

Orbán's Veto Play – The Subsidiarity Card

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Viktor Orbán is known to use veto threats in the European Council to get his way. This time, he was keen to see that after months of tense exchanges with the Commission, Hungary gets access to EU funds that had been blocked in order to achieve compliance with the [rule of law](#) and fundamental rights (EU Charter) conditionality. So, PM Orbán saw it fit [to loudly contest](#) Ukraine's accession and the financial aid package of 50 billion Euros on the continent and [across the Atlantic](#). And heard he was. President Zelensky had signed into law [new legislation passed by the Ukrainian parliament \(Rada\) to restore minority language rights](#) on 8 December, a contentious issue in Ukrainian-Hungarian relations.

Then right before the EU summit in Brussels, the [EU Commission decided to unblock](#) 10.2 billion Euros of cohesion funds on 13 December. Once the Hungarian Parliament processed a rushed omnibus bill, the Commission was satisfied that – after several exchanges – Hungary met the horizontal enabling condition on the EU Charter of Fundamental Rights regarding judicial independence.

This may be PM Orbán's strongest veto play to date. To reinforce the seriousness of PM Orbán's veto threats, the Hungarian Parliament passed a legislative package, complete with a constitutional amendment, to defend sovereignty from foreign interference (T-6222) which is yet to be signed into law. This package appears to be thematically linked to a curious provision that was added to the omnibus bill with the same last-minute rider that tipped the balance towards unblocking the cohesion funds. This new provision opens up a novel preliminary ruling procedure for the CJEU before the Hungarian Constitutional Court. It is premised on the understanding that the Hungarian Constitutional Court is the court best suited in Europe to interpret questions of constitutional tradition, national identity or sovereignty. In other words, PM Orbán slipped a subsidiarity card to the deck he uses for his veto play – right under the Commission's nose.

Funds set loose

Regarding [judicial reforms](#), one of the Commission's key concerns was the removal of potential limitations on references for preliminary rulings by Hungarian courts. The Hungarian Parliament met the Commission's request by adding to an already overpacked omnibus bill on higher education a [last minute rider](#) to amend the act on criminal procedure (Act no. XC of 2017, Article 490(1)). Parliament passed the bill in the evening of 12 December and the new act signed by the president was printed in the official journal on 13 December 2023 (Act no. LXXXV of 2023, Magyar Közlöny issue 178 of 2023).

The [Commission's press communication](#) states that “The Commission will **closely and continuously monitor**, notably through audits, active engagement with stakeholders and in monitoring committees, the application of the measures put in place by Hungary. If, at any point in time, the Commission considers that this horizontal enabling condition is no longer fulfilled, it may again decide to block funding.” (original emphasis) Although the Commission continues to withhold 21 billion Euros due to rule of law concerns, the Commission's decision to was instantly criticised. [German Green MP Daniel Freund warned](#) that “the timing of the release only allows the conclusion that this was not about judicial reforms. Instead, the 10 billion Euros was intended to remove Orbán's veto.”

The Commission clearly had no more time or patience for all elements of PM Orbán's veto play: the sovereignty protection package did not receive consideration this time around. The Commission's silence is all the more curious as the tabling of the sovereignty protection package was accompanied by a [billboard campaign](#) depicting Ursula von der Leyen and Open Society Foundations chair, Alex Soros, with the slogan: “Let's not dance to their tune.”

Unleashing the defense of sovereignty

The aim of the omnibus bill is to defend the motherland, Hungarian interests and rules from foreign interference. Among the typical threats the bill seeks to eliminate, the preamble specifically mentions that in the 2022 national elections “the prime ministerial candidate of the united opposition itself has said that millions of US dollars were transferred to them from the United States of America during the election campaign.” It also mentions specifically that “in spring 2022 the united opposition circumvented this rule by using funds from abroad through NGOs and companies engaged in political activities.”

The new [bill](#) establishes an Office to Defend National Security that will be in charge of developing a methodology for the analysis of risks to sovereignty; mapping and investigating threats to sovereignty and preparing annual sovereignty reports. The focus of the new Office's investigating powers appears to be organisations engaged in “activities using foreign funding may influence the outcome of elections” and organizations that “use foreign funding to influence the will of the voters or support such activities.”

This new Office has rather eminent constitutional status: its independence is embedded in the Fundamental Law through the newly enacted Twelfth Amendment (R(4), amended on 12 December 2023); its president is selected by the prime minister and appointed by the president of the republic; the president also enjoys the same immunity that is due to members of Parliament. The investigative powers of the Office are expressly exempted from administrative judicial review.

The bill also amends several provisions related to the conduct of elections and party finance. It introduces a new crime of “unlawfully influencing the will of the voters” defined as “A member, responsible person or executive officer of a nominating organisation under the Act on Electoral Procedure, as well as a candidate under

the Act on Electoral Procedure, who uses prohibited foreign funds or, in order to circumvent this prohibition, uses a financial advantage derived from an agreement disguising the origin of the prohibited foreign funds, shall be punished by a criminal offence punishable by imprisonment for up to three years.” This new crime complements the existing prohibition of on political parties to accept foreign funds, included in the act on the operation and management of political parties.

The vagueness of this provision new criminal provision makes it particularly problematic, especially when it comes to the act of disguising prohibited funds.

According to the [Hungarian Helsinki Committee](#): “The self-defense bill is a thinly veiled attempt to intimidate and silence brave citizens who are working in the interests of their communities from participating in public life.” Indeed, the bill’s preamble specifically points to how “in spring 2022 the united opposition circumvented this rule by using funds from abroad through NGOs and companies engaged in political activities.” This is a reference to a [civil society-led mobilization campaign](#) that contributed to 1.6 million casting invalid votes in the government’s referendum on gender, rendering the referendum ultimately invalid. Some of the civil society organizations were [fined by the National Election Commission](#), and ultimately by the Supreme Court for interfering with the integrity of the elections.

There is little doubt that the legislation of the defense of sovereignty was meant to taunt the European Commission. As the Hungarian Helsinki Committee poignantly pointed out: “This legislation, reminiscent of the stigmatising 2017 LexNGO and the 2018 Stop Soros laws, is yet another affront to Hungary’s constitutional, international, and EU commitments.”

Until recently, the defense of sovereignty in the face of European interference used to be the packed [Polish Constitutional Tribunal’s specialty](#). Hungary tended to stick to the more conservative rhetoric of defending national constitutional identity. In the heat of European debates on the migration crisis the Fundamental Law was amended to make defending the constitutional identity and the Christian culture of Hungary the constitutional obligation of every state institution (Article R(4), as inserted by the Seventh Amendment, 28 June 2018). The Seventh Amendment also defended sovereignty indirectly when it inserted wording on the prohibition of settlement of foreign populations (Article XIV(1)). The Twelfth Amendment also avoids the word sovereignty: the sentence that anchors the Office on the Defence of Sovereignty entrenches an independent body tasked with defending constitutional identity.

It is hardly an oversight that the legislative package on the defense of sovereignty leaves room for creative ambiguity. It certainly created an opening for slipping a subsidiarity card to the omnibus bill at the last minute – and getting it past the Commission, at least for now.

The Ultimate Magic Trick: The Subsidiarity Card

The omnibus bill that managed to please the Commission on judicial independence introduces a new procedure to the act on the Constitutional Tribunal (adding Article 16/A to Act no. CLI of 2011 on the Constitutional Court), called ‘decision on a preliminary European Union interpretation opinion’ (*elzetes európai uniós értelmezési véleményről szóló döntés*).

The new procedure opens up the possibility for the European Court of Justice to turn with a reference to the Hungarian Constitutional Court and seek a preliminary opinion if a case pending before the CJEU brings up an issue concerning “Hungary’s

- (a) constitutional settlement, including basic state functions – such as defending the state’s territorial integrity, public order and national security,
- (b) constitutional
- (ba) order,
- (bb) requirements, and
- (bc) traditions, and
- (c) national identity,
- (d) sovereignty,
- (e) unalienable right to dispose of its population,
- (f) Fundamental Law’s protection on fundamental rights and liberties protected, and human dignity.”

The official reasons attached to the provision emphasize that this is an advisory process, wherein the Constitutional Court is meant to act in a preparatory and auxiliary capacity. The provision did not receive any attention in Parliament, given its last-minute inclusion in a large and diverse omnibus bill. The spirit of sovereignty protection, however, can still be sensed in the text, as it lists constitutional traditions, national identity and sovereignty one after the other as objects falling within the Hungarian Constitutional Court’s domain of expertise.

The procedure may be meant as a vehicle in the service of European judicial dialogue: to encourage the CJEU to act towards national constitutional courts in the spirit of reciprocity, in order to avoid clashes and to give effect to the principle of subsidiarity (TEU Article 5(3)).

The provision may of course also become a convenient excuse for non-compliance with future judgments of the CJEU. It creates a legal foundation for the Hungarian government to claim that a particular judgment violates the aspects of the Fundamental Law listed above (including sovereignty), and as such cannot be executed: had the CJEU bothered to turn to the Hungarian Constitutional Court for a preliminary interpretation before reaching its conclusion, the CJEU could have been told so in advance. The provision does not say that the Hungarian government or the Constitutional Court may prevent the execution of a CJEU judgement with reference to the grounds listed as potential preliminary reference subjects. But it certainly creates a new avenue for contesting the primacy of EU law in a highly visible way, with direct reference to sovereignty.

A Russian inspired subsidiarity card

The subsidiarity card may sound comforting at first, given the principle's solid grounding in Article 5(3) TEU. Certainly, this provision in its current form is not a mirror image of the [2016 Russian law](#) that authorized the Constitutional Court to find international courts' judgements non-executable with reference to the Constitution. But especially at a time when the air in Hungarian Parliament is thick with the defence of sovereignty, the whiff of Russian inspiration is hard to ignore when a subsidiarity card is pulled in the vicinity of European courts.

It will be curious to see the Commission turn its attention to the sovereignty package, once the dust settles on PM Orbán's latest veto play.

