

*In Iustitia Discordia:
Dealing with Problematic Member States*



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Letter of Welcome

Ladies and Gentlemen, distinguished delegates,

It is our pleasure to welcome you at the first European Council Summit at GrunnMUN since 2016! We are excited to have you as delegates representing the European heads of state and government. We look forward to see your skills in debating and diplomacy on the pressing topic of the complex relationship between the European Union and the Member States deemed “problematic”.

The reason for opting for this specific topic is not hard to understand: in this complicated era, when the international community faces major challenges, the unity of the European Union is crucial. In this guide we shall discuss how this issue affects the internal consistency of the Union and what the European Council could do to counter this issue.

We shall introduce you to the topic at hand to provide you with a starting point for your own research, and we hope that it will serve as a tool to prepare for the Conference. Therefore, please note that this guide is not meant to replace your own research and is not a complete analysis of the topic at hand.

If you have questions regarding the topic, please do not hesitate to contact us!

Kind Regards,
Eva Visser and Diana Scorpan
Chairs of the European Council | GrunnMUN 2019

History and Competences of the European Council

The Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009, gave the European Council the status of an official EU institution and in it, includes the introduction of the position of the President of the European Council.¹ Before its formal foundation, it had been functioning on the edge of the EU governing system through informal summit meetings initiated in the 1960s, which were issued by the political leaders of the Member States for discussing issues of common concern.²

Nevertheless, even before its formal recognition, the European Council supported the transformation of the organization by establishing the provisions of progressive policies such as the Single European Act (SEA) and the Monetary Union.³ The main powers of the European Council include agenda-setting, which can be derived from Article 15(1) TEU, where it is established that the European Council provides the EU with the “necessary impetus” for its development and decides upon the overall political direction.⁴ In essence, this agenda-setting power has led the European Council to be considered as the motor of European Integration. This impetus for providing direction to the European Union is strictly political, and is limited by the last sentence of Article 15(1) stating that the European Council is inherently restricted from initiating legislation,⁵ which is within the Competences of the European Commission.

The European Council is composed of national leaders, and has therefore been explicitly mandated to set the agenda in the area of freedom, justice and security.⁶ Also, it sets out guidelines defining and identifying the strategic interests and objectives of the Common Foreign and Security Policy.⁷ Another of its competences are exercising the appointments of the president of the European Central Bank, the High Representative of the Union for Foreign Affairs and Security Policy and naturally its own President.⁸ Usually, decisions in the Council are taken by qualified majority voting, although in some areas it is required to decide by unanimity. The appointments mentioned above are decided upon by qualified majority. Neither the European Council President nor the Commission President participates in the voting procedures.⁹

In recent years, countries such as Hungary, Poland, Romania and Bulgaria have received a lot of criticism from the EU, after adopting illiberal policies that helped

¹ “The European Council – the who, what, where, how and why.” Last modified February 18, 2016.

<http://ukandeu.ac.uk/explainers/the-european-council-the-who-what-where-how-and-why/>

² “The European Council – the who, what, where, how and why.” 2016.

³ “History.” Last modified November 11, 2018. <https://www.consilium.europa.eu/en/history/?filters=2031>

⁴ Article 15 TEU. 2012/C 326/01 2012

⁵ Article 15(1) TEU. 2012/C 326/01 2012

⁶ Youri Devuyt “The European Council and the CFSP after the Lisbon Treaty” *European Foreign Affairs Review* 17 no. 3 (August, 2012): 327-349.

⁷ Youri Devuyt “The European Council and the CFSP after the Lisbon Treaty” 2012.

⁸ “The European Council – the who, what, where, how and why.” Last modified February 18, 2016.

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⁹ “The European Council – the who, what, where, how and why.” Last modified February 18, 2016.

the governing parties stay in power and perpetuated corruption in the countries. The concern is that the enlargement of the EU since 2004 has brought into the bloc central and east European countries that do not fully share the same norms of democracy, human rights and the rule of law which are fundamentally established in the European treaties.

The common problem with the controversial laws adopted in these countries is the fact they create a system which is meant to help the current governments stay in power. They include giving more powers to the parliament to elect judges, undermining the independence of the justice system and changing the criminal law and creating small “flaws” which can be used by corrupt political actors to avoid prosecution.

There is a big concern that “EU programs are reinforcing the very Communist-era behaviors they are intended to eradicate. Taxpayer-funded grants from the European Union are fueling cronyism and corruption, especially in its newest and most vulnerable member states.”¹⁰ Concerns about the shift in Poland triggered calls to limit access to EU funds for countries disrespecting the democratic rule of law. The issue has been raised by EU member states, including Germany, France and the Nordic states.¹¹ Moreover, this triggers even more division alongside Europe, as France has made some severe comments on the situation. France does not want to finance a populist Europe; the country’s foreign minister Jean-Yves Le Drian has indicated.¹²

However, even though the problem is recognized and the EU as an entity is pushed to take more strict action, there are limits to the legal actions that can be taken regarding the issue, which shall be discussed in the following chapter.

¹⁰ Johnson, Ben. “EU Funds 'the Largest Source of Corruption in Central and Eastern Europe'.” *Acton Institute*, www.acton.org/publications/transatlantic/2017/06/01/eu-funds-largest-source-corruption-central-and-eastern-europe

¹¹ Tb. “Why Poland Is EU's Real Problem.” *New Europe*, 11 Dec. 2017, www.neweurope.eu/article/poland-eus-real-problem/

¹² Kondzińska, Agata, et al. “French Foreign Minister: We No Longer Want to Pay for Poland and Hungary.” *Euractiv.com*, 5 Sept. 2018, www.euractiv.com/section/future-eu/news/french-foreign-minister-we-no-longer-want-to-pay-for-poland-and-hungary/

Past Action on the Issue at Hand

There have been some past actions that tried to remedy the situation. The European Commission has begun proceedings against the Polish government and the Polish supreme court has asked the European Court of Justice to rule on whether the forced retirement of judges violates EU guarantees on judicial independence. On 20th December 2017, The Commission declared:

"Despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland. The Commission is therefore proposing to the Council to adopt a decision under Article 7(1) of the Treaty on European Union. The European Commission is taking action to protect the rule of law in Europe. Judicial reforms in Poland mean that the country's judiciary is now under the political control of the ruling majority. In the absence of judicial independence, serious questions are raised about the effective application of EU law, from the protection of investments to the mutual recognition of decisions in areas as diverse as child custody disputes or the execution of European Arrest Warrants."¹³

In the case of Hungary, and similar standoffs with Romania and Bulgaria in recent years, the first response from fellow member states and the European Commission, the EU's executive, tends to be political pressure or moral persuasion to try to make the government in question alter its behavior. Finally, on 12 September 2018 the European Parliament voted to have the Council decide on starting proceedings against Hungary under Article 7.¹⁴

While that can have an impact, as was the case in Romania last year when the prime minister sought to oust the president, in tricky cases of law backed by democratically elected parliaments, as in Hungary, it is much more difficult.¹⁵ Hungarian government spokesman Zoltán Kovács recently told NPR that his prime minister — Viktor Orbán — will veto any attempt by Brussels to impose sanctions against Warsaw, a position backed on Feb. 20 by the Hungarian Parliament.¹⁶

The following section looks into loser detail on these member states, as well as the current state of the rule of law in Bulgaria and Poland.

¹³ "Brussels Struggles to Bring Hungary Back into Line." *Euractiv.com*, 13 Mar. 2013,

www.euractiv.com/section/central-europe/news/brussels-struggles-to-bring-hungary-back-into-line/.

¹⁴ "European Parliament votes to trigger Article 7 sanctions procedure against Hungary." Last modified 12 September, 2018. <https://www.euronews.com/2018/09/12/european-parliament-votes-to-trigger-article-7-sanctions-procedure-against-hungary>

¹⁵ "Romania Corruption Battle Exposes the Limits of EU's Influence." *Financial Times*, Financial Times, 22 February, 2018. www.ft.com/content/bc9c43dc-1703-11e8-9376-4a6390addb44

¹⁶ "Why the Dispute between Poland and the EU Matters." *The Economist*, The Economist Newspaper, 22 January, 2018. www.economist.com/the-economist-explains/2018/01/22/why-the-dispute-between-poland-and-the-eu-matters

Problematic Member States

Romania:

Bucharest is part of an increasingly emboldened group of central European capitals — led by Warsaw and Budapest — that are clashing with the commission over the rule of law. Laura Codruta Kovesi, the country's anti-corruption chief, is under pressure; her supporters fear she is set to be ousted as part of a government overhaul of the justice system. It has triggered street protests and shown the limits of special EU checks on Romania since its EU accession in 2007. At the heart of the controversy is Liviu Dragnea, chairman of the ruling Social Democratic party and widely seen as the architect of the justice system revamp. He denies wrongdoing in several criminal cases, including a probe into road projects backed by €21m of EU funding — a case launched late last year. The Romanian dispute is the more striking because the country — along with Bulgaria — is subject to special EU monitoring aimed at improving how they tackle graft. The measures are a tacit acknowledgment of how weak the Union's remedies are against any member state that is at odds with Brussels in the sometimes-subjective area of the rule of law and common values.¹⁷

Poland:

Poland represents a dilemma for the EU. Since coming to power in October 2015, the right-wing Law and Justice party (PiS in Polish) has been weakening the country's democratic checks and balances. After two years of finger-wagging, the political leaders in Brussels appear to have lost patience. Having determined that the rule of law in Poland is under threat, in December EU officials triggered Article 7 of the Treaty on European Union, which refers to "a clear risk of a serious breach" of EU values. Poland has three months to address the concerns. If it does not, it could ultimately lose its EU voting rights. Yet that is not all that is at stake. As Brussels flexes its muscles, the way it deals with Poland will set a precedent that could have ramifications even beyond the EU's borders. PiS was quick to overhaul the constitutional tribunal, stacking it with cronies, and has also replaced the heads of the public radio and television broadcasters. More recently, it has targeted judges, whom it regards as a spoilt "caste". Two laws adopted in December (and prompting the triggering of Article 7) strengthened PiS's grip on the National Judiciary Council, which appoints judges, and the Supreme Court, which rules on the validity of elections, among its other responsibilities. Of the Supreme Court's 80-odd judges, 40% will be forced to retire on the grounds of old age. Meanwhile, thanks in part to generous welfare policies, the party has kept its lead in the polls, far ahead of the centrist opposition. This has helped it shrug off domestic and international criticism.¹⁸

¹⁷ "Romania Corruption Battle Exposes the Limits of EU's Influence." *Financial Times*, Financial Times, 22 Feb. 2018. www.ft.com/content/bc9c43dc-1703-11e8-9376-4a6390addb44

¹⁸ "Why the Dispute between Poland and the EU Matters." *The Economist*, The Economist Newspaper, 22 Jan 2018. <https://www.economist.com/the-economist-explains/2018/01/22/why-the-dispute-between-poland-and-the-eu-matters>

Hungary:

Following general election held in April 2010, Hungary's Prime Minister Viktor Orbán said that voters had carried out a "revolution" by giving his party Fidesz two thirds of the seats in parliament to rebuild Hungary after a near financial collapse. Fidesz is affiliated with the Centre-right European People's Party (EPP), the largest political group in the European Parliament.

A new Hungarian constitution was passed in April 2011 without much debate. It was severely criticized by civil liberties groups and the Socialist and Liberal European political families, for being contrary to EU norms and values and for strengthening the Fidesz one-party rule. However, the EU commissioner responsible for institutional relations, Maroš Šefcovic, who is affiliated with the Centre-left Party of European Socialists (PES), said in July 2011 that the new Hungarian constitution does not raise issues of compatibility with European Union law.

In the case of Hungary, both failures to implement secondary EU legislation and problems with the Rule of Law violating basic EU values can be observed.¹⁹ Of those, the latter type of noncompliance as observed with the new constitution is the most critical. Even though few of them have been referred to the ECJ by the Commission, the Hungarian constitution-making process failed to meet the requirements of complying with the basic principles and standards of the TEU as it was extremely rapid and lacked any openness and transparency.²⁰ The Hungarian government has taken the position that under Article 4(2) the EU must 'respect ... the national identities, inherent in their fundamental structures, political and constitutional'.²¹ Still, under articles 3(1) and 5 TEU, respecting and promoting these values is an explicit obligation, if not even an indispensable condition for preserving membership.²²

Still, Orbán uses the argumentation that all the new Hungarian legislation has equivalents in other EU Member States.²³ Though it is true that illiberalism is not unique to Hungary, the dangers of the individual reforms made by the Fidezs party is the manner in which they critically undermine democracy through their combined effects, creating what the scholar Kim L. Scheppele has aptly termed as a "Frankenstate".²⁴

¹⁹ Zoltán Szenté, "Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them," in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* ed. András Jakab and Dimitry Kochenov. (Oxford: Oxford University Press, 2017), 454-475.

¹⁹ Zoltán Szenté, "Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them," 454-475.

²⁰ Ibid.

²¹ Article 4(2) TEU. 2012/C 326/01 2012

²² Article 3(1) and 5 TEU. 2012/C 326/01 2012

²³ Zoltán Szenté, "Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them," 454-475.

²⁴ Kim L. Scheppele, 2013. "The Rule of Law and the Frankenstate: Why Governance checklists do not work." *Governance* 26 no 4. (September 2013): 559-562.

Bulgaria:

Restructuring Bulgaria and Romania through EU policy has existed in two forms since 2000: through the *acquis communautaire* and through the Cooperation and Verification Mechanism (CVM). The former is a quite extensive body of EU laws and regulations which have to be adopted by candidate member states within their accession process.²⁵ The latter has been developed as a framework to provide special monitoring to Bulgaria and Romania after their accession in 2007. Being the first ever Member States to be monitored under the CVM, the conditionality under both mechanisms have struggled to create effective long-term reforms in Bulgaria and Romania, mostly because of failure to ensure government accountability.²⁶

One aspect undermining EU conditionality was the low credibility of the threat of punishment for non-compliance. Due to geopolitical circumstances in Europe and as a consolidation for being left out of the 2004 enlargement, Bulgaria and Romania were ascertained in 2003 of their accession date of January 2007. Consequently, once this date was set, motivation to pursue reform fell dramatically.²⁷

²⁵ Abigail Adams, "EU Outliers: The Limitations of the EU in Reforming Illiberal Democracy in Bulgaria and Romania" *The SAIS Review of International Affairs*. Last modified 12 October 2016.
<https://www.saisreview.org/2016/10/12/eu-outliers/>

²⁶ "EU Outliers: The Limitations of the EU in Reforming Illiberal Democracy in Bulgaria and Romania" 2016

²⁷ Ibid.

The Legal Aspects of the Issue

The European Union has most frequently been described as functioning as a supranational organization, and its Community laws have been recognized as 'higher' law with regard to its relationship to national law. Most significantly, this has been ruled by the European Court of Justice in the Van Gend and Loos and the Costa ENEL cases.^{28,29} In addition, the Union has founded itself on certain common values that are expressed in Article 2 TEU, such as the respect for human dignity, democracy, freedom, equality, the rule of law and respect for human rights. It also highlights the equal rights of persons belonging to minorities.³⁰ This process of constitutionalism arguably underscores the institutional and organizational commitment to the constitutionalist ideal, especially regarding the common values that have been established in the Community law, but currently only few ways of enforcing these values exist.

In Article 7 of the TEU, the ambitions of the EU and its institutions in upholding constitutionalism against national threats are most clearly expressed.³¹ The Article expresses that the European Council may determine whether a Member State is clearly risking a serious breach of the values referred to in Article 2, and consequently decide to suspend the voting rights of the nonconsenting Member State in the Council through consensus voting.³² Currently this is the most stringent political sanction the Council can impose on a Member State and consequently the Article has infamously been called the 'Nuclear Option'.³³

As stated above, it is only recently that the EU started with initiating Article 7 on Poland and Hungary to evoke an infringement procedure on breaching these fundamental values. However, infringement procedures on the basis of Article 2 arguably only address the current political challenge on a very indirect level. Lessons on this have been drawn particularly by the ruling of the European Court of Justice in 2012 concluding that the early retirement of 274 judges in Hungary violated international law.³⁴ As Orbán compensated the judges instead of retrieving them their former positions, he complied with the ECJ's letter but the political intention of the ruling had been bypassed completely.³⁵ Moreover, due to the requirement of the Council to act by unanimity, reaching an agreement regarding in-compliant Member States seems hardly feasible politically.

Article 260 TFEU finds another legal ground for initiating an infringement procedure when a Member State fails to fulfil an obligation under the Treaties and this Article has been used abundantly by the ECJ to force Member States into

²⁸ C26/62. *Van Gend & Loos v Netherlands Inland Revenue Administration*. 1963.

²⁹ C6/64 *Flaminio Costa v. E.N.E.L.* 1964.

³⁰ Article 2 TEU. 2012/C 326/01 2012

³¹ Matteo Bonelli, "From a Community of Law to a Union of Values: Hungary Poland, and European Constitutionalism" *European Constitutional Law Review* 13, no. 4 (December 2017): 793-816.

³² Article 7 TEU. 2012/C 326/01 2012

³³ "What is Article 7, the EU's 'nuclear option'?" Last modified December 9, 2018.

<https://www.politico.eu/article/graphic-what-is-article-7-the-eus-nuclear-option/>

³⁴ European Court of Human Rights. *Case of BAKA v. Hungary*. 20261/12 2016.

³⁵ "Why the Commission is Treating Poland More Harshly Than Hungary in its Rule of Law Review." Last modified February 4, 2016. <https://www.cer.eu/in-the-press/why-commission-treating-poland-more-harshly-hungary-its-rule-law-review>

compliance of EU law. This article allows the European Union to cut funding to a Member State when an infringement has been concluded by the ECJ.³⁶ Even though this could provide a more stringent way of pushing non-complying Member States into conformity, compliance to the fundamental values has so far not been ruled as identifying a systematic violation of an EU obligation. Therefore, validating the proceeding of an infringement under Article 260 is an issue to be discussed³⁷

Another option could be abolishing Article 51 of the Charter of Fundamental Rights of the European Union, which would enable the linking of EU fundamental rights to the status of EU citizens and thereby making the latter able to defend their rights through their national courts and the European Court of Human Rights subsequently if national courts are unable or unwilling to defend those rights.³⁸ The Venice Commission, one of the advisory bodies of the Council of Europe which provides constitutional assistance on implementing democracy through law, could be extended in competences. Also, it could be supplemented altogether with a new institution that would act as a guardian to the *acquis normatif* established in Copenhagen, and that could offer consistent political judgments.³⁹

Finally, the Council could consider reforming the structural funding system in a manner that would make the Member States receiving the funds required to be *in line* with the common values of the European Union. These abovementioned legal reforms could provide leverage forcing a Member States into compliance since currently there is no means of expelling a Member State that is in constant breach of Community values.

Considering the limited effectiveness of the legal proceedings discussed above, at the current Summit, the Council will have to discuss what political solutions it can provide to the issue described above. Even though the Council is not allowed to initiate legislation, it will be important to discuss what political approach should be taken in order to enable the EU to enforce its fundamental values upon Member States. In order to stabilize democracy and the rule of law in the long run, the understanding of the latter has to be profoundly rethought whilst also taking into consideration the civic and societal dimensions of constitutionalism.⁴⁰

³⁶ Article 260 TFEU. 2012/C 326/01 2012

³⁷ Kim L. Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions," in *Reinforcing Rule of Law Oversight in the European Union*, ed. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 105-132.

³⁸ Armin Von Bogdandy and others, "A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine," in *Constitutional Crisis in the European Constitutional Area*, ed Armin von Bogdandy and Pål Sonnevend (Hart Publishing: Oxford, 2015), 248.

³⁹ Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?" *European Law Journal* 21, no. 2 (March 2015): 141-160.

⁴⁰ Milada A. Vachudova, "Why Improve Eu Oversight of Rule of Law?" in *Reinforcing Rule of Law Oversight in the European Union*, ed. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 270-289.

The Implications of the Issue

As long as illiberal democracies within the European Union fail to comply with the fundamental values, the ambitions of the EU shall substantially be undermined in several ways. First of all, it could cause a deterioration of the mutual trust and recognition between Member States, in a process which has been designated as the 'all affected principle.'⁴¹ In this principle, democratic rule of law problems within one Member State have externalities affecting other citizens and Member States throughout the Union, most of all in the consistency between the internal and external policies. If the EU does not internally preserve its values, it faces critical inconsistency in its conditionality in the context of enlargement policy.⁴²

Second, as Member States have given up on certain means of control in areas of political, social and economic life, they must maintain confidence in the commitment of Brussels to live up to its commitment to exercise its delegated powers and to defend their citizens in their place.⁴³

What should not be forgotten is that the EU is known as a Union of states that share a common value: creating better living standards for their citizens. In order to make this possible, the relationship between Member States must be based on trust and respect, so they can work effectively to achieve this goal. When some of the member states adopt controversial laws conflicting to the values of the Treaties, EU citizens can conceive this as a message that the Union is weak in maintaining control and that not all Member States agree on its goals. This is dangerous, as it makes the entire Union appear weak, which in turn can fuel Euroscepticism and distrust in the EU's institutions.

Lastly, all citizens within the Union shall be affected by an illiberal Member State acting in the EU through its decisions in the Council, besides causing feelings of Euroscepticism to increase while facing their presence within the Union.⁴⁴ Countering illiberal democracies within the EU is therefore a crucial aspect of maintaining the Union's support by its citizens and warding off sentiments of (anti-EU) populism.

⁴¹ Carlos Closa, "Reinforcing EU Monitoring of the Rule of Law," in *Reinforcing Rule of Law Oversight in the European Union*, ed. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 15-35.

⁴² Christophe Hillion, "Overseeing the Rule of Law in the EU," in *Reinforcing Rule of Law Oversight in the European Union*, ed. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 59-81.

⁴³ Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?" *European Law Journal* 21, no. 2 (March 2015): 141-160.

⁴⁴ Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?" 141-160.

Conclusion

To conclude, among Brexit and the refugee crisis, there are many things currently challenging the internal unity of the European Union. There are still big discrepancies between Member States, both on the economic, political and judicial point of view. What are the main problems and what can the EU do in order to overcome them? Does the EU have the moral and legal right to intervene? These are the crucial questions that have to be answered in this conference.

The issue that will be discussed by the European Council is a very complex one. It requires a lot of skills and knowledge about the laws and procedures of the EU. However, if enough time is spent on research and preparation, every delegate should be able to engage in an intense and fruitful debate on the future of Europe.

We expect creativity, active participation and out of the box thinking. We are looking forward to seeing the delegates in the process of debating, creating interesting alliances and producing brilliant resolution papers. A crucial thing to consider is that the distribution of powers in the EU is horizontal, and not vertical. In order to change legislation or reach a decision in the council, you need unanimity. Therefore, your diplomacy skills are much needed in this context.

Questions A Resolution Must Resolve (QARMA):

- How can we use legislation compatible with existing EU procedures to achieve efficient infringement procedures?
- How can the legislation be adapted to make it more effective?
- Does the EU have the right to intervene in the internal affairs of Member states?
- Is it possible that a complete harmonization occurs between the judicial systems of Member States?

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