



The home straight: the EU mechanism for defending the rule of law

Commentary

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The discussion about new mechanisms for defending the rule of law in the European Union is entering its decisive stage. However, the scale of the newly-announced report by the European Commission on the state of the rule of law in the EU is not commensurate with the size of the problem. The same is true of the current version of the draft legislation on introducing a mechanism making the disbursement of EU funds conditional on a member state respecting the rule of law. If the European Parliament and the “Group of Friends of the Rule of Law” do not show determination, this unique opportunity to halt the erosion of the EU’s foundations will be wasted.

From a long-term perspective, the rule of law crisis is the most serious threat to the EU’s future. Without independent courts in all member states, a common legal area – the essence of the European project – cannot function. In the long term,

democratic systems cannot coexist with partially or entirely authoritarian systems if this coexistence is based on mutual trust and shared values and rules. The situation in Poland triggered an unprecedented “rule of law revolution”¹ that involved the European Commission taking active steps (anti-infringement proceedings) alongside the Court of Justice of the European Union (CJEU) to address problems concerning judicial independence in EU member states. The CJEU’s February 2018 judgment was ground-breaking. It opened the door to the Court using Article 19 of the Treaty on European Union (on the need to secure effective legal protection in all member states, known as the “Portuguese judges’ case”) to initiate judicial proceedings. Regardless of the

¹ P. Buras, *The EU must defend its rule-of-law revolution*, July 11, 2019, https://www.ecfr.eu/article/commentary_the_eu_must_defend_its_rule_of_law_revolution, here and further access on October 5, 2020.

importance of this breakthrough, the interventions by the Commission and the CJEU failed to prevent a drastic deterioration of the situation, especially in Poland and Hungary. This can be seen in numerous reports by international institutions, including the Commission itself, and by the Article 7 TEU procedures launched against both countries, as part of which serious threats to the rule of law may be identified. The anti-infringement proceedings in the CJEU based on Article 19 are also proof of this. This explains the plans to create further instruments at the EU level to better monitor the situation and respond to threats.

Report on the status of the rule of law in the EU

On September 30, the Commission published its first annual report on the state of the rule of law in the EU and its individual member states.² This report aims to supplement the EU's arsenal of measures for enforcing European norms and values. It is meant to have a preventative function and to discourage governments from violating the rule of law by including their actions in the Commission's observations. It also aims to legitimise EU measures defending the rule of law in individual countries by showing that they are based on objective comparative analysis and that member states are treated in a uniform manner. In practice, it will certainly be referred to in the debate on the rule of law in the EU.

The publication of the report completes the yearly cycle, which includes monitoring the state of the rule of law in all member states led by the Commission and consultations with stakeholders (mainly national governments and social organisations). The report focuses on four areas, regardless of the country: the state of the judiciary, fighting corruption, media pluralism and the division of powers (checks and balances).

² Report on the situation in the EU: https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf.

The reports do not refer to all issues connected to the rule of law, such as the situation of minorities, the functioning of law enforcement and security services and the accountability of the public administration. The Commission plans to phase in a catalogue of issues in coming years. The time-frame is limited to the past year, although, in some places, earlier events are mentioned, too.

Most of the issues causing the Commission "concern" relate to the situation in Poland and Hungary. However, the Commission has identified areas in all the member states where improvements are recommended. There are clearly more objections concerning countries in Central Europe. Besides Poland and Hungary, this encompasses Croatia, the Czech Republic, Bulgaria and Romania. Malta has an extensive file, too.³

With reference to Poland, considerable space is given to the judicial changes adopted by the Polish government. A raft of government steps limiting the independence of the Constitutional Tribunal, Supreme Court and the common courts were noted. The politicisation of the Prosecutor General's Office was also mentioned. The report includes issues that were not previously the subject of heated debate between Poland and the EU. These include how the media market functions (fears about the politicisation of regulatory bodies) and the legislative process (legislative standards are being violated when legal acts are adopted). This may raise questions about whether the politicisation of the National Broadcasting Council and the National Media Council will become the next field of political tensions between Poland and the Commission, since the EU has considerable powers in this area. However, there were relatively few reservations about the countering and fighting of corruption.

The report does not add any new knowledge about the rule of law situation in Poland (and

³ Reports on the rule of law situation in individual member states: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en.

Hungary), beyond what the Commission and institutions cooperating with it have been writing for years.⁴ The report's greatest weakness is the lack of an overall evaluation. Instead, it mentions individual facts. In other words, the report's authors can see the trees, but not the forest (or they do wish not to see it). It does not state anywhere that we are dealing with a systemic threat to the rule of law or democracy in a particular country. This is particularly noticeable given how, for example, the Venice Commission, has long issued legal opinions about the threat of a "Soviet model of the judiciary" in Poland and how various international institutions have deemed Hungary a semi-authoritarian country.

This may be seen as a slight political cop-out typical of the Commission, which is unwilling to take on the role of the lead defender of the rule of law and would rather member states take political responsibility for the enforcement of European values. Meanwhile, as Daniel Hegedüs aptly noted, "the Commission is a stakeholder in the rule-of-law dialogue with the member states, not an external third party", as it is bound to defend the treaties.⁵ The report's weight will therefore be seriously limited.

The report fails to indicate what kind of measures the Commission – not to mention the EU as a whole – should use when countries consistently violate the principles of the rule of law. The EU's current ineffectiveness does not stem from ignorance of the situation in countries such as Poland and Hungary. Rather, the available instruments are insufficient and there is a lack of political will to use the means available consistently. The report will not serve as an impulse for more robust policy against the countries with the deepest crisis of democracy. It might provide a point of reference if the political will for more concrete

action, such as the suspension of EU subsidies, emerges. However, other published documents can also serve this purpose; for example, as part of the Article 7 procedure.

As a result, the opportunities for a cyclical monitoring and consultation process, and the prospect of similar reports in the future, will almost certainly not discourage the government in Warsaw or Budapest from continuing policies that subordinate democratic institutions. Over the past year, these two countries have taken further steps that violate the rule of law, knowing that their actions would be recorded. The Hungarian government's statement that it is breaking off contact with the European Commissioner for Values, Věra Jourová, on the eve of the report's publication, alongside the joint decision by Warsaw and Budapest on forming their own Polish-Hungarian institute for comparative research on the rule of law in the EU, demonstrate these countries' governments' resilience to criticism, as long as it is not accompanied by serious restrictions. Therefore the discussion on a mechanism that would help the EU institutions use the most powerful instrument at their disposal to defend the rule of law is much more important than the publication of this report. That most powerful instrument is, of course, access to European funds.

The conditionality mechanism

On September 30, 2020 the Council of the European Union adopted a position on the regulation on the protection of the EU budget in case of breaches of the rule of law.⁶ This is a draft of the most important mechanism being discussed on defending the rule of law. It will make the allocation of EU funds conditional on respecting

4 Report on the rule of law situation in Poland: https://ec.europa.eu/info/sites/info/files/pl_rol_country_chapter.pdf

5 D. Hegedüs, *The European Commission Missed Rule-of-Law Opportunity*, October 1, 2020, <https://www.gmfus.org/blog/2020/10/01/european-commissions-missed-rule-law-opportunity>.

6 <https://www.consilium.europa.eu/media/45842/regulation-of-the-european-parliament-and-of-the-council-on-a-general-regime-of-conditionality-for-the-protection-of-the-union-budget.pdf>.

the rule of law.⁷ The Council's adoption of the position is of crucial significance when it comes to the legislative procedure. The Commission initiated it when presenting draft legislation in May 2018⁸ and the European Parliament sent the Council its position after the first reading in 2019.⁹ The Council has failed to adopt a position since then, which reflects the difficulty of member states reaching an agreement. This has halted the legislative procedure, with the risk that it will be entirely blocked. The resolutions at the EU summit in July 2020, which expressed a desire to introduce a mechanism for defending the rule of law,¹⁰ finally opened the door to an amended version of the draft and a decision enabling further proceedings.

Despite this progress, the draft EU regulation adopted by the Council (submitted by the current holder of the EU presidency, Germany) contains fundamental changes in its stance on the Commission's original proposal. If they are accepted by the Parliament, they will markedly limit the ability to apply the conditionality mechanism. This watering down of the draft is why the so-called "Group of Friends of the Rule of Law" (i.e. the Netherlands, Denmark, Belgium, Finland and Sweden) joined Poland and Hungary (which

oppose the very idea of the mechanism) in opposing the position's adoption by the Council of the EU.¹¹

The key change concerns the conditions in which the Council may impose this type of restrictive measures. The current version states that it may do so when "breaches of the principles of the rule of law in a Member State affect **in a sufficiently direct way** [authors' emphasis]" the management of EU funds or its financial interests. It differs from the original version in that it does not assume that situations of "general deficiencies of the rule of law" and where "risk" already has occurred will negatively affect how funds are managed. The new wording therefore narrows the criteria for triggering the mechanism to the extent that using it to counter, for example, the systemic breach of judicial independence (like in Poland) will be exceptionally difficult, if not impossible. This is because it would require proof that, for example, the disciplinary system violating the standards of independence has a clear and direct bearing on how funds from the EU budget are distributed in Poland.

In its current form, the regulation assumes a decision-making process that would make use of the mechanism unlikely, even in cases where objective circumstances justify its use. A decision to punish a member state will require a qualified majority in the Council of the EU. In other words, 15 countries, representing at least 65% of the population, need to agree. Admittedly, this is a lower threshold than for the completely dysfunctional Article 7 procedure (where the risk of a threat to the rule of law in another member state requires a four-fifths agreement, between 22 EU states). However, it is high enough to raise doubts about whether it is achievable. Moreover, the position adopted by the Council of the EU introduces additional safeguards for countries that

7 For more, see S. Ananicz, *Pieniądze za praworządność: czy na pewno?*, https://www.batory.org.pl/wp-content/uploads/2020/08/Pieniadze-za-praworzadnosc_Komentarz.pdf.

8 *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*, May 2, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018PC0324>.

9 Legislative train regarding the draft regulation: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0136\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0136(COD)).

10 P. Buras, *Po szczytce UE – batalia o praworządność wciąż trwa*, July 28, 2020, https://www.batory.org.pl/blog_wpis/po-szczytce-ue-batalia-o-praworzadnosc-wciaz-trwa/.

11 EU-Staaten überstimmen Ungarn und Polen im Rechtsstaatsstreit, September 30, 2020, <https://www.spiegel.de/politik/ausland/eu-staaten-stimmen-fuer-deutschen-plan-zu-finanzsanktionen-bei-rechtsstaatsverstoessen-a-94dec2dd-7105-49a5-8ff0-3d791e980e4c>.

the rule of law mechanism may be used against. In “exceptional” situations (no definition of is provided), these countries can postpone – for up to three months – an unfavourable decision by the Council of the EU, sending the case to be considered by the heads of state and government (the European Council). It is unclear what role discussion at EU summits would play in this case. Nevertheless, in practice, the principle of unanimity in force there means that including the European Council could result in a quasi-veto, allowing countries to block decisions imposing financial sanctions.

The political game

In the context of this report, representatives of the Commission have been talking about measures aimed at preventing a rule of law crisis. In addition, Angela Merkel has recommended the draft mechanism adopted by the Council of the EU as a “compromise”. However, much suggests that, in both cases, there are doubts concerning the steps’ effectiveness. The fate of the legislation on the conditionality mechanism – more in a political than a formal sense – is part of the complicated mosaic of interests in the budget negotiations that are drawing to a close. Both the Commission and the German presidency would like the EU budget to be passed as quickly as possible, especially since it is linked to the so-called “recovery and resilience” fund, which will provide economies affected by the pandemic with financial assistance. The legislation’s final shape and effectiveness will largely depend on the positions of the Parliament and of the “Group of Friends of the Rule of Law”, which includes some of the largest net contributors to the EU budget.

The draft regulation is now the subject of negotiations between the Parliament and the Council of the EU (as part of the “trilogue” procedure). Establishing an effective mechanism for defending the rule of law is a priority for the Parliament in its budget negotiations (in its resolution passed

in July, it was mentioned in first place).¹² Nevertheless, the pressure to quickly adopt the budget, along with the nature of the negotiations, suggest that the Parliament will be unable to push through all its demands. This raises another crucial question concerning which points the Parliament will be forced to or inclined to make concessions on. Its other demands include increasing budget funds for future EU goals. In this, the Parliament will face clear resistance in the Council of the EU from the so-called “frugal four” (Denmark, Sweden, the Netherlands and Austria), who will stick to the compromise reached at the EU summit in July.¹³ Although the issue of budget spending divides the Parliament and the “frugal four”, both these stakeholders place a strong emphasis on the rule of law. Cooperation in this issue (with the aim of strengthening the Council of the EU’s proposal) could provide the Parliament with compensation for the lack of an agreement on increasing spending. It could also allow it to save face after the negotiations, despite the lack of success in this area.

The budget negotiations are not formally tied to the rule of law mechanism. A regulation on the matter could be adopted independently of the conclusions on the size of the budget or how it is financed. However, in political terms, all these problems are packaged together and it is difficult to approach them in isolation. This is because the extraordinary recovery and resilience fund (de facto an additional EU budget) means that the EU needs to make a decision on how it will be funded (the decision concerns the EU’s so-called “own resources”). This requires the approval of all the member states and their parliaments. While Poland and Hungary cannot block legislation on

¹² *Conclusions of the extraordinary European Council meeting of July 17–21, 2020*, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0206_EN.pdf.

¹³ A. Smoleńska, P. Wiejski, *Nowelizacja budżetu UE: ocean i perspektywy*, https://www.batory.org.pl/wp-content/uploads/2020/06/Nowelizacja-budzetu-UE_Komentarz.pdf.

the mechanism for defending the rule of law, which would be passed by a qualified majority in the Council of the EU, they can make their support for own resources dependent on whether the mechanism meets their expectations. Yet by withholding their support for this decision, which is so crucial for the budget, these countries would be cutting off the branch they are sitting on. It would delay the budget's adoption and therefore the payments from the recovery fund that Poland and Hungary expect to receive significant funds from. Nevertheless, these two countries' governments seem very determined to prevent the EU from introducing an effective mechanism protecting the rule of law.¹⁴ Indeed, Viktor Orbán stated that he is prepared to veto the adoption of the EU recovery fund if it is tied to the rule of law conditionality.¹⁵ Nevertheless, net contributors' bargaining power is greater; these countries are less concerned about adopting the budget and recovery fund, since they are not direct beneficiaries of them. The sequence in which the individual documents are adopted will be crucial.

Conclusions

Linking payments from the EU budget to respect for the rule of law may be the EU's most effective defence mechanism for dealing with the most serious crisis it faces. The European Parliament and the countries involved in defending the rule of law should ensure that the conditionality mechanism adopted can function effectively. In particular, when negotiating with the Council of the EU, the Parliament should make its support dependent on the following conditions being met:

- Systemic breaches of judicial independence should be clearly mentioned as “conditions” that can trigger the conditionality mechanism and the reference to “sufficiently direct” influence on how EU funds are managed should be withdrawn as a fundamental criterion;
- The “safeguard” of appealing to the European Council should be removed.

In addition, the Parliament should accept the European Stability Initiative think tank's proposal that failure to comply with Court of Justice of the European Union judgments concerning Article 19 (on effective legal protection) result in the European Commission requesting that the country lose access to the EU funds.¹⁶ Firstly, this would substantially strengthen the EU's most important instrument protecting the rule of law, the anti-infringement procedure (with reference to judicial independence), with a crucial role for CJEU judgments. Secondly, the purpose would not be to punish countries, but to deter them from breaching the fundamental principle that CJEU judgments must be respected, especially those concerning the foundation of the EU's activity, the rule of law (hence the extraordinary financial sanctions). Any government considering limiting judicial independence would be aware that it would eventually receive CJEU judgment and that, if it ignores it, it will face the real threat of a large fine. This solution – even if it is restricted to cases “only” affecting judicial independence – would be more powerful than the solutions currently being put forward, with their merely theoretical effects.

¹⁴ M. de La Baume, H. von der Burchard, D.M. Herszenhorn, *Poland joins Hungary in threatening to block EU's budget and coronavirus recovery package*, September 18, 2020, <https://www.politico.eu/article/poland-joins-hungary-in-threat-to-block-eus-landmark-budget-and-recovery-package/>.

¹⁵ Euractiv, *Orbán: If rule of law debate stalls, we can bypass EU framework for financing*, October 5, 2020, <https://www.euractiv.com/section/justice-home-affairs/news/orban-if-rule-of-law-debate-stalls-we-can-bypass-eu-framework-for-financing/>.

¹⁶ *An Article 19 Mechanism – The need for a robust defence of EU rule of law*, July 23, 2020, <https://www.esiweb.org/publications/article-19-mechanism-need-robust-defence-eu-rule-law>.

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