

# EROSION OF THE RULE OF LAW IN THE EUROPEAN UNION

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## ABSTRACT

*The paper covers some aspects of the rule of law erosion in certain EU Member States. The focus is on the ways in which the erosion is materialised in practice. The aim of this paper is to enrich the discussion on the importance of this problem, and to point to the urgency for measures to be adopted for the strengthening of the rule of law, particularly in the Member States which entered the EU as part of the so called Big Bang enlargement package. This paper highlights some contribution which certain institutions have given to date in the treatment of this issue, and calls attention to the analysis of the extent of the provisional agreement between the European Parliament and the Council on the protection of the EU budget.*

**Keywords:** Erosion, Rule of law, European Union, European Commission.

## INTRODUCTION

The European Union now has 27 Member States, and it is highly uncertain whether and when a new country will join the EU. Meanwhile, the EU is facing a variety of crises. One of them is the erosion of the rule of law. The Rule of Law as a fundamental value is increasingly under pressure in some European Member States. The focus is currently on Hungary and Poland. However, structural rule of law deficiencies are present in other EU Member States which have been facing endemic corruption, weak institutional capacities, lack of freedom of media and the rise of populist politicians. This was clearly pointed out by the European Commission in its first Rule of Law 2020 Country Report (SWD (2020) 300 -326 final,). This situation can have severe repercussions on the functioning of the EU. Together with the ongoing pandemic, this is perhaps one of the greatest challenges for the EU and its institutions. By addressing this issue effectively, the EU and its institutions can demonstrate their capacity and restore the shaken trust of the citizens. Can the erosion of the rule of law in certain Member States be brought under control? The inconsistent approach of the EU institutions to date has not yielded any significant result.

In the beginning, there is a common link between the Brexit and the backsliding of the rule of law. It consists in that, when the Member States' leaders were negotiating the provisions of the Lisbon Treaty more than twelve years ago, they did not seriously think through all the details in relation to Article 50 TEU (Withdrawal clause) and Article 7 TEU (Protection of the EU core values). Why? Because little did any one of those sitting at that negotiations table back then know that those two articles would ever be applied. The then Member States, before the biggest enlargement to ten countries of the Central and Eastern Europe, held that the simple presence of Article 7 TEU would be enough to deter and prevent an attempt to erosion of democracy and the rule of law by those ten Member States (Pech & Scheppele, 2017). Therefore, instead of by its unfounded title nuclear option (Kochenov, 2017), it is better to call Article 7 TEU smokescreen. Thus, Article 7 TEU has been given psychological rather than true legal

significance. However, actions against Poland (C-619/18, C-192/18), Hungary (C-78/18), albeit with many procedural technicalities, managed to end the taboo that Article 7 is entirely inoperable.

In its three-year hustle with the United Kingdom, the European Union already paid the price of recklessness. That said, is there a far more serious scenario coming up over the non-compliance with the core values that form the very foundation of the European Union? For now, we can see that the erosion of the rule of law has affected the very countries which entered the EU within the framework of the so-called Big Bang enlargement. Having developed from dictatorships, the Central and Eastern European countries aspired to consolidate their democracies. These countries had, for a long time after the World War II, existed under communist regimes, deprived of national sovereignty. Were they too fast, not having experienced sufficiently all the benefits of the full national sovereignty, i.e. being unprepared, to enter this new supranational arrangement? The presumption that due to the economic handicap, their institutional and political development won't be contradictory to the EU core values was obviously wrong. Moreover, now we can already see it was wrong to believe also that the communist rule has relatively permanently inoculated the Central and Eastern European countries against all viruses of the autocratic behaviour.

In this article we will endeavor to examine briefly the issues of the rule of law as the core value on which the EU is founded and the erosion of its full capacity in certain Member States. In this respect, the focus of our interest will be on the several ways in which the erosion of the rule of law is materialized in practice. In addition to that, we will briefly mention some of the mechanisms developed so far for dealing with this problem. We will particularly consider the extents of the provisional agreement between the Council and the European Parliament pertaining to the EU budget protection, which was reached on 5 November 2020.

### **Matter of Concern for the European Union**

In order to address these issues, first it must be considered why the rule of law is so important for the EU. EU was created and progressively developed through an evolutive process of a kind and in a peaceful manner where the point of origin was the concept of “*integration trough the rule law*” (Lenearts, 2020). The Rule of Law in the beginning was taken as an inheritance that originated from the Member States’ constitutional traditions principally the Western European countries. Generally speaking, the EU Treaties provide that the EU is founded on rule of law (Article 2 TEU) as a one of the values common to the Member States (Pech, 2020). In addition, the rule of law must also be actively promoted as indicated in the Articles 3(1) and 13 (1) TEU (Hillion, 2016).

EU Member States have accepted high standards of the rule of law. That includes the principles of legality, legal certainty, prohibition of arbitrary exercise of executive powers, effective judicial protection ensured by independent and impartial courts, extending to respect for fundamental rights. Acceptance of these standards does not mean that the Member States have become immune to various practices that are eroding the protection of the rule of law. On the contrary, the rule of law in the EU has become a matter of concern over the past decade. Why is the rule of law in the EU a matter of concern today?

Firstly, we can say that the rule of law is essential to the effectiveness and credibility of the EU laws and policies. Article 7 TEU points out the legal obligation to respect the values of

the rule of law stated in Article 2 TEU. Every breach of the Treaty, especially of the core values which are common to all of the Member States and on which the EU is founded, represents an alarm which requires an appropriate reaction. Infringements of the rule of law reflect not only on the EU and its Member States but also beyond the EU borders. In this respect, infringements of the rule of law can affect the relations between the citizens and the corporations from third countries. Due to the erosion of the rule of law, foreign investors may recognize that the EU area is no longer the same legal environment for business as it was before.

Secondly, EU is a community based on the rule of law. With the phrase “*Union based on the rule of law*”, the rule of law acquired its peculiarity in the EU. In that very context, the rule of law is manifested as a principle which reflects the fundamental significance within the corpus of core values, thereby achieving stability and coherence of the legal order of the EU. The rule of law represents a central pillar on which the vision of the future of the EU relies. It ensures the required level of cooperation of the Member States and the citizens thereof in the spirit of mutual trust, and the trust in public institutions, inter alia in the judiciary system, it is crucial for the good functioning of the democratic societies. All that which is jeopardizing the rule of law, is undermining also the legal, political and economic foundations of the EU. Deficiencies in one Member State affect the other Member States and the EU as a whole. Compliance with the rule of law is imperative for ensuring the trust of the citizens and the companies in public institutions. It is the foundation of the modern democracy to which the EU aspires, and is based on the legal recognition of legal systems. Mutual recognition is possible on the basis of mutual trust between the Member States, citizens and institutions, and as long as it remains so the rule of law will exist as the core value of the EU democracy. In the citizens’ perception, the rule of law is of immense value. It is a prerequisite for ensuring the equality before the law and the protection of the EU citizens’ rights. Thus, it is the amalgam of standards, expectations and aspirations. It is a principal link among the democracy, fundamental freedoms and the demands for justice and fairness in the dealings between the government and the citizens. Thus, here the erosion of the rule of law in the Member States is reflected on the Union based on the rule of law and represents a threat to the mutual recognition, trust, and ultimately to the EU itself. Having said that, the rule of law erosion finally may disrupt the EU legal order (Closa, 2016) and potentially impede the lawfulness of following EU decisions (Müller, 2015).

Third is the principle of consistency or the absence of contradiction. Article 7 TFEU puts forward that the EU shall ensure consistency between its policies and activities, taking into consideration the objectives and in line with the principle of conferral of powers. EU requires that the membership candidate countries respect the values of the rule of law. According to Article 49 TEU, respect for the rule of law is a prerequisite for the EU membership. In other words, any European country aspiring to the EU membership must abide by the values upon which the European Union is founded. The provision comprised in Article 49 TEU was introduced with the Amsterdam Treaty and it represented a logical sequel or rather codification of the political criteria for the membership which had been adopted by the European Council in Copenhagen. Furthermore, the EU is very consistent in its demand for the respect for the rule of law addressed to the third countries with which it is concluding international contracts in different areas. If such demands are being made to the third countries, then it is entirely logical to assume that in the context of the principle of consistency the EU is demanding the same from the

Member States and their institutions. Therefore, we can note that the principle of consistency represents a very powerful normative argument for the EU.

### **Benchmark of Political Legitimacy**

Although it is often labeled as the benchmark of political legitimacy (Canevaro, 2017), the rule of law by itself is not sufficient. European Union is based on the set of common values comprising the rule of law, but also including fundamental rights and democracy (COM(2020) 580 final). This is a tripod of values of the modern democracy on which the European societies and the common identity are founded. These values permeate the whole of the EU's legal and institutional structure and all of its policies and programmes. It is important to stress here that these three fundamental values must coexist in synergy, i.e. they must be in a harmonic relationship of mutual respect and balance. Democracy cannot progress without independent courts, which guarantee the protection of basic human rights and civil liberties, and without an active civil society and the freedom of media. So, neither one of these three values is to be used as an argument against the other. Each instrumentalization of any one of them leads to the weakening of the democratic order. For instance, the instrumentalization of democracy against the rule of law will gradually lead to the rule of law growing into the rule by law. There is a clear distinction between the rule of law and rule by law. Rule by law is based on a strictly formal approach. It starts from a legal system as a hierarchy of norms, or commands to which a powerful political will assigns a meaning. According to this concept, all institutions exercise their competences in line with the positive law without entering into its qualitative content. On the other hand, rule of law emphasizes that the positive law must be based on certain scales of values and meta-legal principles, i.e. rule of law takes into account the character of the positive law. This is because the positive law can be unjust, discriminatory and repressive. Rule of law in relation to rule by law entails, besides valid and fair procedures, also certain rules that are inspired by the highest human, moral, philosophical, religious values standing as the meta-legal basis and civilization standard for a certain legal system taken in its complexity and entirety. It is not possible to regulate through laws everything one government would wish for; instead, the rationality of legal regulation is understood here as flexibility of the framework within which "legal circulation" takes place, which is simply a manifestation of other transactions, i.e. circulation between people. Instead of everything being only formally based on laws, it is more important that the legal system includes also the material aspect, meaning it should be rationally structured so as to provide people with favourable living conditions, that is, to safeguard the man's life, body, freedom and property. It is important here to add one remark. In the course of 2020, due to the pandemic caused by the spread of coronavirus, the authorities have limited to a certain degree our freedoms, such as the freedom of movement and gathering. However, this cannot be considered an erosion of the rule of law as long as those limitations of our rights are not exceeding what is necessary and proportionate, have a limited duration and are being overseen by national parliaments and courts.

Furthermore, the rule of law cannot be used as a pretext or argument against democracy and basic human rights. For instance, if we were to say that members of minorities cannot run as candidates in elections for certain positions for the reason that such a situation is not envisaged by the constitution and law. This would be a clear example of the instrumentalization of the rule of law in relation to democracy and basic human rights.

## Second Elections

Before we answer the question from where the greatest danger for the ensuring of the rule of law is coming, we will consider some specific factors of the environment in which there is an ongoing debate about the respect for the rule of law. I find that we cannot neglect the fact the institutions, as well as the society itself, are nowadays facing great challenges. This is foremost pertaining to the health-related, ecological and economic challenges, but also to the technological advancement, or generally the challenge of the Fourth Industrial Revolution. These challenges demand certain adjustments, and also clear measures. Governments are the ones who should offer a way out and propose measures which would concurrently entail adaptation to the new conditions and offer a perspective and progress for the citizens. Summarizing the need for the government to, in the current crisis circumstances, adopts measures which would be more flexible and allowing for the necessary adjustments in order to protect the citizens of Hungary, Fidesz adopts the law which grants the government a mandate to rule by decrees and without parliamentary oversight. The situation is additionally complicated with the current pandemic of COVID-19 which serves the political leaders as a pretext to additionally strengthen the autocratic position of their government by violating the rule of law.

What's more, one of the most important issues the governments are concerned with nowadays is the second elections. The second elections become much more important than these that have already been won. In that way, the election campaign never stops. It lasts in continuity. The principal objective of the permanent election campaign is to significantly reduce and limit the risk of losing the second elections. It is interesting that in 2012 the government of Viktor Orbán adopted amendments to the Electoral Law of Hungary which favourize the position of his party Fidesz. Experts estimate that, in spite of somewhat worse results in the 2019 local elections, owing to these interventions it will be almost impossible for the opposition parties to win the general elections taking place in 2022. Thus, here we can see from where some other politicians in some other countries copy the same story with the electoral laws. Particularly interesting here are the relations also between the political parties. Onstage we can see a new surreal phenomenon of political relations: the government is criticizing the opposition more than the opposition criticizing the government. Moreover, the relations “*government-opposition*” is less and less based on the principle of healthy rivalry between political opponents. There are a growing number of states in which the political subjects perceive each other in their mutual relations as political enemies. Traditionally, politics should consist in challenging one's political opponents in terms of the framework of political culture patterns that are accepted in democratic society. Democracy can survive only if political opponents accept each other as such, that is, as opponents, and in no way as political enemies.

## The Most Important Factors Materialising the Erosion of the Rule of Law

And now, to finally attempt at answering the main question: which are the indicators of the erosion of the rule of law, or, how can we even recognize from where the danger is coming?

## Corruption

Certainly the problem of corruption, particularly of high level corruption, and the inefficiency of anti-corruption strategies can be listed here. Corruption is a serious problem which jeopardizes the efficient functioning of the state and public bodies at all levels, and it is one of the key factors for the erosion of the values and principles on which they are founded. Hence, the rule of law as well. The most dangerous state of political order is when corruption is spreading in an organised and systematic way and thus becomes a way of life for the citizens. Despite some positive movements, the efficiency of the investigative measures, and of the prosecution for the crimes of corruption, is still a major challenge for Hungary, Bulgaria and Romania, while Italy and Greece have managed to achieve certain progress. In the Member States which were among the latest to enter the EU there are certain obvious deficiencies in the public administration. These deficiencies can lay ground for arbitrary decision-making and an environment where the officials more easily succumb to the pressures of corruption. Autocratic rule dominated by the arbitrariness of the authorities is among the chief causes of corruption. This is an example of the so-called high corruption and abuse of office associated with the cases in which the political power is striving to prevail over the rule of law. With the aim to stabilize the position of power, the authorities are seeking to corrupt their closest associates in order to keep them under control, blackmail them and prevent their organized rebellion, and then they, in turn, by the same principle, corrupt their junior associates, and so the corruption spreads systematically and pervades the entire pyramid of power. In the contemporary circumstances, the most common forms of corrupting the associates in the government include facilitating purchases for public needs without control, obtaining loans without invitation to bid, precise rules or public access, facilitating monopolizing of import procurement, discretionary powers.

## Freedom of Media

Another is the freedom of media. Freedom of media as its integral part represents one of the basic human rights and the foundation of any democratic regime. Citizens have the right to be informed about which measures their governments are taking and that is a fundamental element of every democratic regime. Journalists have the right to exercise their profession in a safe and independent environment without any kind of pressure from the governments or political parties. Civil society and media free of influence by government are vital safeguards of strong democracies, and therefore have a crucial role in democratic questioning of the decisions made by the authorities. Media under control often fail to respect the ethical norms, they are exposed to political and other pressure and serving corporate and private interests of authorities, and also stand in the way of the development of the freedom of expression and the entire system of human rights protection on the one hand, and on the other of the very rule of law. Freedom of media and pluralism of the means of public information are key elements in the facilitation of the rule of law, democratic accountability and fight against corruption. However, in some Member States, media and the journalists are often facing threats coming from the authorities. In 2011, Viktor Orbán's government passed the Law on Media which has a significantly effect on the freedom of media.

## Judicial Independence

However, the most important indicator of the erosion of the rule of law is seeking to place the judiciary or judicial system under control. This is because the judicial system is entirely dedicated to the idea of providing, by acting impartially and independently, support to the rule of law by ensuring that no one is above the law. There are different modalities used in attacks against the judiciary. One of the ways is to exclude or significantly reduce the possibility of a judicial review of legal acts. Another way is to politically instrumentalize the judiciary, i.e. to place under control the management elements of the judicial system. Also, part of this is related to the controlling judicial nominations. This was used in the entire authoritarian overthrow strategies recently employed in Poland and Hungary. It is not so seldom that individuals are object of various attacks: the judges. What are worrying are the orchestrated attacks which are coming from the government officials and in which there is no hesitation to exploit the government infrastructure and media where some judges are subjected to ill-treatment by media. Infrequently, judges are being portrayed as exponents of certain political parties. Particularly noticeable is the audacity displayed by certain representatives of executive authorities by openly expressing through media their disrespect for the court and court decisions. Internal campaigns seeking to persecute individuals with frantically fabricated disciplinary proceedings along with the public naming and shaming are aimed to intimidate the individuals and place them under control. Rarely, decisions by certain judges are being interpreted as damaging or hostile, directed against a certain ethnic group or political party, with the intention to trigger citizens' distrust in the work of the judiciary and the judges. Ultimately, these actions have very negative consequences for the judicial independence since working under pressure makes the judges feel they do not have a sufficient conformity of freedom and safety which is necessary for them to impartially exercise their function in accordance with the law. And precisely that is one of the fundamental principles of judicial independence. The issue of judicial independence is nowadays problematic in Hungary and Poland in particular, and because of that several years ago the European Commission launched certain procedures pursuant to Article 7(1) of the Treaty on European Union (COM(2018) 324 final). This is pertaining the approach based on the “*no rule of law – no money*” logic, which aims to protect the EU budget in case of generalized deficiencies as regards the rule of law in certain Member States. This will be further discussed later in the text.

It is interesting to mention that from 2015 to date, Poland adopted as many as 18 laws in order to undermine the independence of the judicial system. This simply speaks to a planned and systematic approach to seeking to place the judiciary under control. The Government of Poland has strengthened considerably its influence on the National Council of Justice which nominates judges, dismissed more than 150 (out of 700) presidents and vice-presidents of the regular courts, forced almost 40% of the Supreme Court judges into retirement, which in turn created the need for 70 new judges of the Supreme Court (Von Bogdandy et al., 2018).

Here we intend to answer one more question: for what reason is the independent judiciary so important for the EU in the first place, or what are the most important of the practical reasons. One of the most important practical reasons appearing here is the very EU itself and its single, internal market which is functioning on the basis of uniform or consistent application of the EU law. This process seems to be complicated, considering that some instruments of the secondary legislation are directly applicable, whereas others are not. Directives, for example, must be

transposed into the national legislation of the Member States. The crucial part in this is played by the courts of the Member States which are at that point taking on the role of a European court as they are to ensure consistent application of the EU law. In cases where judges in the Member State have doubts in terms of whether some specific implementation is correct in its entirety, there is an instrument of preliminary ruling at their disposal, referring the matter to the European Court of Justice. This means that, at that point, any national court can bring their action before the European Court of Justice. On the other hand, when the European Court of Justice is invited to intervene by solving the question of the implementation of the EU law at the Member States' national level, it is taking on the role of and functions de facto as the national court of the Member State. This is a very interesting dynamic of relations between the judiciaries of the Member States and of the EU which allows for consistent application of the EU law in the Member States. Should this dynamic get disrupted in any way, it could reflect on the functioning of the single internal market. For example, if under pressure from the authorities the national courts discontinue using that instrument of preliminary ruling, the consistent application of the EU law in the Member States would come into question. As we can see, the respect for the rule of law is the lynchpin also for the functioning of the internal market, cooperation in the area of justice on the basis of mutual trust and recognition, and also for the protection of the Union's financial interests. The problem here which appeared recently in some Member States is the inefficiency of the consistent implementation of the law on whistleblowers in accordance with the Directive 2019/1937 on the protection of persons who report breaches of Union law in the fields of consumer protection, financial interest, and environment. In the long run, this could create legal barriers and jeopardize the internal market, since then the rules in the Member States and their implementation would differ. In the event that the consistent application of the EU law can no longer be guaranteed in the Member States, the question would be how the EU could then function efficiently on its own in the long run.

Based on the above, we can note that the factors materializing the erosion of the rule of law are mainly aiming at placing under control the judiciary, its independence, impartiality, freedom of access to the law and the possibility of relying on fair and just procedures with the aim to determine their rights and requests. To this end, infrequently, corruption and media influence are being employed. The point is that the rule of law is at first being neglected, consciously attacked, so as to get pushed off the scene completely in the end. Some authors define the erosion of the rule of law as a process by which the elected representatives consciously seek to weaken and place under control the internal control mechanisms, with the aim of dissolving the liberal democratic system and ensuring a long-term rule for their political party (Pech & Scheppele, 2017).

### **Provisional Agreement**

In order to combat this problem, the EU institutions have been, for some time now, undertaking certain activities. Particularly evident is the activity of the European Commission, which is logical, considering its importance as a guardian of European values. The European Commission has a direct responsibility for ensuring the respect for the rule of law as the core value enshrined in the EU Treaties. It is important to note that the measures being undertaken here are based on the political, rather than judicial review. Breach of Article 2 TEU in itself cannot be the basis for legal action before the court. This is so because Article 2 TEU is about



the EU values and not legal norms (Van Elsuwege & Gremmelprez, 2020). It is clear from Article 7 TEU that the issue of checking compliance with the EU values on the part of the Member States has been entrusted to the European Council, the Council and the European Parliament. These are dominantly political institutions. Then again, Article 269 TFEU explicitly rules out the jurisdiction of the Court of Justice in deciding on the unlawfulness of the act in relation to Article 7 TEU. However, it is noticeable that the European Commission is relying in one part, indirectly, also on the rulings of the ECJ, and of the European Court of Human Rights. Numerous mechanisms have been developed so far within the Rule of Law Toolbox which aim to bring under control the situation related to the erosion of the rule of law: the European Rule of Law Mechanism, Article 7 of the Treaty of the EU, Infringements, the European Semester, the EU Justice Scoreboard, the Rule of Law Report, the Cooperation and Verification Mechanism, the Structural Reform Support Service, EU Funding and General Regime of Conditionality for the Protection of the Union Budget. Here we will cover in some more detail the Provisional agreement between the Council and the European Parliament about the general regime of conditionality for the protection of the Union budget.

One of the important mechanisms that have been agreed recently is the Provisional agreement between the Council and the European Parliament about the general regime of conditionality for the protection of the Union budget in case of generalized deficiencies as regards the rule of law in the Member States. The agreement was reached on 5 November 2020. This was officially confirmed on 16 November 2020 by COREPER II. The text of the agreement has been published. The general regime of conditionality is part of the set of measures related to the next multi-annual financial framework and recovery plan. Respect for the rule of law is an essential precondition for respecting the principle of sound financial management and for the protection of the Union budget. This mechanism aims to strengthen the protection of EU budget when the breaches of the principle of the rule of law lead to the abuse of EU funding. In cases where the rule of law breaches in a Member State are found to sufficiently directly affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU, the EU can impose a series of measures so as to protect its budget. These measures may include suspension of payments or prohibition of inclusion in new contracts for the Member State which is in breach of the rule of law. When it comes to the suspension of payments, it covers all of the EU funds and resources, including those allocated through the recovery instrument.

Where the Commission will propose an implementing act with financial measures to address the rule of law breaches in a given Member State, the decision will be taken by the Council by qualified majority within one month. A Member State may exceptionally request to discuss the matter in the European Council if it believes that the Commission proposal is a violation of the principles of equal treatment, objectivity and non-discrimination. Then the deadline for the Council to take a decision is extended to three months. Additionally, the Commission can, where it deems appropriate, use Article 237 TFEU in order to prevent unnecessary delay or prolongation of the decision-making in the Council.

However, before the European Commission can launch the procedure, it is necessary that two conditions are met. The first condition is that there are evident breaches of the principle of the rule of law. The second is that such breaches negatively affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the

Union. It is important to emphasize that here it is not necessary for the Commission to prove that the breaches have already had a budgetary impact. It is enough to demonstrate that these breaches have the potential to jeopardize the EU's sound financial management.

As regards the scope of issues which constitute a breach of the principle of the rule of law, it is important to emphasize that a list was agreed comprising the most significant forms of breach of the rule of law. In this regard, endangering the independence of judiciary, limiting the availability and effectiveness of legal remedies, failing to prevent the public powers from arbitrary or unlawful decision-making or withholding financial and human resources which have impact on their proper functioning, are considered to be serious forms of breach of the principle of the rule of law, and the Commission won't have to prove them. In order to determine whether a specific activity constitutes a breach of the rule of law, the Commission has the possibility to seek the opinion of the Venice Commission or the Agency for Fundamental Rights. A brief analysis of the agreed measures reveals their primary objective, which is reflected in the attempt at the short-term stabilization of the current situation. The EU cannot go on buying consensus in the long term. This mechanism can deliver good results in the interaction with other, primarily, preventive mechanisms with the Rule of Law Toolbox. Lastly, imposing sanctions should not be the end goal; instead, the goal should be finding solutions that are protecting the rule of law, on the basis of cooperation and mutual support.

### **Effective Judicial Protection of the Court of Justice**

On the other hand, one should not forget about the importance of the role of the European Court of Justice. This institution is the only one which can directly strengthen the subprinciples on which the rule of law of the EU is based. In this way, for instance, the Court of Justice ruled that the notion of 'judicial independence' is an autonomous concept of EU law and that this implies that judges must be protected against any external intervention that could jeopardise their independent judgment (C-506/04 – Wilson). In several of its recent rulings, the Court called the attention to the importance of respect for the EU core values, and particularly for the rule of law. In the ASJP case (Case C-64/16), the European Court of Justice very clearly underlined the importance of effective judicial protection, that is to say that the independence of the judiciary at the national level is essential for the proper functioning of the judicial cooperation system as embodied by the preliminary ruling mechanism under Article 267 TFEU, as well as for secondary law instruments that are based on the principle of mutual trust. In the above ruling, the Court stated the potential of Article 2 TEU in conjugation with Article 19(1) TEU for ensuring the respect for the rule of law in the EU. The institutional dimension of the independence of the national judiciary is covered by the interpretation of Article 19 TEU. Furthermore, the fundamental values of the rule of law are made operational by Article 19(1), which ensures their implementation with respect to Member States easier than does, say, Article 47 of the EU Charter of Fundamental Rights. After *Les Verts* case, this is perhaps even the most important decision of the ECJ in relation to the rule of law in the legal system of the EU. On 24 June 2019, the Court for the first time had the opportunity to implement the ASJP ruling in the Case C-619/18, *European Commission v Republic of Poland* in relation to the procedure from Article 258 TFEU. In this case, the Court also ordered interim measures for the suspension of the national reforms which would have affected the independence of the judiciary. For the first time, the Court stated that a Member State has violated the obligations from Article 19(1)(2) TEU.

This was the first ruling of the Court about the compatibility of the national measures on the organization of the judicial system in question with EU law in the context of an infringement action under Article 258 TFEU (Bogdanowicz & Taborowski 2020).

## CONCLUSION

Based on all of the above, we can conclude that EU is gradually developing mechanisms through which it is trying to bring the situation with the erosion of the rule of law under control. The challenge is huge, not only because of the fact concerning the complicated organisation of the EU itself, but also because it is about the protection of the core value on which the EU is founded. Matters are additionally complicated with the awareness that the other Member States, which joined the EU family as part of the so-called big enlargement, have neither shown a satisfactory level of immunity to the repercussions produced by the erosion of the rule of law. Therefore, there is no time to waste. The EU must count on the implementation of measures which would, on the one hand, imply the prevention of the autocratic power consolidation in Hungary and Poland, and on the other, prevent the spread of this “virus” to other Member States. In medicine jargon, both is needed: the drug and the vaccine. If the virus spreads to other countries from the large enlargement package, it could then have catastrophic repercussions for the functioning of the EU and its future. The situation is no children’s game, having in mind the recent support given to Hungary by the Slovenian Prime Minister. It seems that here the proactive action by all stakeholders is a very important strategy. Of particular importance for that is the role of the European Commission, which should initiate a dialogue, a sufficiently wide debate on the European level which would cover the issues such as judicial independence, freedom of media, independence of the non-government sector. A wide European debate and a long list of participants can assist in overcoming of obstacles on the path to the rule of law and democratic society.

One should keep in mind that it is the democratically elected governments at issue here. It is about the populists. In a time of populism, it is important to raise the citizens’ awareness about the damaging effects of abandoning the concept of the rule of law, because that could, in the long run, inflict the most damage precisely on them, the citizens.

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