

# Protecting the rule of law in the EU

## Existing mechanisms and possible improvements

### SUMMARY

Under the rule of law, governmental powers are limited by law and may be exercised only on the basis of law. An independent judiciary is indispensable to guaranteeing this state of affairs, and appropriate procedures, including legal remedies, must be in place to guarantee that individuals can protect their rights and trigger judicial review of governmental action. The rule of law has been an enduring basic value of the European Union from its inception, and the principles of the rule of law have been enshrined in the case law of the European Court of Justice (ECJ). The EU's very design is based on a shared responsibility for upholding and enforcing EU law, which is the joint task of the ECJ and national courts. The rule of law within the Member States, at least in areas covered by EU law, is therefore indispensable for the proper functioning of the Union and its legal system. Furthermore, the rule of law is one of the EU's fundamental values, enshrined in Article 2 of the Treaty on European Union, which must be respected by the Member States, including in areas not covered by EU law.

Should an EU Member State be suspected of breaching the rule of law, a number of procedures are available to verify this and, if needed, remedy the situation. First of all, there are three 'soft' mechanisms, which do not give rise to legally binding results, yet nevertheless have a certain political resonance and can be seen as a preparatory step towards legal action. These include the transitional 'special cooperation and verification mechanism' (included in the Act of Accession for Bulgaria and Romania), the Commission's rule of law framework, and the Council's annual dialogues on the rule of law. Apart from these 'soft' mechanisms, three legal procedures are also available which, if concluded, can produce legally binding results. First of all, infringement proceedings can be brought by the Commission if the alleged breach could also amount to the violation of a specific rule of EU law. Secondly, national courts from a Member State in which the rule of law is breached may refer preliminary questions to the ECJ, seeking guidance on the interpretation of EU law with a view to assessing the compatibility of national legislation. Finally, the breach of values procedure can be triggered, possibly leading to the suspension of a Member State's membership rights.



#### In this Briefing

- Concept of the rule of law in the EU
- Political mechanisms for protecting the rule of law
- Legal mechanisms for protecting the rule of law
- Possible options for enhancing the protection of rule of law

*This briefing has been produced at the request of a member of the European Committee of the Regions, in the framework of the Cooperation Agreement between the Parliament and the Committee.*

## Concept of the rule of law in the EU

### Understanding the rule of law

The origins of the notion of the rule of law can be traced back to ancient Greek political philosophy, where it was first formulated by Aristotle.<sup>1</sup> Today, in each EU Member State, the concept of the rule of law is understood somewhat differently.<sup>2</sup> However, a number of key elements of the notion can be identified.<sup>3</sup> First of all, it is the idea of government limited by law (principle of legality)<sup>4</sup> whereby officials must operate within the framework of existing law (including the principle of 'lawful administration').<sup>5</sup> Any change of law must follow prescribed procedures. Limited government is considered a crucial element to reducing the arbitrariness of officials' decisions,<sup>6</sup> thereby drawing the line between actual 'rule of law' and mere 'rule by law'.<sup>7</sup> A second element, known as formal legality (or 'internal morality' of the law) requires that laws must be laid down in advance (no retroactive laws), they must be general (applicable to everyone in a similar situation), and they must be publicly available (promulgated).<sup>8</sup> Some authors also add the principle of proportionality<sup>9</sup> and the requirement for a hierarchical structure within legal systems, whereby inferior rules must conform to superior ones, especially constitutional ones (constitutionalism).<sup>10</sup> A third element is the rule of law requirement for access to an independent and unbiased judiciary enforcing these principles (legal remedies), with appropriate procedures in place allowing citizens and businesses to present their view and argue their position.<sup>11</sup>

#### EU citizens on the rule of law

A [special Eurobarometer on the rule of law](#) (April 2019) showed overwhelming popular support for this value among EU citizens. Some 94 % find judges' independence essential or important, in contrast to only 4 % respondents who consider it unimportant. Likewise, 94 % citizens think that it is important or essential that court rulings be respected, and 91 % recognise the need for judicial review of public authorities' activities. Furthermore, 89 % see a need for independent review by a constitutional court of the constitutionality of laws adopted by the legislature.

### Rule of law in the EU legal order

The basic principles of the rule of law were laid down in early ECJ case law.<sup>12</sup> As the ECJ recently recalled, the EU 'is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act' (Case C-64/16 [Associação Sindical dos Juizes Portugueses](#) ['ASJP'], para. 31). This possibility for individuals to seek effective judicial review is 'of the essence of the rule of law' in the Union (Case C-72/15 [Rosneft](#), para. 73). The principles of the rule of law, stemming from the common traditions of the Member States and adopted as general principles of EU law in ECJ case law, have been, to a great extent, codified in primary law – in particular the [Treaty on European Union](#) (TEU) and the [Charter of Fundamental Rights](#) (CFR). In the TEU's preamble, the Member States confirm their 'attachment to the principles ... of the rule of law'. This idea is reiterated in Article 2 TEU which indicates that the EU 'is founded on ... rule of law', and that these 'values are common to the Member States'. As the ECJ recently highlighted, respect for the rule of law as a value is the basis for common trust between the national judiciaries within the EU ([ASJP](#), para. 30). Elements of the rule of law are also codified in the Charter. In particular, Article 41 provides for the [right to good administration](#), and Article 47 provides for the right to an effective remedy and a [fair trial](#).

### The European Commission's understanding of the rule of law

In its recent [communication](#) of April 2019 on 'Further strengthening the Rule of Law within the Union', the Commission proposed its own definition of the concept of the rule of law:

*Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.*

While to a great extent this definition corresponds to the elements identified by legal theorists and political scientists (see above), it also includes such substantive elements as democracy, fundamental rights and the separation of powers, which go beyond a formal understanding of the rule of law. The Commission's July 2019 [communication](#) on the rule of law (see below) essentially confirmed the broad definition above, blending the rule of law concept with democracy and fundamental rights.

### Recent ECJ case law on the rule of law and judicial independence

In a number of recent cases, the ECJ has developed its doctrine on the rule of law and judicial independence, based on [Article 19\(1\), first paragraph, TEU](#). That provision requires that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' In the [ASJP case](#), para. 32, the ECJ held that Article 19 TEU 'gives concrete expression to the value of the rule of law' enshrined in Article 2 TEU. This latter directly produces obligations incumbent upon the Member State, on account of the principle of sincere cooperation, enshrined in Article 4(3) TEU ([ASJP](#), para. 34). In the [Case C-619/18 Commission v Poland \(Independence of Supreme Court\)](#), para. 52, the Court held that 'although ... the organisation of justice in the Member States falls within the competence of [the] Member States, ... when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.

Specifically, according to the ECJ case law, Member States have a duty to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law ([Case C-583/11 P Inuit Tapiriit Kanatami](#), para. 100-101; [ASJP](#), para. 34; [C-619/18](#), para 48) and to ensure that its national courts or tribunals which operate within areas covered by EU law meet the requirements of effective judicial protection ([ASJP](#), para. 37). This includes safeguarding judicial independence, as required by Article 47 of the Charter ([ASJP](#), para. 41). According to the ECJ, 'the guarantee of independence, which is inherent in the task of adjudication ... is required not only at EU level ..., but also at the level of the Member States as regards national courts' ([ASJP](#), para. 42). In the [ASJP](#) case (para. 44), the Court defined the notion of independence as a requirement for the court to exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or being subordinated to any other body. A court may not take orders or instructions from any source whatsoever, it must be protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

In Case C-216/18 PPU [Celmer](#), para. 65, the ECJ underlined that a national court must be truly impartial, ensuring that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. Moreover, it must maintain objectivity and have no interest in the outcome of the proceedings apart from the 'strict application of the rule of law'. The rules on the composition of courts and on the appointment, length of service, rejection, dismissal and abstention of judges must be framed in a way that dispels 'any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it' (para. 66). Specifically, the dismissal of judges must be determined by express legislative provisions (para. 66). A disciplinary regime for judges must display the necessary guarantees to prevent any risk of being used as a system of political control of the content of judicial decisions (para. 67).

### Types of mechanisms for protecting the rule of law in the EU

The mechanisms which can be deployed by various institutional actors in case of a suspected breach of the rule of law by a Member State<sup>13</sup> can be divided into political ones, which do not give rise to legally binding effects, and legal ones, which produce legal effects, including: (1) a legally binding declaration that a Member State has violated a given rule of EU law (Articles 258-260 TFEU); (2) a legally binding interpretation of EU law confirming that a given Member State's laws, regulations or practices violate the rule of law (Article 267 TFEU); (3) a financial penalty imposed upon a Member State (Article 260(2) TFEU) for non-respect of a judgment rendered at the end of an infringement procedure; as well as (4) the suspension of a Member State's voting rights in the EU (Article 7 TEU).<sup>14</sup>

The table below provides an overview of these mechanisms which are discussed in greater detail in the subsequent sections of this briefing.

Table 1 – Typology of mechanisms for protecting the rule of law in the Member States.

Name of mechanism	Legal basis	Initiator	Decision-maker	Effects
Cooperation and verification mechanism	Acts of Accession RO, BG	Commission	Commission	Non-binding recommendations
Commission rule of law framework	n/a	Commission	Commission	Non-binding recommendations
Council's rule of law dialogues	n/a	Council	Council	n/a
Infringement proceedings	Article 258 TFEU	Commission	Court of Justice	Legally binding determination of breach of EU law, possibly interim measures and financial penalties
Preliminary references	Article 267 TFEU	National courts	Court of Justice	Legally binding interpretation of EU law, empowering national courts to set aside non-compliant national legislation
Breach of values procedure – preventive mechanism	Article 7(1) TEU	Commission, Parliament or 1/3 of Member States	Council (majority of 4/5) after obtaining the consent of the EP (2/3 of votes cast, representing the majority of MEPs)	Declaration that there is a clear risk of breach of EU values by the Member State concerned and possible recommendations addressed by the Council to that Member State
Breach of values procedure – sanctions mechanism	Article 7(2)-(3) TEU	Commission or 1/3 of Member States	Step 1: European Council (unanimity), Parliament (consent by 2/3 of votes cast, representing the majority of MEPs); Step 2: Council by qualified majority	Suspension of certain rights deriving from the application of the Treaties, including voting rights of the Member State concerned in the Council

Source: EPRS, author's own elaboration.

## Political mechanisms for protecting the rule of law

### Cooperation and verification mechanism for Bulgaria and Romania

The [Cooperation and verification mechanism](#) for Bulgaria and Romania is a temporary mechanism, set up in 2007, on the assumption that the two then-new Member States 'still had progress to make in the fields of judicial reform, corruption and (for Bulgaria) organised crime'. Some 12 years later, the mechanism is still in place, and the Commission regularly publishes [progress reports](#). The mechanism is 'soft', as no sanctions are provided for in case of lack of progress. In October 2019, the Commission [indicated](#) that Bulgaria had now met all its commitments, however, the final decision on ending the mechanism will be for the new Commission.

### Commission rule of law framework (pre-Article 7 procedure)

In 2014, the Commission introduced a ['rule of framework'](#) providing a space for structured dialogue with Member States suspected of rule of law breaches. The framework encompasses three stages: assessment, recommendation and follow-up by the Commission.<sup>15</sup> It does not, as such, give rise to binding legal effects.

## Activation of the rule of law framework with regard to Poland

The framework was activated for the first time with regard to Poland in 2016. Under the rule of law framework, the Commission engaged in an exchange of views with the Polish government and issued four recommendations: [2016/1374](#), [2016/146](#), [2017/1520](#), and [2018/103](#). In the Commission's view, some Polish Constitutional Court (PCC) judges had been unlawfully elected and the PCC's independence and legitimacy had allegedly been compromised by the parliament and government. The Commission demanded that the government implement PCC rulings of 3 December 2015 ([Case K 34/15](#)) and 9 December 2015 ([K 35/15](#)), which 'require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge' at the PCC. It also demanded that it publish and implement three PCC rulings ([K 47/15](#), [K 39/16](#), and [K 44/16](#)), which the government initially refused to do, arguing that they had been issued in violation of amending [act of 22 December 2015](#) and the [Constitutional Court Act of 22 July 2016](#), respectively (the former ruled unconstitutional by the PCC in [Case K 47/15](#), in which the Court proceeded [directly](#) on the basis of the Constitution itself), before ultimately publishing them on 5 June 2018.<sup>16</sup> The Commission also criticised the reform of the Supreme Court, the National Council of the Judiciary (NCJ), and of the ordinary courts, and demanded that they be reversed. In the meantime, the Polish government was asked to refrain from actions and public statements which could further undermine the legitimacy of the judiciary and to ensure that any future reforms of the Polish justice system uphold the rule of law, comply with EU law and European standards and are prepared in close cooperation with the judiciary and all stakeholders.

The Polish government disagreed with the Commission's position, presenting its views inter alia in an extensive [White Paper on the Reform of the Polish Judiciary](#) (March 2018). The government argued that it had to launch a deep reform of the judiciary, due to low public trust in courts, the excessive length of judiciary proceedings, as well as a 'failure to account for the communist past'. The White Paper argued that the Supreme Court is still staffed with judges who had decided political cases before the transformation of 1989 (para. 10ff). Furthermore, the situation prior to the reform amounted to an imbalance between the judicial and other branches of government, in which the judiciary had developed a 'peculiar bureaucratic corporate culture' (para. 25ff). The hitherto existing system of disciplinary proceedings was described as 'ineffective'. Against this backdrop, the Polish government argued that the goal of the reforms is to 'redress the balance, while safeguarding and even enhancing all guarantees of independence ... fully in line with the standards underpinning the European Union' (para. 33, 36). Concerning the introduction of an extraordinary appeal, questioned by the Commission, the government pointed out that it is available to protect fundamental rights or in case of other flagrant violations of the law, with regulations in place designed to ensure that legal certainty is maintained (para 51ff). On the new disciplinary proceedings, the government defended the introduction of lay judges (assessors) by indicating that 'Including lay judges in the process of adjudication (with minority vote) resembles the British solution, where the procedure foresees that the panel adjudicating about disciplinary misconduct must always be composed of – next to two judges – two other persons, none of whom can be a judge or even a lawyer' (para. 63). The government added that the involvement of the Minister of Justice is provided only in the initial phase. The White Paper contains detailed arguments concerning judicial independence, which, in the Government's view, has only been strengthened by the reforms (para. 67ff). As concerns the NCJ, the Government pointed out that the previous system of election of its members, which favoured judges of higher courts, was declared unconstitutional ([Case K 5/17](#)), whereas the [new system](#) (providing for election by Parliament from among judges) is more democratic. Finally, on the Constitutional Court, the Polish government view is that the previous Parliament (2011-2015 term) was responsible for breaching the law by appointing five judges 'in advance', whereas the 2015-2019 Parliament has rectified what it perceived as a breach of law (para. 139ff), therefore the Court is correctly composed and that there is no issue of new judges elected to already-filled positions. The government's view differs from that of the Constitutional Court itself, expressed in judgments in [Case K 34/15](#) and [Case K 35/15](#).

Following the issuing of recommendations and exchanges of view with the Polish government, the Commission decided to trigger further mechanisms, potentially leading to legally binding effects, including infringement proceedings and the breach of values procedure (see below).

## Council annual rule of law dialogues

In December 2014, the Council decided to establish its own annual peer-to-peer dialogues on the rule of law.<sup>17</sup> In their [conclusions](#), the Council and the Member States in Council agreed to set up an annual dialogue in the General Affairs Council, to be prepared by Coreper (the Committee of Permanent Representatives to the EU of the governments of the Member States). The dialogue is to be based on the principles of objectivity, non-discrimination and equal treatment of all Member States, conducted on a non-partisan and evidence-based approach and without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States.

## Legal mechanisms for protecting the rule of law

### Infringement proceedings (Article 258 TFEU)

#### Legal framework

As 'guardian of the Treaties', the European Commission is empowered to commence infringement proceedings (Article 258 TFEU) against a Member State suspected of breaching the rule of law principles, if they are directly enshrined in the Treaties. The most important rules of primary EU law concerning the rule of law are Article 19(1) TEU and Article 47 CFR.

### Recent and ongoing cases concerning the rule of law in the Member States

#### Early retirement of judges in Hungary (Case C-286/12, completed)

The first infringement case brought to the ECJ on a rule of law issue was [Case C-286/12 Commission v Hungary \(Compulsory retirement of judges\)](#), regarding the lowering of the retirement age of Hungarian judges and other legal professionals from 70 to 62 years. Technically, the Commission based its case on the [Equal Treatment Directive](#), but from the context, it appeared to observers that the removal of judges, prosecutors and notaries had adverse implications for judicial independence.<sup>18</sup> The Court agreed with the Commission that the Hungarian compulsory retirement scheme violated the principle of proportionality, and therefore illegal under the Directive.

#### Early retirement of ordinary judges in Poland (Case C-192/18)

On [15 March 2018](#), the Commission took Poland to the ECJ on the issue of differentiated pension ages for male and female judges, as well as on the discretionary power of the Minister of Justice to extend the length of service for individual judges, issues that had been addressed in the Commission's earlier recommendations (see above). The Commission not only based its case on the [Equal Treatment Directive](#), but also Article 19(1) TEU on judicial remedies and Article 47 CFR on access to justice. In the meantime, Poland modified its laws, providing for the same pension age for female and male judges, and transferring the power to extend service from the Minister of Justice to the NCJ. Before the Court, Poland argued that the case is inadmissible because the national rules had already been amended. Concerning the allegation of a breach of Article 19 TEU, Poland argued that the Commission's application is generalised, hypothetical and abstract, as well as encroaching upon Poland's competence to organise its own system for the administration of justice. Advocate General Tanchev delivered his [opinion](#) to the ECJ on 20 June 2019, in which he agreed with the Commission to a large extent. In its [judgment](#), delivered on 5 November 2019, the Court upheld the action brought by the Commission for failure to fulfil obligations and held that Poland had failed to fulfil its obligations under EU law by establishing a different retirement age for men and women who were judges or public prosecutors in Poland and by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges.

## Early retirement of Supreme Court judges in Poland (Case C-619/18, completed)

A separate case against Poland was filed by the Commission concerning the lowering of the retirement age of Supreme Court judges ([Case C-619/18](#)), an issue also addressed earlier in the Commission's recommendations (see above). On the other hand, the Polish legislation gave the President of Poland the power to extend, at his discretion, the period in office of judges affected by the new legislation, thereby enabling the President to allow judges to remain in their posts for the period of their original appointment (i.e. until the previously applicable retirement age). The Commission argued that the Polish legislation breaches the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 CFR. The ECJ introduced interim measures, effectively suspending the application of the Polish legislation and reinstating the Supreme Court judges. However, the measures were implemented by a separate [act of the Polish Parliament](#) of 21 November 2018, reinstating the judges in question on the authority of the Polish legislature.

Poland subsequently asked the Court to close the case as devoid of purpose (since the judges had already been reinstated by the act of 21 November 2018), a request to which the Court did not agree. On the substance, Poland, supported by Hungary, argued that that the contested national rules do not fall within the scope of Article 19(1) TEU nor Article 47 CFR. The latter article does not apply, according to the two Member States, because no fundamental rights were violated and the law on organisation of justice does not implement any EU legal act. Concerning the specific issues, Poland argued that early retirement cannot be equated with dismissal, as the judges in question continue to receive their salary (as a 'judge in state of retirement'). Furthermore, Poland argued that the reform aims at aligning the judicial retirement age with the standard retirement age. The President's discretionary power to prolong a judge's mandate does not affect the judge's independence, which is guaranteed through the secrecy of deliberations and rules on composition of the Supreme Court's chambers. Finally, Poland pointed to the absence of EU-wide standards on judicial self-government bodies participating in the appointment of judges. The Court delivered its [judgment](#) on 24 June 2019, in which it found that by lowering the retirement age of the judges of the Supreme Court for judges in post appointed to that court before 3 April 2018 and, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

## New disciplinary regime for judges in Poland (case filed on 29 October 2019)

On [3 April 2019](#), the Commission launched infringement proceedings against Poland concerning the new disciplinary regime for judges as provided for by the [Supreme Court Act 2017](#) and the amended [Ordinary Courts Act 2001](#). In its letter of formal notice, the Commission argued that the disciplinary regime amounts to a breach of Article 19(1) TEU in connection with Article 47 CFR. On 17 July, the Commission sent a [reasoned opinion](#) on the proceedings, giving Poland two months to amend its legislation. On 10 October, the Commission decided to [refer](#) Poland to the ECJ, requesting an expedited procedure. The Court [received](#) the Commission's application on 29 October.

## Preliminary references from national courts (Article 267 TFEU)

### Legal framework

The preliminary ruling procedure (Article 267 TFEU) is the very 'keystone' of the EU judicial system ([Case C-619/18](#), para. 45). National courts may use the preliminary ruling procedure to seek an interpretation of EU law, including guidance from the ECJ allowing them to assess, on their own authority, the conformity of specific national measures with EU law. The answer provided in the ECJ's ruling is not only binding on the individual national court which asked it, but as a precedent<sup>19</sup> contains an authoritative interpretation of EU law, binding on all Member States and their authorities. The duty to follow such an interpretation follows from the principle of harmonious interpretation.<sup>20</sup> Failure to comply with an interpretation of EU law provided in a preliminary ruling is a breach of EU law that may give rise to infringement proceedings brought by the Commission.<sup>21</sup>

## Recent and ongoing cases concerning rule of law in the Member States

### New Disciplinary Chamber of the Polish Supreme Court (case pending)

[Joined Cases C-585/18, C-624/18 and C-625/18](#) *AK v KRS (Independence of the Disciplinary Chamber of the Supreme Court)* concern appeals brought by Polish Supreme Administrative Court and Supreme Court judges who launched legal action concerning the lowering of their retirement age. The referring court in all three cases – the Labour Chamber of the Supreme Court – questions the independence of the newly created Disciplinary Chamber of the Supreme Court (DCSC). The Polish government argues that the system of appointment of DCSC judges does not diverge from that for judicial appointments in other Member States and even to the ECJ. The appointment of judges is a prerogative of the President, who is not bound by the opinion of the National Council of the Judiciary (NCJ). The influence of politicians, and judges appointed by parliament, who are members of the NCJ, upon the election of DCSC judges does not compromise the independence of the latter, which is safeguarded by an elaborate system of guarantees, linked in particular to their appointment for an unlimited time, irremovability, immunity, duty to remain apolitical and abstain from extra-judicial activities, and remuneration. The Commission disagreed, pointing inter alia to the fact that the DCSC is a newly created body with newly appointed judges. Attorney General Tanchev delivered his [opinion](#) on 27 June 2019, proposing that the ECJ rule that the requirements of judicial independence under Article 47 CFR should be interpreted as meaning that a newly created chamber of a court of last instance of a Member State that has jurisdiction to hear a case by a national court judge and is composed exclusively of judges selected by a national body (such as the NCJ), and that is not guaranteed to be independent from the legislative and executive authorities, does not satisfy those requirements. A judgment is [expected](#) on 19 November 2019.

### New disciplinary procedure for Polish judges (case pending)

In [Joined Cases C-558/18 and C-563/18](#) *Miasto Łowicz v Wojewoda Łódzki*, two Polish judges have sought guidance from the ECJ as to whether the new regime for disciplinary proceedings against judges in Poland meets the requirements of judicial independence under Article 19(1) TEU. The government of Poland argued that rules on disciplinary proceedings against judges fall within the competences of the Member States, and for this reason, EU law does not apply to their assessment. Furthermore, the Polish government adds that the ECJ's reply is not necessary to resolve the disputes in the main proceedings, as they have nothing to do with the disciplinary regime in Poland (the referring judges are not currently subject to any disciplinary proceedings). On 24 September 2019, Attorney General Tanchev delivered his [opinion](#), arguing that whereas the legal questions fall within the scope of EU law (Article 19 TEU), they are nonetheless inadmissible, because the judges have failed to explain in what way the national legislation in question would affect their independence and have not provided any factual or legal elements to substantiate the need for a preliminary ruling for resolving the cases with which they are dealing.

## Breach of values procedure (Article 7 TEU)

### Legal framework

The Article 7 TEU procedure is concerned, strictly speaking, not only with the rule of law, but also breaches of EU values. In fact, there are two distinct procedures – the preventive mechanism (Article 7(1) TEU), and the sanctions mechanism (Article 7(2)-(3) TEU). Both mechanisms are independent of each other, meaning that the sanctions mechanism can be triggered without going through the preventive mechanism, and the preventive mechanism does not necessarily entail any sanctions.

### Preventive mechanism

Under the preventive mechanism (Article 7(1) TEU), the Council may determine that there is a clear risk of a serious breach of EU values by a Member State. The procedure can be initiated by the Parliament, Commission or one third of EU Member States. The Council issues a decision by a

majority of four fifths of its members after having received Parliament's consent which, in turn, requires a two-thirds majority of the votes cast, representing an absolute majority of all Members (Article 354(4) TFEU). The Member State incriminated may not vote in the Council.

### Sanctions mechanism

Under Article 7(2)-(3) TEU, sanctions can be triggered with a proposal from the Commission or one third of Member States, but not by the Parliament. In a first step, on such a proposal, the European Council (i.e. Heads of State or Government) determines, by unanimity and after obtaining Parliament's consent (by a two-thirds majority of the votes cast, and an absolute majority of Members under Article 354(4) TFEU), the existence of a serious and persistent breach of EU values by a Member State. The incriminated Member State may not vote in the European Council. In a second step, the Council may suspend certain membership rights of the Member State concerned, including voting rights in the Council. This decision is adopted by qualified majority (354(1) TFEU) and the Council enjoys discretion as to the choice of sanctions to be imposed. Importantly, Parliament's consent is necessary only for the first phase of the sanctions mechanism, but not for the second phase (decision on the suspension of membership rights). The representatives of the Member State concerned do not take part in the votes in the Council and European Council, and are not counted in calculating the majorities necessary to trigger sanctions or a preventive determination, or to adopt other decisions (Article 354(1) TFEU). The need for securing unanimity in the European Council in the first phase of the sanctions mechanism prompted former Justice Commissioner Viviane Reding to [describe](#) the mechanism as 'in practice almost impossible to use'.

### Ongoing Article 7 procedures

#### Preventive procedure concerning Poland (launched by the Commission in 2017)

On 20 December 2017, the Commission adopted a [reasoned proposal for a Council decision](#) on the determination of a clear risk of a serious breach of the rule of law by Poland. The Council has discussed the issue several times, and the Polish government was heard on 26 June 2018, 18 September 2018, and 11 December 2018. The Commission has regularly updated the Council on the situation, [claiming](#) that its concerns remain unaddressed. During Poland's latest hearing on 11 December 2018, seven [major](#) topics were discussed (addressed earlier in the Commission's recommendations): early retirement of Supreme Court judges; the reform of the NCJ; impact of the retirement regime upon the independence of ordinary judges; new disciplinary regime and the DCSC; new extraordinary appeal procedure; the situation of court presidents as affected by the dismissal and appointment regime; the question of the composition of the PCC and publication of three of its judgments considered *ultra vires* by the government. Within Parliament, from which consent is required under the procedure, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has been designated as the lead committee, and the Committee on Constitutional Affairs (AFCO) will deliver an opinion ([procedure 2017/0360\(NLE\)](#)). On 14 October 2019, LIBE appointed its Chair, Juan Fernando López Aguilar (S&D, Spain) as rapporteur. The AFCO committee still needs to appoint its rapporteur for opinion.

#### Preventive procedure concerning Hungary (launched by the Parliament in 2018)

On 12 September 2018, Parliament adopted a [resolution](#) under Article 7(1) TEU, calling on the Council to establish a clear risk of a serious breach of EU values by Hungary (rapporteur: Judith Sargentini, the Netherlands, Greens/EFA), [procedure 2017/2131\(INL\)](#)). Parliament's concerns included a broad array of issues: the functioning of the constitutional and electoral system; the independence of the judiciary and other institutions; corruption and conflicts of interest; privacy and data protection; freedom of expression, academic freedom, freedom of religion, freedom of association; the right to equal treatment; minority rights; fundamental rights of migrants, asylum seekers and refugees; as well as economic and social rights. Following the 2019 European elections, the LIBE committee appointed a new rapporteur, Gwendoline Delbos-Corfield (France, Greens/EFA). On 16 September 2019, the General Affairs Council held a [hearing](#) with Hungary, in accordance with

Article 7(1) TEU. The Hungarian delegation argued that Parliament's resolution lacks legal basis, violates Parliament's Rules of Procedure, is biased and contains a number of errors. On the substance, Hungary argued that, in the area of migration, it had to restore balance between individual rights and the public interest. Concerning judicial reforms, it pointed to Hungarian cooperation with the Venice Commission and the country's favourable Justice Scoreboard ranking. On academic freedom, the Hungarian delegation expressed the view that academic life in Hungary is flourishing, while it is normal for countries to regulate academic institutions based abroad, in the interests of ensuring a level playing field. Concerning religious freedoms, Hungary contends that Member States have the right to differentiate between the legal status of historic (traditional) churches and the status of other religious communities. Hungary argued that non-governmental organisations' funding must be transparent, and on minority rights the delegation argued that sound policies are in place against racism, and particular attention has been devoted to the integration of Roma people. The Commission disagreed with the Hungarian delegation. In the debate that ensued, the Hungarian delegation responded to specific issues raised by 10 delegations.

## Possible options for enhancing the protection of rule of law

### EU mechanism on democracy, rule of law and fundamental rights

In a [resolution](#) adopted in October 2016, Parliament [called upon](#) the Commission to create an EU mechanism on democracy, rule of law and fundamental rights. Parliament wanted the Commission to submit, by September 2017, a proposal based on Article 295 TFEU that would entail the conclusion of a Union Pact for democracy, the rule of law and fundamental rights, in the form of an interinstitutional agreement laying down arrangements facilitating cooperation between the EU institutions and the Member States in the framework of Article 7 TEU. The new mechanism would integrate and complement existing mechanisms, be evidence-based, objective, address both the Member States and the EU institutions, and include preventive, as well as corrective measures. A panel of independent experts would assess the state of democracy, rule of law and fundamental rights in the Member States annually, as well as develop country-specific draft recommendations. In consultation with the panel, the Commission would draw up an annual report on the state of democracy, rule of law and fundamental rights in the Member States, which would be published and discussed in an annual inter-parliamentary meeting. The Commission [replied](#) to Parliament's proposal on 17 February 2017, questioning the need for and feasibility of an annual report and a specific policy cycle prepared by a committee of experts, along with the need for and added value of an interinstitutional agreement in this area. On 14 November 2018, Parliament adopted a new [resolution](#) calling on the Commission to propose the adoption of an interinstitutional agreement on an EU Pact and to consider linking the proposal for a regulation on protecting the EU budget in case of rule of law deficiencies in the Member States with that mechanism.

### Cutting funding to countries accused of breaching the rule of law

In May 2018, the Commission put forward a [proposal](#) for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, based on Article 322(1)(a) TFEU. The proposal defines generalised deficiencies as regards the rule of law as including, in particular, endangering judicial independence, failing to prevent, correct and impose sanctions for arbitrary or unlawful public authority decisions, and limiting the availability and effectiveness of legal remedies. If the Commission finds generalised deficiencies in one of the Member States as regards the rule of law as described above, it may resort to protective measures, including the suspension or reduction of payments from the EU budget and the prohibition to enter into new legal commitments. The Council would be able to veto the Commission's ruling by a qualified majority, but Parliament would have no say in the matter. In April 2019, the Parliament adopted its [first-reading legislative resolution](#) on the proposal, putting forward a number of significant modifications. First, Parliament would make the definition of a 'generalised deficiency' far more specific. Second, it would put Parliament and Council on an equal footing in terms of

procedure: once the Commission considers that the generalised deficiency as regards the rule of law is established, it would adopt a decision on the appropriate measures by means of an implementing act; such a decision would enter into force if neither the European Parliament nor the Council reject the transfer proposal within four weeks of its receipt. Thirdly, it would set up a special panel of independent experts on legal and financial matters to assist the Commission in evaluating the situation in a Member State. The Council discussed the proposal during its meetings in May and June 2019, but has not yet adopted a position.

## Rule of law review cycle (Commission)

In its July 2019 [rule of law communication](#), the Commission put forward the idea of a 'rule of law review cycle'. It proposed to promote a 'rule of law culture' within the EU through various measures, and to prevent rule of law backsliding in Member States by deepening its monitoring of Member States' compliance with the rule of law through a 'rule of law review cycle'. The cycle would cover all Member States and culminate in the adoption of an annual rule of law report that would summarise the situation in Member States as regards the rule of law. Finally, the Commission intends to 'pursue a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary', drawing on the recent ECJ case law related to the independence of the judiciary, as well as to improve the procedure used to decide on the existence of a breach of EU values under Article 7 TEU and to modify the 2014 rule of law framework to involve other EU institutions in the process.

## Supporting civil society, including at regional level

Raising awareness about the rule of law among EU citizens can also take a regional dimension. In its July 2019 [rule of law communication](#), the Commission highlighted that the EU 'offers a unique platform to develop and promote awareness on rule of law challenges', adding that civil society 'is of particular importance, including at regional and local level'. The Commission has already proposed to boost funding and support for a thriving civil society, the promotion of media pluralism and networking among stakeholders in the rule of law field, as well as supporting EU-wide organisations, bodies and entities pursuing a general European interest in the field of justice and rule of law. In this context, the Commission mentioned a number of programmes within the forthcoming [new Multiannual Financial Framework \(MFF\) for 2021-2027](#), including '[Creative Europe](#)', '[Rights and Values](#)' and '[Justice](#)'.

## Academic proposals

Academics have also advanced a number of proposals. Armin von Bogdandy *et al.* put forward a '[reverse-Solange doctrine](#)' for the ECJ, under which the Member States would retain their exclusive competence to protect fundamental rights only 'as long as' (*Solange*) they are not systematically violating their 'essence', enshrined in Article 2 TEU. In this latter case, citizens of the Member State concerned would be able to rely on their EU citizenship to seek protection of their EU fundamental rights before national courts which, in turn, would be able to seek guidance from the ECJ through the preliminary reference procedure. Iris Conor, in turn, proposed a '[horizontal Solange](#)' concept, under which it would be for other Member States to sanction their peers that violate the rule of law or other EU values. The ECJ's case law concerning the possibility of refusing to surrender suspects under the European Arrest Warrant procedure to countries where the rule of law is not observed (Case C-216/18 PPU [Celmer](#)) can be seen as an application of Conor's 'horizontal *Solange*' in practice. Finally, Jan-Werner Müller proposed the creation of a new EU body, which he referred to as the '[Copenhagen Commission](#)'. The aim of this body would be to subject the current EU Member States to a similar monitoring process as applies to candidate countries (hence the reference to the '[Copenhagen criteria](#)'). Petra Bård and Anna Śledzińska-Simon [propose](#) to give more thrust to rule of law infringement cases, urging the ECJ to automatically prioritise and accelerate such cases, and to use interim measures on a regular basis.

## MAIN REFERENCES

Maňko R. [The EU as a community of law: Overview of the role of law in the Union](#), EPRS, European Parliament, 2017.

Poptcheva E.M., [Understanding the EU Rule of Law mechanisms](#), EPRS, European Parliament, 2016.

Van Ballegooi W., Evas T., [An EU mechanism on democracy, the rule of law and fundamental rights](#), Interim European Added Value Assessment accompanying the legislative initiative report, EPRS, European Parliament, 2016.

## ENDNOTES

- <sup>1</sup> R. Stein, 'Rule of Law: What Does it Mean?', *Minnesota Journal of International Law* 18.2 (2009): 293-303, 297-298.
- <sup>2</sup> Th. Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart 2017), p. 38-39.
- <sup>3</sup> B.Z. Tamanaha, [The History and elements of the Rule of Law](#), *Singapore Journal of Legal Studies* 2012, p. 236; Stein, op.cit., p. 300-302.
- <sup>4</sup> S.C. Stimson, 'Constitutionalism and the Rule of Law' in *The Oxford Handbook of Political Theory*, OUP 2008, p. 322-323.
- <sup>5</sup> R. Geiger in *European Union Treaties*, ed. R. Geiger et al, C.H. Beck and Hart 2015, p. 15-16.
- <sup>6</sup> Konstadinides, op.cit., p. 47.
- <sup>7</sup> M. Krygier, 'The Rule of Law' in *The Oxford Handbook of Comparative Law*, OUP 2012, p. 234-235.
- <sup>8</sup> Krygier, op.cit., p. 236-237; F. Merli, 'The Principle of Legality and the Hierarchy of Norms' in *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, ed. W. Schroeder, Bloomsbury 2016, p. 42.
- <sup>9</sup> e.g. Geiger, loc. cit.
- <sup>10</sup> Stimson, op. cit., p. 319; Merli, op.cit., p. 43-44.
- <sup>11</sup> Krygier, op. cit., p. 239-240.
- <sup>12</sup> T. von Danwitz, [The Rule of Law in the Recent Jurisprudence of the ECJ](#), *Fordham Int.LJ* 2014/37(5), p. 1314-1316.
- <sup>13</sup> On the issue of ensuring the observation of the rule of law by the EU institutions, see EPRS briefing on [EU as a community of law](#) (2016) and Konstadinides, op.cit., pp. 105-138.
- <sup>14</sup> Some authors claim that the mechanism is political due to the requirement of unanimity and the presence of a 'diplomacy feature' in the mechanism (see Konstadinides, op.cit., p. 163).
- <sup>15</sup> D. Kochenov and L. Pech, [Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), *European Constitutional Law Review (ECLR)* 2015/11, p. 524.
- <sup>16</sup> They were published with an annotation that they were adopted 'in breach of the law' (see Dz.U. 2018, items [1077](#), [1078](#) and [1079](#)).
- <sup>17</sup> R. Uitz, [The Perils of Defending the Rule of Law Through Dialogue](#), *ECLR* 2019/15, p. 3.
- <sup>18</sup> U. Belavusau, [On age discrimination and beating dead dogs: Commission v. Hungary](#), *CMLRev* 2013/50, p. 1152.
- <sup>19</sup> P. Craig, G. de Búrca, *EU Law*, 5th ed., OUP, 2011, p. 475-476; D. Chalmers et al., *EU Law*, CUP 2008, pp. 295-296.
- <sup>20</sup> Craig and de Búrca, loc. cit.
- <sup>21</sup> See e.g. [Case C-427/98 Commission v Germany](#) where Germany was taken to the ECJ for not complying with an earlier ECJ preliminary ruling in [Case C-317/94 Elida Gibbs](#).

## DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2019.

Photo credits: © European Union / Court of Justice.

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

[www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank) (internet)

<http://epthinktank.eu> (blog)

