

# STEPS TOWARDS THE PROTECTION OF THE RULE OF LAW IN THE EUROPEAN UNION



Alexandros Politis  
Academic Assistant, College of Europe, Law Department



College of Europe  
Collège d'Europe



Rule of law is one of the main values on which the European Union is founded, laid down in Article 2 TEU. The rule of law ensures that authorities act with respect to the law and under the control of independent and impartial courts. Even though there is no hierarchy between these values, no other value can be guaranteed in a Member State if the rule of law has been compromised.

Article 7 TEU grants to the EU institutions the possibility to monitor whether Member States act in compliance with the values of Article 2 TEU. According to Article 7(1) TEU, the Council can determine that there is a “*a clear risk of a serious breach*” of the EU values. Article 7(2,3) TEU provides for a mechanism which can lead to the imposition of sanctions against Member States when “*a serious and persistent breach*” is established.

Due to the recent rule of law “backsliding” in Hungary and Poland, the EU institutions made attempts to trigger the procedure of Article 7(1) TEU. For this procedure to be initiated, the European Commission, the European Parliament or one third of the Member States have first to submit a reasoned proposal to the Council.

Since 2011, Hungary has repeatedly put at risk the rule of law by, *inter alia*, limiting the powers of its Constitutional Court and suddenly lowering the judges’ retirement age. In addition, recent legislation such as on media ownership, NGOs, foreign universities (e.g. Central European University), minorities and refugees

run contrary to other EU values. Against that backdrop, the Parliament adopted from 2012 to 2017 Resolutions calling Hungary for legislative reforms. In the absence of a positive response, the Parliament issued a reasoned proposal on 12 September 2018.<sup>1</sup>

On the other hand, the Commission focused on the rule of law crisis in Poland. Since 2015, the Polish justice system has been significantly affected because, among others, of the lowering of the judges’ retirement age and the politically influenced appointment of new judges in the Supreme Court, the government’s refusal to publish the Constitutional Court’s judgements and the political interference in the composition of the Constitutional Court. Given the lack of improvements, the Commission, after applying from 2016 to 2017 its “Rule of Law Framework”<sup>2</sup>, which provides for specific steps for a dialogue with the Member State concerned and concrete recommendations, submitted a reasoned proposal on 20 December 2017<sup>3</sup>.

<sup>1</sup> European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, (2017/2131(INL)).

<sup>2</sup> Commission, Communication of 11.3.2014 to the European Parliament and the Council, a new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

<sup>3</sup> European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law of 20 December 2017, COM(2017) 835 final.



In this respect, the Commission was proved more effective than the Parliament in concluding its investigation. The Commission's reasoned proposal on Poland was drafted after a 2 years "monitoring" and contains a well substantiated Commission's own reasoning. On the other side, it took 6 years for the Parliament to draft its proposal on Hungary, most of which is based on the conclusions of other international bodies. Despite the above, the Commission was criticised for procrastinating the enactment of the procedure of Article 7(1) TEU.<sup>4</sup> Nonetheless, the Commission, due to its supranational nature, can conduct thorough dialogues and take decisions even in the detriment of the Member States' interests. On the contrary, the national ministers are reluctant to disrupt the political balance in the Council. Therefore, the Commission, by putting forward an analytical proposal, exercises much more pressure to the Council to react than if there were only some observations on its table. In addition, though, the possibility of putting into force the "sanctioning mechanism" of Article 7(2,3) TEU was in any way already "dead". Article 7(2) TEU provides for a unanimous vote of all members of the European Council except for the one which is under scrutiny. Since the vote against Poland and Hungary would take place separately, both countries declared that they would not vote against each other.

In parallel, the Commission made use of the infringement procedure of Article 258 TFEU in order to lodge actions against Hungary and Poland concerning some of their legislative reforms. In that regard, the Court of Justice condemned Hungary<sup>5</sup> for violating the principle of non-discrimination on the ground of age,

<sup>4</sup> G. HALMAI, The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States, *EUI Working Papers*, pp.11-14.

<sup>5</sup> Judgment of 6 November 2012, C-286/12, *Commission v Hungary*, EU:C:2012:687.

as enshrined in the Directive 2000/78/EC<sup>6</sup>, and found, by way of interim measures, that Poland<sup>7</sup> possibly acts at variance with Articles 19(1) TEU and 47 of the EU Charter. Even though the Hungary's compliance was not the most desirable, Poland introduced amendments in the Law on the Supreme Court eliminating provisions on the forced retirement of the judges, which entered into force on 1 January 2019. There is though one important limitation on the use of Article 258 TFEU: it can address only non-compliance within the scope of EU law while Article 7 TEU aims at remedying situations which fall both within and outside the scope of EU law given that some aspects of the EU values fall in areas where the Member States act autonomously.

The Commission also proposed in May 2018 a Regulation<sup>8</sup> which provides for the cutting, limitation or suspension of EU funding to Member States in case of a generalised deficiency as regards rule of law. The "raison d'être" of this proposal is that the Member States which cannot secure the rule of law are unable to guarantee a sound financial management of EU funds. The Parliament supported this proposal on 17 January 2019.

In sum, even though the EU seems to not promptly and efficiently tackle the "rule of law violations", its efforts are to be welcomed. The Commission has attempted to defend its role as a "guardian of the treaties" through several means. What is still missing is the political willingness of the Member States to confirm that the EU is a union of values, without being constrained by the possible political risks.

<sup>6</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

<sup>7</sup> Order of the Court of 17 December 2018, C-619/18 PPU, *Commission v Poland*, EU:C:2018:1021.

<sup>8</sup> Commission, Proposal of 2.5.2018 for a Regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule in the Member States, COM(2018) 324 final.