

PROTECTION OF RULE OF LAW WHILE PROTECTING RULE OF LAW: WHO GUARDS THE GUARDIAN? / Ondrej Blažo

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Abstract: *The paper focuses on judicial review of political or quasi-political/quasi-legal decisions or other acts of the institutions of the EU involved in following procedures designed to protect the value of rule of law: a) mechanism for protection of values under Art. 7 of the Treaty on European Union and b) measures adopted within the conditionality for the protection of the EU budget (Regulation 2020/2029). At a first sight, the difference between the judicial review of measures aimed to protect rule of law in the Member States under Art. 7 TEU and under Regulation 2020/2029 can appear straightforward: a limited procedural review of measures adopted under Art 7 TEU due to specific powers stipulated in Art. 269 TFEU and full judicial review of measures adopted under Regulation 2020/2029. However, notwithstanding different structure, uncertainties stemming from the wording of the Treaties, the Treaties provide comprehensive framework of judicial control of analysed types of measures aimed to avoid backsliding rule of law in the Member States.*

Key words: *Rule of Law; Judicial Review; Article 7 TEU; Conditionality Regulation; EU Budget; European Union*

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1. INTRODUCTION

Mechanisms for the safeguarding rule of law as a value of the European Union (EU) were not developed merely within the term of von der Leyen's European Commission (Mokrá et al., 2019, p. 182), however, strengthening of the enforcement of this value within the EU is one of the main strategic goals of von der Leyen's agenda (Leyen, 2019, pp. 14–15). The rule of law as a spiritual and moral heritage (Mader, 2019, p. 136) was incorporated into Art. 2 Treaty of European Union (TEU) as a value of the EU, Preamble of the Charter of Fundamental Rights of the EU (CFREU) as well as Art. 21(1) TEU in the regards of external relations. The values of the EU, including the rule of law, exceeded the framework of mere political declaration or moral purpose of the EU existence and were effectively turned into judicially applicable provision (Spieker, 2021). The legal framework is based on the optimistic prism towards the integration and provisions of Art. 7 and Art 50 TEU were introduced as a safeguard *ultima ratio*. Due to this optimistic optics, the TEU does not contain any provisions on expulsions of a Member State from the EU (Circolo, 2022) and backsliding of the level of alignment to the values of the EU, or more precisely deviating from them via systematic measures undermining democracy and rule of law

(Anders and Priebus, 2021; Daminova, 2019; Gatta, 2019; Komanovics, 2022, p. 131; Martín Arribas, 2022).

Measures established by the EU law, aimed to ensure outlawing any deviation from the value of rule of law, can be split between judicial and non-judicial. While the judicial measures involve the Court of Justice of the EU (CJEU) directly, the latter are enforced by other EU institutions, i.e. the European Commission, the European Council, the Council of the EU, and the European Parliament. All these bodies are manifestly political bodies (although their political interests can be different or contradictory) and in order to ensure enforcement of rule of law principles in line with rule-of-law safeguards, judicial control thereof is required. The judicial control is essential for ensuring reliability and trustworthiness of the procedures linked to the protection of the rule of law (in this context, compare Spieker, 2021, p. 240). This paper will not focus on judicial review of the state of rule of law, i.e. via infringement procedure and preliminary rulings (e.g., Bonelli, 2021) and will not question the independence of the CJEU (discussions in this context, see Kochenov and Butler, 2022) leaving them out of the scope of the paper. The paper will rather focus on judicial review of political or quasi-political/quasi-legal decisions or other acts of the institutions of the EU involved in following procedures designed to protect the value of rule of law:

- a) mechanism for protection of values under Art. 7 TEU;
- b) measures adopted within the conditionality for the protection of the EU budget.¹

The paper will not analyse these instruments in detail beyond framework necessary for the assessment of the extent of judicial supervision. Moreover, it will not deal with “negotiated” mechanisms of rule of law surveillance, in particular conditionality mechanisms in association agreements and accession process or GSP+ and also not on measures adopted within the Common Foreign and Security Policy (CFSP) aimed to protect rule of law in the third countries.² Hence, the aim of the paper is the assessment of safeguards provided in the case of unilateral measures adopted by the EU’s institutions in order to maintain and protect rule of law, i.e. whether the rule of law is protected in these mechanisms.

2. MECHANISM FOR PROTECTION OF VALUES UNDER ART. 7 TEU

The legal regulation mechanism for protection of the values of the EU based on Art. 7 TEU is scattered among other provisions: Art. 269 TFEU limiting powers of the CJEU and Art. 354 TFEU providing the details of voting procedures required by Art. 7 TEU.

The powers of the CJEU to review acts adopted under Art 7 TEU are limited as regards:

- a) person who can request the review (“...solely at the request of the Member State concerned by a determination of the European Council or of the Council...”)
- b) the procedural point of view (“Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request”)
- c) scope of the review (“...in respect solely of the procedural stipulations contained in ...[Art. 7]”).

¹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 4331, 22.12.2020, pp. 1–10). EL: <http://data.europa.eu/eli/reg/2020/2092/oj>

² See CJEU, judgment of 22 June 2021, *Venezuela/Council*, C-872/19 P, ECLI:EU:C:2021:507.

Since Art. 269 TFEU contains no reference to Art. 263 TFEU, the first question is, whether Art. 269 TEU is a *lex specialis* to Art. 263 TEU (in comparison, Art. 274 TFEU refers to Art. 263 TFEU in the case of review of restrictive measures). This question is not solved by the Rules of Procedure of the Court of Justice as well since procedures under Art. 269 TFEU are mentioned in Title VIII as “Particular Forms of Procedure” (Art. 206 of the Rules) and thus are not included in Title IV “Direct Actions”. However, there is a question of the added value of the relation of Art. 269 TFEU to Art. 263 TFEU as *lex specialis*. Provisions of Art. 269 TFEU provide specific requesting party, limitation period and the scope of review and hence there are no remaining provisions of Art. 263 TFEU that could be applicable within the review under Art. 269 TFEU. On the other hand, the wording of the competence of the CJEU apparently carves out the review of acts adopted under Art. 7 form general rules of review under Art. 263 TFEU: “The Court of Justice shall have jurisdiction (...) solely at the request of the Member State (...) and in respect solely of the procedural stipulations (...)”. If we turn the sentence into negative wording, we will get: “the CJEU shall have no jurisdiction to review acts adopted under Art. 7 TEU by the Council or European Council by requests of other persons that the Member State concerned and in respect to other grounds than the procedural stipulation.” AG Bobek in *C-650/18 Hungary/Parliament* also distinguishes between acts and decisions of the Council in general and acts referred as “determinations”³ and thus, the decision of the Council under Art. 7(3) TEU falls out of the limited scope of review under Art. 269 TFEU and can be reviewed under Art. 263 TFEU.⁴

It must be noted that Art. 263 TFEU is not the only avenue for review of legality of acts of the EU institutions. They can be reviewed within Art. 267 TFEU as well as within any procedure within the competence of the CJEU due to provision of Art. 277 TFEU. As discussed above, Art. 269 TFEU limits (or, more precisely, deprives) the competence of the CJEU review “determinations” not only *vis-à-vis* possible review under Art. 263 TFEU but in regards Art. 267 TFEU and 277 TFEU as well. Hence, the court of the Member States cannot raise a preliminary question regarding validity of act adopted under Art. 7 TEU by the Council or by the Commission containing “determination” and validity of such an act cannot be raised within any other proceeding within the competence of the CJEU by other party than the Member State concerned and after lapsing one-month limitation period.

Art. 269 TFEU limits the competence of the CJEU when reviewing legality of the acts of the European Council and the Council, this provision, however, remained silent on possible actions for failure to act under Art. 265 TFEU. The Council is obliged to regularly monitor the development in the Member State concerned [Art. 7(1)(2) and Art. 7(4) TEU] and can be thus requested to revoke, lift, or adjust adopted measures.

Analysing the limits of the scope of the review under Art. 269 TFEU, we can find possible similarity with the restricted competence of the CJEU to review acts adopted within the CFSP (Art. 275 ZFEU). Apart from review of the actions by individuals raised under Art. 263(4) TFEU, the CJEU holds competence to “...monitor compliance with Article 40 of the Treaty on European Union”. Based on Art. 40 TEU, the CJEU has a competence to monitor:

- a) division of powers between the EU and the Member States and extent thereof,
- b) division of powers between the institutions of the EU and extent thereof,
- c) fulfilment of procedural rules stipulated by the TEU or TFEU.

Within the review of the acts adopted within the CFSP, the CJEU is therefore empowered to monitor proper application of any institutional, organizational, or

³ Opinion of AG Bobek of 3 December 2020, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2020:985, par. 43-78.

⁴ *Ibid.*, par. 99.

procedural rule based on the Treaties. This scope of the review strikingly differs Art. 275 TFEU from Art. 269 TFEU, which allows monitoring solely “procedural stipulations” provided by Art. 7 TEU. Indeed, procedural stipulations under Art. 354 TFEU shall be monitored as well since they are directly referred by Art. 7(4) TEU. Such a wording explicitly excludes any further considerations and even other institutional failures or misuse of law if they are not directly included in Art. 7 TEU. Absurdly, the CJEU cannot even monitor validity and legality of composition of the institutions adopting the measure or proper formal content of an act (Art. 296 TFEU)⁵ or due signature (Art. 297 TFEU).

Apart from the decisions of the Council and the European Council containing determination of “a clear risk of a serious breach by a Member State of the values referred to in Article 2” [Art. 7(1) TEU] and “the existence of a serious and persistent breach by a Member State of the values referred to in Article 2” [Art. 7(1) TEU], Art. 7 contains other preparatory and final acts of the institution of the EU:

- a) proposal of the European Commission or proposal of the European Parliament under Art. 7(1) TEU;
- b) proposal of the European Commission under Art. 7(1) TEU;
- c) consent of the European Parliament under Art. 7(1) and Art. 7(2) TEU;
- d) recommendations of the Council under Art. 7(1) TEU;
- e) decision of the Council on suspension of certain rights of the Member State under Art. 7(3) TEU.

All above-mentioned acts fall outside the scope of Art. 269 TFEU, and their reviewability can be assessed under Art. 263 TFEU. Since recommendations cannot be reviewed under Art. 263 TFEU and decision on suspension of rights is evidently final decision addressed to a Member State influencing rights thereof, i.e. undoubtedly fall into the scope of Art. 263 TFEU, only the possibility of review of “preparatory” acts are remaining in question. It is stemming from the settled case law that intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment.⁶ However, if a “preparatory” act constitutes separate legal effects to the third parties that cannot be remedied by the action against the “final” act, the “preparatory” act can be subject to action for annulment under Art. 263 TFEU.

Such considerations were confirmed by the CJEU in *C-650/18 Hungary/Parliament*,⁷ the only case judicially testing application of Art. 7 TEU. The legal effects of the resolution of the European Parliament (and thus accordingly that of the European Commission) under Art. 7(1) TEU were confirmed due to wording of Protocol (No. 24) on asylum for nationals of Member States of the European Union that allow consider admissible applications of nationals of the Member States against which the procedure under Art. 7(1) TEU was launched.⁸ Apparently, such an effect of Protocol (No. 24) seems to be accidental and authors of the Treaties probably did not intend to add another layer of judicial review of acts adopted under Art. 7 TEU. Moreover, resolution of the European Parliament or the proposal of the European Commission could be subject to more thorough review under the full application of Art. 263 TFEU comparing to review of “determinations” of the European Council or the Council. This approach is far from being systematic in a situation when launching the procedure under Art. 7(1) TEU by the

⁵ “Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.”

⁶ E.g., CJEU, judgment of 15 March 2017, *Stichting Woonlinie and Others v Commission*, C-414/15 P, ECLI:EU:C:2017:215, par. 44.

⁷ CJEU, judgment of 3 June 2021, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2021:426, par. 29-61.

⁸ Sole Article, subpar. b).

Member States is not subject to a judicial review by the CJEU. In *C-650/18 Hungary/Parliament*, the CJEU tried to save this accidental effect of Protocol (No. 24) on review of acts under Art. 7(1) TEU by restricting its powers by Art. 269 TFEU, even if it was reviewing an act outside of the scope of that provision and basing its competence on Art. 263 TFEU only: "(...) the general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU to review the legality of acts of the EU institutions cannot be interpreted in such a way as to deprive of practical effect the limitation on that general jurisdiction provided for in Article 269 TFEU."⁹ Therefore, the CJEU is ready to accept its power to review "preparatory" acts adopted by the European Commission or by the European Parliament under Art. 263 TFEU, but only if brought by a Member State concerned and based on the arguments on procedural matters. This solution resembles the solution of a riddle in Brothers Grimm's "Die kluge Bauerntochter".¹⁰ Indeed, the CJEU desired to protect possible competence of the Council to make determinations under Art. 7(1) TEU, however refusing to review an act of the institution by a broad interpretation of restriction of competence relating to the other type of review resembles more *denegatio iustitiae* that self-restraining approach of the CJEU to political, economic or social considerations of the institutions. It is true that if the CJEU reviews existence of a clear risk of a serious breach of values within the review of the European Parliament's or the European Commission's proposal, it can block path for adoption of "determination" by the Council, if the proposal is annulled. On the other hand, the CJEU can step out of the role of a pure guardian of legality when correcting mistakes or failures of the legislator unfavourably to the parties to the proceeding. In this point in *C-650/18 Hungary/Parliament* the CJEU did not follow the Opinion of the AG Bobek, who had assessed all the pleas of Hungary, including grounds for the resolution of the European Parliament.¹¹

To conclude, in order to save the Council's full competence to make determinations under Art. 7(1), the CJEU could have refer to its self-restraint to review political decisions of the institutions rather than referring directly to Art. 269 TFEU.

In comparison, the CJEU seems to have full-scale jurisdiction to review all aspects of the decision of the Council under Art. 7(3) TEU within the ambit of Art. 263 TFEU. However, within this review, legality of previous determination of the European Council adopted under Art 7(2) TEU cannot be challenged due to Art. 169 TFEU. A possible review can be split into two parts:

- a) existence of a serious and persistent breach of values;
- b) extent and proportionality of restriction of rights of a Member State in concern.

At a first sight, the first limb appears to be unreviewable, since the Council shall rely on pure existence on determination given by the European Council under Art. 7(2)

⁹ CJEU, judgment of 3 June 2021, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2021:426, par. 51.

¹⁰ The peasant's daughter was required by the king to come to him neither naked nor clothed, neither walking nor riding, neither on the road nor off it.

¹¹ Opinion of AG Bobek of 3 December 2020, *Hungary/Parliament*, C-650/18, ECLI:EU:C:2020:985, par. 147: "Article 7(1) TEU does not limit the reasons on the basis of which a reasoned proposal may be adopted. Nor could it seriously be argued that there is some other provision of EU law, including the duty of sincere cooperation, which somehow limits the pool of sources on which a reasoned proposal under Article 7(1) TEU would be permitted to rely. Since that proposal must be reasoned, the Parliament must rely on objective elements suggesting the existence of such a risk. Previous findings of infringement may undoubtedly constitute such elements, thereby helping to make a case against the Member State concerned under Article 7 TEU to the extent that such infringements amount to a disregard of EU values. Thus, in relying on infringement proceedings, whether they be closed or pending, the contested resolution has not breached any of the principles relied upon by the applicant within its fourth plea."

TFEU and thus the CJEU may focus merely to monitor existence of such a determination. However, if the Council may revoke or change its previous measures in response to changes in the situation which led to their being imposed, the Council shall check the existence of situation which led to the determination provided by the European Council in the moment of adoption of the decision under Art. 7(3) TEU. Otherwise, it can lead to a situation where one day, the Council adopts a decision and the following day, it revokes it due to change of situation. The Council may rely on the determination made by the European Council that certain facts lead to the conclusion that there is a serious and persistent breach of values, but it cannot rely on the existence of those facts, in particular when there is certain time delay between the European Council's determination and the Council's decision. Simply, due to limits of the Art. 269 TFEU, the CJEU cannot review legality of the European Commission's determination of existence of a serious and persistent breach of values, however, it may (shall) review whether such a determination was still applicable in the moment of adoption of the decision of the Council under Art. 7(3) TEU due to state of matters in that moment.

The second limb of possible review is not restricted by Art. 269 TFEU and thus the review procedure will not differ from review of other individual acts (i.e., proportionality of measures, due process of law, duty to provide substantiated reasons, etc.)

3. MEASURES ADOPTED WITHIN THE CONDITIONALITY FOR THE PROTECTION OF THE EU BUDGET

From the point of view of the legal basis and political arguments, Regulation 2020/2092 was, on the one hand, described as an effective measures to protect rule of law in the Member States as an abstract value, on the other hand, as a purely budgetary measure simply expanding previous measures protecting taxpayers' money (Blauberger and van Hüllen, 2021; Łacny, 2021; Pech, 2022). This dichotomy lead to disputes whether political aims (protection of values) of Regulation 2020/2092 does not circumvent mechanisms under Art. 7 TEU. This mixture of political goals and purely budgetary goals aimed to uphold the legal basis for the regulation – Art. 322 TFEU – is visible in the preamble of Regulation 2020/2092: e.g., Recitals 1, 3, 4, 5, 6 and 11 refer to protection and maintaining values of the EU *in abstracto*, and e.g. Recitals 2, 7 and 13 et seq. refer to the necessity of effectively functioning enforcement system of law in the Member States in order to manage EU funds.

Argument on circumventing Art 7 TEU and Art. 296 TFEU was rejected by the CJEU in C-156/21 *Hungary/Parliament and Council*¹² and C-157/21 *Poland/Parliament and Council*¹³ (for more details Hoxhaj, 2022). Due to inapplicability of Art. 269 TFEU, in both cases the CJEU confirmed full competence to review implementing decisions under Art. 6(10) or Art. 6(11) of Regulation 2020/2029 within the ambit of Art. 263 TFEU. Along with the general principles and requirements for adoption of acts of the institutions, provisions of Art. 6 of Regulation 2020/2029 provide a procedural steps to be observed within the procedure. Summing up, the review of legality of an implementing decision of the Council under Art. 6 of regulation 2020/2029 can be subject to review under Art. 263 TFEU and challenged by all alternative applicants, as well as within preliminary reference under Art. 267 TFEU or review under Art. 277 TFEU. Moreover, in the case of possible lifting measures under Art. 7 of Regulation 2020/2029, the decision on lifting measures can be challenged as well. Regarding both alternatives (adoption measures and lifting

¹² CJEU, judgment of 16 February 2022, *Hungary/Parliament and Council*, C-156/21, ECLI:EU:C:2022:97.

¹³ CJEU, judgment of 16 February 2022, *Poland/Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.

measures), the Commission and the Council may be forced to act by the action under Art 265 TFEU. The CJEU has a competence to review not only procedural requirements, but also proportionality of measures as well as existence of conditions of measures.

When assessing the existence of rule of law violation and proportionality of measures adopted in order to protect EU budget against negative consequences of backsliding of rule of law in a Member State, it can be expected that the CJEU will follow its established practice of deference to discretionary powers of other institutions when perusing their duties: "(...) the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue..."¹⁴ Therefore, the CJEU cannot be expected to perform profound investigation and would monitor manifest excesses when assessing rule of law violations in a Member States, their links to performance of the EU budget and proportionality of measures, while accepting choices made by the European Commission and by the Council within their institutional discretion.

4. CONCLUSIONS

At a first sight, the difference between the judicial review of measures aimed to protect rule of law in the Member States under Art. 7 TEU and under Regulation 2020/2029 can appear straightforward: a limited procedural review of measures adopted under Art 7 TEU due to specific powers stipulated in Art. 269 TFEU and full judicial review of measures adopted under Regulation 2020/2029. However, the construction of powers of the CJEU *vis-à-vis* Art. 7 TEU has several intentional and unintentional gaps. First, as a collateral consequence of the wording of Protocol (24) the CJEU has competence to review a proposals for adoption of measures under Art. 7(1) TEU. The CJEU tried to tackle this non-systemic and almost accidental competence by expanding limits of Art. 269 TFEU to application Art. 263 TFEU in case *C-650/18 Hungary/Parliament*. Unfortunately, this approach, even logical and aiming to preserve competence and possible discretion of the Council under Art. 7(1) TEU, restricts the competence of the CJEU without any support in the wording of the Treaties. Judicial-deference approach to political deliberation appears to be more suitable and supported by the settled case law. Although the CJEU cannot review deliberations made by the European Council in its "determination" under Art. 7(2) TEU it can still review proportionality of the Council's measures based on that "determination" as well as whether the "deliberation" can be still a valid basis for the Council's decision under Art. 7(3) TEU. Nevertheless, the limited scope of review of proposals under Art. 7(1) TEU and "deliberations" under Art. 7(1) and 7(2) TEU does not diminish competence of full review of decisions under Art. 7(3) TEU. On the other hand, in can be expected, that in both cases, review decisions under Art. 7(3) TEU and implementing decisions based on Regulation 2020/2029, the CJEU may apply judicial deference in respect of discretionary powers of the European Commission and the Council. Thus, notwithstanding different structure, uncertainties stemming from the wording of the Treaties, the Treaties provide comprehensive framework of judicial control of analysed types of measures aimed to avoid backsliding rule of law in the Member States.

¹⁴ CJEU, judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, ECLI:EU:C:2006:10, par. 80 and case law cited therein.

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