

Rule of Law - What to do about the destruction of Europe's foundations?

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Is the "Regulation of the European Parliament and of the Council on the protection of the Union budget in the event of general shortcomings as regards the rule of law in the Member States", i.e. the "rule of law mechanism" envisaged in connection with the Covid Recovery Fund, the means by which the dismantling of the rule of law in individual EU Member States can be effectively countered?

The new "rule of law mechanism": a breakthrough in securing the rule of law?

Judging by the attention the rule of law mechanism has received in the media, one might get this impression. The rule of law mechanism at least has the advantage that it does not require a unanimous decision of the Council, as does the initiation of infringement proceedings under Article 7 TEU.

But will it prove to be the practicable instrument to stop or even reverse the systematic dismantling of the rule of law in Poland or Hungary, for example?

Doubts are permitted. They are already linked to the conditions that must be fulfilled in order to be able to impose the financial sanctions provided for in the regulation.

First of all, the rule-of-law mechanism does not primarily serve to uphold the rule of law in the member states, but, as can already be seen in the name of the regulation, to "protect the Union's budget". Only if deficiencies in the rule of law lead to an impairment of the Union's financial interests can the Commission intervene. The proponents of the rule of law mechanism in the Commission and especially in the European Parliament seem to have initially accepted this only indirect protective effect. This may be because in the context of this particular budget, which was characterised by the Covid Recovery Fund, there was an opportunity to place the rule of law mechanism on a reasonably sound legal basis in the existing treaties (Art. 322 TFEU). Presumably, they hoped that the financial interests of the Union would "secretly" take a back seat to the politically foregrounded protection of the rule of law in the practical handling of the rule of law mechanism.

The new rule of law mechanism will not meet many expectations

However, this hope was abruptly dampened by the resolution of the European Council on the Rule of Law Mechanism, which it adopted at its meeting on 10/11

December 2020. This resolution had become necessary in order to induce Poland and Hungary to renounce their veto against the Union's "Covid budget".

The Council first explicitly emphasised that the "*objective of the regulation on a general conditionality arrangement for the protection of the Union budget ... (was) to protect the Union budget, including "NextGenerationEU", the sound financial management and the financial interests of the Union*". The protection of the rule of law was no longer mentioned in this passage. Furthermore, the Council explicitly pointed out that sanctions can only be imposed if "*the causal link between these violations (i.e. violations of the rule of law) and the negative impact on the Union's financial interests ... has been sufficiently directly and properly established*". And to nip any misunderstanding or hope in the bud, the Council stated: "*The mere finding of a breach of the rule of law is not sufficient to trigger the mechanism.*"

To the Commission, the Council looked forward to

- "*develop guidelines on how it will apply the Regulation, including a methodology for carrying out its evaluation,*"

and that

- "*these guidelines ... will be developed in close consultation with the Member States*".

Finally, the Council obliged the Commission to await the outcome of an action for annulment of the Regulation - already announced by Poland and Hungary and filed in the meantime - before proposing any action under the rule of law mechanism.

Beyond the question of what legal significance the Council resolution might have for the application of the rule of law mechanism, the actual significance will be considerable. For it is the Council that decides on sanctions measures by qualified majority. It is hardly to be expected that the Council's resolution will not influence its decision-making. It is even likely that, if it is politically opportune, it can serve as a welcome pretext for not imposing sanctions - by a body which, of all the European institutions, is most characterised by compromise along national lines.

The more promising path: infringement proceedings under Art. 258, 260 TFEU

So are the prospects bleak for the European struggle for the rule of law, for a transparent, accountable, democratic and pluralistic legislative process, for legal certainty and against arbitrariness, for effective judicial control, respect for

fundamental rights and equality before the law and, last but not least, independent and impartial courts and judges?

No, because this fight can already be waged with instruments that have long been enshrined in the European treaties - and the Commission is already doing this, perhaps not consistently enough so far.

Art. 258 TFEU provides that the Commission may request a member state to put an end to an infringement of an obligation under the Treaties. If the state does not comply within the time limit set by the Commission, the Commission may refer the matter to the European Court of Justice.

Such violations may concern the rule of law, a constituent element of the EU according to Art. 2 EUR. In its latest Rule of Law Report of 30.09.2020, the Commission provides a status report on the rule of law in the respective countries in separate country chapters for all Member States. There are major problems with regard to Poland. This is also reflected in numerous infringement proceedings that the Commission has already conducted against Poland for violations of the rule of law.

Most recently, the Commission obtained an urgent decision against Poland in an infringement procedure because of a change in the disciplinary rules for judges. Under this rule, disciplinary proceedings can be brought against judges on the basis of their judicial decisions or on the basis of their statements about the functioning of the constitutional institutions in Poland and the submission of a question of law for a preliminary ruling by the ECJ. This legal provision is directed head-on against judicial independence. The Commission has thus apparently identified a decisive attack against the rule of law in Poland.

In this urgent decision of 08.04.2020, the ECJ obliged Poland to immediately suspend the application of national provisions on the powers of the disciplinary chamber with regard to disciplinary proceedings against judges. The ECJ's decision on the merits is still pending; the action was brought on november 22, 2019.

The interim order suggests that the ECJ will also rule in the main case that Poland must repeal or amend legal rules that affect the independence of judges and courts. If Poland does not comply, the Commission may ask the Court to impose a lump sum to be paid by the Member State to punish the past infringement and a penalty payment to enforce the cessation of the infringement in an amount it considers appropriate in the circumstances.

It is a rocky and lengthy road to this point, a road that begins with the identification of a concrete violation of the rule of law. The particular difficulty of this task becomes clear simply from the fact that the dismantling of the rule of law usually takes place behind a formally seemingly intact façade of the rule of law through a multitude of individual legal and administrative regulations.

This process compared with the steps that are necessary until a decision is taken by the Council under the new rule of law mechanism, one will conclude that this procedure is certainly no less time-consuming and labour-intensive. In addition, there are two advantages of the infringement procedure over the new rule of law mechanism: There is no need to prove that the EU's financial interests have been violated and that this has been caused by deficiencies in the rule of law. And the decision on financial sanctions does not lie with the European Council, so it should not be exposed to the risk of political influence to the same extent as the European Council's decision on the imposition of sanctions under the new rule of law mechanism.

But:

Two "tightening up" of the infringement procedure are necessary

Art. 260 TFEU provides that the Commission shall have discretion to determine the amount of the lump sum and the daily rate of the periodic penalty payment. The Commission sets itself rules for the exercise of this discretion, which it makes public in a notice published in the Official Journal of the EU. Currently, the Commission bases its calculation on two factors: the gross national product of a Member State as an expression of its financial capacity and its institutional weight in the structure of the Union, expressed by the number of seats of the respective Member State in the European Parliament.

The question arises whether the assessment of periodic penalty payments and lump sums sufficiently takes into account the importance of the legal interest that is the subject of the infringement proceedings and whether an additional multiplier of its own should not be applied for infringements of fundamental values and "building elements" of the EU, as laid down in Art. 2 TEU and the EU Charter of Fundamental Rights, which adequately reflects this importance.

The enforcement of sanctions against a Member State that is not willing to pay lump sums and penalty payments set by the ECJ also faces a hurdle that needs to be overcome.

Article 280 TFEU provides that ECJ judgments are enforceable, but refers to Article 299 TFEU for this purpose. However, this provision stipulates that enforcement of payment claims against Member States is not possible.

There are legal differences of opinion as to whether EU payment claims against Member States can in fact not be enforced. But this dispute is likely to be of more academic than practical significance, given that enforcement would have to be carried out by the Member State concerned or its authorities.

Will the financial sanctions imposed on Poland by the ECJ on a proposal by the Commission for a breach of the rule of law remain a mere paper tiger with at best a moral appeal?

This need not be the case if the Commission decides to recover its court-ordered sanction claims by offsetting them. In practice, such offsetting would amount to what is also provided for in the new rule of law mechanism, namely the withholding of funds that a member state can claim from the EU budget.

Such a set-off would not be an enforcement measure, but it would ensure that the infringement procedure does not become a blunt sword, but a realistic chance for the EU to secure its existential foundations, of which the rule of law is undoubtedly one of the most important.

Defending the fundamental basics of the EU is worth every effort, including infringement proceedings.

It will be above all the task of the European Parliament and the public to support the Commission in its arduous work of identifying serious violations of the rule of law, but also of fundamental values of the Union such as the freedom of information, i.e. freedom of the press, enshrined in Article 11 of the EU Charter of Fundamental Rights, to ensure that sufficient human resources are available for this purpose, both qualitatively and quantitatively, and to encourage it to conduct infringement proceedings consistently, up to and including the enforcement of financial sanctions.

The importance of this work cannot be overestimated. It is important, not at least in the interest of the people in the affected member states, that EU citizens are not transformed from subjects of political will to objects of state arbitrariness. A little political pressure can certainly do no harm.