

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN
COUNCIL AND THE COUNCIL

Further strengthening the Rule of Law within the Union.

State of play and possible next steps

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Poland's contribution

Poland believes that the rule of law is one of the fundamental values on which the European Union is founded. Like other Member States and EU institutions, we attach much importance to its promotion, protection and defense.

Drawing upon our experience from Article 7 TEU procedure, we hereby present our first reflections on the Commission's Communication.

GENERAL REMARKS

- Existing rule of law toolbox (Article 7 TEU, infringement proceedings and preliminary rulings) are adequate and sufficient to pursue the goals set by the European Commission in its Communication.
- Based on our Article 7 experience, the issue we should consider in the first place, is how to make better, more effective use of the existing legal and procedural framework. This could be achieved by way of an honest, informal dialogue held between the European Institutions and the Member States, dedicated to practical problems in the application of Article 7 TUE.
- The question of whether the present rule of law toolbox should be modified or extended is another issue. Any such modification must remain within the framework of the Treaties. The Treaty basis – when it comes to the rule of law – is laid down in Article 7 TEU. There are no legal grounds to reach for “creative” alternatives to the procedure specified therein. All ideas and suggestions, however well-intended, should above all respect the existing Treaty basis.
- One of the most obvious Treaty restrictions is the area of sole competences of the Member States. The European Commission, in its attempt to create uniform rule of law standards for all, must take into account the diversity among Member States when it comes to their constitutions, legal systems and organization of administration of justice – as provided in Article 67 (1) TFEU.
- Given the above, we express our doubt whether the form of a communication and an open invitation to express thoughts on the rule of law framework addressed to a large group of governmental and non-governmental actors will bring desired, viable results and whether the proposals would be legally applicable in the EU legal environment.

DETAILED REMARKS

- Some practical aspects of the Article 7 procedure would benefit from improvement or clarification. This is particularly true in relation to the preparatory stage, i.e. the dialogue with the European Commission. Our experience tells us that this stage is crucial for several reasons: it is the most “fact-based” stage, with room for experts’ contacts, regular exchange of views and relatively low (albeit present) risk of “politicization”. We should strive to make most of opportunities available at this stage. This has not been the case in practice. In particular, the fact that many of the issues which were presented as problematic were eventually remedied by Poland did not change the course of the procedure and the fact that many of these areas were never mentioned again at further stages of Article 7 TEU procedure didn’t seem to have any influence on the EC’s perception of the alleged “cumulative effect”.
- Another point which merits attention is the effect the CJEU rulings on rule of law issues should have on the pending Article 7 TEU proceedings. It is logical that once a rule of law case is positively settled before the CJEU, the Article 7 TEU procedure concerning the same case should be discontinued. There is no grounds for the Council or the EC to debate over the rulings of the CJEU. Acting otherwise may lead to diminishing the role of the CJEU provided in the Treaties, and to establishing a practice without a valid legal basis.
- The European Commission’s proposal to gather data on the rule of law situation in the Member States from extra-EU sources raises the question of the relevance and credibility of such sources, as well as their political inclinations. Certain additional sources might be useful to detect early warning signs of deterioration of the rule of law situation. However, there is a threat that compiling data from multiple external sources will not contribute to simplifying the rule of law prevention and protection system – quite the contrary.
- As to the EU rule of law definition and common standards and practices, in our opinion the CJEU case-law should be the primary source of expertise and binding interpretation. Additional data might only have an auxiliary character.
- EC’s competence to request information from Member States beyond the data which the Member States already provide (e.g. statistical) should not be extended. It could interfere with the Member States’ area of sole competences and breach basic principles of the Union: principle of subsidiarity, principle of proportionality and principle of conferral
- Any rule of law mechanisms should not be combined with the EU budget protection regime, as there is no Treaty basis for such approach. This view is also shared by the Council Legal Service (i.a. CLS opinion 13593/18). The aim of the proposed conditionality on the basis of Article 322(1)(a) TFEU should be the sound implementation of the EU budget and protection of the financial interests of the Union. Any such mechanism may not amend, supplement or have the effect of circumventing the procedure envisaged in Article 7 TEU. Specifically, it cannot be used as a means of exerting additional political pressure against a Member State in case Article 7 TEU procedure proves to be “ineffective”. Such approach would be unacceptable and would contradict the very idea of dialogue and the Treaty itself. For this reason, the reference to the said financial regulation should be removed from the Communication. The Member States and the EU Institutions should work towards improving the existing Rule of Law toolbox instead of searching for a quick path to impose sanctions. For the same reasons we do not support the proposal to include rule of law related conditionalities in other areas.

- Moreover, there are no standards that are universally applied in practice in the area of justice systems. To the contrary, Article 67 (1) TFEU guarantees respect for all the different legal systems and traditions present in all Member States. In the absence of such standards, conditionality criteria set outside of Treaty provisions would be arbitrary and prone to misuse for reasons other than protection of the rule of law (e.g. political goals).
- Poland is against communitarising the periodic peer review mechanism proposed by some Member States. Irrespective of the early stage of discussions on its introduction, the mechanism's potential added value lies precisely in its intergovernmental character.

CONCLUSIONS

- In our attempts to make the rule of law mechanisms more effective, we should rely on the existing rule of law toolbox. Instead of a competitive approach, we should rather opt for inclusive, workable solutions.
- We must learn from Article 7 experience and concentrate on fact-based discussions, expert-level consultations, ensuring coherent institutional cooperation and coordination of actions being undertaken. Openness to dialogue must prevail over the temptation to impose sanctions or threaten with their immediate use.
- Raising awareness and rule of law promotion are important tasks, but we should first agree on a common definition of rule of law and – on the basis of the CJEU case-law – work out standards that will be acceptable for everyone, in line with national legal systems and traditions of all Member States.
- We are of the opinion that the introduction of several of the abovementioned proposals included in the Communication would result in legal uncertainty and may breach the Treaties. Expanding the discussion about the rule of law beyond Treaty basis will further dilute the already vast debate and will not contribute to better mutual understanding, nor to development of acceptable and applicable standards.