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# Protecting checks and balances to save the Rule of Law

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For half a decade, the Polish government has been reshaping the country's judicial system in a process described by the European Union as a "*threat to the rule of law*". Despite numerous Council of Europe reports and resolutions, several infringement proceedings and decisions of the Court of Justice of the European Union (ECJ), and the unprecedented activation of the so-called Article 7 procedure of the Treaty on European Union (TEU), the transformation of the judiciary into relays of political power has continued and accelerated since the Law and Justice Party (PiS) won a new term in 2019 and the re-election of President Andrzej Duda in 2020, pushing Poland to the limits of the European legal order<sup>[1]</sup>.

In Hungary, Prime Minister Viktor Orban has been exercising "illiberal democracy" for a decade since the adoption of a new constitution in April 2011. Like Poland, the launch of an Article 7 procedure has so far had little effect on political developments in Hungary, where electoral rules have been changed several times to favour the ruling Fidesz party and where democratic debate has been confiscated by the state-run and pro-government media.

In the autumn of 2020, these two countries fought to the bitter end against the introduction of a mechanism making the payment of European funds conditional on the independence of the judiciary. They reject the proceedings against them. They reject the notion of the rule of law and defend an extensive interpretation of the principle of subsidiarity, in which they include the definition by the Member States of their own legal order, in opposition to the principle previously accepted by all of the primacy of European law over national law.

for the law and democratic values. Already, courts in Ireland, the Netherlands and Germany have refused to extradite to Poland on the grounds that fair trials are no longer guaranteed there. Such developments call into question the mutual recognition and legal certainty on which the Single Market is based.

While the European democratic system is subject to hybrid threats from outside, it is being challenged from within by the current governments in Hungary and Poland and their systemic weakening of checks and balances and guarantees of political alternation. This weakening in turn opens the door to the undermining of the fundamental rights of individuals and minority groups.

The European Union has so far failed to slow down and stop the anti-democratic drift of Fidesz and PiS. But as the attempts to overturn the outcome of the presidential election in the United States have shown, independent judges and an unhampered press remain the last two bulwarks against power grabs and authoritarian inclinations. For the European Union, it is essential to act as a priority to preserve these checks and balances, before they are "captured" and neither the law nor the citizens can prevent what is no longer a taboo: the rejection of democratic rules.

The risk is not theoretical. In Poland, for example, the body now responsible for checking the validity of elections and examining electoral disputes is the Extraordinary Control and Public Affairs Chamber of the Supreme Court, one of the bodies set up by the current government and which cannot be described as an independent body according to the criteria established by the ECJ.

The Union has instruments to respond and anticipate. So far, it has used them only cautiously and

In so doing, they undermine the founding consensus of the Union, a political construction based on respect

<sup>[1]</sup> Developments in Poland are being followed by two sites in particular: [verfassungsblog.de](http://verfassungsblog.de) and [ruleoflaw.pl](http://ruleoflaw.pl).

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incompletely. Yet there are ways to defend European values and democracy more firmly.

### 1. AN EXTENSIVE "TOOLBOX"

The rule of law is mentioned twice in the preamble to the [Treaty on European Union](#), and in article 2 which stipulates that "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*". In 2020, the Commission defined the rule of law as the thing that guaranteed that "*all public powers always act within the constraints set by law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial courts*"[2].

#### Prevention and repression

To ensure the respect of these principles and values, the European Union and firstly the Commission, have a "[toolbox](#)" organised in two parts, one preventive and the other the repression.

The preventive aspect includes several mechanisms: the EU Justice Scoreboard, which assesses the independence and efficiency of judicial systems every year; the programmes to support structural reforms and the programmes to support judicial networks, pluralism and media freedom, which are integrated into the EU budget; the European Semester, which publishes annual recommendations by country on economic policy, but also on administration and justice; and since 2020 the European Rule of Law Mechanism, an annual cycle based on a country-by-country report. Bulgaria and Romania are also subject to a Cooperation and Verification Mechanism, which has been assessing the situation in the areas of administration, justice and the fight against corruption since their accession in 2007.

When preventive tools are no longer sufficient to ensure the rule of law in a Member State, the Commission

has four instruments at its disposal to address the situation.

The first instrument is the [framework for the rule of law](#), established in 2014, which provides for the launch of a "structured" dialogue with a Member State if there are "*clear indications of a systemic threat to the rule of law*". After an assessment, the Commission sends a recommendation if it has found that there is "*objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it*". If the recommendation remains without effect, the Commission can activate the second instrument at its disposal, Article 7.

#### Article 7

[Article 7](#) TEU provides a procedure in the event of a breach of article 2 and this can lead to sanctions. By referring to the set of values mentioned in Article 2, it allows for a more comprehensive approach, relevant in the sense that certain measures are not threats to the rule of law when taken separately, but become so when combined with others.

The Article 7 procedure is organised in two distinct parts, in which it is the Member States that must take a decision. Article 7.1 states that "*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*". To this end, the Council shall hold hearings with the government in question "*and may address recommendations to it*".

Article 7.2 provides that "*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*". In such a case, it is then for the Council to decide by qualified majority to suspend certain rights, "*including the voting rights of the representative of the government of that Member State in the Council*".

[2] Negative effects such as these states that "The rule of law includes 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".

The rule of law framework has been activated only once, in 2016, after the first justice reforms in Poland. The Commission issued four recommendations, which were not followed by the Polish government. As a result, the Commission triggered Article 7 in December 2017. Article 7 was activated a second time in September 2018 against Hungary by the European Parliament, without the rule of law framework having been used before.

### Infringements and conditionality

The third repressive instrument, which is not specific to the question of the rule of law, is the infringement procedure, opened by the Commission when a Member State violates or fails to apply Union law, and which can lead to referral to the Court of Justice of the Union, whose rulings are binding on the Member States, which are subject to fines and financial penalties if they fail to take them into account.

The most recent "repressive" instrument is the [Regulation on a general regime of conditionality for the protection of the Union budget](#), which allows for the reduction or suspension of EU funds to Member States where breaches of the rule of law no longer guarantee the proper use of EU taxpayers' money. Adopted in December 2020 after a compromise with Warsaw and Budapest, which were threatening to block the EU's multi-annual budget, the mechanism came into force in January 2021 and will be applied as soon as the Court of Justice, which was referred to by Hungary and Poland in March, has ruled on its conformity with the treaties.

### Conditionality and objectivity

The conditionality regime and the rule of law mechanism respond to two necessities that have emerged in recent years. Budgetary conditionality, proposed in 2018 by the Commission, addresses not the causes but the consequences, in this case financial, of the weakening of checks and balances, which are particularly strong in Hungary, where Viktor Orban's entourage has enriched itself in part thanks to European funds. It signals to Warsaw and Budapest, but also to States such as Bulgaria, Romania and the Czech Republic, that the Union is not a manna without counterpart. It should

also enable concrete pressure to be brought to bear on these States, and to obtain from them what has not been made possible by dialogue or Article 7.

The European rule of law mechanism is a response to the criticism that the European institutions are using the rule of law for political purposes. This new annual cycle, which opens with country reports and continues with their examination in the Council, aims to ensure impartiality of assessments through criteria applied to all countries. The reports cover four areas: the justice system, the anti-corruption framework, media pluralism, institutional checks and balances. This is a step forward as the cycle institutionalises these four criteria for defining the rule of law.

*"The approach is based on close dialogue with national authorities and stakeholders, bringing transparency and covering all Member States on an objective and impartial basis", explains the Commission, which hopes to prevent "rule of law problems from emerging or deepening".* The first discussions, at the end of 2020, focused on the Commission's general report and the state of play in five countries, chosen in order of protocol<sup>[3]</sup> and not according to the urgency of the situation. Other countries will be examined in the coming months. The situation in each of the 27 Member States will therefore not be discussed every year and there is no timetable for when, for example, Hungary and Poland will be on the agenda.

The effectiveness of these two new measures remains to be seen, but as the [Commission](#) noted in 2019, *"confidence that shortcomings can be resolved would help to strengthen trust both between Member States and between the Member States and EU institutions"*. The Commission hopes to create a culture of the rule of law based on awareness and promotion of the values and principles that establish it.

### A new field: the media

The notion of the rule of law has long been considered to cover the functioning of justice and the risk of arbitrariness. By referring to Article 2 TEU, Article 7 has broadened the definition by linking it to respect for fundamental values, which include media pluralism.

[3] The alphabetical order, using the first letter of the country's names in their own language. The 5 first countries are : Belgium, Bulgaria, Czech Republic, Denmark and Estonia. The situation in Germany was not discussed because it chaired the Council meetings.

The attacks on pluralism in some Member States, the development of threats to the democratic system through manipulation of information, as well as the emotion caused by the murders of journalists in Malta and Slovakia, for example, have led the European institutions to include press freedom in the assessment of systemic risks to the rule of law. Pluralism and media freedom, which the Commission describes as "key enablers for the rule of law, democratic accountability and the fight against corruption", are thus one of the four pillars of the rule of law mechanism. The Commission analyses the situation with regard to the independence of regulatory authorities, media ownership, public advertising, safety of journalists and access to information.

Vigilance on these issues does not mean, however, that the EU has the means to intervene on all of them. Compelled to act within the framework of the competences conferred on it by the Treaties, the Commission relies on the rules of the internal market to promote and protect pluralism and support the media sector.

In December 2020, it put forward several paths of action as part of its [action plan for European democracy](#) and an [action plan for the media and the audiovisual](#). In 2021, it is to propose a recommendation on the safety of journalists and organise a "structured dialogue" with Member States, regulatory authorities, journalists and civil society to implement it. It is preparing an instrument to act against SLAPPs<sup>[4]</sup>, the increasing abuse by some governments and their support to put pressure on journalists, [for example in Poland](#) where the daily *Gazeta Wyborcza* [faces](#) around 60 litigation procedures, including on the part of the Minister of Justice. At the beginning of March the Commission [launched](#) a pilot rapid response project to detect, respond to and prevent infringements to the freedom of the press.

The Commission plans to analyse national rules on media diversity and concentration with a view to proposing measures to defend pluralism. To increase transparency on media control, it plans to co-finance a database project called the Media Ownership Monitoring Instrument. It also calls for the creation of transparent public procurement registers in the field of advertising. It points out that state advertising can be "*used to exert*

*indirect political pressure on the media*" by depriving them of resources if they are too independent. The Hungarian government to favour media close to the ruling party uses this practice in particular. It is at the heart of a Polish bill to tax private advertising revenues, which is how independent media finance themselves in the absence of public advertising.

Instruments can be used to ensure media independence, such as the Audiovisual Media Services Directive (AVMS), revised in 2018, which sets out obligations for national regulatory authorities in this area and 'encourages' the adoption of national legislation on transparency of ownership of media service providers.

## 2. THE LIMITS OF EXISTING INSTRUMENTS

In its [2020 report](#), the Commission noted "major problems" in some Member States, "*when judicial independence is under pressure, when systems have not proven sufficiently resilient to corruption, when threats to media freedom and pluralism endanger democratic accountability, or when there have been challenges to the checks and balances essential to an effective system*". This is a sign of the inadequacy or lack of effectiveness of the actions taken.

### A framework emptied of its substance

In 2014, the Commission set up the Rule of Law Framework. It lacked a means of action other than infringement procedures, which only concern points of application of EU law, and more flexible than Article 7 procedures, whose 'thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort'.

Yet it has only used this framework once, to try to stop developments in Poland. It has not used it against countries where it has expressed concerns, such as Malta, where the murder of journalist Daphne Caruana Galizia highlighted systemic failings in the judiciary, or Romania, where the then ruling Social Democratic Party (PSD) legislated to try to protect its leader from corruption proceedings and increase its control over judges.

[4] Strategic Lawsuits Against Public Participation

The Commission warned both States, but it was because of domestic political developments, not because of the Commission's action, that action was eventually taken and the situation improved. By failing to act, the Commission has effectively raised the threshold for activation of a mechanism that was intended to allow action to be taken before the situation became critical.

It has weakened the tool by failing to engage with Hungary despite the government's repeated breaches of EU values since 2010. Yet it was [planned](#) for the framework to be "activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law".

### Article 7 in stalemate

At a time when threats to the rule of law are multiplying, the Commission can as a result only use the two tools it had at its disposal before 2014, the infringement procedure and Article 7.

In 2017, it triggered Article 7 §1 on the "clear risk of a serious violation" of the rule of law. It did so [according](#) to Commissioner Frans Timmermans, in "an attempt to start a dialogue to resolve the situation". The dialogue continued in the Council, but did not lead to any decision or improvement of the situation in Poland. In the case of Hungary, it was the Parliament, after several resolutions calling on the Commission to do so, that triggered Article 7.1 and referred the situation to the Council.

Since the launch of the two procedures, the Council held three hearings with the Polish government, between June and December 2018, and one with the Hungarian government in December 2019. Four countries have held the Council presidency without organising any hearings of Poland, despite the strengthening of political control over the judiciary, the introduction of a controversial disciplinary regime and the failure to comply with CJEU decisions.

Article 7.1 is the preventive part of the procedure, distinct from the repressive part which can lead to the

suspension of voting rights in the Council. By using §1 rather than §2, the Commission has simply prolonged, the structured dialogue it conducted unsuccessfully with the Polish government from July 2016 to December 2017. The failure of the dialogue and the continued political takeover of the Polish judiciary demonstrated that the government was pursuing a conscious and determined strategy, over which the Commission and its recommendations had no control. By activating Article 7.1, the Commission emerged from its fruitless tête-à-tête with Poland but allowed Warsaw to ease the pressure by taking advantage of the Council's own inertia.

Article 7 has become a mere continuation of the rule of law framework, but at State level. The result is a perspective-less and diminishing dialogue with two governments that reject the premise on which it is based. The framework was set up to act before reaching the critical threshold of Article 7. Activation of Article 7 sealed the failure of the framework. The way the procedure has been conducted rendered it meaningless. The two mechanisms, once used, weakened each other and demonstrated the Union's inability to enforce its fundamental principles through the very tools created for this purpose.

### Infringement, an under-utilised avenue

Faced with Warsaw and Budapest's intransigence and the Council's pusillanimity, it is in the oldest and least specific rule of law tool that the Commission has found its least ineffective means of action.

Since 2017, the Commission has launched four infringement proceedings regarding justice reforms in Poland. Two have resulted in judgments of the ECJ. In June 2019, [it deemed](#) that the reduction of the age of retirement of judges at the Supreme Court infringed the principle of the tenure of judges and thus the independence of the judiciary. In November 2019, it [issued](#) the same judgement regarding all of judges and magistrates. Anticipating these decisions, the Polish government had already revised these measures.

The other two proceedings, opened in 2020 in relation to the new disciplinary regime for judges, are still

on-going. In the first the ECJ, delivered an interim [ruling](#) asking for the "immediate" suspension of the measure deemed "*likely to cause serious, irreparable harm to the Union's legal order, and to the Supreme Courts disciplinary chamber*". On 31 March 2021, the Commission [referred](#) Poland to the ECJ in these two complementary proceedings and asked it to provisionally suspend the powers of the Disciplinary Chamber of the Supreme Court to waive judicial immunity and the employment of judges, as well as the provisions which prevent Polish courts from directly applying certain provisions of EU law to protect the independence of the judiciary.

Hungary has been taken once to the ECJ for its judicial reforms. The ECJ [deemed](#) in 2012 that the "radical" lowering of the age of retirement of judges was "unjustified discrimination founded on age." It was also condemned twice in 2020 [for having restricted](#) the funding of NGO's from abroad and [regarding the bill](#) on universities targeting George Soros' University of Central Europe. A procedure is still pending regarding the legislation that incriminates support activities to asylum seekers (the so-called "Stop Soros" bill). On 25 February the Advocate General [deemed](#) that it contravened European law[5].

In view of the number of objections raised against Poland and Hungary, the use of the infringement procedure appears to be limited and demonstrates that Article 7 has been used to try to bring the governments of both countries back into the European fold of the rule of law. In doing so, the Commission has deprived itself of the more direct and less political tool of the infringement procedure and has allowed the most central elements of the rule of law violations in Poland to persist.

### Procedures that are too long

Even when they are opened, infringement proceedings take a long time to be concluded, which reduces their effectiveness in solving the problem in question.

For example, the Commission launched an infringement procedure on the law on the Central European University in Budapest three weeks after its adoption

in April 2017. After sending a letter of formal notice, a reasoned opinion and a supplementary opinion to which Budapest failed to respond, it referred the matter to the ECJ in December 2017. The Court delivered its judgment in October 2020, three and a half years after the adoption of the law, but eleven months after the university moved to Vienna, where it found refuge after its ban in Hungary.

Similarly, the Commission opened proceedings against the new disciplinary regime for Polish judges in April 2019, one year after it came into force in April 2018. Referred to in October 2019, the ECJ demanded in April 2020 the immediate suspension of the competences of the disciplinary chamber of the Supreme Court. But the proceedings are still pending, and while the government refuses to comply with the ECJ order, more and more Polish judges are subject to prosecution involving the disciplinary chamber and thus to the risk of government arbitrariness.

### 3. ACTING MORE FORCEFULLY AND EFFECTIVELY

The Commission has [stressed the following](#): "The longer [problems] take to resolve, the greater the risk of entrenchment and of damage to the EU, as well as to the Member State concerned". While the institutions and most Member States assure that the defence of the rule of law is a priority for the Union, all of them must provide the means to do so.

#### Making Article 7 credible

To restore credibility to Article 7, Member States in the Council should quickly conclude the proceedings against Poland and Hungary.

It has been widely said that the Council will not be able to conclude the proceedings because the two countries will support each other and prevent any decision to sanction them. However, the unanimity vote and the decision to apply sanctions fall under the Article 7.2 procedure, not the Article 7.1 procedure, which is open in both cases. The aim of the latter is to simply establish a "clear risk of a serious breach" of the rule

[5] TIn 2020, Hungary was also condemned by the Court of Justice for its refusal to apply the relocation mechanism for asylum seekers, for illegally detaining asylum seekers in transit zones, and for failing to fulfil its international protection and return obligations.

of law, without the possibility of imposing sanctions. The Council, where 25 states voted in favour of the conditionality regime in December 2020, should be able, if it has the political will, to muster the four-fifths majority required for this decision.

Concluding the Article 7.1 procedure would not subject the two countries to sanctions, but it would be the first time that the rule of law would be formally asserted by peers as being under threat. This would also make it possible to open up the Article 7.2 procedure, which would not be successful as long as Budapest and Warsaw supported each other, but it would increase political pressure, especially if combined with other instruments such as the infringement procedures and the conditionality regime. Portugal is unlikely to be able to take the initiative for a vote in the Council before the end of its presidency in June. Slovenia, which takes over in the second half of the year, will probably not have the political will to do so because its Prime Minister, Janez Jansa, who has been accused of "illiberal drift", in particular because of his behaviour towards the media, is close to Viktor Orban. It will therefore be up to France, which will preside over the Council in the first half of 2022, to make this a priority of its mandate and to take the political decision to put the vote on the agenda in order to close the first phase of Article 7 and assert the Union's values.

### **Strengthening to protect the rule of law mechanism**

The European Rule of Law Mechanism, considered as a preventive instrument, does not include any obligation for the States to address the problems that are recorded in the annual report. In the long run, it risks suffering the same fate as the Cooperation and Verification Mechanism (CVM), which has been published every year since 2007 without having led to the expected progress in Bulgaria and Romania.

In its approach to objectivity and promoting a culture of the rule of law, the Commission has favoured the preventive dimension of the mechanism, to the detriment of a more operational aspect linked to the repressive aspect. The annual reports must go beyond a simple observation.

In September 2020, Parliament [requested](#) the creation of a new mechanism to cover democracy, the rule of law and fundamental rights, which would replace various instruments including the MCV and the mechanism to protect the rule of law and would be supported by "country-specific clear recommendations, with timelines and targets for implementation". Non-compliance would lead to action under Article 7, infringement procedures or the implementation of budgetary conditionality. The mechanism in its current form, focused on the rule of law, would be strengthened if it included such provisions, linking the monitoring of national situations to the means of action.

### **Using the full potential of infringement procedures**

The Commission, which considers that the most effective tool at its disposal is the infringement procedure, should make more systematic use of it, to provide the broadest and strongest possible response to attempts to weaken the rule of law.

In the Polish case, three judicial reforms could be the subject of proceedings: the composition of the Constitutional Court and its non-compliance with the rulings of the European Court of Justice; the competences of the Extraordinary Chamber of the Supreme Court, (which is responsible for, among other things, electoral disputes); and the composition of the National Council for the Judiciary, a body which has been suspended from the European Network of Councils for the Judiciary because of its political character.

The Constitutional Tribunal, which is partly composed of judges appointed in violation of a ruling by the Court in its previous configuration, is at the heart of the Polish government's project. Concerns about its independence and legitimacy, which justified the opening of the Rule of Law Framework in 2016 and the triggering of Article 7 in 2017, "have so far not been resolved", [admitted](#) the Commission in September 2020. The Tribunal is now used to justifying the lack of respect of ECJ rulings, and restrict some rights, such as the right to abortion.

Although the EU has no direct competence over the laws concerning the press, the Commission and the

Courts of Justice have a number of legal means of countering the control of the media. The Commission [was unable to oppose](#) the creation by decree on the part of the Hungarian government of a Foundation for the Press and Media of Central Europe (KESMA) which placed 470 media under the same authority, because it is not big enough to affect the internal market.

However, it could address the lack of independence of the Media Authority (NMHH) and its decision-making body, the Media Council, by opening an infringement procedure for non-compliance with the AVMS Directive. An [assessment report](#) regarding the implementation of the directive published by the Commission in February 2021 stresses that "*Hungary represents a unique case, as there is no independent regulator to ensure fair market competition because the government-appointed Media Council can intervene in a merger approval procedure conducted by the independent Hungarian Competition Authority and the authority's decision is subject to approval by the Media Council*", whose independence the report finds 'is not guaranteed'.

The NMHH is the body that decided in February 2021 not to renew the operating licence of Klubradio, a media critical of the government, simply because the radio station did not submit certain administrative documents in time.

In Hungary, the prioritisation of public advertising to State-owned media or media owned by those close to the government could be considered as illegal State aid. The Commission received two complaints in 2016 and 2019, first about the financing of public broadcasting and then about the targeting of public advertising, and has still not concluded its preliminary investigations. But it notes in its [2020 report](#) that in Hungary, The report states that "the share of state advertising that went to pro-government outlets in the newspaper market was 75%, in the television market 95%, in the online news market 90% and in the radio market 90%" and that in terms of revenue, "pro-government media control about 80% of the news media market and coverage of political content". In view of the situation, it seems urgent to act.

[6] Hence it gave the Polish government two months in 2020 to respond to the warning regarding the second bill on the disciplinary regime for judges, one of the strongest attacks against the independence of the latter.

### Accelerating procedures and imposing temporary measures

Justice takes time, which is sometimes necessary for its proper exercise. But in the case of breaches of the rule of law, the *fait accompli* can create situations that are difficult to reverse.

A country subject to an infringement procedure generally has two months to respond to the letter of formal notice and, if its response is unsatisfactory, a further two months to respond to the reasoned opinion sent to it. But in urgent cases, the Commission can impose shorter deadlines. It has already done so, but not systematically[6]. It may also reduce deadlines beforehand, to open proceedings after the adoption of the contested measures, and during the procedure, to reduce the time for the dispatch of a reasoned opinion after an unsatisfactory response, and refer the country to the Court of Justice if it still does not comply.

The referral of Poland to the ECJ announced on 31 March 2021, eleven months after the entry into force of the law and less than a year after the opening of the infringement procedure, as well as the request for interim measures associated with the referral, are a positive sign for Polish judges currently subject to a wave of immunity waivers, prosecutions and arbitrary transfers initiated by the Prosecutor General, who is none other than the Minister for Justice.

In addition, the Commission can ask the Court of Justice to impose interim measures. Article 278 TFEU thus allows the Court, "if it considers that circumstances so require", to order the suspension of the contested measures. The Commission has used this provision three times: in 2018 for the reform of the Polish judges' pension, in April 2020 for the new competences of the Disciplinary Chamber of the Supreme Court, and in March 2021 for the competences of the Disciplinary Chamber. Such a measure could perhaps have allowed the Central European University to remain in Budapest. If the Advertising Act were to be adopted in Poland and the Commission were to launch an infringement procedure, an interim injunction would be justified and necessary to avoid irreversible damage to the Polish media.

The Court may decide, on request of the applicant or by decision of its President, to deal with certain cases under an accelerated procedure "where the nature of the case requires that it be dealt with within a short time<sup>[7]</sup>". The Commission and the Court, as guardian of the Treaties and "guarantor of the protection of European law", can use this possibility to limit as much as possible the infringement of countervailing powers in the Member States.

### Impose fines and periodic penalty payments

Article 260 TEU states that "if the ECJ finds that a Member State has failed to fulfil an obligation under the Treaties, that State shall be required to take the necessary measures to comply with the judgment of the Court". If the State in question fails to comply, the Commission may again refer the matter to the Court, requesting "such amount of the lump sum or penalty payment to be paid by the Member State concerned as it considers appropriate in the circumstances" and the Court may decide on the fine to be imposed.

On 18 February 2021, following this procedure, the Commission sent a letter of formal notice to Hungary to implement the June 2020 ECJ ruling on the financing of foreign NGOs and gave Hungary two months to comply. If the Hungarian government does not comply, the Commission should not hesitate to take the case to court.

One year on, Poland has still not implemented the order of the CJEU of 8 April 2020 to "immediately" suspend the activities of the disciplinary chamber. The centrality of this body to the destabilisation of judges and the open challenge to the European legal order that this refusal represents should have promptly imposed a new Commission procedure with the possibility of requesting financial sanctions.

In 2017, the Commission asked the Court to order the suspension of deforestation operations in Bialowieza, pending a final ruling. It attached to this summary judgment a request for a penalty payment, which the Court [granted](#) stating that it has 'the power to prescribe any interim measures it deems necessary in order to ensure that the final decision is fully effective'. Even if the Commission did not seek to collect these

penalty payments and Poland complied with the final judgment five months later, in April 2018, this case law would be entirely applicable to interim measures on rule of law issues and provides a strong incentive for a government to comply with the Court's decisions.

In such emblematic and far-reaching cases, the Commission should not hesitate to press for the implementation of the Court's decisions and to impose financial penalties where appropriate.

### Making use of case law

A [2018 ECJ ruling](#) in response to a preliminary question on the reduction of salaries of judges in a court in Portugal opened up new legal ground by stating that the independence of judges is indispensable to guarantee, in accordance with the Union Treaty (Article 19), "remedies sufficient to ensure effective legal protection in the fields covered by Union law" and linking this provision to Article 2.

Since then, the Court has continued to develop case law in response to attacks on the rule of law. In [November 2019](#) and [March 2021](#), in response to preliminary questions from Polish judges, it established the criteria for assessing the independence of the disciplinary chamber of the Supreme Court and the National Council of the Judiciary.

Further references from Polish judges are expected to complete the case law in the coming months. In a [first case](#), in which the Advocate General has to deliver his opinion on 14 April, the Court will decide on the status under European law of the disciplinary chamber of the Supreme Court. The question is central to [another case](#) on which the Court has to take a decision. A third judgment is also highly anticipated, because the [preliminary question](#), was made by one of the judges of the Supreme Court appointed by the Council for the Judiciary, and thus in violation of European law.

For the Commission, these answers to the Polish judges' questions provide a solid basis for action. Much of the caution and even inaction of which it has been accused stems from a strategic wait-and-see position

<sup>[7]</sup> Rules of Procedure of the Court of Justice of the European Union, Article 133

to allow the Court to open the legal way against the Polish government. It must be ready to act once the Court has ruled.

### Fully implementing budgetary conditionality

Even when watered down by the Council, the regulation on budgetary conditionality remains an instrument that is likely, if not to convince governments to give up their infringements of the rule of law, at least to increase the price they have to pay for doing so. Provided that this instrument is used.

While the compromise reached in the Council postpones the application of the regulation after the ECJ has given its opinion, the Vice-President of the Commission, Vera Jourova, [maintains](#) that the regulation will have immediate impact as EU funds can be frozen before they are paid out if the Commission finds that 'there is no independent judge to decide impartially and independently on cases of corruption and fraud involving EU money'.

In contrast to the framework on the rule of law and the Article 7 procedure, the conditionality regulation imposes time limits between each stage of the procedure, with a total duration of at least five months and no more than nine months. This is a step towards efficiency but leaves room for discretion and therefore for delay or inaction at three key moments.

The Commission can initiate a procedure if it finds that there are "reasonable grounds" for believing that a State is threatening the proper use of EU funds, and that other instruments are unable to remedy the situation. Once it has notified the Member State and the latter has replied within one to three months, the Commission has an "indicative time limit" of one month and "in any event a reasonable period" to decide whether to propose sanctions. And when the Commission's proposal is submitted to the Council, the latter can modify it - and thus weaken it - by a qualified majority.

The Commission must therefore not hesitate to use the instrument of conditionality, without postponing possible decisions on the eventual use of other instruments, and the Council must have the political

will to bring the procedures to a successful conclusion without being tempted by accommodations with Member States that undermine the rule of law and the financial interests of the Union.

### Using the political window

The Commission and the Council's caution can be explained by the reluctance to antagonise Member States and the fear of acting on a fragile legal basis. It can also be explained by political considerations and the need to have the support of the Member States in question on important political issues. For example, since 2019, appointments to the heads of the institutions, the major climate guidelines and the adoption of the Union's multiannual budget and recovery plan have required consensus or even unanimity. From now on, even the most difficult decisions, such as those on migration policy, are taken by qualified majority, which reduces the negative influence of States that would like to 'bargain' their support for a reduction in pressure on the issue of the rule of law.

The Commission and the Council have often been accused of being soft on Hungary because of Fidesz's membership of the European People's Party (EPP), the main political force. Fidesz left the EPP in March 2021, thereby refusing to share the Christian Democratic political family's conception of the rule of law and European democracy. This break opens a political window to firmly apply infringement procedures and budget conditionality.

### Using the law creatively

Through prudence or lack of political will, the EU institutions have allowed Hungary and Poland to use the law to create measures that are systemically problematic. If the institutions cannot in turn use the law, they can use it to their full advantage to defend it. The Court of Justice, through its proactive case law in its preliminary rulings, encourages a less conservative approach.

The Commission could thus use Article 2, which commits Member States to respect democracy and the rule of law, to attack judicial reforms that are clearly in violation of these values. According to a narrow interpretation by

the Council's Legal Service, only Article 7 can respond to infringements of Article 2. The Commission should not be afraid to defend a more open position before the Court of Justice, in particular by linking Article 2 and Article 19 as the European judges have already done.

The Commission could also adopt an aggressive interpretation of the legal texts and defend media by invoking Article 2, which mentions pluralism, and Article 11 of the Charter of Fundamental Rights, which states that "the freedom and pluralism of the media shall be respected". It has not done so, out of caution and for fear that the ECJ would not follow this course. The situation nevertheless calls for an initiative.

Some legal experts now also advocate that the Commission should be able to bundle proceedings in response to the systemic nature of breaches of the rule of law. This would mean that it could respond not just to new laws in isolation, but to actions that rely on non-independent bodies to dismantle or weaken checks and balances. Attempting to address the systemic aspect solely through the use of Article 7 is no longer sufficient.

The European Parliament was very active during the previous legislature in organising debates with the heads of government of Hungary and Poland, as well as Malta, Romania and Slovakia, and in activating Article 7 against Hungary. While the Council excludes it from the meetings of this procedure, the Parliament could take up the rule of law mechanism and decide, once it has resumed its normal activity, to systematically organise debates on the countries whose annual reports are the most problematic.

Finally, the three main institutions - Commission, Parliament, Council - must use not only law, but also communication much more clearly and strongly, and ensure that actions follow words. In December 2020, five Member States (Belgium, Denmark, Finland, the Netherlands and Sweden) participated alongside the Commission in a hearing at the Court of Justice in the context of the procedure on the disciplinary regime for judges. Member States could be more involved in supporting the actions undertaken. The Commission should do more to explain its work, its intentions but also its constraints, rather than repeating that it is "following the situation closely". The strength of the law and the range of existing instruments also lies in the confidence that the institutions inspire in citizens and governments.

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