year. Additionally, the EU wouldn't have been able to commit to new projects under most of its programmes, such as Cohesion or Horizon, and rebates would not be paid to some of the net contributors to the EU budget. Furthermore, around 25–30 billion euros in Cohesion funds would have been lost even once a new budget for 2021 is adopted under the previous MFF, given that the 2014–2020 budget has lower budgetary ceilings compared to the next seven-year budget (Valero 2020).

At the same time, Germany as the president of the EU Council, and personally Angela Merkel, strove for a compromise among the Member States in the session of the European Council held between 10 and 11 December 2020. The German efforts proved to be successful since a compromise was brokered contained by the European Council Conclusion on 10 and 11 December 2020, resulting in a lift of the Hungarian and Polish Governments' political vetoes. The disputed compromise has meant the victory of deliberation and consensus-seeking as central decision-making mechanisms of the NIG over the hard bargaining and veto threat of 'old' intergovernmentalism. On the basis of the compromise the Council of the EU adopted the regulation on 14 December, while the European Parliament did the same on 16 December 2020.

If we take a closer look at the elements of the compromise, we can find several additional clues of the NIG, especially as regards the central role of the European Council on concrete regulatory issues. The European Council conclusions pin down that a methodology guideline would be developed in connection with the application of the rule of law conditionality regulation by the European Commission 'in close consultation with the Member States'. What's more, the document adds that 'should an action for annulment be introduced with regard

to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment. Until such guidelines are finalised, the Commission will not propose measures under the Regulation.' In fact, the European Council has prescribed the creation of a non-binding document (guidelines) for the application of a legal act which itself contains provisions in connection with its application. Article 4 of the regulation defines the possible cases of the breach of the rule of law which serve as basis of the application of those measures ruled in Article 5 with the aim to protect the European Union budget. Article 6 defines the procedure of the adoption of the measures, while Article 7 rules the lifting of measures.

Another bizarre momentum is that the regulation came into force on 1 January 2021; at the same time, the European Commission hasn't started applying it and evaluating the possible breaches of the rule of law that have financial consequences because of the instructions of the European Council regarding the lack of the guidelines and the foreseeable judicial revision of the regulation. The latter is not only a possibility anymore, since the Hungarian and Polish Governments, waiting until the last moment of the deadline, on 11 March 2021 launched a legal challenge against the regulation at the European Court of Justice.

If we turn to the question of 'complicity' of the supranational institutions in the dynamics of the NIG, it is worth starting with the European Commission. Although the Commission has put the rule of law mechanism on the political agenda based on its initiative role, and originally made an ambitious proposal guaranteed by the reversed qualified majority rule, some circumstances and subsequent events are pointing in the direction for strengthening the European Council and the intergovernmental governance, this time in the area of the protection of the rule of law.

As we have pointed out above, the European Commission hasn't devoted any significant role to the European Parliament in the rule of law conditionality mechanism in its original proposal, and despite the efforts of the European Parliament, the adopted regulation has maintained the marginal role of the EP, confining it to the right for being informed (Article 8) or for inviting the European Commission for a structured dialogue on its findings regarding the existence of the conditions for the adoption of measures (Article 6).

As regards the application of the regulation, the European Commission has been following rather the political instructions of the European Council instead of fulfilling its responsibility prescribed by Article 17(1) TEU, 'the Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'. The Commission, in spite of the numerous calls of the European Parliament to apply the conditionality regulation since it entered into force on 1 January 2021 and is binding in its entirety and directly applicable in all Member States, has not yet started to implement the legal act at the time of writing this paper.

Furthermore, besides the reference to the lack of the guidelines prescribed by the European Council, another argument has appeared in the communication of the Commission aiming to legitimise its non-action. On 25 August 2021 Commission spokesperson Balázs Újvári called the conditionality mechanism an element of 'last resort', adding that 'We will not go ahead until we make sure that in terms of our toolbox this is the right instrument to be used and the work has been ongoing in this regard for a number of months. When all the conditions are met for us to start implementing the regulation we will not hesitate to do so' (Euronews 2021).

Nevertheless, the European Parliament doesn't share this view as it can be read in its resolution issued on 8 July 2021 stating: '[...] measures under the Regulation are necessary in particular, but not only, in cases where other procedures set out in the Financial Regulation, the Common Provisions Regulation and other sector-specific legislation would not allow the Union budget to be protected more effectively; [...] this does not mean that the Regulation is to be considered as a "last resort", but rather that the Commission can use a wide range of procedures to protect the Union's financial interests, including the Regulation, to be chosen on a case-by-case basis and used in parallel if needed, depending on their efficiency and effectiveness.' The Parliament emphasises too that 'the Regulation is the only EU legislation linking respect for the rule of law to the EU budget [...] therefore, [...] its unique provisions should be fully applied to ensure complementary protection for the rule of law in addition to EU finances' (European Parliament 2021c Point 21, 22).

If we take a look at the Political Guidelines of the Leyen-led Commission, we can see a discrepancy between the political manifesto and the reality. The document claims that 'Our European Union is a Community of Law. [...] Strengthening the rule of law is a shared responsibility for all EU institutions and all Member States. I will ensure that we use our full toolbox at European level. [...] The Commission will always be an independent guardian of the Treaties. Lady Justice is blind – she will defend the rule of law wherever and by whomever it is attacked' (von der Leyen 2019).

The attitude of the Commission regarding the non-application of the regulation has caused an inter-institutional debate with the European Parliament which may even end at the European Court of Justice as it is unfolded below.

Taking the 'complicity' of the European Parliament, we can face a rather different situation. It's important to emphasise that the European Parliament has been insisting on the new rule of law mechanism and its connection to the EU budgetary issues all the time. It has even threatened veto of the long/term budget for 2021–2027 if the rule of law mechanism isn't connected to it and to the Next Generation EU recovery fund (Kahn 2020). It's also the truth that the EP has made efforts to gain a more significant role in the new rule of law mechanism, and when it was opposed by the Council, the EP still supported the

regulation, as it was done in the case of watering-down the original proposal of the European Commission regarding the reversed qualified majority. So the European Parliament has expressed its commitment to the conditionality mechanism several times and after its adoption to the immediate application of it as well, reminding the European Commission and the European Council of their competences and responsibilities.

On 17 December 2020, the EP adopted a resolution in which it recalled 'that in accordance with Article 15(1) TEU, the European Council shall not exercise legislative functions; considers, therefore, that any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice' (European Parliament 2020 Point 5). Additionally, it qualified the content of the European Council conclusions on the regulation as 'superfluous', since in the view of the EP 'the applicability, purpose and scope of the Rule of Law Regulation is clearly defined in the legal text of the said Regulation' (European Parliament 2020 Point 4).

On 25 March 2021 the European Parliament adopted another resolution in which it recalled 'that the Commission shall be completely independent, and its members shall neither seek nor take instructions from any Government in accordance with Article 17(3) of the TEU and Article 245 of the TFEU' (European Parliament 2021 Point 6). In the co-legislator's point of view since 'the situation as regards respect for the principles of the rule of law in some Member States warrants immediate consideration', the European Commission should make 'full use of its powers of investigation for each case of a potential breach of the principles of the rule of law by a Member State' (European Parliament 2021 Point 7). Consequently, the Parliament called the European Commission to finalise the guidelines by 1 June 2021 and to start applying the regulation right afterwards. Indeed, it threatened to take the Commission to the European Court of Justice if it fails to fulfil its responsibilities (European Parliament 2021 Point 13 and 14). As regards the judicial review of the regulation, the European Parliament asked the European Court of Justice to follow an expedited procedure, furthermore it recalled that 'actions brought before the CJEU do not have any suspensory effect according to Article 278 of the TFEU' (European Parliament 2021 Point 12).

As the Commission didn't meet the deadline, the European Parliament issued another resolution on 10 June 2021 in which it expressed its regret over the Commission's failure 'to activate the procedure laid down in the Rule of Law Conditionality Regulation in the most obvious cases of breaches of the rule of law in the EU'. The Parliament laid down that it immediately started the necessary preparations for potential court proceedings under Article 265 TFEU[3] against the Commission (European Parliament 2021b Point).

3 According to Article 265 TFEU 'Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member

As regards the complicity of the European Parliament in the strengthening of the European Council and the intergovernmental nature of the EU governance, at least in connection with the new conditionality regulation, it cannot be detected. At the same time, it would be crucial, in case of further reluctance of the Commission, that Parliament carry out its threat about the court proceedings under Article 265 TFEU against the Commission, and ensure its full commitment to the regulation.

Conclusion

As we can see above, in accordance with the presumption of comparative politics on democratisation and the concept of authoritarian equilibrium, there have been efforts to disrupt the authoritarian equilibrium which has been helping the Orbán Government to stay in power for more than ten years. On one hand, partisan support of Fidesz has come to an end after several years of a love-hate relationship. Seemingly, by the end of 2020 and beginning of 2021, the political and reputational costs of the alliance with Fidesz became too high for the EPP. As a result of the split up, Fidesz has lost its strong position and space for political manoeuvre as part of the biggest political group in the EP. Although Viktor Orbán didn't waste time, and started almost immediately initial negotiations with Matteo Salvini, leader of the Italian League Nord and Jaroslaw Kaczynski, president of the Polish ruling party PiS on the creation of a brand-new party group in the EP, even if these efforts result in any outcome in the future, it won't substitute that firm partisan support that the EPP provided.

Regarding the effort to cut the financial support of a government which breaches the rule of law, it has a formal result, namely the adoption of the rule of law conditionality resolution. At the same time, due to the watering down of the mechanism and the controversial compromise of the European Council this new mechanism couldn't fulfil the expectations. Furthermore, the compromise has highlighted several elements of the NIG such as the importance of deliberation and consensus, the growing role of the European Council in concrete regulatory issues and the 'complicity' of the supranational institutions, and in the case of the conditionality mechanism, complicity of the European Commission. As a consequence, the efforts to disrupt the financial support of authoritarian regimes within the EU have been neutralised by the mechanisms of new intergovernmentalism so we still cannot talk about an initial authoritarian disequilibrium. One might think that the fact that in July 2021 the Commission didn't accept the recovery plan of Hungary, but rather it decided to prolong the assessment period right after the adoption of the widely contested Hungarian anti-LGBTQ

States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.'

law may somewhat modulate the findings about the 'complicity' of the Commission. Nevertheless, the Commission insists that its appraisal of the recovery plan does not involve the LGBTQ law and that the delay is due to shortcomings by Hungary on anti-corruption and auditing mechanisms and guarantees on the independence of the courts (EURACTIV 2021). At the same time, if the Commission's arguments are real, it is a big question as to why it has not yet started to apply the regulation, since these deficiencies constitute the conditions for the adoption of measures under the regulation according to Article 4.

In the case of the European Parliament we cannot detect the signs of 'complicity', at the same time it would be crucial to keep on its insistence on the immediate application of the conditionality regulation, with all the measures at its disposal, even to start a court procedure under Article 265 TFEU against the Commission.

Without the application of the regulation the European Union may miss another opportunity to draw the red line and not let it be crossed over and over again at least in those areas of the rule of law which have financial consequences.

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***Krisztina Juhász** is a senior lecturer at the Department of Political Science, University of Szeged. Her research interest are the EU Common Security and Defence Policy, migration and asylum policy of the EU, and the rule of law toolbox of the European Union. Email: juhaszk@polit.u-szeged.hu; ORCID: 0000-0002-8120-8967.*