ESTABLISHED EU RULE OF LAW INSTRUMENTS

STATE-OF-THE-ART WORKING PAPER

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This project receives funding from the European Union's Horizon Europe research and innovation programme under the Call HORIZON-CL2-2021-DEMOCRACY-01 – Grant agreement n°101061621

2023

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LISTE OF ABREVIATIONS

AG: Advocate General
AMR: Alert Mechanism Report
ASGS: Autumn Package consisting of the Annual Sustainable Growth Survey
CEECs: the Central and Eastern European countries
CP: Cohesion Policy
CSRs: Country-Specific Recommendations
CVM: Cooperation and Verification Mechanism
DRF: EU Pact for Democracy, the Rule of Law and Fundamental Rights
EAW: European Arrest Warrant
ECA: European Court of Auditors
ECB: European Central Bank
ECHR: European Convention of Human Right
ECJ: European Court of Justice
ECtHR: The European Court of Human Rights
EMU: Economic and Monetary Union
EP: European Parliament
EPPO: European Public Prosecutor's Office
EU: European Union
EUCO: European Council
EUJS: EU Justice Scoreboard
IMF: International Monetary Fund
MFF: Multiannual Financial Framework
MIP: Macroeconomic Imbalance Procedure
MS: Member State(s)
NCAs: national competition authorities
NGEU: Next Generation EU package
NGO: Non-governmental organization
NRRPs: National Recovery and Resilience Plans
OLAF: European Anti-Fraud Office
OMC: Open Method of Coordination
PRP: Preliminary Reference Procedure
RLRC: Rule of Law Review Cycle
RoL: Rule of Law
RRF: Recovery and Resilience Facility
SCPs stability and convergence programmes
SGCY: the Support Group for Cyprus
SGP Stability and Growth Pact
SRSP Structural Reform Support Programme
TEU: Treaty of the European Union
TFEU: Treaty of the Functioning of the European Union
TFGR: Task Force for Greece
The Charter: EU Charter of Fundamental Rights
TSI: Technical support instrument

2.2. The infringement Proceeding

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The infringement proceeding is a **key instrument of European law since its foundation.** It was foreseen already by the original texts of the ECSC Treaty (Article 88) and the EEC Treaty (Article 169, identical to Article 141 EAEC Treaty), aiming at guaranteeing the respect and effectiveness of European law in all Member States. Over time, Treaties' provisions on the infringement proceeding have been repeatedly amended in order to make it more streamlined and effective. In particular, these multiple changes have sought to overcome the duplications envisaged in the original model, which had proved only partially effective in pushing Member States towards greater coherence (Kilbey 2007). Lastly, with the Treaty of Lisbon (taking up ideas already present in the unapproved Constitutional Treaty), the infringement procedure was modified in two distinct directions, however converging in making it much more effective as a deterrent. On the one hand, the pre-litigation phase has been shortened (Article 260(2) TFEU) (Peers 2012); on the other, it was foreseen the possibility of applying financial penalties already under the first infringement procedure (Article 260(3) TFEU) (Várnay 2017). It is therefore a tool conceived with **general purposes**, and precisely for this reason its specific functionality in dealing with issues related to the rule of law can be questioned, in the light of the much broader set of more dedicated instruments (Coman 2022).

The first reaction of the Commission to the emerging situation of rule of law crisis in specific Member States was to affirm the necessity of a 'better developed set of instruments' to tackle this challenge (European Commission, President Barroso 2012) [2], so implying the limits of the existing ones. In the scholarly debate, some authors underlined the limits of using infringement proceedings in this context. Some underlined that they may lead only to symbolic effects, when the Member State concerned enacts only a formal compliance with Commission's requests (Batory 2016). Others even pointed out that in the context of a rule of law crisis, infringement proceedings may even result counterproductive, considering their impact on a compromised domestic public opinion (Schlipphak & Treib 2016).

Also in the light of the evolution of the situation in Hungary, Romania and Poland, the debate on the possible use of infringement proceeding offered further opinions, proposing **specific adaptations of the tool to make it more adequate to promote the rule of law** (Besselink 2017; Moberg 2020). For example, its use in a more systemic way has been fostered in order to deal with multiple and composite threats, as is typical of risks concerned by rule of law backsliding (Scheppele 2016). Then, a new interpretation of the procedural rules of the ECJ has been proposed, aimed at creating a fast track for the infringement procedures with implications related to the rule of law, so as to increase promptness and certainty of the penalty resulting from its violation (Bárd & Śledzińska-Simon 2019).

As it can be seen, scholarly reflection on infringement procedure and its capacity to promote the rule of law, have been **much more low-profile than the "nuclear option"** of the instrument ideally specifically devised on the same subject, i.e. art. 7 TEU. Without supporting formal amendments to Treaties' provisions, those proposals were in the sense of re-interpreting the tool, stretching to the maximum the potential of an existing and, so to speak, "ordinary" instrument.

Such **ordinary nature of the infringement proceeding** brings a number of advantages and disadvantages.

To a certain extent, the possibility of referring to a **consolidated framework** and a now widespread and well-known institutional praxis is certainly useful (Heringa 2018; Bakó 2021). Hence, the infringement procedure may bring in the set of tools managing the rule of law crisis the extremely effective leverage represented by **fines** (Pohjankoski 2021).

However, in debating about using infringement proceedings to contrast rule of law backsliding, one should not underestimate the effect of degrading the constitutional tone of the conflict. Considering the seriousness and the systematic nature of the violations, the use of the ordinary instrument may be seen inadequate to the values put at risk by the Member State receiving the procedure. In the end, it would imply to react to a comprehensive rule of law backsliding by a Member State of the EU in a way that is similar to the delay in implementing whatever minor directive. In other words, the question is twofold: whether the **limited scope** of infringement procedures, conceived to focus on a single act or law, may miss the bigger picture of systematic violations of the rule of law (von Bogdandy & Ioannidis 2014); and whether such an ordinary instrument is proportionate to an extreme threat to the values referred to in art. 2 TEU.

Also the Commission seems to have experienced a clear evolution in the interpretation of the functionality of the infringement procedure in relation to its ability to contain violations of the rule of law. Still in the Communication of January 2017 on *EU law: Better results through better application* (2017/C 18/02) it seemed to have a preference for the informal tools of the *Rule of Law Framework* , recognizing that some threats in this field cannot be addressed through infringement proceedings (see p. 1). Later, probably due to the problematic evolution happened in some Member States (and in particular in Hungary and Poland), the Commission changed its mind on this matter. In the Communication *Strengthening the rule of law within the Union. In a blueprint for action* of July 2019 [3] , it presented an action plan which, among other things, aims to respond effectively to violations of the rule of law through a wide-ranging use of powers of the Commission itself as "guardian" of the Treaties, in order to ensure compliance with what is provided by Union law in relation to the rule of law. In this perspective, the Commission announced a **"strategic approach" to infringement proceedings in this area.** Such a strategic approach is not limited to the role of the Commission in activating infringement procedures (and in the timing to do so), but it also includes a more widespread involvement of the CJEU, through "requesting expedited proceedings and interim measures whenever necessary" (p. 14).

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This change of attitude on the side of the Commission has led to an emphasis on the complementarity between the general instrument of the infringement procedure and the specific one of the Article 7 TEU procedures (on which section 2.1.). Indeed, these procedures are not mutually exclusive. In contrast with this conclusion, the nature as lex specialis for Article 7 TEU had been hypothesized (Kochenov & Pech 2015), so to preclude the possibility of activating, for similar reasons or in any case against the same Member State, an infringement procedure relating to compliance with the rule of law. This statement was challenged in the literature first (Schmidt & Bogdanowicz 2018) and then overcome by the practice: both the Conclusions of Advocate General Tanchev in C-619/18 Commission v Poland (§48-51), as well as the aforementioned Communication of the Commission of 2019 (see p. 9) clarified that these are complementary tools in the pursuit of the same goal.

In the light of this complementarity, as well as of the poor results of Article 7 TEU procedures in recent years (Puetter 2022), the potential of infringement procedures in promoting compliance with the rule of law deserves all the more attention.

Some characteristics of this institute may offer **answers to the limitations shown by the procedures of Article 7** TEU. In particular, the infringement procedure is a purely legal instrument, which can be activated by the Commission. Albeit subject to the discretion of the latter (Stone Sweet 2004) it is not conditioned to filters of a political nature by the other Member States. The requirements for the activation of an infringement procedure are more concrete, as they are related to an effective violation of an obligation imposed by European law, not being sufficient "a clear risk of" a (serious) breach. Regardless of the preconditions and mechanisms for triggering the procedure, the difference between Article 7 TEU and Article 258 TFEU is most evident in terms of sanctions that can be applied to the State concerned, which are consistent with the political or legal nature of the instrument through which they are determined. Instead, the objection related to the different scope of application of the two tools seems to be less decisive: at first glance, the mechanism of Article 7 TEU would appear to be directed also towards acts not limited to the principle of conferral, involving also the inner functioning of the Member State (Kochenov & Pech 2015); however, the practice has shown that acts generally affecting the functioning of the judiciary (i.e. the first and essential safeguard of compliance with the rule of law) end up being "attracted" under the EU competence, as they are functional to the application of European law as well (C-619/18, Commission v Poland , §50) (Bard 2021).

The **most recent practice** of the tool is related to the multiple issues concerning the independence of the judiciary in Poland. In the last few years, no fewer than three infringement procedures have been initiated. A first one (launched on 3 April 2019) on the new disciplinary regime of judges, considered harmful to the independence of Polish judges with respect to political power.

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A second one (29 April 2020, moreover during the most difficult phase of the pandemic) in relation to multiple acts on the functioning of the judicial system in Poland. A third (22 December 2021) is particularly interesting because it relates to the jurisprudence of the Polish Constitutional Tribunal on the primacy of Union law. In the first two cases, the Court of Justice already supported Commission's objections, whereas the third case has been recently referred to ECJ (15 February 2023): after a reasoned opinion sent in July 2022, the Commission did not find satisfactory how Poland addressed the concerns related to Article 19(1) TEU, deciding to activate the subsequent step of the procedure.

As for the financial consequences of this strategy, the pression put on Poland is potentially extremely high. Only with regard to the second case (C-204/21 R), the CJEU, upon the request of the Commission, ordered Poland to pay a fine of one million euros per day for not having suspended the provisions relating to the Disciplinary Chamber of the Supreme Court (order issued on 27 October 2021). Actually, Poland seems not willing to fulfil this obligation, in a certain way confirming that this strategy of the Commission may determine an escalation in the clash between the Commission and the targeted Member State (Anders & Priebus 2021).

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Endnotes

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