

BLOG POST

THE “ARTICLE 7” PROCEEDINGS AGAINST POLAND AND HUNGARY: WHAT CONCRETE EFFECTS?

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It has now been more than a year since the Article 7 procedure of the Treaty on the European Union was initiated by the European Commission against Poland (on the 20th of December 2017) and more than six months since it was initiated by the Parliament against Hungary (on the 12th of September 2018). However, the media interested that accompanied the implementation of these procedures, because of their novelty, seems to be in sharp contrast with the actual results. The difficulty to obtain information about the procedures themselves¹ brings to the fore the role played by the European Council, which is expected to eventually bring to a vote the pronouncement of a “clear risk of a serious breach by a Member State of the values referred to in Article 2”, i.e. the common values (including those of the rule of law) of the European Union.

In fact, the recent period highlights the inability of Article 7 to correct potential deviations from rule of law in Member States, except if one takes into account the possibility that the much praised “strengthening of the dialogue” between the EU’s Council of Ministers (in the General Affairs Council configuration, hereinafter referred to as the GAC) and the Member State may help to reconcile positions. However, as we will see below, it is unfortunately not due to Council proceedings that a slight correction of the situation in Poland has been allowed, even though they are part of the arsenal that makes it possible to maintain pressure on the concerned governments.

The proximity of the European elections and the potential political use of the issues regarding rule of law – within the framework of a split between progressive and nationalist forces in Europe – also requires us to think about how the tools for maintaining the rule of law can be sharpened in order not to let the Polish and Hungarian cases be repeated.

As planned by the treaties, the triggering of Article 7 against Poland gave way to three hearings

¹. The author would like to thank Professor Laurent Pech (University of Middlesex in London) for his work in obtaining the publication of several key documents in the follow-up to the Article 7 proceedings against Poland.

of the Polish Government before the GAC2, on the basis of the four corrective recommendations that have been issued by the European Commission between July 2016 and December 2017, as well as of the application of decisions of the Court of Justice of the European Union in cases involving the Polish judicial system. Each hearing was accompanied by a PowerPoint presentation of the Polish delegation (lasting between 40 minutes and one hour), followed by an opportunity given to the national representatives to ask two questions to the Polish delegation. The three hearings lasted in total between two and three hours, dealing with all the topics covered in the recommendations. This includes especially the operations, appointment and forced retirement of judges of the Constitutional Court, the effective implementation of decisions rendered by the court before 2016, the extraordinary appeal procedures allowing the reopening of the already decided proceedings, or the role of the National Council in the appointment process of judges. It should be noted that, with the only exception of a question by an Estonian representative, no country from Central or Eastern Europe (including Austria, which was holding the Presidency of the Council) took the floor at these hearings, with the questions coming mainly from France, Germany, Ireland, Spain, Portugal and the Benelux and Scandinavian countries. This geographical divide reflects the political divisions that have subsisted on this issue, and the lack of a shared interest within the Council for this procedure. The highly technical and legal nature of the case also requires ministerial teams to be extremely well prepared, which can also lead the capitals to make political choices about the issues their staff should focus on.

The role of the Council in the framework of the Article 7 process, and particularly of its rotating presidency, merits a detailed discussion. Indeed, following these three hearings (or more, if necessary), the Council could organize a vote (after obtaining the approval of the European Parliament) on the “clear risk of a serious breach” of the rule of law, requiring the approval of the four fifths of its members. However, it should be noted that the current Romanian presidency seems to show a blatant lack of interest in these issues; as noted by journalist Alexandra Brzozowski, rule of law was not discussed at the first GAC of 2019, unlike all the meetings in the same format in 2018³. European law professors Laurent Pech and Patryk Wachowiec have symbolically noted that rule of law is conspicuously missing from the “Europe of Common Values” page of the Romanian’s Presidency website⁴. Although the Commission was able to offer its analysis of the procedures at the GAC on the 19th of February 2019, the Council’s paralysis on the subject of the rule of law, fuelled in particular by concerns about the Romanian case, raises fears that there will be no significant progress in either procedure before the Presidency is handed over to Finland on the 1st of July 2019.

Beyond that, it appears that few countries have a structured approach to how the Council’s limits can be circumvented in order to continue to put pressure on Poland and Hungary. On the contrary, both countries have a very clear strategy for their defence and have devoted large administrative resources for this purpose; this is particularly true for Budapest, which regularly publishes long documents to clarify its arguments and seeks to gather support from other Member states,

2. The hearings took place on the 26th of June, the 18th of September and the 11th of December 2018.

3. « Poland gets a pass as Romanian presidency struggles with rule of law approach », Alexandra Brzozowski, Euractiv.com, 9 January 2019

4. « 1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I) », Laurent Pech, Patryk Wachowiec, Verfassungs Blog, 13 January 2019

while Warsaw operates in a more discreet but nonetheless efficient way in buying time⁵.

Finally, it is clear that the ongoing discussions on the next Multiannual Financial Framework can - negatively - influence national positions, within the framework of the permanent and overlapping negotiations that traditionally govern the Council's functioning. It therefore appears that there is a relative lack of unity, or at points even of prolonged interest, on the side of Member States about the potential benefits of the procedure due to the blockages explained above. Both the structure and functioning of the Council and the lethargy of the procedures play into the hand of the incriminated countries and eventually favour the lack of progress in their case. It is also a pity that, at the institutional level, the European Parliament cannot play a more important role in the article 7 procedures: it is clear that its members could play an important role in keeping these discussions in the political spotlight and keep pressure on their governments. However, it appears that the Austrian Presidency of the Council organized only one informal breakfast dialogue on the issue with, in particular, MEP Judith Sargentini (NL-Greens/EFA), the author of the report on the rule of law in Hungary which led to the triggering of Article 7. It should also be noted that a recent controversy has highlighted the Council's reluctance to involve the Parliament in the discussions on the rule of law. Indeed, in an oral note delivered at a staff meeting, the Council's Legal Service expressed its view that the Parliament's services could not be heard in the course of the Council's work⁶. The fact that this note was issued orally and was not reflected in any minutes or other written proceedings, clearly creates the impression that the Council wanted to have plausible deniability in its decision not to involve the Parliament in these cases. Article 7 procedures are therefore not immune from institutional competition, which leaves little hope for any change of gear under the Romanian Presidency.

The only way to frame Article 7 as having had positive effects is to include this procedure in the more general toolbox available to the EU to put an end to abuses of the rule of law. Indeed, it appears that it is the combination of actions before the Court of Justice of the European Union (hereinafter referred to as the CJEU) and the infringement proceedings brought by the Commission that have led to minor progress in the reform of the Polish judicial system. These are the same tools that will have to be used in continuing to move forward, with the hearing procedures serving in this case, for the interested chancelleries, as an opportunity to collect information about the ongoing judicial proceedings.

A request for interim measures by the Commission was dealt with urgently by the CJEU, which in turn ordered the temporary suspension – pending a judgment on the merits – of measures concerning the retirement age of judges of the Polish Supreme Court⁷, which led to a rather bizarre situation in which some forcibly retired judges were allowed to return to their posts. In addition, the preliminary reference (to the CJEU) made by the Irish High Court concerning the extradition request of a Polish citizen detained in Ireland (the so-called “Celmer” judgment, 2018) also prompted the CJEU to comment on the validity of the European arrest warrant if the requesting country displayed systemic or widespread deficiencies that would affect the

5. See, for example : [here](#).

6. The author would like to thank Professor Laurent Pech for this information (obtained in a private interview) and which was confirmed in other interviews conducted by the author. The note is dated the 28th of July 2017.

7. Order from the 17th of December 2018 of the Court of Justice of the European Union, Grand Chamber.

independence of the judicial system⁸. The CJEU has called on national courts to undertake checks on the risks of lack of access to a fair trial before an independent tribunal⁹, thereby laying the foundation of a jurisprudential structure that could question the all-important principle of mutual trust that drives relations between the judicial systems of the EU Member States.

However, these advances, albeit important, cannot fully prevent the implementation of reforms of the Polish judicial system, nor even other abuses such as the fact that some Polish judges, who have had issued preliminary references to the CJEU, have been subjected to preliminary disciplinary investigations in Poland¹⁰, which is obviously a mean of pressure. Moreover, the newly adopted amendments to the law on the organization of the Supreme Court did not touch upon the standing of newly appointed judges, nor has the Constitutional Court so far returned to its previous functioning. The clear reluctance of top Polish political leaders to apply the measures enacted by the CJEU, and the fact that the recommendations issued by the Commission have been insufficiently implemented (except, for example, for the retirement age of judges, which has been standardized), means that the Commission will have to continue to issue infringement proceedings against the amendments suggested in its recommendations and which have not been implemented so far. The most recent example of this came on date when the Commission issued a recommendation to Poland regarding these new disciplinary measures for judges¹¹. Member States and their judicial systems (including the Polish one, as seen above) will also continue to play a role in the construction of the jurisprudential structure at the CJEU through their recourse to it. While the latter did not wish to immediately call into question the principle of mutual trust between national judicial systems in the *Celmer* judgment, 2019 could also lead to a more solid legal construction in the handling of the Polish case.

However, it is impossible to say that the Commission has the same interest in the Hungarian case. As things stand at present, it is hard to imagine any change in this case before the equation of the next Commission's political identity and the future of the leading party in Hungary, Fidesz, within the European People's Party is solved¹². Proposals have been made, in particular by the MEP Sophie in't Veld (NL-ADLE), for the creation of a "Union for Democracy, the Rule of Law and Fundamental Rights Mechanism"¹³, which would make permanent an annual mechanism, led by the Parliament, to review the state of rule of law state in Member States. This proposal is supported by Belgian and German governments, which have expressed support for a rotating peer committee mechanism that would perform the same function, but where the participation by Member States would be voluntary¹⁴. The EPP leader and Spitzenkandidat, Manfred Weber, also has come out in support of this proposal, only with a slightly different functioning, according to an op-ed published in the German press on the 18th of March 2019. Finally, during the month of April, the Commission is expected to publish a new communication on the rule of law, following the one of the 11th of March 2014¹⁵ which established a framework for conducting discussions

8. "Celmer" judgment, CJEU, the 25th of July 2018, Grand Chamber.

9. A detailed review of the CJEU's "test" is available here.

10. Ibid.

11. http://europa.eu/rapid/press-release_IP-19-1957_en.htm

12. Unless one considers that the so-called "voluntary suspension" of Fidesz and its monitoring by three wise men, the names of which Fidesz reportedly had a say over, is a satisfying solution.

13. European Parliament resolution, 25 October 2016.

14. POLITICO Brussels Playbook, 19 March 201

15. Communication from the Commission to the European Parliament and the Council, the 11th of March 2014.

between Member states and the Commission before any triggering of Article 7. However, both France and Germany have publicly released a statement asking for a first hearing of Hungary in September, paving the way for - at least - a discussion about this opportunity at the GAC level¹⁶.

Lastly, it is important to note that progress on the rule of law framework has been de-linked from the discussions on mechanisms linking the provision of European funds to respect for the rule of law; indeed, the Commission's proposal of May 2018 should be brought back to the drawing board in the context of the discussions on the next Multiannual Financial Framework, particularly to the extent that it would require a "reverse qualified majority" to unblock the delivery of funds. It is clear that the Commission is searching for a different instrument that would satisfy the Member States who want to see this concept enshrined in the next MFF. With that in mind, it still remains crucial to make a clear differentiation between Article 7's rule of law measures and the possible measures linking respect for the rule of law to the provision of funds in order for both to maintain a stable legal basis. In addition, the failure of several countries of the region to comply with the asylum obligations also remains entirely distinct from the rule of law issue.

The limited effects of Article 7 regarding rule of law in Poland and in Hungary obviously raise the question of the instrument's effectiveness, especially in this particular case where the Council's Presidency does not wish to play a decisive role and move these procedures along. It seems that the year 2019 is not going to be conducive to progress on this issue, unless the future Finnish Presidency is significantly more active than Romania. Pending these institutional advances, the quality of the political dialogue between the Commission and Warsaw has, so far, shown no signs of improvement, and it seems likely that the electoral campaign will not change this situation. Secondly, and more importantly, the question of the possibility of reversing these reforms will become increasingly pressing and embarrassing, especially in the context of the general elections scheduled in Poland in the fall of 2019. Moreover, it is also clear that the countries potentially targeted by rule of law procedures can feel confident because, under the current conditions, the European Union has too few means at its disposal to ensure the defence of rule of law on the continent. In the short term, it remains to be seen whether rule of law issues will be used in the election campaign by those who support a strong approach (the Scandinavian and Benelux countries, France to a lesser extent) in order to mobilize their electorate. In this respect, it is interesting that Emmanuel Macron's proposals for a "European Renaissance" do not refer to rule of law, even though his presidential campaign had shown his interest in this matter, which has since been addressed by Nathalie Loiseau, the Secretary of State for European Affairs, and now leader of the presidential party's list in the upcoming European Parliamentary elections.

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16. Alexandra Brzozowski, « [France and Germany pile pressure on Poland and Hungary over rule of law](#) », [euractiv.com](#), 10 April 2019;