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The European Commission's Enhanced Rule of Law Mechanism

Molly O'Neal

The new European Commission has signaled its commitment to advance the work of its predecessor in asserting European Union (EU) authority to prevent – and, if necessary, respond to – breaches in the rule of law by member states. A new toolbox of measures to accomplish this aim would build upon the Rule of Law Framework, adopted in 2014, and rulings by the Court of Justice of the European Union (CJEU) requiring compliance by member country courts and judicial systems with EU legal principles of judicial independence and separation of powers. The first two principal aims of the reinforced toolbox of measures are to foster, through public outreach, a rule of law culture across the EU, and to expand the scope of monitoring and reporting to all member countries while deepening the Commission's institutional expertise to achieve a timely and detailed understanding of developments. The third aim is to reinforce the leverage of the EU to respond in cases where there is serious deviation from rule of law norms. This latter aspect of the reinforced "toolbox" includes adopting a strategic approach to bringing anti-infringement cases to the CJEU and the introduction of rule of law conditionality to EU funding in member countries.

The incoming president of the Commission, Ursula von der Leyen, incorporated in the programmatic political guidelines for her presidency an explicit commitment to the intensified effort to uphold the rule of law. She called for an additional comprehensive European Rule of Law Mechanism that would be applicable across all member countries and offer a uniform approach to monitoring and reporting on each member country by the Commission. She cited the recent rulings of the CJEU as a basis for asserting the competence of the Commission as a guarantor of the rule of law. She also endorsed the proposal to make the rule of law an integral part of the Multiannual Financial Framework for 2021—2027.

The proposed measures, detailed in the Commission's Rule of Law Blueprint for Action of July 17, build upon European Parliament (EP) resolutions calling for a stronger Union stance on the rule of law, recent CJEU rulings, and the firm endorsement by von der Leyen, as well as by the two unsuccessful candidates for the Commission presidency, Manfred Weber and

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Frans Timmermans. The full enactment of these measures is anticipated to be a key work strand of the incoming Commission.

Article 2 of the Treaty of the European Union (TEU) states that the Union is founded on the shared values of democracy, the rule of law, and respect for fundamental rights. Article 19 TEU entrusts national courts to ensure the full application of EU law. Effective judicial protection by independent courts is required by Article 19(1) as a concrete expression of the rule of law. Deficiencies in the rule of law can encompass threats to the independence of the judiciary, arbitrary or unlawful decisions by public authorities, limited availability or ineffectiveness of judicial remedies, and failure to implement higher court judgments. The three pillars of the reinforced rule of law approach led by the Commission are promotion, prevention, and response.

Promotion of a Shared Rule of Law Culture and Prevention of Breaches

The Commission plans to engage the European public across many dimensions to raise awareness of the centrality of rule of law to the values and functioning of the EU, and it will sponsor efforts by civil society actors and academia to support public understanding of this issue. The Commission plans to strengthen cooperation with the Council of Europe (Venice Commission and GRECO) as well as with the Organisation for Security and Co-operation in Europe and — where rule of law intersects economic policies — the Organisation for Economic Co-operation and Development. It will also build upon the work of European judicial networks and the cooperation among member states' constitutional courts. The Commission calls on the EP, the Council, and member state governments to bring complementary efforts to the promotion of a rule of law culture.

The key feature of the prevention pillar of the new toolbox is the introduction of monitoring of rule of law performance across all member countries — a proposal first advanced by the German and Belgian foreign ministers in April 2019. There will be a Rule of Law Review cycle and an annual rule of law report based on an enhanced and constant dialogue with all member states through a network of contact persons. This process is intended to ensure that the Commission can react early to emerging situations rather than seek to roll back challenges to the rule of law. The intensified monitoring and reporting will help to demonstrate to member states and publics that any EU action taken to respond to rule of law breaches is objective, proportionate, and non-discriminatory.

Response Pillar: The Court of Justice of the European Union

The new toolbox will build on significant CJEU rulings in 2018 and 2019 and adopt a strategic approach to addressing rule of law challenges by bringing anti-infringement cases to the CJEU. In a 2018 case (related to a salary dispute by judges in Portugal), the CJEU ruled that member states are "required by Union law to ensure that their courts meet the requirements of effective judicial protection" and that "the independence of national courts is essential to ensure such judicial protection." This ruling underpinned subsequent rulings related to aspects of Poland's judicial overhaul.

The first of these cases contested Polish legislation passed in 2017 that would have retroactively imposed a lowered retirement age of 65 on Supreme Court judges — a measure that would have forced the retirement of 27 of the 72 Supreme Court judges then serving. The law also provided that Supreme Court judges could serve beyond the age of 65 on application to the Minister of Justice, whose decision whether to extend tenure had no explicit criteria and would not be subject to judicial review.

In response to these proposed measures, the European Commission brought a complaint under the anti-infringement procedure to the CJEU in July 2018. The April

2019 opinion of the Court's Advocate General stated that the legislation lowering the retirement age for Supreme Court judges violates the principles of irremovability of judges and of judicial independence. The government of Poland complied with the finding, in keeping with the CJEU's accelerated procedure. The CJEU confirmed this finding in its ruling on June 24, 2019. In a second case brought by the Commission, the CJEU ruled on November 5 that a law that lowered the mandatory retirement ages for judges in the Common Courts — to age 65 for men and 60 for women — was inconsistent with EU law.

The CJEU ruled on November 19 on a complaint brought by several sitting Polish Supreme Court judges challenging the independence of the newly created Disciplinary Chamber of the Polish Supreme Court. The members of this Chamber are elected by the National Council of the Judiciary (NCJ), a body formerly elected by judges themselves, but that is now appointed by the parliament's governing majority on the recommendation of the Minister of Justice. In his opinion, published on June 27, the Advocate General found that the Disciplinary Chamber does not satisfy the requirements of judicial independence established by EU law. He argued that any properly functioning judicial council (in this case the NCJ) must not be under the influence of the legislative or executive authorities. The final CJEU ruling in this case lays out the legal standard for independence that must be met under EU law, but it calls for the Polish Supreme Court itself to rule on whether the Disciplinary Chamber is independent.

Response Pillar: Conditioning EU Funding on Rule of Law Performance

A regulation proposed by the Commission in May 2018 argues for protection of the EU budget in case of "generalized deficiencies as regards the rule of law" in member states. The EP adopted the regulation on first reading with amendments in April 2019. It remains to be finalized and adopted by the Council. This regulation is expected to be effective with the adoption of the Multi-annual Financial Framework, and its rationale builds upon rules already in place that condition EU funding on indicators of macroeconomic stability.

Under this regulation, the Commission would be given the authority to recommend to the Council to reduce EU funding in a "proportionate" way that is based upon evidence of generalized deficiencies in the rule of law in a member country. Measures could involve the suspension or reduction of funding under existing commitments, or a prohibition on new commitments to specific categories of recipients. The regulation includes procedures for the prompt lifting of measures when the member country can show the deficiencies have been corrected.

The argument in favor of the regulation is framed on the responsibility for the EU to use its budgetary resources effectively and without undue risk — a well-established principle. The regulation makes the case that, if the rule of law is systematically flawed, EU funding cannot achieve its core aims. It specifies that the rule of law implies that "the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, separation of powers, and effective judicial protection by independent courts are respected."

This regulation would come into force beginning on January 1, 2021, and it would provide major new leverage to the Union vis-à-vis member states where rule of law norms have been breached. Although presented as a fiduciary measure, the new regulation would also operate as a sanction, complementary to the Article 7(1) TEU procedure.

Stalled Article 7 Procedures

To date, Poland has been the sole test case of the Rule of Law Framework of 2014, beginning with the launch in early 2016 of consultations on the status of judges elected to the Constitutional Tribunal by the out-

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going Sejm (parliament) in 2015. The Commission's concerns about the changes to the Tribunal's composition did not persuade the government to change course. Consequently, the independent check on executive and legislative power provided by the Tribunal, as envisaged under the Polish constitution, has been substantively weakened.

The Commission in December 2017 put a proposal based on Article 7(1) TEU to the Council, stating in particular that the constitutionality of laws in Poland could "no longer be verified and guaranteed by an independent constitutional tribunal." The Polish case is backed by a detailed legal argument from the Commission. The Council held three hearings in 2018 on the Polish case. The Commission has not applied the 2014 Rule of Law Framework to the case of Hungary. However, on September 12, 2018, the EP adopted a resolution invoking Article 7 and calling on the Council to consider the risk of a serious breach of foundational EU values by Hungary. The Council held a hearing on the Hungary case in September 2019 and has scheduled a further hearing for December 10.

The application of Article 7 has a high decision threshold (unanimity) and depends on the willingness of member states to take firm action. Because the procedure is exceptional by nature, action-forcing deadlines have not been adopted. Consequently, the cases against Poland and Hungary have not gathered much momentum.

Prospects for Success of the New Toolbox

The stronger position of the Eurosceptic right in the newly elected parliament may favor efforts by some member countries to force a retrenchment of EU ambitions to uphold a uniform standard for judicial independence across all member states. However, the loss of seats by the center-right and center-left has been matched by gains by the Renew Europe (liberal) and Green factions, who generally endorse a common EU defense of fundamental principles such as rule of law. The nationalist right Identity and Democracy faction in the parliament claims to have been crucial to von der Leyen's election and may hope to exert leverage over the enactment of her program. On the other hand, Donald Tusk's anticipated election to lead the parliament's largest faction, the European People's Party, will allow him to offer strong support to the Commission's rule of law ambitions and could contribute to streamlining Article 7 proceedings.

As one of three executive vice presidents in the new Commission, Timmermans will not have responsibility for pressing the rule of law agenda, but he has led the design and advocacy of the new toolbox. Enacting and applying the enhanced rule of law mechanism will be among the responsibilities of the new Vice President for Values and Transparency, Vera Jourova, a Czech citizen. Her appointment signals that rule of law is not an alien imposition on a few member countries, but rather is embraced by all members for application to all members. As the Commissioner for Justice, Consumers and Gender Equality under the outgoing Commission, Jourova has been a vocal advocate of stronger rule of law measures and endorsed the linkage of EU funding to rule of law compliance.

Although the CJEU has established the legal basis for EU competence on judicial independence, the Court can only react to member state legislation rather than preempt violations of core EU principles. The new EU toolbox aims to avert where possible, and sanction where necessary, significant challenges to the rule of law on the part of any member country. Its most consequential instrument — the proposed cuts to EU funding where there are rule of law deficiencies — could yet be vitiated by procedural limitations introduced by opponents.

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