# A New Page in Protecting European Constitutional Values: How to best use the new EU Rule of Law Framework vis-a-vis Poland

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24.01.2016 doi: 10.17176/20160126-170932

## The proceedings so far and the challenge ahead

On 13 January 2016, the European Commission announced its decision to further investigate whether the recent reforms of Poland's Constitutional Tribunal and Public Service Broadcasters are consistent with the rule of law, a common value of the EU according to Article 2 TEU. On that day, the Commission held a 'College Orientation Debate' discussing these developments in light of previous correspondence with Poland. After this meeting, Commissioner Timmermans officially notified the Minister of Justice of Poland, Mr Ziobro, that from now on the Commission would consider the issue under the 'EU Framework to strengthen the Rule of Law' (Rule of Law Framework, *Rechtsstaatlichkeitsaufsichtsverfahren*). On 19 January the matter was lively discussed in the European Parliament, and a vivid public discussion started.

Many media reports focused on the possibility that this initiative might lead the EU to apply the sanctions of Article 7 TEU—often wrongly termed as "nuclear" effects. However, that is far beyond what is politically likely at the moment. The real issue is the deployment of the new Rule of Law Framework as a more conducive alternative, hopefully based on the support by European public opinion.

The Rule of Law Framework was set out by the Commission in the form of a communication to the European Parliament and the Council in March 2014 as a "pre-Article 7" procedure. It does not foresee binding measures or sanctions, but rather provides for a structured succession of steps that have a double aim: to visibly investigate the possibility that the Commission proposes to the Council the activation of Article 7 TEU, and, in this way, to create a setting in which the Member State concerned mends the critical issues that threaten EU values. Being used now for the first time, it is highly important that the Framework is put on the right track.

In light of the Polish developments, three features of this Framework, which should be seen and developed as a new EU's mechanism to protect European constitutional values, deserve particular attention. The first has to do with the scope of the Rule of Law Framework, the second with the notion of systemic threat, and the last with the challenge of operating the Framework in a cooperative, non-adversarial way.

## "Thick" or "thin" rule of law?

At first sight, and as implied by its title, the new mechanism seems to be dedicated to the protection of only one of the values of Article 2 TEU, the rule of law. However, the Framework adopts a broad reading of the rule of law, citing as part of the rule of law not only 'independent and impartial courts', but also 'effective judicial review including respect for fundamental rights' and 'a transparent, accountable, democratic and pluralistic process for enacting laws'. It appears thus that the Framework is also meant to protect fundamental rights and democracy.

This general orientation towards a "thick" rule-of-law concept is in principle reaffirmed in the decision to submit Poland to the Framework, which notes that '[t]he rule of law is … a constitutional principle with both formal and substantive components'. Nevertheless, when it comes to the actual reprimands against Polish reforms, priority is given to the formal dimension. In his letter of 13 January, Frans Timmermans

makes Poland especially accountable for disregarding decisions of the Polish Constitutional Tribunal. Freedom and pluralism of the media, as questions of democracy and fundamental rights, do form part of the critique, but they take a back seat. It would be however unfortunate if the scope of the Framework is developed minimising other threats to the European constitutional order, such as democracy and human rights.

## Respecting and Showing Respect to the EU's Limited Role

Secondly, the Framework is aimed to counter "*systemic*" threats to the rule of law, not isolated breaches of fundamental rights or miscarriages of justice. The instrument is reserved for extreme cases that are 'likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law'. The Commission uses the term 'systemic breakdown' in its Communication. "Systemic" emerges thus as a new category of threats to EU values that lie *above* isolated incidents, but do not necessarily amount to "serious and persistent", which is required for the activation of Article 7 TEU. The pre-Article 7 character of the Framework implies to avoid getting there, while respecting the EU's subsidiary role according to the overall system of competences.

However, the Commission's early steps do not address why the situation in Poland could amount to a "systemic" threat to EU values. The letter to Poland, formally announcing the activation of the Framework, makes no single reference to "systemic". And Frans Timmermans, in his introductory remarks to the Discussion of the European Parliament, referred to this element by simply saying that '[g]iven the central position of the Constitutional Tribunal within the Polish judicial system, we risk seeing the emergence of a systemic threat to the Rule of Law.' This treatment of the component of "systemic" is unsatisfactory for two reasons.

First, the general reference to "the central position of the Constitutional Tribunal" is too cursory to offer a reasoned justification why the reforms brought forward by Poland qualify as a systemic threat. Second, according to the clear wording of the Framework, a simple "risk" of the emergence of systemic threat is not sufficient to trigger its activation—the systemic character of the threat needs to be present and immediate. As we have shown elsewhere, the systemic component to the violation of the rule of law is indeed fundamental for the legality of the Framework, since it demarcates the scope of action between the EU and Member States under Article 2 TEU. Moreover, if the Commission's activity is to induce any government to reconsider its policy, it needs to rely on European public opinion—and to mobilize European public opinion, the Commission must indicate the systemic nature of the threat to common values. In our previous work, we shaped this general term using theoretical and comparative considerations. The Commission should do more to clarify its understanding of the concept—not least because this is required by the rule of law to which also the Commission is subject: any rule application needs to be reasoned, in particular in such sensitive issues.

## Reasons for a "Systemic Deficiency Committee"

The third characteristic of the new Framework is the Commission positioning itself as the key institution. It is the Commission that sends to the Member State concerned a 'rule of law opinion', it is the Commission that engages with it in a dialogue with a view to remedying the problem. If that does not lead to a satisfactory resolution, it is again the Commission that proceeds to the second stage and addresses to the Member State concerned a 'rule of law recommendation'. It is the Commission, in this recommendation, that sets a fixed time limit and even includes specific indications on appropriate measures. It is the Commission that, if the Member State does not adequately respond to these concerns, will 'assess the possibility of activating one of the mechanisms set out in Article 7 TEU'. It is the Commission to deploy the naming-and-shaming mechanism, by publishing both the sending of the recommendation and its main content.

This has triggered strong reactions. Hungary and Poland see action under the Framework outside the

competences of the EU and the Commission. The Legal Service of the Council has also submitted that the Framework is incompatible with the principle of conferral. It has even 'officially' leaked this opinion, which is highly unusual. According to its view, the mechanisms of Article 7 TEU set out the exclusive procedures for protecting EU values.

This is not convincing. The Framework clarifies and makes transparent how the Commission proceeds before submitting a proposal under Article 7. It has the role of prior administrative clarifications that indicate how the Commission will exercise the competence it clearly wields from Article 7 TEU. The Framework foresees no legal sanctions: publishing letters, opinions and recommendations, even if they amount to 'naming and shaming', do not require a specific competence. For any legal act, the final word is reserved for the Council and the European Council following the steps set out in Article 7 TEU, including the procedural guarantees for the Member State concerned.

Yet, the Commission, an ever more political institution, needs to be non-partisan in such proceedings and employ the Framework in a cooperative way. One consequence of the current proceedings was a counter-coalition of a broad spectrum of Eurosceptics that see it as a political manoeuvre. To counter such claims, we suggest a "Systemic Deficiency Committee" operating as an independent body within the Commission, building on the proposal of a Copenhagen Commission and supported by the European Parliament. Such a Committee would alleviate allegations of bias or partisanship from the side of the Commission, provided that its membership has a strong standing in the public sphere. Different to the proposed Copenhagen Commission, however, we suggest embedding such Committee in the current framework.

## Outlook

In sum, the application of the Framework in the current Polish case is a step in the right direction. It seems a good instance to develop the Framework as an EU mechanism to protect European constitutional values in a European legal space which is rife with constitutional crises, but short of instruments to address them. Its pertinence appears even more clearly in comparison to the Council's (in)activity under its own rule-of-law mechanism, hastily put forward after the Commission's Framework. The activation of the Framework has shown its potential to mobilize European public opinion and orient public discourses to the current condition of EU values. Major EU newspapers have taken up the issue, informed commentary is being produced, and the European Parliament had a promising debate on the issue. Of course, the Framework provides no silver bullet. It will require great political skill to make it a success.

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## SUGGESTED CITATION

von Bogdandy, Armin; Antpoehler, Carlino; Ioannidis, Michael: A New Page in Protecting European Constitutional Values: How to best use the new EU Rule of Law Framework vis-a-vis Poland, Verfassungsblog, 24.01.2016, doi: 10.17176/20160126-170932.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20160126-170932.