



The EU rule of law mechanism - walking a political tightrope between European values and the national identity of the Member States

In light of the latest developments in Poland, the EU Commission could, for the first time, apply what is known as the EU rule of law mechanism. On 11 March 2014, the EU Commission submitted a Communication entitled "A new EU Framework to strengthen the Rule of Law" (COM (2014) 158). This states that the EU Commission intends to enter into a "structured exchange" with a Member State where there are "clear indications of a systemic threat to the rule of law" in that Member State. This so-called EU rule of law mechanism was introduced in order to supplement EU instruments aimed at protecting common values in the Member States. The EU Commission's action, however, has come up against political and legal objections.

An Overview of the EU rule of law mechanism

Requirement: Indications of a "systemic threat to the rule of law" in a Member State.

Procedure:

- 1) Assessment of the situation by the EU Commission together with international experts.
- 2) Non-binding recommendation from the EU Commission to the Member State with a time limit for implementation.
- 3) Monitoring implementation of the recommendation.

Aim: Solution by way of "structured exchange" with the respective Member State.

1 Insufficient EU instruments for protecting common values

According to its own definition, the EU is a community founded on the values of respect for human rights, democracy and the rule of law (Art. 2 TEU). The political events in Romania, Hungary and Poland have raised doubts as to whether these values are in fact shared equally by all Member States. Until now, the EU has rarely been in a position to enforce these values in the Member States. This is partly to do with the fact that it only has limited legal instruments at its disposal for exerting any influence on the direction of domestic policy in the Member States.

1.1 Comprehensive examination only in accession proceedings

Before a state can accede to the EU, respect for the common values is examined on the basis of the Copenhagen Criteria. These include e.g. the institutional stability of the country as a guarantee of democracy and the rule of law. In principle, following conclusion of the accession proceedings, no further assessment takes place. In fact, the EU undertakes to respect the national identity of the Member States as expressed, inter alia, in their fundamental political and constitutional structures (Art. 4 (2) TEU). One exception is the Cooperation and Verification Mechanism for Romania and Bulgaria which allows the EU to monitor the progress of judicial reform and the fight against corruption in these two Member States.

1.2 High political barriers to sanctions against Member States

According to the Lisbon Treaty, the EU can only enforce the common values by way of the procedure under Art. 7 TEU. Art. 7 (1) TEU provides that the Council can, with a four fifths majority of its members, determine that there is a "clear risk of a serious breach" of the common values by a Member State, and can address "recommendations" to the country concerned. Irrespective of this, under Art. 7 (2) TEU, the European Council may unanimously determine that there is a "serious and persistent breach" of the common values by a Member State. Only when this unanimous decision has been taken by the Heads of State and Government can the Council impose sanctions against the Member State concerned under Art. 7 (3) TEU by way of qualified majority. The sanction expressly referred to is the suspension of voting rights of the Member State concerned. Financial sanctions are also possible. In 2015, the EU Commission declared that the reintroduction of the death penalty, as proposed by Hungarian Prime Minister Viktor Orban, would certainly result in the institution of proceedings under Art. 7 TEU. Apart from such extreme examples, the application of Art. 7 TEU, particularly the imposition of sanctions, is considered to be largely inconceivable due to the strict voting requirements.

1.3 Infringement procedure only allows selective intervention

The infringement procedure (Art. 258 TFEU) only applies where a Member State infringes EU law. In 2010, France ceased its mass deportation of Bulgarian and Romanian Roma people after the EU Commission threatened it with an infringement procedure for breach of the EU rules on freedom of movement. Two years later, an infringement procedure against Hungary, relating to the compulsory early retirement of politically undesirable judges, prosecutors and notaries, only resulted in a finding of unlawful age discrimination. The latter example in particular shows that the infringement procedure only allows for selective intervention and is ill-suited to the task of enforcing widespread compliance with the rule of law.

2 The EU rule of law mechanism seeks to resolve threats to the rule of law by way of dialogue

The EU rule of law mechanism, presented in 2014, is supposed to close a gap in the run up to the application of Art. 7 TEU thereby supplementing the existing EU instruments aimed at protecting the common values. As a basis for this, the EU Commission appears to use its competence to institute proceedings under Art. 7 TEU. As early as 2003, the EU Commission announced that, as soon as it was considering the use of Art. 7 TEU, it would contact the Member State "informally" and give it the opportunity to respond. Then, as now, the declared aim of the EU Commission was to prevent the imposition of sanctions by entering into dialogue with the respective Member State. According to the EU rule of law mechanism, the EU Commission now wants to replace these "informal" contacts with a "structured exchange" consisting of a three-stage procedure (see box).

The EU rule of law mechanism will not apply in case of individual breaches of fundamental rights or miscarriages of justice, but only where there is a "systemic threat to the rule of law". In this regard, the rule of law represents the collective term for democratic and transparent legislative procedures, independent and unbiased courts, respect for fundamental rights and equality before the law. The EU Commission points out that the precise content of the principles and standards stemming from the rule of law may vary at national level according to the constitutional system of the Member States - an indirect reference to the EU's obligation to respect the national identity of the Member States (Art. 4 (2) TEU).

The Commission will cooperate with recognised institutions, such as the Venice Commission of the Council of Europe, responsible for the rule of law, and the EU Fundamental Rights Agency, to assess whether the developments in a Member State represent a systemic threat to the rule of law. In principle, the content of the dialogue with the Member State will be treated as confidential. Nevertheless, the EU Commission wants to make the introduction of proceedings public and inform the European Parliament and the Council of its progress, regularly and in detail. In addition, the EU Commission reserves the right to institute proceedings under Art. 7 TEU in the event that the Member State fails to comply with its recommendations within the time limit.

3 Political and legal objections in the Council to the EU rule of law mechanism

The European Parliament has expressly welcomed the EU rule of law mechanism. The Council first obtained an opinion from its legal service which came to the conclusion that the EU rule of law mechanism was unlawful because it exceeded the powers of the EU Commission. The United Kingdom expressly opposed the introduction of an EU rule of law mechanism applicable to all Member States. Thereafter, in December 2014, the Council decided to set up a "political dialogue" to promote and protect the rule of law in the EU. The dialogue will take place once a year in the General Affairs Council and is supposed to supplement the infringement procedure under Art. 258 TFEU and the procedure under Art. 7 TEU. The Council also emphasises that the dialogue will respect the national identity of the Member States.

4 Assessment

The EU rule of law mechanism does not grant the EU any new powers to enforce common values. It is a purely political instrument whose outcome essentially depends on the willingness of the respective

Member States to cooperate. In order to be able to exert political pressure, it is important that the procedure under Art. 7 TEU can also be initiated in case the regarding Member State refuses to cooperate with the EU Commission. The successful application by the EU Commission of the EU rule of law mechanism is therefore likely to depend on political support from the Council. The Council, however, seems to have fundamental objections to the EU rule of law mechanism. Rather than welcoming the EU Commission's course of action, the Council has suggested political dialogue between all Member States. In light of the political developments of recent years, it is doubtful whether an annual exchange of opinions will actually be enough to protect the rule of law in all Member States. The European Parliament, on the other hand, basically appears willing to support the EU rule of law mechanism. The EU Commission will need this support because, by applying the EU rule of law mechanism, it is walking a political tightrope between European values and the national identity of the Member States.