**EU control mechanism on the rule of law and fundamental rights**

Art. 2 TEU

“The Union 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

- the EU verifies compliance with these values in the run-up to EU accession (art. 49)/ lack of similar mechanism after accession

- art. 7 TEU introduced by the Treaty of Amsterdam/ sanction mechanism

- amended after Austria case by the Treaty of Nice (2000 Austria right-wing populist government/Freedom Party) – preventive mechanism in para. 1

- 2014 A new EU Framework to strengthen the Rule of Law
  Commission introduced a three step mechanism to identify "systemic threats" to EU values/ must be completed before art. 7 is triggered/
  - Commission`s assessment
  - Commission`s recommendation
  - follow-up to the recommendation

- how art. 7 operates?
Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

- MS concerned is not counted in 1/3 (9 MSs) or 4/5 (22 MSs) and does not take part in the voting
- EP – 2/3
- higher threshold for QMV in the Council or EC – 72% of MSs (20 MSs) and 65 % population (55%/65%)
Powers of the Commission - "the guardian of the Treaties"

– action for failure to fulfil an obligation (art. 258 TFEU) ➔ the CJEU
e.g.==>

C-286/12 Commission v Hungary (equal treatment as regards the compulsory retirement of judges and public prosecutors)

C-518/07 Commission v Germany, C-614/10 Commission v Austria (independence of data protection authorities)

C-619/18 Commission v Poland/ lowering of the retirement age of the Supreme Court judges

➔ successful request for preliminary measures under art. 279 TFEU

!!! Polish law suspended/ new law on the Supreme Court

– launching art. 7 ➔ 2017 against Poland
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL  A new EU Framework to strengthen the Rule of Law /* COM/2014/0158 final */

(...)

2. Why the rule of law is of fundamental importance for the EU

The principle of the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law[10].

Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components[11].

This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of
expression, freedom of assembly and respect of the rules governing the political and electoral process.

Within the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State[12]. Those are clear examples of why all Member States need to be concerned if the rule of law principle is not fully respected in one Member State. This is why the EU has a strong interest in safeguarding and strengthening the rule of law threats across the Union.
Art. 7 launched by the Commission against Poland to defend judicial independence

20 December 2017 after two years of political dialogue
non-observance of own law - situation in the Constitutional Tribunal
(composition, non-publishing of certain judgments, appointment of the President of the Court, refusal of the President of the Republic to swear some judges),
violation of the independence of common courts and the Supreme Court,
subjecting the National Judiciary Council to political influence

⇒ systemic violation of the independence of the judiciary ⇒ violation of art. 19 TEU

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

EP supported the Commission

Formal hearings in the Council e.g.:

26 June 2018
18 September 2018
Ground-breaking Judgments of the CJEU of 2018

C-64/16 Associação Sindical dos Juízes Portugueses (Portuguese judges’ salaries)

– the CJEU has competence to assess the functioning of the judicial system of the MS/ bases – articles 2 and 19 TEU

– MSs have an obligation to ensure that their courts meet the requirements of effective judicial protection (para. 41)

– Independence of courts is a basic guarantee of the proper functioning of the leading principles of the EU legal order - the principles of mutual trust, mutual recognition, protection of fundamental rights, and proper functioning of the preliminary ruling procedure

C-216/18 PPU, LM (Celmer)
(Polish judiciary deficiencies/ European Arrest Warrant/ Irish court preliminary question/ Area of Freedom, Security and Justice/ the principle of mutual trust

- refusal to execute the EAW – is an exception to the principle of mutual recognition underling the EAW mechanism

- the existence of a real risk that the person in respect of whom EAW has been issued will suffer a breach of his fundamental right to an independent tribunal/ the essence of his fundamental right to a fair trial/ is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to the EAW

- the executing judicial authority has to make an assessment of the situation in MS/ also by asking the relevant Polish court/ hence many questions from e.g. Irish, Spanish, Dutch courts to Polish courts

- information in a reasoned proposal addressed by the Commission to the Council on the basis of art. 7(1) TEU is particularly relevant for the purposes of that assessment

- Defence of independence of judiciary by national court ➔ many preliminary questions on Polish judicial reform to the CJEU by Polish Supreme Court and administrative courts
Art. 7 TUE launched against Hungary by the EP


– systemic violation of the independence of the judiciary
– functioning of the electoral system and the entire system of exercising power
– corruption
– restricting freedom of speech (media)
– restricting freedom of scientific research (university autonomy)
– violating the rights of minorities, in particular Roma
– violating the rights of migrants and refugees
– violation of the prohibition of discrimination

Commission - supports the EP