

# Why the Commission is treating Poland more harshly than Hungary in its rule of law review

 [blogs.lse.ac.uk/europpblog/2016/02/04/why-the-commission-is-treating-poland-more-harshly-than-hungary-in-its-rule-of-law-review](https://blogs.lse.ac.uk/europpblog/2016/02/04/why-the-commission-is-treating-poland-more-harshly-than-hungary-in-its-rule-of-law-review)

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*In January, the European Commission announced an inquiry into whether recent Polish reforms affecting the country's constitutional tribunal and media are consistent with the rule of law. [Agata Gostyńska-Jakubowska](#) writes that the Commission's review has been noticeably different from its previous approach in relation to Hungary, where there have been similar concerns raised over reforms carried out by Viktor Orbán's Fidesz government. She argues that the fact that the Law and Justice party has less political allies at the European level and that the Juncker's Commission is more assertive vis-à-vis member-states than its predecessor, may go some way toward explaining why the cases have been handled differently.*



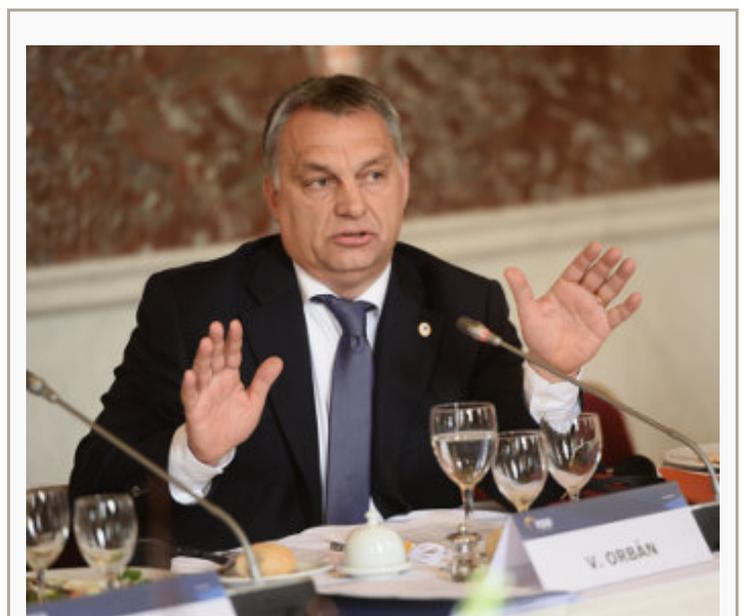
Poland's [Law and Justice](#) (PiS) party has never hidden its admiration for the [Fidesz](#) government in Hungary. Today, PiS has a parliamentary majority and can copy Fidesz policies. But while Viktor Orbán, the Hungarian prime minister, has managed to get away with most of his reforms – perceived by many as 'illiberal' – Polish authorities may be less lucky. On 13 January the European Commission triggered a 'rule of law framework' against Warsaw – an instrument it adopted in 2014.

Neither Fidesz nor PiS like being criticised, whether by the media or the courts. When Orbán won parliamentary elections in 2010 he quickly turned the public media, which were often critical of him, into a government mouthpiece. The Polish government has also replaced the top management in public radio and TV with supporters of PiS.

When in the past the Hungarian constitutional court questioned laws passed by Fidesz, the party (which until 2015 had a supermajority in parliament) simply amended the Hungarian constitution. PiS lacks a constitutional majority to do this but it can still amend laws. In December 2015 it changed the act governing the Constitutional Tribunal (Court). The new law obliges the Tribunal, among other things, to rule on cases in the order it receives them, rather than deciding for itself which cases are more important and should be considered first.

PiS had therefore hoped that it would be some time before the Tribunal, which has many pending cases, has the opportunity to assess the constitutionality of its new measures. But in January 2016 the Tribunal decided that it will nevertheless review the changes to its own operation. If the Tribunal rules that they violate the constitution and the government does not honour its verdict, the conflict will escalate.

The EU institutions worry that Budapest and Warsaw are weakening democratic checks and balances. The European Parliament has regularly summoned Orbán to explain his 'illiberal' policies; and the Commission took Hungary to the Court of Justice for violating EU law by forcing the country's 274 judges to retire. The Commission did not, however, activate article 7 of the Treaty on European Union (TEU) against Hungary. This article – regarded as the 'nuclear option' – is



Viktor Orbán, Credit: European People's Party (CC-BY-SA-2.0)

designed to address a serious threat to democratic values in a member state and can lead to the suspension of EU voting rights. EU leaders (minus the one concerned) must agree unanimously to impose such sanctions – something hard to achieve even if Poland and Hungary were not protecting each other.

Rather than making a vain attempt to use article 7 against Poland, the Commission activated the rule of law framework. This is despite the fact that the Council legal service had expressed its reservations concerning the legal basis of this instrument. The framework enables the Commission to assess “systemic threats” to the rule of law in EU member states. It builds on a dialogue with the member state in question, but the Commission may recommend changes to disputed policies. If it is not satisfied with the outcome of implementation of its recommendations, the Commission can propose that article 7 be activated.

### **Why does the Commission appear to be treating Warsaw more harshly than Budapest?**

There are at least four reasons for the different approaches taken in relation to Poland and Hungary. First, Orbán conducted most of his controversial reforms between 2010 and 2012 when the EU was pre-occupied with the euro crisis. Today, the EU faces even more crises, but the Juncker Commission is more assertive vis-à-vis member states and sees protecting the rule of law within the EU as a higher priority than Barroso did.

In this area, as in many others, the Juncker Commission reflects the priorities of the European Parliament. The Socialists & Democrats as well as Liberals have long called for tighter EU supervision of democracy in EU countries. Juncker, who needs the Parliament’s support to pass his legislative programme, is responding to their concerns.

Second, Fidesz has more influential allies than PiS has. Fidesz belongs to the European People’s Party (EPP), the biggest political group in the European Parliament. Joseph Daul, the EPP president, once [admitted](#) that Orbán is the party’s “enfant terrible”. But the EPP has only 30 seats more than the Socialists & Democrats in the Parliament and needs to hold onto the 12 votes of Fidesz.

Law and Justice sits with the British Conservative Party in the European Conservatives and Reformists’ group, which is only the third largest formation in the Parliament. PiS may have thought that an alliance with David Cameron’s party would be enough to block EU action against Warsaw. Although the British government views the rule of law framework as an undesirable power grab by the Commission, it is unlikely to be a vocal opponent of action against Poland. Cameron is renegotiating Britain’s membership of the EU. Warsaw is his close ally but Cameron also needs the support of other member states, including those that worry about the rule of law in Poland and Hungary. The British prime minister will also need a helping hand from the European Parliament to translate some elements of the deal he reaches with member-states into EU legislation.

Third, the Commission has drawn lessons from its unsuccessful legal attempts to bring Orbán to heel. When in 2012 the Court of Justice ruled that the early retirement of the country’s 274 judges (whom Orbán replaced with party loyalists) violated EU law, Orbán compensated the judges instead of reinstating them, thus complying with the letter but not the intention of the ruling. The rule of law framework is designed to fill the gap between infringement procedures and article 7 and make the Commission’s actions more efficient.

Finally, Poland is one of the most pro-European nations in the EU. According to the latest [Eurobarometer report](#), 55 per cent of Poles view the EU positively. This compares to 39 per cent in Hungary and an EU average of 37 per cent. The Commission may have hoped that while citizens of most member states would have seen its action as an unnecessary intervention in domestic matters, Poles might react differently.

If the Commission is right, Poles will see its decision to trigger a rule of law framework as a sign that their country is losing influence in the EU and hold it against PiS. Support for PiS will fall, causing the government to reconsider its policies. But if the Commission is wrong, it risks antagonising one of the few truly pro-European member states.

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Note: This article is an amended version of a [bulletin article](#) published by the Centre for European Reform. It gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics.

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