




VOCAL EUROPE


Policy Paper

The power of Article 7: Protection of European values or punishment tool? An analysis of the Polish case

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POLICY PAPER

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1. Background

1.1 EU values and their protection: Articles 2 and 7 TEU

Article 2 of the Treaty on the European Union (TEU) defines the EU as founded on the values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” The European society is referred to as one where “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The 2015 “Promoting and safeguarding the EU’s values” Summary of EU Legislation stresses the importance of the rule of law as a precondition for all fundamental values under Article 2 TEU, and for respecting the rights and obligations deriving from the EU Treaties and from international law.¹ The concept of rule of law is defined by the Commission as “the fact that public authority is under the control of an independent and impartial judiciary within existing law and in line with the values of democracy and fundamental rights.”²

In March 2014, the European Commission adopted a new Rule of Law Framework to address systemic threats to the EU values. The Summary of EU Legislation recites that if no solution is found within the Framework, which allows the Commission to enter a dialogue with the EU Member State concerned in order to prevent the escalation of systemic threats to the rule of law, “Article 7 TEU will always remain the last resort to resolve a crisis and ensure compliance with EU values.”³

In the current developments regarding Poland, the crisis thus seems to have reached its peak as the last resort has already been exhausted. The aim of Article 7 is to protect the values embedded in Article 2, and to ensure that all EU Member States respect common values, especially including the rule of law. Article 7 is divided into three parts and two mechanisms.

First, the **preventive mechanism** (Article 7(1)) allows the Commission, the EP or one third of Member States in the Council to give the EU country concerned a warning before a serious breach has actually taken place. The mechanism can be activated only when a “clear risk of a serious breach” is present, and needs to be approved by 2/3 majority in the EP. The country is then called to explain itself in the European Council, which may then vote by 4/5 majority to identify a breach and issue recommendations to the concerned country.

Second, if a “serious and persistent breach” of the Article 2 EU values by the Member State is identified, for example when the country in question ignores the Council’s guidance, the Commission or 1/3 of Member States in the Council supported by a 2/3 majority in Parliament calls the country to answer before the European Council again (Article 7(2)). The EU leaders must then decide unanimously whether they want to proceed to the next stage.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133500>

² <https://www.euractiv.com/section/justice-home-affairs/news/we-lack-alternatives-to-article-7-german-analyst/>

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133500>

Third, when there is unanimity that the severe breach has persisted for some time, the 28 Member States may vote by qualified majority to impose sanctions. The **sanctioning mechanism** (Article 7(3)) allows the Council to suspend certain rights deriving from the application of the treaties to the EU Member State concerned, including the voting rights of that country in the Council. The EP closes the procedure by giving its consent by 2/3 majority.⁴

*The TEU says very little about what constitutes a “breach of the rule of law” under Article 2 TEU. Three characteristics have been introduced by scholars in order to determine the breach: (1) “unconstitutional constitutionalism”, where power is abused through completely legal means; (2) dismantlement of the liberal democratic state; and (3) systemic corruption. All these appear to be present in the case of Poland.*⁵

Between 2009 and 2017, the Commission had been confronted on many occasions with crisis events in some EU Member States, which revealed specific rule of law issues. The EU institutions addressed these events by both exerting political pressure and by launching infringement proceedings.⁶ Critics said that the political alliances to obtain the required majorities for the triggering of Article 7 would too difficult to obtain, and that the possible political fallout would have the potential of being too toxic.⁷

The mechanism of Article 7 TEU had yet not been applied until against Poland in December 2017. Article 7 was triggered again for breaches of EU values by Hungary in September 2018. What happened between 2016 and 2018 in Poland that led to the first ever launch of the last resort mechanism?

1.2 The overhauls of the Polish judicial system between 2016 and 2018

Since Poland’s right-wing Law and Justice Party (PiS) came to power in October 2015, it began making changes to the judiciary, insisting the new reforms are needed to combat corruption and change a judicial system which was still haunted by the communist era.⁸ More than thirteen laws have been adopted, affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service, and National School of Judiciary.⁹ Dozens of judges have since then been effectively dismissed from such courts.¹⁰

In January 2016, the Commission launched an unprecedented initial probe, or preliminary assessment, to see if the amendments of the Polish government violated EU law and justified punitive measures.¹¹

⁴ <https://www.euractiv.com/section/justice-home-affairs/news/brussels-triggers-unprecedented-action-against-poland/>

⁵ http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133500>

⁷ <https://www.euractiv.com/section/politics/video/running-the-rule-over-article-7/>

⁸ <https://www.euractiv.com/section/future-eu/news/polish-pm-expects-nuclear-article-7-to-be-triggered-next-wednesday/>

⁹ <https://www.euractiv.com/section/justice-home-affairs/news/brussels-triggers-unprecedented-action-against-poland/>

¹⁰ <https://www.euractiv.com/section/future-eu/news/thousands-protest-as-polish-president-signs-judicial-appointments-law/>

¹¹ <https://www.euractiv.com/section/justice-home-affairs/news/commission-launches-unprecedented-probe-into-polish-judicial-reforms/>

On 1 June 2016, the Commission formally warned Poland to reverse the changes, in order to remove a “systemic threat” posed to the rule of law. However, Warsaw failed to address such concerns. On 27 July, the EU gave Poland a 3-month deadline to reverse the changes made to the judicial system.¹² In October 2016, Poland rejected the Commission’s recommendations concerning how to solve the constitutional crisis, which raised concerns both at home and abroad.¹³ In December 2016, the Commission gave the Polish government two further months to reverse the overhaul to its Constitutional Court.¹⁴

In February 2017, Poland dismissed the deadline given by the Commission to implement measures to protect the powers and independence of the Constitutional Court. The Commission held these reforms as essential in order to respect the rule of law. These requests came right after Polish President Duda of Poland chose a candidate backed by the PiS party as the new head of the Constitutional Tribunal. This procedure was considered by the Commission as “fundamentally flawed with regard to the rule of law.”¹⁵ In May 2017, Poland refused again to follow the Commission’s recommendations.

In July 2017, a new legislation came into force which allowed the Parliament to appoint Supreme Court judges. This led to thousands of demonstrators marching in protest on the Polish Supreme Court and in many other Polish towns. Once again, the ruling right-wing party defended the amendments, defining them as necessary to fight corruption and streamline the judicial system. President Duda vetoed two of the three bills introduced but signed into law the third amendment which allowed the justice minister to unilaterally replace the chief judges in the common courts, which include appeal courts.¹⁶

In response, the Commission once again replied that the reforms “would abolish any remaining judicial independence and put the judiciary under full political control of the government.”¹⁷ The Polish government was therefore given to a month to end what the Commission considered a “systemic threat” to the rule of law, and to inform about the steps taken to modify the changes made. On 29 July 2017 the Commission launched an infringement procedure on the Polish Law on Ordinary Courts, also on the grounds of its retirement provisions and their impact on the independence of the judiciary.¹⁸ Therefore, the Commission raised concerns about, inter alia, a violation of Article 19 TEU, which provides that judges of the ECJ should “be chosen from persons whose independence is beyond doubt”.¹⁹

¹² <https://www.euractiv.com/section/justice-home-affairs/news/eu-gives-poland-three-months-to-address-rule-of-law-concerns/>

¹³ <https://www.euractiv.com/section/central-europe/news/poland-rejects-eu-demands-on-court-crisis/>

¹⁴ <https://www.euractiv.com/section/central-europe/news/eu-ministers-extend-talks-with-poland-over-rule-of-law-fears/>

¹⁵ <https://www.euractiv.com/section/justice-home-affairs/news/supported-by-hungary-poland-defies-eu-over-rule-of-law/>

¹⁶ <https://www.euractiv.com/section/justice-home-affairs/news/article-7-the-ins-and-outs-of-the-eus-nuclear-option/>

¹⁷ <https://www.euractiv.com/section/freedom-of-thought/news/candlelight-protest-against-changes-to-polands-judiciary/>

¹⁸ http://europa.eu/rapid/press-release_IP-17-2205_en.htm

¹⁹ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1230#.W9BgWC1aaCR>

In August 2017, Poland missed again its deadline to respond to the Commission's concerns. PiS rejected such concerns, insisting that the controversial court reforms were "in line with European standards."

In early December 2017, the Polish Parliament adopted new reforms allowing it to choose members of a body designed to protect judicial independence and reinforce political control over the Supreme Court. This was after the EU had been warning for months that it might trigger Article 7. The reforms were criticized as they undermine the independence of the judiciary, subordinating it to the executive and the legislature, eroding the separation of powers and the rule of law.²⁰ However, Polish PM Morawieki insisted that each Member State has an absolute right to reform their judicial body, saying that the ineffectiveness of the Polish courts needed to be changed. The Commission referred this case to the European Court of Justice (ECJ) on 20 December 2017.

On 20 December 2017, for the first time in history, after two years of repeated efforts to engage the Polish government in a constructive dialogue, Commission's Frans Timmermans announced the activation of Article 7 against Poland.²¹ This was presented as a reasoned proposal to the Council to adopt a decision under Article 7(1) TEU. The country then had three months to adopt the Commission's recommendations.²²

On 3 April 2018, the new judicial laws entered into force in Poland. At the EU General Affairs Council hearing on the rule of law in Poland on 26 June 2018, in the context of the Article 7(1) procedure, no indication was given by the Polish authorities of forthcoming measures to address the Commission's outstanding concerns.

On 3 July 2018, the Polish government amended provisions regarding the retirement age for Supreme Court judges, lowering it from 70 to 65 years. The new law conferred to the Polish President the power of removal of more Supreme Court judges, if considered necessary, and of appointment of an acting First President on *ad hoc* basis, pending the judicial appointment procedure. The concerned decision resulted in about 37% of the judges retiring prematurely, including the opposition-appointed First President.²³

The overhaul was considered as incompatible with EU law and especially with its values, as it breached "the principle of the independence of the judiciary, including the irremovability of judges," stated the Commission in September 2018.²⁴ Given the lack of progress on this issue in the Rule of Law dialogue with Poland, the Commission sent a Letter of Formal Notice to the Polish authorities on 2 July 2018 concerning the Law on the Supreme Court, and followed this with a Reasoned Opinion on 14 August 2018. Warsaw was given one month to revert the amendment in August by the Commission, but such warning was ignored by PM Morawieki. The Polish

²⁰ <https://www.euractiv.com/section/future-eu/news/polish-pm-expects-nuclear-article-7-to-be-triggered-next-wednesday/>

²¹ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W82Gsy1aaCR>

²² <https://www.euractiv.com/section/justice-home-affairs/news/brussels-triggers-unprecedented-action-against-poland/>

²³ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W82Gsy1aaCR>

²⁴ <https://www.euractiv.com/section/justice-home-affairs/news/polish-government-rejects-brussels-objections-regarding-supreme-court/>

authorities replied to both the Letter and to the Reasoned Opinion by rejecting the Commission's concerns, failing to alleviate the Commission's legal worries.

On 18 September 2018, a second hearing on the rule of law in Poland was organized in the General Affairs Council in the context of the Article 7(1) procedure. The Polish authorities again stood by their position and refused to propose any measures to address the concerns of the Commission and other Member States.²⁵

On 24 September 2018, in the context of the initiated infringement procedure against Poland, the Commission asked the ECJ to determine whether the Police administration has violated the “principle of judicial independence” with its law on the Supreme Court. The Commission therefore decided to move “to the next stage of the infringement procedure, deciding to refer the case to the Court of Justice of the EU.

With its referral, the Commission has also decided to ask the [ECJ] to order interim measures, restoring Poland's Supreme Court to its situation before 3 April 2018, when the contested new laws were adopted.”²⁶ If the Court would conclude that Poland has violated EU laws and if Poland does not comply with the ruling, Warsaw could end up paying large financial penalties “based on the duration and severity on the infringement and the size of the Member State,” said the Commission.²⁷

Lastly, in October 2018, without waiting for the ruling of the ECJ, Polish President Duda appointed 27 new judges to the Supreme Court. This was done despite the EU’s objections to the reforms before the ECJ. On 19 October 2018, the ECJ ordered to “immediately suspend” the retirement of the Supreme Court’s judges under the disputed law, saying it threatened judicial independence.

Eventually and surprisingly, on October 22, the Supreme Court Chief asked 23 of the retired judges to return to work. This represents a major change in the constitutional crisis of Poland and in the relations between Brussels and Warsaw.

2. State of play

2.1 Current debates and positions

Currently, the vote has just been cast on Article 7(1) TFEU, i.e. the preventive mechanism. The existence of a “clear risk of a serious breach” of the rule of law has thus been determined by the majority of Member States in the Council.

The Commission recognized that the events in Poland needed the opening of a dialogue with the PiS Government in January 2016 under the Rule of Law Framework, which is set to create a continuous dialogue between the Commission and the Member State concerned.

²⁵ http://europa.eu/rapid/press-release_IP-18-5830_en.htm

²⁶ http://europa.eu/rapid/press-release_IP-18-5830_en.htm

²⁷ <https://www.politico.eu/article/ecj-to-rule-on-polands-supreme-court-law-judicial-independence/>

THE POWER OF ARTICLE 7: PROTECTION OF EUROPEAN VALUES OR PUNISHMENT TOOL? AN ANALYSIS OF THE POLISH CASE

After two years of unfruitful dialogue, however, the Commission's official press release of 24 September 2018 states that "Poland fails to fulfil its obligations under Article 19(1)" of the TEU "read in connection with Article 47 of the Charter of Fundamental Rights" of the EU. "The implementation of the contested retirement regime for Supreme Court judges in Poland is being accelerated and is creating a risk of serious and irreparable damage to judicial independence in Poland, and therefore of the EU legal order."²⁸

Commission First Vice-President Frans Timmermans has been the one pushing for changes to the judicial reforms since the coming into power of the PiS in 2015. He long and fiercely combated against the Polish reforms in order to revert them. The triggering of Article 7 was indeed announced by Timmermans in December 2017. In October 2018, he commented he was "concerned that the situation in Poland was deteriorating rather than improving." He also added that "it is a source of particular worry that Poland has not said whether it will obey the ECJ."²⁹

To this day, France and Germany represent the countries the most strongly aligned against the changes advanced by the Polish administration. In August 2017, German Chancellor Angela Merkel expressed her support to the Commission over the dispute on the freedom of the Polish courts. Merkel stated that she took the issue "very seriously", "because the requirements for cooperation within the European Union are the principles of the rule of law". "We cannot simply hold our tongues and not say nothing for the sake of peace and quiet," she added. In the same month, French PM Emmanuel Macron stated that Poland was isolating itself within the EU and that Polish citizens "deserved better" than a government at odds with the bloc's democratic values and economic reform plans.³⁰

In December 2017, both Merkel and Macron told in a joint press conference that they would support the Commission in case it would decide to trigger Article 7 against Warsaw. In October 2018, both countries condemned Poland for pressing ahead with controversial changes to its Supreme Court despite EU calls for restraint. France's Europe Minister Nathalie Loiseau stated that the country is worried about the decision taken by Polish President Duda to appoint 27 new judges during the same month. "Despite our appeals, Poland has not waited for the rulings of the [ECJ] and has taken decisions which will be difficult to change," she added.³¹

The Polish Foreign Ministry has been saying since 2017 that the changes to the judicial system have been made in line with European standards, and that they have created "the right conditions for a normal functioning" of the Constitutional Court. The government has described the actions and statements of Timmermans as "politically motivated as aimed at stigmatizing a Member State."³²

Poland enjoys the wide support of the Hungarian Government. In November 2017, Hungarian Deputy Prime Minister Zsolt Semjen said the EP's decision to launch Article 7 "is a shame and a

²⁸ http://europa.eu/rapid/press-release_IP-18-5830_en.htm

²⁹ <https://www.euractiv.com/section/future-eu/news/france-germany-dress-down-poland-over-court-reforms/>

³⁰ <https://www.euractiv.com/section/justice-home-affairs/news/merkel-backs-brussels-in-row-with-poland-over-courts/>

³¹ <https://www.euractiv.com/section/future-eu/news/france-germany-dress-down-poland-over-court-reforms/>

³² <https://www.euractiv.com/section/justice-home-affairs/news/supported-by-hungary-poland-defies-eu-over-rule-of-law/>

scandal.” He stressed that the Hungarian government stands at the side of Poland and rules out the adoption of the decision. Furthermore, he confirmed that Hungary would make use of its right of veto.³³ Czech Republic has also announced that it would back Poland in its dispute with the EU.³⁴

On the other hand, some are debating the existence of the problem in itself. Analysts like Piotr Maciej Kaczyński argued in 2017 that the whole matter is a “big misunderstanding”. He defined the changes as part of a simple democratic process: “A new government took power, and it changes realities as it pleases. It is not conducting a coup d’état [...] on the rule of law. It is not doing anything illegal.”

2.2 Shortcomings of the current EU approach (Article 7 TEU)

The shortcomings of the Article 7 approach concern mainly procedural requirements and the political relations between the EU and Poland, and with other Eastern European countries as well.

First, Article 7 entails critical procedural limitations. The proceeding is essentially ineffective as Hungary has for multiple times expressed the willingness to defend the stance of Poland and vowed to veto the triggering of Article 7(3) TEU for the Polish government. This is critical as the procedure requires unanimity in the Council for the provision to be activated, jeopardizing the effectiveness of Article 7 in itself.

Second and therefore, this situation is creating a sort of new “Eastern bloc”, where Eastern European countries seem to be targeted due their infringements of European values. Hungary has also been involved in the triggering of Article 7 as of September 2018, and Romania and Bulgaria seem also to be in the crosshairs of the EU. The Parliament of Romania approved a judicial reform package which was considered as an attempt by the executive branch to take over the justice system,³⁵ and which has already come into force.

According to the analysis of Nicole Koenig,³⁶ Article 7 is so far being discussed in Central and Eastern European context because of the very low perceived independence of national courts, which is also low in some Western European countries such as Italy and Spain. However, she argues that the difference with Eastern European countries concerns the general confidence of citizens in the state. This is assumed to be lower in ex-communist countries. Moreover, attention has been kept on Central and Eastern Europe due to major events, such as the continuous laws enacted by the Polish administration. Therefore, although the independence of courts might be low also in other European countries, this was noticed less by the EU due to a lack of focusing events which can draw the attention of policy-makers to the countries regarding a possible threat to the rule of law.

Third, the Council exhibits unwillingness to go forward with the enforcement proceedings. As Hotham & Nacif state, “a Member State is wary of condemning another for its violation of Article 2

³³ <https://www.euractiv.com/section/justice-home-affairs/news/european-parliament-sets-in-motion-nuclear-option-for-poland/>

³⁴ <https://euobserver.com/justice/140385>

³⁵ <https://www.euractiv.com/section/justice-home-affairs/news/romania-risks-following-poland-down-nuclear-option-path/>

³⁶ <https://www.euractiv.com/section/justice-home-affairs/news/we-lack-alternatives-to-article-7-german-analyst/>

TEU, as this could backfire”.³⁷ The procedure of Article 7 is already corrupting relations between Poland and the EU. The finalization of the Article 7 procedure could possibly end up leading, in the worst case, to a possible exit of Poland from the European Union. The EU is experiencing a time of crisis because of issues such as populism, criticism for lack of institutional democratic accountability, and the Brexit negotiations. In such critical times, the prospect of another triggering of Article 50 TEU is the last thing the EU needs.

The EU is very aware of the risks of crossing lines of national sovereignty, and it is for this reason that the EU institutions are more inclined to resolve matters diplomatically. However, this has led to Poland continuously refusing to cooperate up until the triggering of the “nuclear option,” the application of which is moving forward in a very slow and stagnant motion. The European Council still does not seem willing to move faster towards the triggering of the sanctioning mechanism after the preventive mechanism of Article 7, which is still providing room to Poland to keep ignoring the Commission’s recommendations.

It seems that the threat of the suspension of voting rights for the country is not representing enough for a strong menace, although Poland is the sixth bigger Member State in population and with considerable leverage in policy- and decision-making within the EU, especially regarding military matters. This leads to the fourth limitation of the Article 7 procedure: the lack of a deterrence mechanism. The Treaties do not present any expulsion provision from the Union. Although such a mechanism could be considered very extreme and against the aim of an “ever closer Union” under Article 1 TEU, this could nonetheless be beneficial in ensuring the respect of the rule of law in the EU.³⁸

The news of 23 October 2018 has shown that the threat of financial sanctions has had a positive impact on the multiple requests advanced by the Commission to reform the amendments to the Polish judicial system.

The referral to the ECJ was, so far, the only instrument that was effective at the Polish court level. It needs to be noticed that such event happened within the framework of the infringement procedure, and not that of Article 7. Moreover, the decision to reappoint some judges was taken by the Supreme Court Chief, and not by the Polish government.

This situation provides an ever-stronger argument for the ineffectiveness of Article 7 for the current situation in Poland. Other mechanisms should be considered, together with a possible reform of the current enforcing instruments, if the EU institutions are serious about upholding the European constitutional project and its values. A prospect of reform would significantly increase the legitimacy of the EU’s interventions.

³⁷ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W82Gsy1aaCR>

³⁸ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W82Gsy1aaCR>

3. Future prospects

3.1 Reforming Article 7

An alternative would be that of reforming Article 7 in its substance and procedure. First of all, the requirement of unanimity should be deleted. This would lead to an at least prospective effectiveness of the instrument. Given the present situation for Poland and Hungary and in future prospects, it is unlikely that a country would be left alone without alliances within the current EU political panorama.

Second, an alternative or reformed Article 7 could be introduced in a way that it would sanction all EU values, having a common catalogue of criteria. This would lead to the possibility of periodically checking the observance of values and stimulating sanctions earlier, without having to trigger an instrument that is being recognized as the “nuclear option” and considered as the last resort. This option could be supported by the creation of a dedicated agency, which is further discussed below. If we are to uphold and defend EU values as the core of the Union, then there must be a much more flexible and easily applicable mechanism that would assure the adherence to such fundamental principles of a constant basis.

Third, joint proceedings under Article 7 TEU might be initiated under the condition that two Member States have been determined to pose a threat to the rule of law. The possibility of the Council being entitled to determine the existence of a breach regarding both Hungary and Poland for a single procedure is currently being discussed. Provided that the concerned countries do not participate in the vote, the launch of a joint proceeding would thus make it possible to prevent both states to permanently veto sanctions for each other. However, this possibility might arise debates and discussions regarding the extent of the EU’s power to step over a state’s national sovereignty, as this has the risk of turning the unanimity requirement into a majority vote.³⁹

Fourth, another reform would be that of implementing other sanctions under Article 7 TEU, and not only the suspension of voting rights as the most severe form of punishment. This pre-emptive measure does not seem to represent a very strong punishment, especially in times of crises of the EU, where populist rhetoric has been taking over the political arena and national decision-making is increasingly regarded as more important and influential than that at EU level. There is a need for judicial overhauls that breach the rule of law and the independence of the judiciary to face more real, punitive measures, which would furnish Article 7 with more deeply entrenched gravity, giving the procedure greater legal and political legitimacy. Therefore, stronger enforcement mechanisms such as financial sanctions would be more effective.

3.2 Linking the rule of law with financial aid

Following the argument outlined above, another alternative to Article 7 could be that of linking the adherence to fundamental rule of law principles with the conditional receipt of sums under the cohesion fund system. Such proposal was first advanced by Germany in May 2017, who suggested that countries that fail to meet EU standards on the rule of law could lose access to financial aid. This move would highly affect the countries that are net recipients of cohesion funding, such as

³⁹ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1230#.W9BgWC1aaCR>

Poland and Hungary, who have both received large sums. Germany proposed that funds could be blocked to those countries that ignore the Commission's recommendations to withdraw or reform the amendments advanced contradicting EU law and values.⁴⁰

In May 2018, the European Commission introduced a Regulation⁴¹ including such proposal. The draft legislation is currently being discussed in the Council (September 2018). The proposal indicates, under Preamble paragraph 6, that horizontal financial rules adopted by the EP and the Council on the basis of Article 322 TFEU apply to the Regulation. "Rules adopted on the basis of Article 322 TFEU also concern the protection of the Union's budget in case of generalized deficiencies with regard to the rule of law in the Member States, *as the respect for the rule of law is an essential precondition for sound financial management and effective EU funding.*"⁴² Paragraph 3 of the explanatory memorandum recites that "respect for the rule of law is covered in a self-standing regulation based on Article 322 TFEU."⁴³

Therefore, according to the Regulation, funding would be suspended if a violation of the rule of law is detected in a country. This would particularly affect Southern and Eastern Member States, as they are more dependent on structural funds.⁴⁴ However, there is a need for such a provision to be included in the Regulation as a proper Article and formal mechanism, rather than merely being present in the Preamble of the legislative act. The provision would then be conferred higher legal authority and power.

The major question is whether the Regulation should be discussed in the context of the negotiations on the next Multiannual Financial Framework (MFF). The German proposal of May 2017 said that the discussions about future cohesion policy cannot be seen in isolation but must be discussed in the context of the future MFF and its role in the implementation of the EU's priorities.⁴⁵ However, if the Regulation was not to be decoupled from the package of the MFF, it would have to be adopted unanimously by the Council as all the rest of the Directives in the MFF.

Instead, the Regulation should be based on the ordinary legislative procedure, where only the majority of the Council would be sufficient. The Council Legal Service is currently assessing whether this option is feasible.⁴⁶ This would allow for a safe implementation of the Directive, notwithstanding countries such as Poland, Hungary, Bulgaria and so on, which would surely block the progress of the legislative act.

⁴⁰ <https://www.euractiv.com/section/central-europe/news/germany-to-propose-cutting-funds-to-eu-members-that-violate-rule-of-law/>

⁴¹ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument.

⁴² Ibidem, p. 13.

⁴³ Ibidem, p.5.

⁴⁴ <https://www.euractiv.com/section/justice-home-affairs/news/we-lack-alternatives-to-article-7-german-analyst/>

⁴⁵ <https://www.euractiv.com/section/central-europe/news/germany-to-propose-cutting-funds-to-eu-members-that-violate-rule-of-law/>

⁴⁶ <https://www.euractiv.com/section/justice-home-affairs/news/we-lack-alternatives-to-article-7-german-analyst/>

Poland is the country that receives the most financial allocations, among the EU 28, in total under the European Regional Development Fund, European Social Fund, Cohesion Fund, and the Youth Employment Initiative within the 2014-2020 period.⁴⁷ If the Regulation was to be adopted, it would represent a real instrument for adherence to EU law more effective than the triggering of Article 7 procedure, including the threat of suspension of voting rights. The conditionality of receipt of funds is a much more real warning. The suspension of funds means a lot less money for the countries concerned, and this would have a very concrete negative impact on the economy of Poland. This is a prospect any government would not wish for the economic development of its country.

3.3 Mechanisms and structures outside of the Treaty framework

New enforcement mechanisms could be introduced as an *extra-acquis* course of action, i.e. outside of the Treaty framework. One type could be an *ad hoc* intervention. This was seen in the case of the rise of the FPÖ in Austria in 2000, where the government formed a coalition with Jörg Haider's far-right Freedom party. 14 Member States immediately imposed bilateral sanctions outside of the scope of the Treaties, rather than activating the Article 7 procedure.⁴⁸

Another option would be that of creating a formal body or structure, external to the Treaty framework, with the sole responsibility of upholding and monitoring the respect of EU values, including the rule of law. Therefore, the attention of the EU institutions and policy-makers would be directed to their primary agenda, without having to shift the focus to such crises and in so doing increasing the magnitude of the problem due to heightened public attention, media coverage and pressure. The nature and structure of this body would depend on the political commitment of the Member States to actually respect and ensure the respect of EU principles.⁴⁹ The facility, agency or oversight body would be parallel to that of the other EU bodies, ensuring dedicated efforts to the uphold and oversight of the upholding to the EU values of all Member States. Checks could be carried out on a periodical basis, perhaps also with the support of annual conferences and meetings of EU Ministers concerned, or even national judges or representatives.

3.4 Combinations and changes with other Treaty articles

Lastly, it has been argued that Article 7 would be more effective if combined with other Treaty articles. One option would be that of linking Article 2 with the enforcement procedure with Article 258 TFEU. Such infringement was indeed launched in July 2018 by the Commission against Poland, although based on concerns about, inter alia, Article 19 TEU (i.e. regarding the independence of judges). The mechanism seems to be having its positive effect, in that the threat of financial sanctions by the ECJ was the sole reason behind the first proactive response by the part of the Supreme Court Chief in October 2018. Given that the unanimity block is not provided under Article 258 TFEU, triggering the Article regarding violations of the rule of law would represent a circumvention of Article 7 TEU. It would thus be necessary to link the triggering of Article 258 TFEU also on the grounds of breach of the Article 2 TEU values.

Lastly, adding a fining mechanism directly to Article 7 could be one direct solution. This would be along the lines of Article 260 TFEU (failure to comply with rulings of the ECJ under the Article

⁴⁷ <https://cohesiondata.ec.europa.eu/2014-2020/2014-2020-Financial-Allocations-by-Member-State-Br/pi4w-3vc9>

⁴⁸ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W82Gsy1aaCR>

⁴⁹ <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1274#.W82Gsy1aaCR>

258 TFEU infringement procedure). However, the amendment to include fines to Article 7 would have to be made in accordance with Article 48 TEU, i.e. the ordinary revision procedure of Treaty articles. Accordingly, Member States are required to vote in consensus. Once again, this would be difficult to acquire considering the opposition of not only Poland, but also Hungary and perhaps other Eastern (and not only) European countries. Moreover, the amendment procedure is a very long and costly one.

4. Conclusions

The PiS party has been introducing amendments to the judicial system since coming into power in 2015. The Commission has put continuous effort to block and revert these amendments, and the situation of stalemate seems to have unlocked in October 2018. However, this was not due to the Article 7 EU procedure initiated in December 2017 against Poland, but due to the ECJ's ruling under the Article 258 TFEU infringement procedure that threatened financial sanctions.

On the one hand, this situation reveals the multiple shortcomings of the “nuclear option” mechanism, and, on the other hand, the power of instruments involving fines or possible financial aid suspensions. In the light of the current developments, these considerations should be taken into account and lead towards a reform of the Article 7 mechanism, or the creation of new formal authorities dedicated to the respect of EU values. Moreover, new systems could be implemented outside of the scope of the Treaties.

The current circumstances in Poland also reveal the flaws of the unanimity rules within EU policy- and decision-making. The effectiveness of the Article 7 procedure is significantly altered due to the impossibility for a positive unanimous vote to be carried out, due to the alliance between Poland and Hungary, and possibly other Eastern European Member States. Moreover, even the reform of Article 7 in itself is dependent on the existence of a consensus within the EU.

The EU needs to be reformed in its deepest. The Treaties are the building blocks of the EU, but they are not made of stone. They can and should be changed as the EU should adapt to our times and the increasing challenges the EU Member States are facing and are going to face. We shall address these challenges as a strong Union, ready and prepared to respond to internal crises, ready to solve them and to move forward, as a “ever stronger Union” than before.

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