

**THE NATIONAL INTEREST IN EU LAW AND GOVERNANCE: THE HUNGARIAN
PERSPECTIVE 1**

FINDINGS OF THE

MUTUAL LEARNING EXPERIMENTS (MLEs)

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Introduction

The MLEs were conducted with two purposes in mind. Firstly, we aimed to collect insights from officials working in the Hungarian and the European Union administrations at the expert level concerning how they understand the national interest in the policy development and decision-making processes in which they participate. Secondly, we wanted to share with them different interpretations and perspectives of formulating and representing the national interest/position in the EU political and legal context, as presented in academic work. The MLEs were not conducted as formal research interviews and their results are not used directly in our research. This is an overview of what we –as academic researchers – learned from the events. Therefore, the following account is not an exact report of the discussions.

Summary of findings

- The national interest emerges as a strategic asset in the EU political process which can be used in inter-governmental bargaining;
- there is also a strong instrumental and procedural understanding of the national interests which seems to dominate the attitude and thinking of national experts;
- at the expert level, the interests of successfully representing the national position, which could involve the successful defence of national measures and policies, could appear as a reduced, operationalised manifestation of the national interest;
- government positions taken in the national interest could be influenced by practical considerations such as the risks of non-compliance with EU law, the threat of infringement procedures, the potential legal justifiability of national measures and policies, or the possibility of continuing with non-compliance despite pressure from the Commission or from other Member States;
- in the EU political process, the symbolism of the national interest may not be entirely lost, however, the practical pressures of the process requiring constant alertness and continuous preparation prefer a more rational understanding;
- in the EU political arena, the Member States may be interested in developing an identifiable political image which could secure their leadership in individual EU policies;
- the Member States could position national interests as the interests of the Union or as Union values and expect their fulfilment on this basis;
- policy crises and far reaching policy reforms in the EU present the Member States with dilemmas as their interests could dictate halting EU processes and ensuring that they are not left out of new, enhanced common policy frameworks at the same time;
- the geographical location of the Member State concerned, its traditional political, cultural or trade links with other states, or its historically evolved characteristics can define the substance of the national interest.

1. The national interest in the context of Hungarian Europe-politics

The MLE revealed a strategic interpretation of the national interest focusing on the potential coalitions that could be established with other Member States in the EU decision-making process and on the potential areas and issues in which cooperation is possible with other Member States. This necessarily also implies an instrumental understanding of the national interest whereby the conduct of individual Member States – alone or together with other Member States – would be determined by what issues they want to put and keep on the EU agenda, and what issues they would want to take off that agenda. The practice of so-called ‘package deals’ in EU decision-making force the Member States to set up coalitions in which, in pursuance of particular local interests, they would be willing to support the interests of other Member States (e.g., votes in exchange for votes or votes in exchange for other advantages). The Member States are, therefore, interested in developing strategic assets in the EU political process by supporting causes which are not directly relevant for the Member State concerned or which are those of other Member States. These assume that the Council is the forum for the Member States to represent and defend their interests, necessarily, within the confines of a collective decision-making procedure aimed at delivering a common position among Member State governments.

In this strategic interpretation of the national interest, Member States may prioritise between ‘lost cases’ and ‘winnable cases’, negotiable and non-negotiable issues, or between permitted and barred issues. It was also raised that while trust among the Member States is essential in the EU political process, allegiances between the Member States change from time to time depending on the position taken by the Member State concerned. The EU political process tolerates Member State opportunism and the Member States are not prevented from pursuing their own interests at the expense of others. The Member States, however, are expected not to hold grudges and not to stab each other in the back.

The MLE discussed whether the national interest as a notion belongs to political symbolism or it can be interpreted as a category in public policy. It was argued that maintaining credibility is essential in the EU political process, which does have an impact on how Member State interests are formulated and presented. The Member State cannot afford not knowing and not understanding the complexities of EU politics and policies. In order to intervene without jeopardising its credibility, the Member State may need to wait for developments, ask questions or prepare for different scenarios. This necessarily reduces the scope for ‘big words’ and acts of symbolism in support of vaguely defined national interests in the European arena. The drama, however, is not completely excluded from the EU political process. Provided that the Member State position is adequately prepared, governments can indeed make symbolic acts in EU negotiations in the protection of the national interest. Also, caution towards EU

positions or policies, when the evidence is unclear or when prospective developments are more than uncertain, can support the Member States being vocal or making known their views in radical ways. This way, unwelcome political or policy developments can be halted or delayed.

As to the question how the national interest is identified, the MLE revealed a predominantly procedural approach. It was raised that the procedural avenues and the expert and political forums are available for Hungary for the development – through inter-departmental negotiations – of the national position which can be presented at the EU level based on the mandate given. In this context, the national interest manifests as the ‘red lines’ in the mandate given, and where there are ‘flexible elements’ in the mandate the national interest is formulated during European negotiations directly, if Hungary is represented at a ministerial level, or indirectly through home ministerial approval, when Hungary is represented at a lower level.

As to the question of identifying substantive national interests, the MLE raised that it is indeed difficult to identify with precision particularly local interests or interests which could not be reformulated, repositioned or abandoned in intergovernmental bargaining at the European level. The geographical location of the Member State concerned, its traditional political, cultural or trade links with other states, or its historically evolved characteristics can lead to pinning down interests which are particular to that political community.

In the current EU decision-making framework, the smaller Member States, like Hungary, would be looking at the positions adopted by the 4 largest or the 5-6 larger Member States, join an emerging majority position, or form a blocking minority if that is dictated by the national interest. Coalition-building would start at the expert level which could have an impact on the proposal being carried forward or being dropped at this level of negotiations. In these processes, it may be possible to predict the prospective position taken by certain Member States.

Most Member States have a definitive political image in the EU. Hungary has been quite active to develop one of its own. It is not particularly clear whether these Member State political identities are all that different, as the Union is based on interests and values shared by the Member States, although their geographical location and geopolitical interests, their level of general economic and social development, or some national particularity can keep Member State preferences apart.

For Hungary, its geopolitical interests dictate that V4 cooperation is given a special value within the EU framework. In many issues, there is clear agreement among the participating states. The potential expansion of the V4 or closer cooperation with other regional cooperation frameworks is, however, approached with caution. With expansion, its effectiveness may decrease and there is larger risk of the participant states not sharing interests and not being able to agree on issues. On the other hand, a larger V4 may mean a more influential block of Member States at the European level.

Access to EU monies, energy policy, Central and Eastern European convergence issues, the Schengen enlargement, or further EU enlargement are other areas that are of special relevance for Hungary. The successful completion of specific EU tasks, such as the presidency, was also regarded as being in the national interest. There is, however, no indication that Hungary has considered or is considering the promotion of fundamental reforms of EU policies in the national interest, and whether it believes that it has the capacity to do so. During its EU presidency, Hungary promoted the adoption of a European Roma strategy. There was an explicit interest in developing a distinctive political image that for Hungary the protection of minorities is a core national and European issue. Strategic considerations also played a role in bringing up this matter in Europe. The adoption of the European Roma strategy was an example of a Member State raising a local concern, which is also prevalent in other Member States, to the European level and expecting an EU response, mainly financing through EU funds, to solve that local problem.

The further enlargement of the EU, because of its geographical position, is particularly closely followed by Hungary. In this process, it is interested both in enforcing the Union's interests and in raising specifically Hungarian concerns. On the one hand, Hungary demands that the *acquis* is met by the candidate country just as it had been expected from Hungary during its own accession process. With this, Hungary does not want to ensure only that the conditions of membership are fulfilled but also that in its future dealings with the new Member State it will not suffer any disadvantage owing to the incomplete implementation of EU law. In order to secure this, Hungary is prepared to give expert assistance to the candidate country. Hungary, based on its own experiences as a candidate country, has also been active in nudging the Union to complete the accession process once the conditions of membership have been fulfilled. On the other, Hungary is keen to introduce conditions of membership which serve particularly Hungarian interests. For instance, the protection of national minorities, including Hungarian national minorities, is regarded by Hungary as an important benchmark of the enlargement of the EU with countries in the Balkans. This is not presented as a Hungarian issue but rather as a matter of enforcing European values.

The MLE also discussed synergies between the Member States and the Union, the overlap between national and Union interests, and the instances of the Member States using the political and policy infrastructure of the Union for promoting their interests. In this regard, the solving of the euro crisis and the strengthening of the EMU presented a particular dilemma for Hungary. On the one hand, a strong and stable Eurozone is essential for the welfare of Hungary and, therefore, it is interested in its further strengthening. On the other, Hungary may also be interested in mitigating the negative consequences of an ever closer Eurozone for non-Eurozone countries which opted to pursue largely autonomous monetary and economic policies. In this policy area, Eurozone and non-Eurozone Member States may have different interests, and in the EU decision-making framework the latter group of Member States may have reduced opportunities to influence EU policy with an impact on non-Eurozone economies and

societies and to represent their interest vis-à-vis the interests of Eurozone Member States. These conflicting aims present national governments with the difficult choice of seeking their fortune either through enhancing Union policies or through opposing these changes or through loosening the common policy through further differentiation and flexibility. The ultimate option of blackmailing the other Member States by floating the idea of an exit from the Union, as in case of Britain, may also be part of Member State strategies.

2. The national interest in the context of EU legal proceedings

The MLE focused on the potential understandings of the national interest in the different legal proceedings before the EU Court of Justice. This is an environment where the Member States are required to formulate positions with regards to their own infringements of EU law, questions of interpreting EU legal obligations, or EU measures suspected of illegality. The specific environment of these procedures has a fundamental impact on the scope and content of the national interest represented and also on the ways it may be represented. The national interest manifests in specialised legal arguments put forward and defended in a particular style within the particular framework of the different procedures. The Member States engage in these procedures with a particular purpose and they develop their strategies having regard to that purpose and to the specificities and limitations of the particular legal framework. These frameworks can be rather different in the different legal procedures regulated in EU law.

The MLE revealed that some of the legal proceedings in the EU involving Hungary may receive particular attention in domestic politics. Following political aims, the government may want to influence the legal position taken, the procedural tactics selected, or the intensity in which government lawyers engage with and represent the case. Legal proceedings against Hungary may be communicated domestically in a manner so that the actual legal issues are ignored and the potential political relevance of the procedure is inflated for purely political purposes (e.g., EU infringement procedures presented as Brussels unjustifiably interfering with the Hungarian way of life and undermining the achievements of the government and the people). In such circumstances, work at the expert level in the interest of Hungary can be disturbed by interferences, ideas or pressures emanating from all areas and levels of Hungarian government. This, in turn, has an impact on the ability of legal experts formulating and representing the national position in such a manner that it is kept within the rational bounds of legal and policy arguments. They are, however, not entirely defenceless. They are able to influence the domestic politics of EU legal proceedings in the preliminary assessment of government policy proposals from the perspective of EU obligations and when designing and monitoring the implementation of EU measures. Necessarily, adequately prepared legal positions which leave no room for disagreement can have an impact on the political decision taken with regards to individual legal proceedings.

It was also raised that the legal proceedings by their nature confine what can be presented as the national position and how it is presented. In ongoing procedures, it is fairly clear to legal experts what actions are needed and what needs to be presented. In this, they are also helped by their experience in preparing the implementation of EU measures as the same legal experts take part in the implementation process and in the subsequent legal procedures initiated in connection with implemented measures. The national measure defended in these procedures is the 'product' of the legal experts

representing Hungary who might well be aware of the problems of the measure in question. As an example, it was mentioned that in infringement procedures government legal experts proceed as the lawyers of the government which has been pursuing a particular line of action (possibly, in breach of its EU obligations) and which now is demanding swift and successful action from its lawyers. In this role, it is straightforward that they need to protect the national measure or national policy under scrutiny in the particular case. As a result, the limited and instrumentalised national position represented in such proceedings can be distinct from the national interest and could raise doubts as to whether the national interest is a useful concept in such a legalistic environment. Ultimately, the legal position represented could contradict the interest of Hungary that in the long run compliance with its EU obligations must be ensured and its unlawful conduct must be abandoned.

In many ways, representing the national interest in EU legal procedures is a simpler and more limited task than representing Hungary in the EU political process. The legal expert can focus on the legal content of national measures and can disregard the moral hiatuses, the political intentions and the broader and narrower context of the measure in question. They can reduce their arguments to defending the national measure under challenge and deal with only the question as to which arguments will stand before the EU Commission and the EU Court of Justice. Often the legal expert would be scrutinising his earlier work leading to the implementation of an EU measure and in the subsequent legal proceedings he would be required to test his own previous position. The challenge here for the legal expert is to respond professionally to the claims made against the national measure giving a certain technocratic edge to what is presented as the national position. The scope of EU law also delimits the potential legal or legally relevant arguments. For instance, the human rights implications of national measures may not be addressed before the EU Court of Justice to the same extent as before the national constitutional court or before the Court of Human Rights in Strasbourg.

Concerning the *Sólyom* case (*Hungary v Slovakia* (C-364/10)), the MLE raised that in that particular context the national interest could be regarded as being more substantial than a strategic or an instrumentalised position represented by the Hungarian agent. On the face of it, Hungary initiated the infringement procedure against Slovakia for the purpose of protecting a symbol of Hungarian nationhood – the person of the President of the Republic of Hungary. While Hungary's claim was confined within the framework of rational legal arguments, it cannot be denied that the legal position taken by Hungary was based on emotional considerations linked to national identity. Hungary also decided to pursue the procedure because it aimed – allegedly – to enforce 'European standards' in how EU Member States should treat each other's citizens. The term 'European standards' denotes in the Hungarian language a value-based understanding of how states and individuals should behave. Curiously, the emotionally constructed national interest element was removed from the proceedings as pursued by the Commission and the EU Court of Justice, and the case was decided on more neutral,

legal grounds. This could be regarded as an example of the national interest being subjected to some form of legal moderation in the EU legal context so as to detach it from its emotional foundations or to smooth acute tensions between the Member State concerned and the Union, or between different Member States. The MLE mentioned that in the context of the *Sólyom* case this intention of moderating the national interest was rather controversial and that the Commission and Hungary reached a different interpretation of what is in the Union's interest. The Hungarian agents pursuing the symbolically loaded Hungarian position felt that there was an important question of EU law which needed to be clarified in the interest of the Union, and the Commission, which normally insists on pursuing procedures to settle such legal issues, decided that it may be in the interest of the Union to keep away from this particular, politically motivated dispute.

The action for annulment initiated in the *Székely Nemzeti Tanács* European citizens' initiative case (registered under T-529/13 *Izsák v Commission*) also represented an example where the positions taken by the intervening national governments seemed to be influenced by political, emotional and historical considerations. Hungary, interested in protecting the rights of Hungarian-speaking minorities abroad, intervened on the side of the applicant. Slovakia and Romania, which have a large number of Hungarian-speaking minorities, intervened on the side of the respondent.

The MLE also discussed that from the perspective of the legal expert sudden changes in domestic policy and politically influenced conflicts with the Union could be particularly disturbing. These usually find the administration unprepared. It is placed under immense pressure to adjust to the changes without being given sufficient time and opportunities to make preparations.

The MLE considered whether the representation of Hungarian interests in EU legal proceedings would be affected by bureaucratic considerations or by the personal considerations of the legal expert. It was raised that there is not an explicit expectation that Hungary should win or lose a particular number of cases. Nonetheless, the integrity of the administration and the integrity of the legal expert as a civil servant dictate that if possible legal proceedings involving Hungary should not be lost. This interest can trump the personal beliefs or the personal assessment of the legal expert in the case concerned.

The MLE made it clear that in general in the matter of infringement procedures Hungary is not subjected to a specifically harsh treatment and is not regarded as a particularly problematic Member State. Although there have been politically sensitive cases which received particular attention, the enforcement strategy followed by the EU does not prioritise Hungarian cases of non-compliance. This does not mean that there are not controversial cases where the Commission is prepared to contradict long standing national practices or sensitive national policies (e.g., public notaries). There are also dormant infringement cases where the EU decided to postpone the commencement

of the procedures, for example, to wait for an EU level settlement of the problem, for the political situation to change, or for an EU strategy to emerge. In such instances, both the Commission and the Member State concerned seem to play a strategic game in which they both try to calculate the next move of the other player and adjust their own actions according to the strategic leeway left by the other player's move. In this environment, the interests pursued at a particular moment – as shaped by the interactions between the players – can be different from what could be called the general Union and national interest. For example, when the Commission launches an infringement procedure its interpretation of the Union's interest could differ from that of the Member States. Also, the doubts formulated by the Member States with regards to the Union's interest as pursued in the procedure can lead to the Commission modifying its position and its understanding of the Union's interest in the given context. The interests of the Member States may also be modified having seen how the Commission's procedure has changed the strategic leeway available to the Member States concerned for maintaining a particular policy or regulatory instrument. The Member States could actively seek solutions whereby the Commission's concerns could be answered and the Member State's position could still be secured (e.g., in the public notaries case Germany modified its laws so as to meet EU free movement requirements but it also introduced new, at this point seemingly EU compatible, restrictions on market access; Hungary, seeing that its regulation of public notaries will attract criticisms from the Commission and having followed the ongoing infringement procedures against other Member States, opted for a 'smart', strategic amendment of the applicable legislation (endowing public notaries with new public powers to be able to invoke the civil service derogation) which is expected to keep Hungarian law immune from EU intervention).

The MLE also touched upon the issue of EU legal proceedings providing signposts or borderlines for national governance. The legal boundaries of Member State policies in EU law indicate the leeway available for national governments, which opens up the possibility for government discretionary choices in developing national policies. Compliance with EU law, the threat of infringement procedures, the possibility to support national policies with legal arguments within the framework made available by EU law, or the possibility of continuing non-compliant policies until the latest possible time are factors that may be taken into account in decision-making in government. Non-compliance and infringement procedures are not necessarily regarded as providing absolute prohibitions for Member State conduct. On the contrary, infringement procedures – the pre-litigation phase – can be relied upon to indicate whether government policy has been lawful and how it should be amended. The establishment of the infringement could also serve as providing an indication as to which direction national policy should be developed in order to avoid the breach of EU law and to realise the local interest under pressure from EU obligations. Necessarily, the availability of financial sanctions for the infringement can raise the costs of such a strategic handling of EU compliance and EU infringement procedures. In grey areas of EU legal obligations, or when non-compliance depends on a careful assessment of Member State conduct in a

balancing exercise, risking the violation of EU law and the initiation of infringement procedures could qualify as good government practice pursuing locally formulated interests. Governments continuing with clearly non-compliant national policies until they can no longer be sustained, a practice which is not excluded from the arsenal of governments unwilling to bear the costs of compliance, may, however, be assessed rather differently.

The threat of EU infringement procedures could also be a useful instrument for Member States aiming to settle disputes with other Member States, disputes which may not wholly fall under the scope of EU law. In the latest sequel of the legal disputes concerning the use of the product denomination ‘Tokai’, which is politically, economically, emotionally, historically etc. important for Hungary to reserve for its own products, raising the possibility of an EU procedure and Hungary urging the Commission to consider launching a procedure were aimed at pressuring Slovakia to start negotiations with Hungary.