

CAN THE EU ENSURE RESPECT FOR THE RULE OF LAW BY ITS MEMBER STATES? THE CASE OF POLAND

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1. Introduction

On October 19, 2018 the Court of Justice of the European Union (ECJ) issued an order for provisional measures in the context of the infringement procedure brought by the European Commission against Poland on 2 October 2018, in relation to a Polish Law lowering to 65 years the retirement age of judges at the Supreme Court (Law on the Supreme Court).

Both the infringement proceedings and the provisional measures are ground-breaking, for they contribute to define a new role for the European Union (EU) in upholding the rule of law within its member States. If confirmed, this course of action could pave the way for the emergence of the ECJ as a court with full jurisdiction over respect for the rule of law, democracy and human rights, overshadowing the traditional boundaries whereunder the member States are bound to respect fundamental rights “only when they are implementing Union law”.¹

This essay first examines the substantive grounds of the action for failure to fulfil obligations directed against Poland (at the time of writing, still to be determined by the Court pursuant to the expedited procedure). It then discusses the pre-conditions for interim relief, the provisional measures ordered by the Court and possible scenarios in case of non-compliance. It finally focuses on the parallel developments under the Rule of Law Framework and the Art. 7(1) TEU procedure and offers some reflections as to the intertwined relationship between law and politics in the EU, when its very founding values are seriously challenged from within.

2. Substantive grounds of the infringement procedure

Not only does the new Polish Law on the Supreme Court lower the retirement age of judges currently in force, appointed to the Supreme Court before the date of entry into force of that law (3 April 2018) – whose 6-year mandate, set out in the Polish Constitution, would be prematurely terminated. It also grants the President of the Republic of Poland discretion to extend the active mandate of Supreme Court judges, affected by the lowered retirement age, who are given the possibility to request a prolongation of their mandate. There are no clear criteria for the President’s decision and no judicial review is available. The European Commission decided to refer Poland to the ECJ for the

¹ Under Art. 51(1) of the Charter of Fundamental Rights of the EU: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.” Moreover, pursuant to Art. 51(2): “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”

violations of the principle of judicial independence, including the irremovability of judges, created by the Law.²

The Commission maintains that Poland fails to fulfil its obligations under the second subparagraph of Art. 19(1), of the Treaty on European Union (TEU) read in connection with Art. 47 of the Charter of Fundamental Rights.

Under Art. 19(1), second sub-paragraph (added to the EU Treaties via the Lisbon Treaty): “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” Art. 47 of the EU Charter of Fundamental Rights provides for the right to an effective remedy and to a fair trial, of which the principle of judicial independence is an essential guarantee. In the Commission’s view, having regard to their specific duties and the authority attaching to their decisions in the national legal order and to the particular obligation to which they are subject under Art. 267(3) TFEU,³ the national supreme courts play a central role in the system for the application of European law. Any doubts as to the compliance with the guarantees of independence as regards those courts are such as to prevent them fully from playing that role. Such doubts are also likely to undermine the mutual trust between the member States and their respective courts, necessary for the principle of mutual recognition, which plays an essential role in connection with many legal acts of the EU concerning the area of freedom, security and justice, to function.

This is the first time the European Commission has initiated an action for failure to fulfil obligations related to the rule of law as its exclusive legal basis. The Court, however, prepared the ground for such a step in the case *Associação Sindical dos Juizes Portugueses* (so called case of the Portuguese judges).⁴ On a combined reading of Art. 2 TEU (values on which EU is based and common to its Member States), Art. 4(3) TEU (principle of sincere cooperation) and

² *European Commission v. Republic of Poland*, Case C-619/18, Action brought on 2 October 2018. All related documents are available at <http://curia.europa.eu/juris/documents.jsf?num=C-619/18>. This infringement procedure is not the only one launched against Poland over measures affecting the judiciary. On 20 December 2017, following the publication of the Polish Law on the Ordinary Courts Composition, the Commission had referred to the Court another infringement procedure alleging that the Law introducing a different retirement age for female judges (60 years) and male judges (65 years), is contrary to Art. 157 of the Treaty on the Functioning of the EU (TFEU) and Directive 2006/54 on gender equality in employment. Also, by giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached retirement age, as well as to dismiss and appoint Court Presidents, the Law undermines the independence of Polish courts in violation of Art. 19(1) TEU in combination with Art. 47 of the Charter of Fundamental Rights.

³ As is well known, Art. 267(3) TFEU, concerning the Court of Justice’s jurisdiction to give preliminary rulings, provides that: “Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

⁴ ECJ (Grand Chamber), judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (Case C-64/16).

Art. 19(1) TEU (principle of effective judicial protection of individuals' rights under EU law), the Court stated: "The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law [...]. It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. [...] Consequently, [...] the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU. In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy" (paras. 35-37; 40-41 of the Judgment).⁵

This judgment essentially established a general obligation for member States to guarantee and respect the independence of their national courts and tribunals, *solely* on the basis of Art. 19(1) TEU read in light of Articles 2 and 4(3) TEU. This interpretation of Art. 19(1) TEU gives the principle of effective judicial protection a much wider scope of application than it would have on the basis of Art. 47 of the Charter, which is subject to Art. 51(1). The Court exclusively relies on Art. 19(1) TEU having emphasised that this provision "relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter" (para. 29). The notion of 'fields covered by Union law' mentioned in Article 19(1) is broadly interpreted by the Court and should now be understood as being wider than the notion of 'implementation' laid down in Article 51(1) of the Charter.⁶

As it has been rightly argued,⁷ "the Court's approach, which is centred on the notion of 'fields covered by EU law' and merely requires the existence of a

⁵ For the Court, however, the challenged salary-reduction measures did not infringe the EU principle of judicial independence because they were a limited and temporary reduction of remuneration to help lower the Portuguese State's excessive budget deficit and applied to various categories of public sector employees. In those circumstances, the disputed measures could not be perceived as being specifically adopted in respect of the members of the Portuguese Court of Auditors and therefore could not be considered to impair the independence of that Tribunal (para. 51).

⁶ While the ECJ [adopts a broad interpretation](#) of the notion of 'implementation' of EU law by Member States, the Court has also established that where "a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction" (See e.g. Case C-617/10, at para 22).

⁷ L. PECH, S. PLATON, *Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juízes Portugueses*, in *EU Law Analysis*,

virtual link between relevant national measures and EU law, is ground-breaking yet compelling. Article 19(1) TEU may from now on be relied upon to challenge any national measure which may undermine the independence of any national court which may hear ‘questions concerning the application or interpretation of EU law’ (para. 40). The key ‘test’ is therefore whether the relevant national court has jurisdiction (or not) over *potential* questions of EU law. If this understanding is correct, the Court’s approach may be viewed as ground-breaking as *most* if not all national courts are, at least theoretically, in this situation.”

Art. 19 TEU may therefore be ‘triggered’ in a much broader set of national situations than Art. 47 of the Charter and in areas where there is very little to no EU acquis. Stating that Art. 19 including its reference to independence, is a relevant parameter of review of national measures, the Court has not only enabled natural and legal persons to challenge a broader set of national measures. As a self-standing provision whereunder national measures can be challenged, Art. 19(1) can also constitute the exclusive legal basis of an infringement procedure brought by the European Commission (or another member State).

3. Pre-conditions for interim relief

With its referral, the European Commission also asked the Court to order interim measures, restoring Poland’s Supreme Court to its situation before 3 April 2018, under Art. 279 TFEU.⁸

Because of the immediate risk of serious and irreparable damages in the light of the principle of effective legal protection in the context of application of EU law, the Commission requested that those measures be ordered before Poland submitted its observations, pursuant to Art. 160, para. 7, of the Rules of Procedure of the Court of Justice.⁹ By separate document, the Commission also requested the Court to determine the case pursuant to an expedited procedure.

On 19 October 2018, the Vice-President of the Court, acting as single judge *before the submission by Poland of its observations in the interim proceedings*, granted all the Commission’s requests until such time as an order is made

available at <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>, 13 March 2018.

⁸ “Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended” (Art. 278 TFEU). Under Art. 279 TFEU: “The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.”

⁹ Pursuant to Art. 160(7) of the Rule of Procedure: “The President may grant the application even before the observations of the opposite party have been submitted. This decision may be varied or cancelled even without any application being made by any party.”

closing the interim proceedings.¹⁰ The Commission's request that the case be determined under the expedited procedure was granted by an order of the President of the Court of 16 November 2018.¹¹

According to the case-law of the Court, an application for interim relief may be granted only if the *fumus boni juris* and the urgency requirements and, where necessary, the weighting up of the interests involved pleads in favour of ordering interim measures.

Regarding the first requirement, the Vice-President refrains herself from establishing its existence and merely considers that the arguments put forward by the Commission do not appear *prima facie* to be manifestly inadmissible or wholly unfounded: "Il suffit donc de constater, aux fins de la présente procédure *inaudita altera parte*, qu'il ne saurait être exclu que la condition relative au *fumus boni juris* soit remplie" (para. 17 of the Order).

The urgency requirement is found to be met because of the profound and immediate change in the composition of the Supreme Court brought about *already* by the Law on the Supreme Court (resulting in the retirement of a significant number of Supreme Court judges, including its President and two Presidents of Chambers), coupled with the cardinal importance of judicial independence as a guarantee of the fundamental right to a fair trial.

Should the action for failure to fulfil obligations brought by the Commission against Poland be ultimately upheld, all the decisions of the Supreme Court up until the decision of the Court of Justice regarding that action would have been given without the guarantees connected with the fundamental right of all individuals to an independent court or tribunal. In that regard, the Vice-President recalls that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Art. 2 TEU, in particular the value of the rule of law, will be safeguarded. The infringement of a fundamental right such as the right to an independent court or tribunal is thus capable, because of the very nature of the infringed right, of giving rise in itself to serious and irreparable damage. In the present case, the fact that the Supreme Court is a court of last instance and that the decisions of that court up until the judgment of the Court of Justice ruling on the action for failure to fulfil obligations will

¹⁰ Order of the Vice-President of the Court, 19 October 2018, in Case C-619/18 R, *Commission v. Poland*, *supra* note 2 [text available in French and Polish].

¹¹ Order of the President of the Court, 16 November 2018, in Case C-619/18 R, *Commission v. Poland*, *supra* note 2. Although the subject matter and the conditions triggering an application for interim relief and those triggering the expedited procedure are not identical, the reasoning of both orders are very similar.

therefore have the authority of *res judicata* enable it to be established that there would be a real risk of serious and irreparable damage to individuals if the interim measures were not adopted and the action for failure to fulfil obligations were to be upheld by the Court.

Precisely because the Law on the Supreme Court entered into force on 3 April 2018 and serious and irreparable damage was already caused, provisional measures are not aimed here to preserve the current situation until the Court's judgment, but rather to restore the *status quo* prior to 3 April 2018 – a result normally ensuing from the declaratory judgment that ultimately finds well-funded the action brought before the ECJ.

Finally, in weighting up the interests involved, the Vice-President considers that ordering the requested provisional measures would not jeopardize the object, but merely postpone the application, of the provisions of national law at issue. Conversely, the application of such provisions would be likely to irreparably damage the fundamental right to an independent court or tribunal: “si le recours en manquement était finalement accueilli, l'application immédiate de telles dispositions serait susceptible de porter préjudice d'une manière irrémédiable au droit fondamental d'accéder à un tribunal indépendant, tel que consacré à l'article 47, deuxième alinéa, de la Charte” (para. 25 of the Order).

Obviously, this is not a true “mise en balance des intérêts [en jeu]”). On the Commission's side, the Order considers the irreparable damage to the fundamental right to an independent court or tribunal that the (continued) immediate application of the Law would entail, should the action for failure to fulfil obligations be upheld. On the side of the respondent State, however, it only states that should the action for failure to fulfil obligations be dismissed, the provisional measures would result in a mere postponement in the application of the Law and therefore would not seriously jeopardise the objective of the provisions in question (“Dans ce contexte, il y a lieu de considérer que l'octroi de telles mesures n'est pas de nature à compromettre gravement l'objectif poursuivi par ces dispositions” (para. 24)). At stake, however, is a sovereign State's jurisdiction to prescribe, which includes the power to adopt legislative provisions and to decide the time and manner of their entry into force. It is a gross understatement to say that because the objective of the Law on the Supreme Court is not jeopardized by a postponement in their application, to order the requested provisional measures does impinge upon any sovereign right of the respondent State. It is not coincidence that this is the first time in the history of European integration, and after almost 70 years of its existence, that the ECJ ordered provisional measures, restorative of the *status quo ante*.

This brings us to the most radical critique of the order in question, which lies in having been issued *inaudita alter parte*, pursuant to Art. 160 (7) of the Rules of Procedure of the Court.¹² No reason, however, is given for the application of the said provision, in addition to the three general requirements (*fumus boni juris*, urgency and weight up of the interests involved) for the issuance of provisional measures, examined above.¹³

4. The provisional measures ordered and non-compliance scenarios

The Order provisionally grants all the Commission's requests.

Poland is ordered to adopt the following four interim measures: (1) to suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges; (2) to take all necessary measures to ensure that the Supreme Court judges concerned by the provisions at issue may continue to perform their duties in the same post, while continuing to enjoy the same status and the same rights and working conditions as they did before the Law on the Supreme Court entered into force; (3) to refrain from adopting any measure concerning the appointment of judges to the Supreme Court to replace the Supreme Court judges concerned by those provisions, or any measure concerning the appointment of a new First President of the Supreme Court or indicating the person tasked with leading the Supreme Court in its First President's stead pending the appointment of a new First President; and (4) to inform the Commission of all the measures it has adopted or plans to adopt in order to fully comply with the Order.

Because the Law on the Supreme Court was already in force at the date of the Order, the provisional measures apply, with retroactive effect, to all the judges of the Supreme Court concerned by the Polish Law on the Supreme Court. The judges of the Supreme Court to whom the Law refers, ought to keep their workplaces, even if they have already retired. As explained in the previous paragraph, the relief aims not only to preserve the situation pending the

¹² The rule is that an application for the adoption of interim measures referred to in Art. 279 TFEU "shall be served on the opposite party, and the President shall prescribe a short time-limit within which that party may submit written or oral observations". The President may also "order a preparatory inquiry" Art. 160 (5) and (6). On Art. 160(7), see *supra*, note 9.

¹³ "Conformément à l'article 160, paragraphe 7, du règlement de procédure, le juge des référés peut faire droit à la demande en référé avant même que l'autre partie n'ait présenté ses observations et cette mesure peut être ultérieurement modifiée ou rapportée, même d'office. Selon la jurisprudence, en particulier lorsqu'il est souhaitable dans l'intérêt d'une bonne administration de la justice d'éviter que la procédure en référé ne soit vidée de toute sa substance et de tout effet, l'article 160, paragraphe 7, du règlement de procédure autorise le juge connaissant d'une demande de mesures provisoires à arrêter de telles mesures, à titre conservatoire, soit jusqu'au prononcé de l'ordonnance mettant fin à l'instance en référé, soit jusqu'à la clôture de la procédure principale, si celle-ci a lieu plus tôt" (paras. 12-13 of the Order).

outcome of the main proceedings, but also to restore the *status quo ante* the challenged measure.

These provisional measures will remain in force until such time as an order is adopted terminating the interim proceedings.¹⁴

Provisional measures are binding. Poland therefore is under an obligation under European law to comply with the Order. Because Poland challenges the very jurisdiction of the Court with respect to the infringement action brought by the European Commission, it seems unlikely that it will suspend the application of the Law on the Supreme Court at any time prior to the definition of the main proceedings on the merit. There is a precedent in this respect, and it is likely that Poland's record of previous non-compliance with provisional measures might be at the origin of the harsh stance of the Vice-President.

In the *Polish Forest Białowieża* case,¹⁵ the ECJ stated that in case of breach of an interim measure addressed to a member State, the Court upon the Commission's request can impose penalty payments and pecuniary damages.¹⁶ Should Poland fail to comply with the ordered provisional measures, therefore, the Commission could resort to a procedure analogous to that under Art. 260 TFEU,¹⁷ whereby it "shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it" (para. 2). It has also been suggested, that in case Poland persists in its lack of compliance even with an order or judgment imposing a payment, the "Financial Regulation will have to be interpreted creatively so that the amounts receivable are offset by forthcoming payments to Poland."¹⁸

¹⁴ This order will be issued after Poland has submitted its observations within the proscribed time-limit, in accordance with the ordinary procedure for interim measures under Art. 279(5) TFEU (*supra*, note 12).

¹⁵ *European Commission v. Republic of Poland (Białowieża Forest)*, Case C-441/17.

¹⁶ In the *Białowieża Forest* case, the Commission had asked the Court to order Poland, pending delivery of the Court's judgment on the merits, to cease, except where there is a threat to public safety, active forest management operations in certain habitats and forest stands, and to cease the removal of dead spruces that are a century old or more and the felling of trees as part of increased logging on the Puszcza Białowieska site. The Commission supplemented that application by a request for a penalty payment to be ordered in the event of failure to comply with the orders made. By order of 20 November 2017, the Court granted that application. See Press Release 122/17, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-11/cp170122en.pdf>.

¹⁷ Art. 260 TFEU regulates the action for failure to fulfil obligations directed against a member State which has failed to comply with its obligations under European Union law. If the Court of Justice finds that there has been a failure to fulfil obligations, the member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties.

¹⁸ D. SARMIENTO, *Interim Revolutions: the CJEU gives its first interim measures ruling on the rule of law in Poland*, in *EU Law Analysis*, available at

In this scenario, the consequences of the Polish leadership's choices would be borne by the people of Poland.

5. Parallel developments under the Rule of Law Framework and Art. 7(1) TEU procedure

The EU 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 ([Art. 2](#) TEU). Only European States which respect the values referred to in Art. 2 and are committed to promoting them may apply to become a member of the EU ([Art. 49](#) TEU). Within the EU, the rule of law is of particular importance. Respect for the rule of law is a prerequisite for the protection of all the fundamental values listed in Art. 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the treaties and from international law.

However, the so-called Art. 7 TEU procedure has never been resorted to. It was amended by the Treaty of Amsterdam to include in addition to a sanctioning mechanism, an “early warning” (preventive) mechanism, i.e. a procedure to be triggered in case of a “clear risk of a serious breach” – rather than a “serious and persistent breach by a Member State” – of the EU common values. The *preventive mechanism* allows the Council to give the EU country concerned a warning before a “serious breach” has actually materialised. The *sanctioning mechanism* allows the Council to suspend certain rights deriving from the application of the Treaties to the EU country in question, including the voting rights of that country in the Council. In that case the “serious breach” must have persisted for some time. Both mechanisms are now enshrined in Art. 7 TEU.

In addition, in March 2014, the European Commission adopted the so-called Rule of Law Framework,¹⁹ for addressing systemic threats to the rule of law in any of the EU's member States. The new framework is complementary to both infringement procedures – when EU law has been breached – and the Art. 7 TEU procedure. It allows the Commission to enter into a dialogue with the member State concerned to prevent the escalation of systemic threats to the rule of law. In preparing its assessment, the Commission can draw on the expertise of other EU institutions and international organisations (notably, the [European Parliament](#), the [Council](#), the [Fundamental Rights Agency](#), the [Council of Europe](#), the [Organisation for Security and Co-operation in Europe](#) etc.). If no solution is found within the Framework, Art. 7 TEU will always

<http://eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html>, 22 October 2018.

¹⁹ See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en.

remain the last resort to resolve a crisis and ensure compliance with EU values.²⁰

In January 2016, the European Commission opened a dialogue with the Polish Government under the Rule of Law Framework. Between February and July 2016, the Commission and the Polish Government exchanged a number of letters and met at different occasions. They were not able, however, to find solution. On 1 June 2016, therefore, the Commission adopted an Opinion concerning the rule of law in Poland, formalising its assessment of the current situation and setting out the concerns of the Commission. On 27 July 2016, the Commission adopted its first Recommendation regarding the rule of law in Poland.²¹ The Recommendation found a systemic threat to the rule of law in Poland and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency. On 21 December 2016, the Commission adopted a second Recommendation regarding the rule of law in Poland.²² The Commission found that, whereas some of the issues raised in its first Recommendation had been addressed, important issues remained unresolved, and new concerns had arisen in the meantime. On 26 July 2017, the Commission adopted a third Recommendation regarding the Rule of Law in Poland,²³ complementary to its Recommendations of 27 July and 21 December 2016, where the Commission considered that the situation of a systemic threat to the rule of law in Poland as presented in its previous recommendations has seriously deteriorated. The Polish Government invariably replied disagreeing with all the assessments set out in the recommendations and did not announce any new action to address the

²⁰ The process is based on a continuous dialogue between the Commission and the Member State concerned. The Commission keeps the European Parliament and Council regularly informed. All EU institutions have a complementary role to play in promoting and maintaining the rule of law in the EU. In December 2014, the Council and the EU countries committed themselves to establishing an annual dialogue among all EU countries within the Council to promote and safeguard the rule of law in the framework of the treaties. The European Parliament has also at several occasions called for EU countries to be regularly assessed on their continued compliance with the fundamental values of the EU and the requirement of democracy and the rule of law.

²¹ Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; OJ L 217, 12.8.2016, p. 53.

²² Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2017/146; OJ L 22, 27.1.2017, p. 65. On 14 September 2016, the European Parliament had also adopted a Resolution on the situation in Poland, *inter alia* calling on the Polish Government to cooperate with the Commission pursuant to the principle of sincere cooperation as set out in the Treaty. On 14 October 2016, the Venice Commission adopted its opinion on the law of 22 July 2016 on the Constitutional Tribunal.

²³ Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146; OJ L 228, 2.9.2017, p. 19.

concerns identified by the Commission. A fourth Recommendation was issued on 20 December 2017.²⁴

On the same date, due to a lack of progress through the Rule of Law Framework, the Commission activated the Art. 7(1) procedure for the first time, and submitted a Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach of the rule of law by Poland.²⁵

At the General Affairs Council hearing on the rule of law in Poland on 26 June 2018, no indication was given by the Polish authorities of forthcoming measures to address the Commission's concerns.²⁶ On 18 September 2018, a second hearing on the rule of law in Poland was organised in the General Affairs Council in the context of the Art. 7(1) procedure. The Polish authorities again stood by their position and refused to propose any measures to address the concerns of the Commission and other member States.

On both occasions, the Council failed to trigger Art. 7. The reasons lay in the political nature of the process. Art. 7(1) TEU provides for the Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the common values referred to in Art. 2 of the Treaty. This a majority not easy to achieve.

In the *LM* case,²⁷ however, the Court stated that judicial cooperation with Poland in criminal matters could come to an end even if Art. 7 TEU proceedings are not triggered against that State: cooperation could be automatically terminated only if the European Council were to adopt a decision determining, as provided for in Art. 7(2) TEU, that there is a serious and persistent breach in a member State of the principles set out in Art. 2. Nevertheless, as long as such a decision has not been adopted by the European Council, the executing judicial authority may still refrain to give effect to a European arrest warrant issued by a member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU, “where that authority finds, after carrying out a specific and precise assessment of the particular case,

²⁴ Commission Recommendation (EU) 2017/9050 of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

²⁵ European Commission, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, 20 December 2017 (COM(2017) 835 final 2017/0360 (APP)).

²⁶ It is in this context, that the European Commission launched the infringement procedure, discussed above. A Letter of Formal Notice to Poland was issued on 2 July 2018. The Polish authorities replied to the Letter of Formal Notice on 2 August 2018, rejecting the Commission's concerns. The Commission subsequently sent a Reasoned Opinion to the Polish authorities on the matter on 14 August 2018, and received a response on 14 September 2018, which again failed to alleviate the Commission's legal concerns.

²⁷ ECJ (Grand Chamber), judgment of 25 July 2018, *LM* (Case C-216/18 PPU).

that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial” (para. 73 of the judgment).²⁸

6. Concluding remarks on the intertwined relationship between judicial and political remedies to ensure compliance with the EU fundamental values

Human rights, democracy and the rule of law lie at the foundation of the EU. Long protected by the ECJ as unwritten general principles, human rights are formally recognized as a matter of EU domestic constitutional law (Art. 6 TEU) and have acquired a prominent role as a limit to the legitimacy of acts by both the EU institutions and the member States (at least, when acting within the scope of EU law). They also officially entered the benchmarks to be met by new members before they obtain the economic benefits of the European internal market (Art. 49 TEU). The rule of law is one of the EU common values (Art. 2 TEU). The European Commission, together with the European Parliament and the Council, is responsible under the Treaties for guaranteeing the respect of the rule of law as a fundamental value of our Union and making sure that EU law, values and principles are respected. And the EU disposes of a specific political mechanism that should ensure respect of its fundamental values, in addition to a conspicuous apparatus of judicial remedies generally available to ensure that the law is observed.

Yet, when the rule of law is seriously questioned in one of its member States, responses are either lacking, inadequate or raise serious doubts as to their own consistency with the rule of law.

What seems effective is not workable (the political venue of Art. 7 TEU), what is workable might not be effective (the dialogue under the Rule of Law Framework), while what is both workable and effective (the provisional measures ordered within the same procedure) just seem to defeat rather than uphold the very same values they are intended to protect.

Art. 7 TEU aims at ensuring that all EU countries respect the common values of the EU, including the rule of law. The preventive mechanism of Art. 7(1) TEU can be activated only in case of a “clear risk of a serious breach” and the sanctioning mechanism of Art. 7(2) TEU only in case of a “serious and persistent breach by a Member State” of the values set out in Art. 2. The Poland case shows, however, that the required majority may prove hard, if not

²⁸ The Irish High Court [asked the ECJ](#) whether European Arrest Warrants issued by Poland must be executed, in light of recent legislative changes concerning the Polish judiciary. The referral was made in the extradition case of Artur Celmer, wanted to face trial in his native Poland on drug trafficking charges and arrested in Ireland under a European Arrest Warrant in May 2018.

impossible, to achieve even when the EU is faced with a serious challenge to its very founding values.

At the time of writing, the ongoing rule of law dialogue with Poland is still the Commission's preferred channel for resolving the systemic threat to the rule of law in Poland, but progress through the Rule of Law Framework seems hard to achieve.

The infringement procedure – in spite of the many uncertainties raised by the interim measures, without which it would also risk, however, to become ineffective by the time a final determination is given – appears as the most promising venue.

Law and politics are deeply intertwined, but there are situations in which this strikes us in a very particular way. The EU reaction to the worrying process of “[rule of law backsliding](#)” – first witnessed in [Hungary](#) and – now in [Poland](#), is a case in point.