

Rule of law in Poland – a testing opportunity for EU's mechanisms

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This brief provides an overview of the rule of law situation in Poland, as well as the measures taken by the European Union (EU), as a reaction to the violation of the judiciary's independence in this Member State.

Values such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights, are the EU's foundation.¹ Unfortunately, the Union is currently faced with a **backslide of one of the aforementioned values – the rule of law**, that can be defined as “*the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party*”.² Rule of law backsliding represents a serious **existential threat to the EU**, because it leads to the establishment of electoral autocracies, where although elections are seemingly free, they result in continuous solidification of the position of one political party and the end effect is transformation in a one-party system. These tendencies are evident in Poland, a Member State of the EU which no longer has an independent judicial system, thus triggering the Union to initiate several mechanisms available for the solution of such problem.

The dialogue pursuant to the Rule of law framework

The application of the rule of law principle in Poland has been closely monitored for a long time, as **deteriorations of the functioning of the legislative and electoral system, the independence of the judiciary and the degree of protection of citizens' fundamental rights have been identified**. In October 2015, parliamentary elections were held and the opposition Law and Justice Party (*Prawo i Sprawiedliwość – PiS*) won.³ Subsequently, the new government, as part of its conservative and Eurosceptic policy, made a number of controversial changes in the judiciary regarding the appointment of judges to the Constitutional Court, the appointment of public prosecutors, their promotion and sanctioning, disregard for Constitutional Court rulings, and lowering the retirement age for Supreme Court judges. In response to these actions, on 13 January 2016, the European Commission (EC) announced that it would conduct a **preliminary assessment of the situation pursuant to the Rule of Law Framework**.⁴ This, then new, instrument, adopted in 2014, is defined as a **procedure**

1 Determined in Article 2 of the Treaty on the European Union.

2 The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values, Laurent PECH, Petra BÁRD, Policy Department for Citizens' Rights and Constitutional Affairs – Directorate-General for Internal Policies, PE 727.551, February 2022, p. 15.

3 'Poland elections: Conservatives secure decisive win', BBC, 26 October 2015, <https://www.bbc.com/news/world-europe-34631826>.

4 Readout by First Vice-President Timmermans of the College Meeting, European Commission Press Corner, 13 January 2016, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_71.



preceding the activation of Article 7 of the Treaty on the EU (TEU),⁵ which consists of a continuous dialogue between the Member State concerned and the EC, consisting of three phases. Based on a thorough fact-check, the EC begins assessing whether there is a systemic threat to the rule of law. If such threat is established, then the EC shall initiate a dialogue with the Member State concerned, by sending a warning on compliance with the rule of law principle, in the form of an opinion. In the second phase, if the issue has not been resolved, the EC sends a public recommendation on compliance with the rule of law to the Member State concerned, setting a deadline for a final solution to the situation. The final stage of this procedure is monitoring how the Member State implements the recommendation, and if it is not complied with, there is always the possibility of initiating a procedure in accordance with Article 7 TEU.⁶

In the first half of 2016, the Polish government made little progress in addressing the rule of law issues, thus the EC adopted an opinion expressing its concern regarding Poland's situation on 1 June 2016.⁷ Despite the opinion given, the EC still considered that the key threats to the rule of law in Poland had not been removed, which is why, on 27 July 2016, it adopted a **recommendation on the rule of law**, aiming for effective functioning of the Constitutional Court in the country.⁸ This document contains five concrete recommendations, which were supposed to be implemented within three months. However, the Polish Ministry of Foreign Affairs issued a statement characterizing these recommendations as interfering in Poland's internal affairs, violating the principles of objectivity, sovereignty, subsidiarity and national identity, concluding that the **EC did not have sufficient knowledge of the functioning of the Polish legal system and the work of the Constitutional Court.**⁹ Hence, the Polish government boldly rejected EC's recommendation claiming it was groundless, that could be attributed to the support that Poland expects from Hungary, in case of initiation of the Article 7 TEU procedure.

Article 7 TEU procedure

Article 7 TEU includes a **prevention mechanism** in the event of a clear risk of serious breach of EU values (paragraph 1) and a **sanctioning mechanism** in the event of a serious and persistent breach of those values (paragraphs 2 and 3). In December 2017, the EC decided to initiate a procedure against Poland in accordance with the first paragraph of Article 7, because, according to it, several laws were adopted for a period of two years, that affect the overall structure of the judicial system in Poland, in a such manner that the legislature and the executive branch are trying to influence the composition, competencies, administration and functioning of the judicial branch.¹⁰ This procedure was initiated by a **reasoned proposal from the EC to the Council of the EU**,¹¹

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1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
 4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
 5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.
- 6 Speech: A new Rule of Law initiative, Viviane Reding, Vice-President, European Commission Press Corner, 11 March 2014, Strasbourg, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_202.
 - 7 Commission adopts Rule of Law Opinion on the situation in Poland, European Commission Press Corner, 1 June 2016, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2015.
 - 8 Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, C/2016/5703, OJ L 217, 12.8.2016, p. 53-68.
 - 9 'Systemic Threat to the Rule of Law in Poland: What should the Commission do next?', Laurent Pech, VerfBlog, 31 October 2016, <https://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next/>, DOI: 10.17176/20161031-160113.
 - 10 Rule of Law: European Commission acts to defend judicial independence in Poland, European Commission Press Corner, 20 December 2017, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367.
 - 11 'EU launches process to slash Hungary's funds over rule-of-law breaches', Lili Bayer, 5 April 2022, <https://www.politico.eu/article/eu-commission-to-trigger-rule-of-law-budget-tool-against-hungary/>.

which was supported by the European Parliament (EP) with a **Resolution, adopted on 1 March 2018**.¹² Although several hearings with the Polish authorities and the Council of the EU have taken place thus far, Member States are still avoiding the next step under Article 7 TEU - the moment of voting whether there is a risk of a serious breach of EU values.

Proceedings before the European Court of Justice

Given the indolence of the Council of the EU in the procedure under Article 7 TEU, the «arena» for the solution of the rule of law problem in Poland has been moved to the European Court of Justice (ECJ). Namely, the **EC initiated two proceedings against Poland before the ECJ**, claiming it does not comply with Article 19 (1) TEU.¹³ The Commission underlines that Member States are obliged to provide a system of legal remedies ensuring effective legal protection in fields covered by EU law, thus national bodies deciding on the application or interpretation of EU law must meet the judicial independence requirement. The ECJ upheld the breach of the obligation contained in this provision in its judgments of June¹⁴ and November¹⁵ 2019.

In addition, **the EC initiated proceedings before the ECJ regarding the new disciplinary regime for judges**. This regime subject judges to disciplinary investigations, proceedings and sanctions based on the content of their rulings. By the judgment in this case, the ECJ reaffirmed that the independence of the judicial system in Poland had deteriorated and the obligations contained in Article 19 (1) TEU had been violated.¹⁶

Financial reward instead of sanctions

Aside from the abovementioned judgments, the ECJ has made additional decisions on preliminary rulings requests submitted by Polish judges, orders for interim measures, and currently there are ongoing proceedings against Poland before the Court.¹⁷ Other than the mechanisms already used by the EU, **the question of the application of the new conditionality mechanism**¹⁸ against Poland is still open. However, the EC decided to move in the opposite direction - **a plan for economic recovery** from the COVID-19 pandemic was approved this month, allowing Poland access to almost € 36 billion in grants and cheap loans from EU funds.¹⁹ The EU financial support comes as a reward for Poland's efforts to help Ukraine during the war, as well as pursuant to the promise given of serious reforms to free the dependent judiciary. The EC has pledged to monitor them closely, albeit there is a **risk that this move could create a practice of "forgiving" rule of law violations** when it is clear that there is still much work to be done to achieve the final goal, which is why the EP has also expressed its concern by adopting a resolution²⁰ warning of this potential effect..

12 'European Commission launches rule-of-law disciplinary procedure against Hungary', Jon Henley, 5 April 2022, <https://www.theguardian.com/world/2022/apr/03/viktor-orban-expected-to-win-big-majority-in-hungarian-general-election>.

13 The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

14 European Commission v Poland, C-619/18, ECLI:EU:C:2019:531, 24 June 2019.

15 European Commission v Poland, C-192/18, ECLI:EU:C:2019:924, 5 November 2019.

16 European Commission v Poland, C-791/19, ECLI:EU:C:2021:596, 15 July 2021.

17 'Protecting Polish Judges from Political Control: A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)', Laurent Pech, VerfBlog, 20 July 2021, <https://verfassungsblog.de/protecting-polish-judges-from-political-control/>, DOI: 10.17176/20210720-140052-0.

18 Access to funds from the EU budget is conditional upon respecting the rule of law principle by Member States.

19 'EU gives Poland route to pandemic recovery cash', Zosia Wanat, Lili Bayer, Paola Tamma, 1 June 2022, <https://www.politico.eu/article/eu-vows-deal-to-unlock-poland-pandemic-cash-hinges-recovery-fund-covid-19-on-reforms/>.

20 European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF) [2022/2703 (RSP)], RC-B9-0317/2022, 9 June 2022, Strasbourg, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0240_EN.html.