



Divisions in Europe Expose the Need for an Ambitious Reform of the European Union

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Policy Recommendations

1. To push back on illiberal trends in Europe, the European Council needs to agree on a long-term policy on migration and asylum issues, combining streamlined legal migration, combat against irregular migration, and cooperation with transit countries. Stepping up cooperation with Turkey, the US and Russia is a prerequisite to address the root cause of increased migration: armed conflicts in the Middle East and North Africa.
2. The role of the EU partisan politics in tackling the rule-of-law crisis needs to be acknowledged. Common EU values should be put above quick political wins by exerting pressure on backsliding national party leaders.
3. The 80 percent of Central and Eastern Europeans that are pro-EU membership should be supported. However, punishing Poland or Hungary could strengthen the “besieged fortress” narrative of their governments, and isolate them. A broad EU reform tackling migration challenges, lagging economic growth and security concerns has more potential to preserve the unity and prosperity in the EU long-term.

Abstract

The EU's rule-of-law dispute with Poland and Hungary signals sharp divisions, painting a picture of a politically fragmented and inwardly focused Union. This dispute puts not only the success of EU enlargement to a litmus test; it challenges Europe's unity. The ripple effect of this dispute could threaten EU legal order defined through the supremacy and uniform

enforcement of EU rules. To tackle the growing Euroscepticism and East-West divide, a long-term strategy aligning the EU's common interest with the national interests of its members is needed. Rather than a threat of sanctions, finding common solutions for the challenges facing the EU today is more likely to overcome growing cleavages in the once tight-knit alliance.



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Introduction

The constitutional crisis in Hungary and Poland tests the resilience of the rule of law in Central and Eastern Europe, but also the EU's political cohesion. The EU celebrated the Eastern Enlargement as the crowning moment of the region's transition to liberal democracy. Fifteen years later, it grapples with an illiberal backlash triggered by controversial constitutional amendments in Budapest and Warsaw, which target the independence of the judiciary, media pluralism and the powers of the Constitutional Courts.¹

Some of the reforms, like the lowering of the judges' retirement age in Hungary, led to verdicts of the European Court of Justice² and the European Court of Human Rights.³ Poland recently introduced a similar reform, affecting more than 40 percent of Polish judges. The Council of Europe's Venice Commission⁴ and the European Commission also criticized the hardline policies of Hungary's Fidesz and Poland's ruling party Law and Justice (PiS), claiming a breach of the rule of law, which is one of EU values.⁵

In 2017, the Commission triggered the sanctioning mechanism against Poland under Article 7 of the Treaty on the European Union.⁶ Yet, the suspen-

sion of Poland's voting rights requires unanimity in the European Council, which will not be achieved without Hungary's vote. The other Visegrad countries, Slovakia and Czech Republic, as well as the Baltic States, are also reluctant to support these sanctions.

This rule-of-law dispute exposes the vulnerability of the EU legal order. Its key features – autonomy, supremacy, and direct effect⁷ – ultimately rest on the members' consensus that EU rules must be enforced. The refusal of Hungary, Slovakia, the Czech Republic and Poland to accept mandatory refugee quotas despite the verdict of the Luxembourg Court⁸ challenges this consensus and should – notwithstanding the question whether the quotas themselves are reasonable – be treated as a warning signal.

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The EU risks being torn apart by national interests and ideological divisions, although Central and Eastern Europeans hold clearly pro-EU views.⁹ Weakened from within and focused inwardly, the EU also stands to lose its role as a global actor. Facing a

1) L. Pech, K. L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", 19 *Cambridge Yearbook of European Legal Studies* (2017), 3-47.

2) ECJ, *Commission v Hungary*, Case C-286/126 (2012).

3) ECtHR, *Baka v Hungary*, Appl. No. 20261/12, 27.5.2014.

4) Venice Commission, Opinion no. 614/2011 of 28.3.2011; Opinion no. 621/2011 of 20.6.2011; Opinion no. 662/2012 of 18.6.2012; Opinion no. 798/2015 of 22.6.2015.

5) Art. 2 of the Treaty on the European Union.

6) European Commission, "Rule of Law: European Commission acts to defend judicial independence in Poland", (20.12.2017),

http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

7) B. de Witte, "Direct Effect, Primacy and the Nature of the Legal Order", in G. de Burca and P. Craig (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011, 2nd ed.), 323-362.

8) ECJ, *Slovakia and Hungary v. Council*, Joined Cases C-643/15 and C-647/15 (2015).

9) P. Schmidt, „Was Ungarn und Österreicher eint und trennt“, *Wiener Zeitung* (16.04.2018).



fraying transatlantic relationship,¹⁰ a deadlock in EU-Russia relations and the challenges of globalization, the EU cannot afford internal fragmentation. How can the unity in Europe be restored? Since Orban and his peers win majorities by pointing to the EU's weak spots, populist discourses can be countered by sustainable EU-led solutions.

Long-Term Migration Policy

To unburden Greece and Italy, which faced unprecedented arrivals of asylum seekers during the 2015-16 crisis, the Council of the EU adopted mandatory refugee quotas. Many members are reluctant to fulfil their quotas though; Hungary and its eastern neighbors have rejected them entirely.¹¹ Crucially, the migration crisis gave a major push to the Eurosceptic parties. In April 2018, Viktor Orban's anti-immigration and Eurosceptic campaign secured him a third term and an absolute majority in Hungary's legislature.

Migration and asylum issues are similarly high on the agenda outside of Central Europe. In Austria, migration challenges are among the key foci of the ruling coalition. In Germany, which welcomed 1.5 million refugees since 2015, the Alternative for Germany received 12% of the votes. Also the rebellious Brexiters won largely on an anti-immigrant platform.

Evidently, the current EU asylum law creates deep cleavages both at the European and at national level. The June summit of the European Council aims to tackle these divisions by overhauling the Dublin asylum system. The current rules require the first-entry state to process the asylum applications, resulting in highly unequal distribution of refugees. Although the European Council President Donald Tusk called them "divisive and ineffective", the Commission pro-

poses a "fairness mechanism" involving a mandatory proportionate reallocation system.¹²

„The relocation scheme is unlikely to win popular support if it does not offer a long-term approach to the challenges of mass migration to Europe, which is estimated to double in the next decades.“

The relocation scheme is unlikely to win popular support if it does not offer a long-term approach to the challenges of mass migration to Europe, which is estimated to double in the next decades. The June summit should thus focus on a long-term policy involving (1) streamlining legal migration, (2) countering irregular migration, and (3) the root causes of growing migration:

(1) Increased mass migration is not a temporary phenomenon, but one of the key challenges of the 21st century. Attempts to stop it will not work, but it should be managed. Sustainable rules enabling people to immigrate into the EU legally could relieve the social and economic tensions in sending and receiving states. Surge in arrivals can outstretch the capacities of the welfare state in the receiving countries, thus the EU needs a legal migration policy aligned with its labor market needs, especially regarding high-skilled labor. The Blue Card Directive, which is too restrictive – and underused, – should be revised to streamline the admission and mobility within the EU of high-skilled workers.

(2) The struggle of the EU to control irregular migration during the 2015-16 migration crisis contributed to the populist uprising in many member states. To prevent political upheavals across Europe, the EU needs to enhance its external border security, coupled with cooperation with transit countries such as Turkey and Libya. This is crucial not only to stop smugglers from profiting from migrants and refugees

10) L. Golino, "A Storm is Brewing in Transatlantic Relations", Atlantic Council (15.3.2018), <http://www.atlanticcouncil.org/blogs/new-atlanticist/a-storm-is-brewing-in-transatlantic-relations>.

11) S. Meretab, "Poland, Hungary, Czech Republic and the Future of the Union", South EU Summit (24.4.2018), <http://www.southeusummit.com/europe/poland-hungary-czech-republic-future-union/>.

12) European Commission, The Reform of the Dublin System, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the_reform_of_the_dublin_system_en.pdf.



but also to reassure the European societies that the national governments – and the EU agency Frontex – are in control of the EU borders.

(3) One of the root causes of migration to Europe are conflicts in Syria, Iraq and Libya, fueled by ISIS activity in the Middle East and North Africa. EU-internal measures cannot address this issue. By joining forces with the US, Russia and the Middle Eastern countries, the EU could contribute to developing common solutions against the terrorist networks.

An effective EU-wide migration strategy is critical for political cohesion in Europe that is under threat due to illiberal trends. To achieve unanimity on this contentious issue, the strategy should combine the above points, thereby recognizing the challenges to the welfare state, concerns over irregular migration, and the causes of increasing migration. The Commission's proposal for the EU budget for 2021-27 reflects some of these needs: Migration is one of the spending priorities, and the proposal allocates much more funding to border control.

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In addition to disagreements over an EU migration policy, political cohesion suffers from the lack of consistency among EU institutions regarding their position on the rule-of-law issues. The dispute between Hungary, Poland and Brussels demonstrates, the European Parliament and the Commission do not always see eye to eye regarding the persisting rule-of-law conundrum.

EU Parties Should Step Up Their Role

The European Parliament has substantial powers: It co-legislates on equal footing with the Council of Ministers, co-decides the EU budget, and approves the President of the European Commission. This gives the European parties a say in European politics.

Yet they remain ambivalent towards the rule-of-law dispute.

Fidesz belongs to the European People's Party (EPP), the largest party of the European Parliament, whose other members include Angela Merkel's CDU and in the case of Austria the ÖVP. The EPP has been ambiguous about its controversial coalition partner. When the Parliament's Committee Civil Liberties, Justice and Home Affairs (LIBE Committee) criticized the backsliding of fundamental rights in Hungary in 2013, the vice-chair of the EPP Manfred Weber disregarded it as an attack of the left. A year later, the EPP President Joseph Daul endorsed Orbán's reelection bid at a rally in Budapest. Orbán's associate Kinga Gal is vice-chair of the EPP and of the LIBE Committee, which has previously condemned Hungarian reforms. In 2017, less than half of the EPP members supported the Parliament resolution on the "serious deterioration" of the rule of law and fundamental rights in Hungary.

Admittedly, the former Vice-President of the Commission and Justice Commissioner Viviane Reding (also EPP), responded to Orbán's anti-constitutional reforms with infringement proceedings. However, if we consider the fact that the Commission triggered Article 7 against Poland (PiS is not part of the EPP) but not Hungary, it seems that the EPP's party loyalty and the wish to maintain the majority in the Parliament might prevent the EU from forming an unequivocal position on the rule-of-law issues. The Commission's pressure on Central and Eastern European members to acknowledge their rule-of-law issues would gain more credibility if it was clearly backed by the European Parliament.

Conclusion: Facing Issues Head-On in Time of Crisis

The Founding Fathers of a unified Europe envisioned economically and politically integrated states as the basis for lasting peace. They laid the groundwork for an unprecedented area without internal borders in which people, goods, services and capital move freely. But the election results across Europe signal competition between this European vision and the nationalists' vision of a Europe with less integration.



Yet more than 80 percent of the populations across Central and Eastern Europe support EU membership,¹³ and pro-EU moods have increased in the entire continent post-Brexit.¹⁴ Although there is no easy way to close the growing divide, the support for EU membership in this region suggests that the EU can regain the unity it enjoyed at the time of the Eastern Enlargement.

„Migration issues will dominate the political agenda in foreseeable future, and nationalists stand to benefit from EU's disagreements on how to manage these challenges.“

Yet, the sanctions against Poland or Hungary are unrealistic due to lacking unanimity, but also unlikely to contain the populist backlash. They could reinforce the “besieged fortress” narrative of the governments, and the local populations could even perceive them as paternalistic. The illiberal trends in the region could, however, be countered by reclaiming the difficult topics, such as migration, from the populist parties. Migration issues will dominate the political agenda in foreseeable future, and nationalists stand to benefit from EU's disagreements on how to manage these challenges. A feasible European-wide strategy considering lagging economic growth, the preservation of the welfare-states, integration and security challenges could offer an antidote to the emerging anti-EU backlash.

the EU cannot afford internal fragmentation. How can the unity in Europe be restored? Since Orban and his peers win majorities by pointing to the EU's weak spots, populist discourses can be countered by sustainable EU-led solutions.

13) Gallup World Poll, “Most in Eastern Europe Positive About EU Membership”, <http://news.gallup.com/poll/210083/eastern-europe-positive-membership.aspx>.

14) B. Stokes, R. Wike, D. Manevich, “Post-Brexit, Europeans More Favorable Toward EU”, Pew Research Center (15.7.2017) <http://www.pewglobal.org/2017/06/15/post-brexit-europeans-more-favorable-toward-eu/>.



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