

CONTROL AND MONITORING MECHANISMS OF THE RULE OF LAW

1. The mechanism of Article 7 TEU

Article 7 TEU has a dual component, repressive and preventive:

- the preventive aspect allows the Council to determine the existence of a clear risk of a serious breach of fundamental rights or freedoms, by a majority of four fifths of its members (i.e. 22 out of 27 Member States), on a proposal from one third of the Member States, the European Parliament or the Commission, and after receiving the assent of the European Parliament;

- the repressive aspect provides for the European Council to establish the existence of a serious and persistent breach by a Member State of the principles on which the Union is founded (freedom, democracy, respect for human rights, rule of law) by the unanimous vote of its members (without the vote of the State concerned), on a proposal by one third of the Member States or the Commission, after receiving the assent of the European Parliament (which has no power of initiative).

Once this violation has been established, it is then up to the Council to **decide by a qualified majority to suspend certain rights** of the State under the Treaty, including the right to vote in the Council.

This repressive procedure is **independent from the preventive aspect** : there is no obligation to establish a risk of serious violation before the punitive part can be implemented.

The preventive track was initiated by the Commission against Poland in December 2017 and by the European Parliament against Hungary in September 2018. The Council **has not yet decided** whether there is a risk of a breach of fundamental rights in these two countries, let alone whether sanctions should be triggered. However, it is holding regular hearings with the states concerned. For the fifth time since the procedure was launched against it in December 2017, Poland was heard by the Council on 22 February. Hungary will be heard on 30 May.

2. Alternative monitoring mechanisms established by the Commission and the Council

a) The Commission's Rule of Law Framework

This is a **non-judicial mechanism set up in 2014** by the Commission to establish a dialogue on respect for fundamental rights with a State if there are clear indications of a systemic threat to the rule of law.

The procedure is based on the publication of annual reports. If the Commission's reports show that there is a risk of a threat to the rule of law, the Commission may issue opinions and then recommendations to the Member State. If the recommendation remains ineffective, the Commission can activate Article 7.

The Rule of Law Framework was activated in 2016 after the first justice reforms in Poland. The Commission issued four recommendations to the Polish government. Following

this, the Commission triggered the preventive arm of Article 7 in December 2017 against Poland.

b) The Commission's annual rule of law reports

Since 2020, the Commission has published an annual report on the general situation on the rule of law in the Union, supplemented by country reports. The reports cover four areas: the justice system, the anti-corruption framework, media pluralism, institutional powers and counter-powers.

The advantage of this exercise is that **all countries are involved**, including those where the rule of law is not criticised, and that the assessment is carried out impartially using **objective criteria**.

The European Parliament calls for the annual reports to take better account of aspects such as freedom of association and the shrinking of the space for civil society, and to analyse cases of undermining the sound financial management of the Union's budget, which would make it possible to link the report to the conditionality mechanism.

The third Commission report to be published in July 2022 should, for the first time, **include recommendations** to help Member States focus their monitoring on key issues, including justice, the fight against corruption and media freedom.

c) Council dialogues on the rule of law

In December 2014, the Council established an annual Council dialogue on the rule of law, based on the principles of objectivity, non-discrimination and equal treatment of all Member States and based on facts.

Discussions are held in the Council on the state of the rule of law in the Member States on the basis of the Commission's annual reports. The last of these was held on 12 April 2022 and focused on the main developments in five Member States: Luxembourg, Hungary, Malta, the Netherlands and Austria. Each of these States was invited to present the main developments at national level and particular aspects of their national rule of law framework.

3. The case law of the Court of Justice

The Court of Justice may be called upon to take a position on national legislation that infringes the rule of law by two means: actions for failure to fulfil obligations brought by the Commission (which may also ask the Court of Justice to order the suspension of the contested measures if it considers that the circumstances so require); and preliminary questions referred by national courts.

As Article 2 TEU cannot be directly invoked, violations related to the rule of law can only be found by the courts if they involve norms stemming from secondary Union law.

4. The conditionality mechanism introduced by the Regulation of 16 December 2020

In order to find an alternative to the sanctions of Article 7, the regulation of 16 December 2020 introduces a mechanism of conditionality of European funds to the respect of the rule of law. The principle is that if a country is guilty of violating the principles of the rule of law, the European Union can decide to suspend payments from the EU budget to that country.

The adoption of this Regulation is based on Article 322(1)(a) TFEU authorising the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Court of Auditors, to adopt by means of regulations the financial rules laying down "detailed rules for the establishment and implementation of the budget and the presentation and auditing of accounts".

The regulation does not apply to all violations of the rule of law, but only to those directly related to the implementation of the budget. However, the Regulation gives very broad examples of violations that could call into question the proper use of EU funds. These include "jeopardising judicial independence", "failing to prevent, correct or sanction arbitrary or illegal decisions by public authorities", "limiting the availability or effectiveness of legal remedies" and "the effectiveness of investigations, prosecutions or sanctions relating to violations of law".

The implementation procedure is closely monitored by the Council. It involves a dialogue between the Commission and the Member State concerned. If the Commission considers that a Member State threatens the proper use of EU funds, it notifies the Member State of questions to which it has one to three months to reply. Depending on the replies, the Commission has an indicative period of one month to propose sanctions to the Council (in the form of an implementing decision). If necessary, the Member State has another month to submit further observations.

These sanctions can consist of several types of measures: reduction or suspension of the disbursement of EU funds, prohibition to enter into new commitments, suspension of disbursement of tranches of loans guaranteed by the EU budget, suspension of economic benefits deriving from an EU instrument. The Commission transmits a proposal for sanctions to the Council, which must adopt it by a qualified majority.

The conditionality mechanism entered into force on 1 January 2021.

However, as Hungary and Poland threatened in December 2020 to oppose the adoption of the recovery plan if the regulation was adopted by the Council, an interpretative declaration was, on the proposal of the German Presidency, included in the conclusions of the European Council of 10 and 11 December 2020. This statement provides, *inter alia*, that :

- the Regulation will have to be applied with full respect for the national identity of the Member States and their political and constitutional structures and implemented in an objective, fair, impartial and fact-based manner, respecting the principle of non-discrimination and equal treatment of Member States;

- the Commission will develop guidelines on how it will apply the Regulation, in close consultation with the Member States. If an action for annulment of the Regulation were to be brought, the guidelines would be drawn up after the judgment of the Court of Justice so that all the relevant elements arising from that judgment could be incorporated into them;

- any formal opening of the procedure will be preceded by a thorough dialogue with the Member State concerned in order to give it the opportunity to remedy the situation.

As Poland and Hungary have brought actions for annulment of the Regulation, its effective application has been suspended pending the Court's judgment. In its judgment of 16 February 2022, the Court dismissed these actions.

The Court of Justice recalled that the values identified by Article 2 TEU define the identity of the Union as a common legal order and that respect for them is a condition for the enjoyment by each State of the rights deriving from the application of the Treaties.

Considering that the proper implementation of the Union's budget and the financial interests of the Union may be seriously jeopardised by breaches of the rule of law in a Member State, the Court held that the Union was competent to establish a horizontal conditionality mechanism on the basis of Article 322(1)(a) TFEU.

Following this judgment, the Commission adopted on 2 March 2022 guidelines which specify how the budgetary conditionality regulation will apply. On 5 April, the President of the European Commission, Ursula von der Leyen, announced that the procedure under this regulation would be launched against Hungary.