

Germany Should Not be an Honest Broker with the EU's Autocrats

Daniel Hegedüs and Garvan Walshe

Chancellor Angela Merkel has put the rule-of-law question at the center of her plans for Germany's presidency of the Council of the EU that will last for the second half of this year. As a key engine of European integration, but also bearing responsibility for allowing the situation in the EU reach this stage over several years, it must not shirk its duty to address this challenge vigorously. Germany has an ideal opportunity to tip the balance in the EU away from autocratizing member states—but only if it does not try to be an honest broker between defenders and opponents of democracy and the rule of law.

It has been a decade since Victor Orbán took power in Hungary, and nine years since he overhauled the country's constitution and attacked its democratic institutions. As a result, Freedom House has downgraded Hungary from a democracy to a “hybrid regime,” the first time this has happened to an EU member state. Poland has suffered even more aggressive attacks on rule of law since 2015 under the de facto rule of Jaroslaw Kaczynski, the chairman of the governing Law and Justice (PiS) party.

EU member states, joined in the Council of the European Union, have stood by while Orbán and Kaczynski have stripped Hungarians' and Poles' fundamental rights of meaning. Each time a new attack on democratic pluralism was carried out—from turning state television into Soviet-style propaganda mouthpieces to capturing constitutional courts, allowing far-right nationalist mobs to vandalize a Jewish community center or intimidate gay rights activists, and exploiting Europe's oldest hatred by presenting a Jewish financier as an enemy of the Hungarian and Polish nations—member states found an excuse not to act. Not even credible evidence of theft of millions of euros of European taxpayers' money has been sufficient to move them.

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The argument, heard most strongly from the council, has always been that “now is not the time.” First the financial crisis justified inaction, then the refugee crisis. Coddling Europe's autocrats has been the mainstream strategy to preserve EU's unity. Now the coronavirus pandemic is being pressed into service as the latest reason not to act. Instead of addressing autocratization and the embezzlement of EU funds in Hungary and Poland, the EU plans to transfer even more of taxpayers' money to the two member states subject to Article 7 procedures.

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Orbán and Kaczynski have, however, taken the current crisis as a chance to strike. Kaczynski has attempted to keep his ally Andrzej Duda in the presidency during the ongoing election by any means necessary. Orbán used the pandemic as an opportunity to defund opposition parties and municipalities, as well as to make secret for the next ten years the cost of a major Chinese-funded railway project, which his friend, the businessman Lőrinc Mészáros, has won a lucrative contract for.

This abuse and corruption have two major effects. First, it fuels anti-Europeanism in Northern and Western member states. Their citizens quite reasonably ask why they are sending money to a government like Poland's that refuses to publish the rulings of the country's own Constitutional Court, or like Hungary's that expels a world-famous university. Second and more importantly, it puts the integrity of the EU legal order into question.

While part of the informal "friends of rule of law" group of member states, Germany has made little headway against the increasingly authoritarian governments in Budapest and Warsaw. Merkel's Christian Democratic Union (CDU) is among the last protectors of Orbán's Fidesz party in the European People's Party (EPP). However, there has been some positive movement. The chancellor's proposal to make rule of law central to Germany's presidency has been supported by the Foreign Office, headed the Social Democrat Heiko Maas, which has reintroduced rule-of-law conditionality into the Multiannual Financial Framework Negotiations (MFF).

For years, Orbán and Kaczynski have acted with impunity by taking advantage of the EU's and Germany's desire to calm, rather than escalate, conflict. They stake out extreme positions and threaten vetoes to force a "compromise" that gives them most of what they really want. To challenge their strategy, German diplomacy has to leave its comfort zone and not shy away from conflict. It has to learn from the strategy employed by such authoritarian governments if it is to thwart them. Germany needs to stake out ambitious and radical proposals to create the space for a compromise that works in favor of the rule of law, not against it.

There are three concrete steps Germany should take to do this.

Make Next Generation EU funds conditional on restoring the rule of law

Germany's presidency of the Council of the EU should propose the extension of the MFF's rule-of-law conditionality to the Next Generation EU funds, which are heavily tilted toward Hungary and Poland despite these countries' mild coronavirus exposure, and further make the funds conditional on joining the European Public Prosecutors' Office.

To avoid Warsaw and Budapest acting as spoilers, Berlin should make contingency plans to overcome obstructionism by recasting the Next Generation EU funds as an enhanced cooperation initiative—that is, an exclusive cooperation format—that is limited to fully democratic members.

Even if Germany cannot succeed with these proposals, stepping back from some of them may help to forge ambitious and favorable compromises, and to ensure the preservation of a strong rule-of-law conditionality in the MFF. The conditionality should be built on the reverse qualified majority decision-making scheme originally proposed by the European Commission. In this scheme, a qualified majority of member states would

be required for a rejection rather than a confirmation of the commission's rule-of-law sanction. This would make it much harder to build blocking coalitions among the member states against the commission's actions.

Tip the scale within the EPP

The CDU must summon the courage to support the fully democratic members of the EPP and its president, Donald Tusk, in expelling Fidesz. Germany should also encourage EPP-affiliated European Commissioners and especially President Ursula von der Leyen to play hardball not only with Poland, but with Hungary as well. Otherwise, the credibility of German efforts to safeguard the rule of law will suffer heavily during its presidency.

Call the Eurosceptic bluff

PiS and Fidesz have played with the idea of Poland and Hungary leaving the EU rather than accept its democratic principles, but these countries are not the United Kingdom, and these two parties are not steeped in the anti-European ideology of the British Conservative Party. In fact, the threat of Huxit and Polesit is empty because it would undermine the economic basis of the Hungarian and Polish economies, and large majorities of Hungarians and Poles want to stay in the EU.

Given that their economies are the most heavily dependent on EU funds, Hungary and Poland need a reasonable MFF agreement probably more than any other member state. If they meet a stubborn, unchallengeable commitment by other member states—led by Germany in its presidency of the Council of the EU—to introduce hard rule-of-law conditionality to the MFF, they would not have any other option but to accept that eventually.

Orbán and Kaczynski only have a few options at the European level if they meet strong resistance. If they bring their conflict with the EU to the breaking point, they will have to back down or risk losing power and subsequently being subjected to wide-ranging investigations for corruption.

German diplomacy has to call the bluff of the Polish and Hungarian governments over the rule of law. It will soon turn out that Europe's autocrats have the most to lose in such a confrontation.

Garvan Walshe is the executive director of TRD Policy.

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