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EU Institutions in the Crosshairs: Rule of Law or Power Play?

The acceleration of the power dynamics between the institutions of the European Union is a phenomenon that is still developing and will become even more significant in the next few years. Part of this can be linked to the debate on the rule of law between the EU institutions and the Member States, which has now become a political product, in which the institutions and Member States concerned are involved with varying degrees of intensity, and of which Hungary and Poland in particular have become the main targets. In the context of the forthcoming Hungarian EU Presidency, this trend may become of particular importance, and it is therefore crucial to analyse and interpret the evolution of the power dynamics between the EU institutions. An essential part of this analysis is a recent trend that may bring a transformation of the way rule of law is regarded: the emergence of rule of law control concerning the activities of the EU institutions is becoming more and more intense, with increasing focus on the conformity of institutional acts with the EU Treaties and on the fulfilment of legal obligations by the EU institutions themselves. From a political point of view, the phenomenon has so far been largely peripheral, with the main messages of the 'mainstream' – or at least those who consider themselves as such – parties not being critical of the institutions, although these political groups, which are part of the mainstream European public life, are themselves not exempt from rule of law monitoring either.

The rule of law criteria for the EU institutions

The rule of law must underpin the functioning of all the institutions of the European Union. This requirement can be interpreted as meaning that the institutions must act in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which were adopted voluntarily and democratically by the Member States. According to the Treaties, the purpose of the institutions is that:

"The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions" [Article 13(1) TEU]. Another criterion of the rule of law which is applicable to the institutions is that, according to the same provision, "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation" [Article 13(2) TEU].

European integration started out as a purely economic integration and, accordingly, neither the EU institutions nor the Member States considered it necessary for the founding Treaties to contain principles and provisions to safeguard the rule of law. The emergence of the rule of law criteria was brought about by the desire to strengthen political integration.

Accordingly, the Maastricht Treaty created a political union which now operates with the rule of law as both a legal and a political concept.[1]

From a case law perspective, the decision of the Court of Justice of the European Union (Court of Justice, CJEU) in the Les Verts case provides a basis for an important definition of the rule of law in EU institutional practice.[2] According to the Court's judgment, the Union is a "[…] community based on the rule of law in so far as neither the Member States nor the institutions are exempt from verification of the conformity of their acts with the Treaty". In practical terms, this judgment defines the provisions of the Treaties as a basic constitutional charter for the EU institutions. Regarding the concept of the rule of law, the Court of Justice of the European Union offers no further definition, however.

This is where the reference to the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights) becomes relevant. The Charter is the basic document on the conditions related to the rule of law for the EU institutions. Article 51 of the Charter of Fundamental Rights states that "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". Prior to the entry into force of the Charter and its incorporation into the Treaties, there was no provision in the Treaties that set out in detail the fundamental rights and rule of law criteria to be respected by the Member States when applying European institutions and Union law. The Charter is therefore a relatively new instrument, since it was proclaimed on 7 December 2000, at the same time as the Treaty of Nice, in accordance with the conclusions of the Cologne European Council of 1999, although at that time it was still an interinstitutional agreement, and therefore at a lower level in the EU's hierarchy of sources of law than the Treaties. It was only with the entry into force of the Lisbon Treaty in 2009 that the Charter of Fundamental Rights was elevated to the level of the EU Treaties.[3] From the perspective of the history of integration, the European Union and its institutions have lagged far behind the Member States for decades in detailing the conditions for the rule of law, while the constitutional structures of the Member States have precisely defined the conditions for the legitimate functioning of their public bodies. It should be noted that today's concept of the rule of law is a political ideal that goes beyond its criteria and beyond the formal and the substantive forms of the rule of law.[4] However, the report of the Venice Commission of the Council of Europe, which was adopted to define the substantive elements of the rule of law, outlines, in a way that is also relevant to the EU institutions, that the conceptual elements of the rule of law are: the rule of law, legality, the requirement of legal certainty, the prohibition of arbitrariness, the right of access to an independent judiciary, the protection of human rights, the prohibition of discrimination and the principle of equality before the law.[5]

[1] Téglási 2014: 154.
[2] Judgment of the Court of 23 April 1986 in Case 294/83.
[3] Téglási 2014: 156.
[4] Győrfi–Jakab 2009: 156.
[5] Venice Commission 2010.

The EU's institutional system has long resisted 'superseding' control mechanisms. Despite the fact that in substantive legal terms the legal standards applicable to EU institutions cover a very wide range of norms, monitoring of the compliance of EU institutions with the rule of law is still in its infancy. However, considering the fact that the issue of the responsibility of EU institutions for the rule of law has been taboo for decades, the recent precedents that have emerged certainly represent a breakthrough.

Interinstitutional dynamics and the principle of institutional balance

For the sake of completeness of interpretation, we cannot ignore the aforementioned interinstitutional power dynamics that characterise the approach to the rule of law issue. First of all, the Lisbon Treaty can be considered, from this perspective, as having brought about a rearrangement of the balance of power between the European institutions.[6] In this context, the various EU institutions, in particular the European Parliament and the European Commission, have seized every opportunity to use the new rules, interpreting them according to their own objectives, to gain as much political leeway and power as possible, both vis-à-vis each other and vis-à-vis the Member States. The principle of institutional balance is of paramount importance for integration as an integral part of the rule of law conditionality of the EU institutions.

The principle of institutional balance is not explicitly enshrined in written primary law, with the Court of Justice of the European Union having the responsibility for developing it.[7] The so-called institutional triangle is at the heart of EU decision-making, and the EU's institutional triangle system is thus based on both the sharing and the combination of power.[8] The roots of this principle can be traced back to the earliest period of EU integration, specifically to the Meroni judgment, in which the Court of Justice referred for the first time to the "balance of powers which characterises the Community's institutional structure" as a guarantor principle. The norm currently in force is the provision of Article 13(2) TEU, which refers accordingly to the obligation of the EU institutions to cooperate, as mentioned above. In this sense, this means that the EU institutions must comply with the rules governing their competences, but in a teleological sense it also means that it is up to the institutions themselves to reveal the true content of the rules governing their competences, interpreted in a way that is appropriate to the situation, thereby ensuring that the Union functions properly and with the necessary efficiency. This interpretation in itself provides sufficient room for manoeuvre to allow the dynamics of power-sharing between the institutions to take effect.

Experience has shown that the rule of law approach towards Member States has provided an excellent platform for waging the political struggle for competences in the

[6] "The Court of Justice of the European Union, one of the EU institutions, has had one of the strongest influences on the history of integration through its judicial law-making" (Arató et al. 2020: 51).

[7] Mohay 2012: 27.

[8] Trócsányi–Sulyok 2020: 226–235.

past and that, similarly, the interinstitutionally oriented debate on the rule of law could provide an excellent opportunity for a reordering of power within the EU organisational system in the coming years.

Interinstitutional litigation – A path to accountability for the rule of law

Litigation between the EU institutions is not common, but it is not unique in the practice of the European Court of Justice. To give just a few examples of interinstitutional disputes: In the spring of 2021, the European Parliament brought an action of failure to act against the European Commission (case C-137/21), as part of the "usual comitology battle" between the two institutions, this time on visa reciprocity. The Parliament argued that the Commission should have adopted a delegated act under a valid and existing legal instrument in respect of third countries imposing a visa requirement on nationals of EU Member States, but that the Commission had failed to do so.[9] The reasoning behind the case is that Bulgarian, Croatian, Cypriot and Romanian citizens are still required to hold visas to enter the United States, even though U.S. citizens are not required to do so when visiting an EU country.

In 2018, there was a specific case (T-156/18), that was not purely interinstitutional, but which had an institutional policy dimension, when the leader of the European Conservatives, Ryszard Legutko, a politician from the Polish Law and Justice Party, and another member of his party, Tomasz Piotr Poręba, brought a lawsuit for failure to act against the European Parliament, because, in their view, the Parliament had failed to forward to the Council of the European Union a written question which they considered to be in breach of the European Parliament's Rules of Procedure (Rules of Procedure). The General Court dismissed the action as inadmissible, arguing that the failure to forward a parliamentary question cannot be regarded as an act that can be challenged by way of action for failure to act.[10]

Article 265 TFEU stipulates that when the European Parliament, the European Council, the Council, the Commission or the European Central Bank fails to act in breach of the Treaties, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to initiate an infringement procedure. To be admissible, the institution concerned must be given two months' notice to act, followed by two months for the institution concerned to take the action affected by the failure to act voluntarily, after which a further two months may be allowed for legal proceedings.

Therefore, for an EU institution to be found to have failed to act, it must be under an obligation under the EU Treaties. However, the practice of the CJEU is controversial as to whether it constitutes a failure to act if an EU institution takes a position in the

[9] Action brought on 4 March 2021 in Case C-137/21, European Parliament vs. European Commission.
[10] Order of the General Court of 8 March 2019 in Case T-156/18, Ryszard Legutko and Tomasz Piotr Poręba vs. European Parliament.

pre-action procedure when requested to do so, but still refuses to take the action in question. At least, this is the position taken by the Court in its previous case law. In Dumez vs. Commission (Case T-126/95),[11] the applicant sought to have the Commission bring infringement proceedings against Greece in respect of the public procurement for the new Athens airport. According to the Court of Justice, private parties do not have the right to challenge a decision of the Commission refusing to initiate infringement proceedings in a particular case. However, it is also true that the Court interpreted this provision in this way in relation to private parties and not in relation to an EU institution. The picture is somewhat more nuanced in the CJEU's opinion in Pioneer Hi-Bred (T-164/10),[12] according to which the inapplicability of an action for failure to act does not preclude the EU institution from being unclear in its response to a failure to act notice as to whether or not it accepts the act to which it has been invited.

Another decision, also in an interinstitutional case, differs from the general practice of the CJEU. In this case, the Court of Justice interpreted the rules to mean that the mere fact of replying to a failure to act does not absolve the EU institutions from liability. According to the judgment in Comitology (Case 302/87), where the European Parliament brought action against the Council of the European Communities, the refusal to act, however clearly expressed, does not in itself constitute an act of omission.[13]

It can thus be seen that the EU institutions have been the target of actions for failure to act in the past, but this is the first time that the European Council and the European Commission have been held liable not only for the unlawful failure to act but also for the resulting breach of the principles of the rule of law in the context of the application of the conditionality regulation.[14]

Chapter One of the rule of law conditionality case: European Parliament vs. Council

Following the European Council meeting of 10–11 December 2020, the outcome of the EU's agreement on the budget and the recovery fund was hailed as a victory for all parties concerned. A superficial observer might have been under the illusion that the European Union was actually operating according to a policy of compromise above all else. However, as the American poet and diplomat James Russell Lowell put it, "Compromise makes a good umbrella, but a poor roof": regulation regarding the infamous rule of law conditionality had been surrounded by tension for weeks before the formal agreement.

[11] Order of the General Court of 13 November 1995 in Case T-126/95, Dumez vs. European Commission.

[12] Judgment of the General Court of 26 September 2013 in Case T-164/10, Pioneer Hi-Bred International Inc. vs. European Commission.

[13] Judgment of the Court of 27 September 1988 in Case 302/87, European Parliament vs. Council of the European Communities.

[14] 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.

In addition to the budgetary instruments, the European Council adopted a political agreement which, among other things, foresaw that EU governments could challenge the rule of law regulation attached to the budget before the European Court of Justice. Under the agreement reached at the December 2020 summit of heads of state and government, the European Commission agreed to work with member states to develop a methodology for implementing the rule of law mechanism, but if the regulation is challenged in the Court of Justice – which Hungary and Poland duly did on 11 March 2021 – the procedural rules will only be finalised once the case is closed. According to the text of the agreement, the Commission will not propose any measures before the methodology has been finalised.[15] The agreement was published in the form of Council conclusions, one of the features of which is that they have no legal binding force and no normative effect under the Treaties. The Council normally uses these documents to express its political position on a subject related to the EU's field of activity, and these conclusions therefore tend to be primarily political commitments or positions.

The European Parliament found the agreement unacceptable from the outset, however. A few days after the agreement and before the December plenary, i.e. before the debates and votes on the draft regulation, the subject was already on the agenda of the joint meeting of the BUDG-CONT (Budget and Budgetary Control) committees of the European Parliament on 14 December 2020. In a closed session, the European Parliament's Legal Service answered oral questions on the subject, including several accusations from MEPs that the Council does not respect the rule of law when it adopts conclusions that go against the substance of a regulation. During the debate, the Legal Service confirmed that, according to the case law of the Court of Justice, the conclusions of the European Council can in no way override the provisions of an EU regulation – since, in accordance with Article 15(1) TEU, the European Council does not exercise a legislative function and the framework for the applicability of the conditionality regulation is contained in the regulation itself.[16]

At the request of the EP's Committee on Constitutional Affairs (AFCO), the Parliament's Legal Service examined the options and concluded that the CJEU would not consider the action for annulment of the Council conclusions to be admissible. On the one hand, an action for annulment under Article 263 TFEU could be brought against any measure adopted by the institutions, whatever its nature. The Council conclusions therefore fulfil the criteria for being open to challenge. However, according to the Legal Service, the judgment of 21 June 2018 in Case C-5/16 Poland vs. European Parliament and Council is relevant in this respect, where the CJEU held that in a case where the Parliament and the Council act as co-legislators, they are not at all obliged to follow the conclusions of the European Council.[17] On this basis, therefore, the Council conclusions do not contain

[15] European Commission 2022.

[16] "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions" [TEU Article 15 (1)].

[17] Judgment of the Court of Justice of 21 June 2018 in Case C-5/16, Poland vs. European Parliament and Council.

provisions for the Parliament and, consequently, the CJEU would presumably not consider the conclusions to be open to challenge by the EP. In its opinion, the Legal Service took it for granted that Hungary would challenge the Regulation on the conditionality of the rule of law and, in this respect, urged the EP to concentrate its efforts on defending the position of the EU institutions in the challenge to the Regulation with the Council, rather than on challenging the Council conclusions. The opinion also contained a veiled reference to the Commission, which, according to the resolution, is under no obligation to comply with the Council conclusions, even if it wishes immediately to apply the rule of law conditionality regulation against any Member State.

Following this negative legal opinion, the European Parliament, foregoing the possibility of taking legal action against the Council, reverted to its own toolbox of political and then legal pressure, with the Commission now in its sights.

Chapter Two of the rule of law conditionality case: European Parliament vs. Commission

In its motions for resolutions in March[18] and June[19] 2021, the European Parliament consequently called on the Commission to apply the Regulation on the rule of law conditionality of EU funds against Hungary and Poland without delay. In the absence of any substantive response from the "guardian of the treaties" to these calls, Parliament President David Maria Sassoli wrote to Ursula von der Leyen at the end of the summer calling on her to take the necessary steps and raising the prospect of bringing an action for failure to act against the Commission.

In her letter of reply, the Commission President argued that the conditions for applying sanctions to the two Member States were not clear. She also stressed that she was free to choose from the range of rule of law instruments at her disposal and that it was therefore up to her to decide what action she considered to be effective in this case, and that it was not necessarily this Regulation that would be applied.

In response, the EP launched the necessary internal procedures to prepare for legal action in early autumn. The normal procedure, under the Rules of Procedure, is for the Parliament's Legal Service to prepare an opinion on the chances of success of the case and to appoint a rapporteur to draft a proposal for a case, which is then voted on in committee. The Legal Service is traditionally cautious about the Parliament's litigation initiatives and seeks to identify all possible risks of litigation, but the rapporteur, German Green Party politician Sergey Lagodinsky, argued that the Commission was violating the rule of law by not applying the existing regulation and that the EU institution should be brought to heel as soon as possible.

The Committee on Legal Affairs therefore supported the action and the then President of the European Parliament, David Maria Sassoli, brought an action on behalf of the

[18] European Parliament 2021a.
[19] European Parliament 2021b.

Parliament against the Commission before the European Court of Justice, as recommended by the Committee on Legal Affairs (JURI). However, following the judgment of the Court of Justice of the European Union of 16 February 2022 (C-156/21) rejecting the actions brought by Hungary and Poland in the case and the announcement by the President of the Commission on 5 April 2022 that the Regulation would apply to Hungary, the political groups in the European Parliament decided – behind closed doors – to withdraw the action in May 2022.[20]

Interinstitutional storm over approval of Polish recovery plan

Thus, while the case of the conditionality regulation detailed above put the EU institutions concerned in the crosshairs of the rule of law debate because of a failure to act, the same situation arose in the case of the Polish Recovery and Resilience Plan (RRP) as a result of actually taking a measure, namely the approval of the RRP.

At the end of May 2022, the Polish Sejm adopted the draft legislation to abolish the Disciplinary Chamber of the Polish Supreme Court, as called for by the EU institutions, and which allowed the €35.4 billion Polish Recovery Plan to be approved by Brussels. A few weeks later, in mid-June, the necessary formal decision was taken by the Council of the European Union.[21] The approval came despite the European Parliament's criticism of the Commission's endorsement of the Polish Government's plan, both in plenary and in a separate resolution.[22] MEPs stressed that the implementation of European Court of Justice judgments and the primacy of EU law cannot be treated as a bargaining chip and that the Commission is in breach of the rule of law, despite the EU institution making it clear that the Polish Government must meet several milestones to comply with EU law before Poland can receive any payments.

Even though no disbursement has been made to Poland since then, the approval of the Polish recovery plan is a major source of political and interinstitutional tension both inside and outside the institutions. On 28 August 2022, effectively repeating and further elaborating on the reasoning of the European Parliament's June decision, four European judges' associations, the Association of European Administrative Judges (AEAJ), the European Association of Judges (EAJ), Rechters voor Rechters (Judges for Judges) and the European Judges for Democracy and Freedom (MEDEL), brought an action against the Council decision approving the Polish recovery plan, seeking its annulment.[23] The main argument of the action is that the Council's decision does not restore the independence of the Polish judiciary and ignores previous rulings of the Court of Justice of the EU, and therefore violates the rule of law. The legal arguments were developed by The Good

[20] Judgment of the Court of Justice of 16 February 2022 in Case C-156/21, Hungary vs. European Parliament and the Council of the European Union.
[21] Council of the EU 2022.
[22] European Parliament 2022b.
[23] The Good Lobby 2022.

Lobby Profs, a group of legal academics including well-known law professors who were also involved in the drafting of the basic idea of the rule of law conditionality regulation.

In the authors' view, the milestones set by the Commission and the payments made conditional on them circumvent a number of European Court of Justice rules on the independence of the Polish judicial system. The milestones call for a reform of the disciplinary system for judges, the establishment of a new body to replace the chamber, and a review of the cases of judges affected by decisions of the disciplinary chamber. According to the organisations bringing the action, the decisions of the Disciplinary Board should necessarily be null and void, and the cases of Polish judges subject to disciplinary measures should not be reviewed, but these judges should simply be reinstated to their previous positions with immediate effect, as required by previous rulings of the European Court of Justice. The Commission and the Council must not deviate from this and must not be content with anything less. They consider that the contested Polish RRP decision in fact gives legal effect to the decisions of the Polish Disciplinary Chamber, which was established in breach of EU law, based on the Court's ruling, and whose decisions are therefore null and void.

The central claim of the action, and the most important argument from an integration point of view, is that the judgments of the European Court of Justice in infringement proceedings are binding not only on the Member States addressed but also on the EU institutions themselves, the bodies of the Union. As a consequence, ignoring these judgments violates the rule of law and the duty of loyalty between the institutions. Reference is also made to the Bosman case (C-415/93),[24] which is of particular sporting historical importance, in which the Court of Justice ruled, in a case concerning the transfer of a Belgian footballer, Bosman, that the EU institutions cannot authorise or approve practices which are contrary to the Treaties. As regards the milestones imposed as conditions for payment, the action alleges that these milestones not only circumvent the binding decisions of the Court of Justice, but that the Commission and the Council acted without express competence in determining them. Consequently, both institutions have infringed a system of conditions of the rule of law which has hitherto been imposed on the institutions of the European Union and not on the bodies of the Union, but only on the Member States.

The case could become one of the most important cases in recent decades, but the merits of the arguments presented will first have to be decided by the European Court of Justice in a procedural ruling on whether the action is admissible. An important point in this respect is that, since the applicants are judicial associations, i.e. private parties in a procedural sense, they must satisfy the Plaumann test and demonstrate their direct involvement and interest in the case.[25] In the Plaumann case, the German Government asked the Commission to authorise the suspension of customs duties on the import of

[24] Judgment of the Court of Justice of 15 December 1995 in Case C-415/93, Union royale belge des sociétés de football association and others vs. Bosman and others.

[25] Judgment of the Court of 15 July 1963 in Case C-25/62, Plaumann & Co. vs. Commission of the European Economic Community.

mandarins. In its decision to the German Government, the Commission rejected the request, but a mandarin importer, Plaumann, challenged the validity of the decision. The ECJ ruled that persons who are not addressees of a decision can be regarded as individually concerned only if they are affected by it by reason of a characteristic peculiar to them or if there are circumstances which distinguish them, like the addressee, from all other persons. This is a rather strict set of criteria, although the Court's practice has become increasingly lenient in recent decades, particularly in environmental cases. The judges' organisations bringing the above action demonstrated their compliance with the Plaumann test, in particular by having among their members Polish judges who are subject to the Polish disciplinary measures in question.

If the European Court of Justice upholds the action brought by the judicial organisations, it will have a number of legal consequences for the present situation. Among other things, a situation of lis pendens will be created with regard to the Council decision approving the recovery plan, and although actions brought before the Court of Justice of the European Union do not have suspensive effect, the Court may order a stay of execution of the contested act if it considers it necessary in the circumstances (Article 278 TFEU). As a consequence, Poland would have no chance of receiving any payment from the recovery fund until a decision is taken. As regards the merits of the action, it is possible in a formal sense, but in reality, it is difficult to imagine that the ECJ would provide a ruling that would be contradictory and prejudicial to itself.

Institutional appointments and objections to the rule of law

When, in February 2018, the European Commission accelerated the appointment of President Jean-Claude Juncker's Chief of Staff, Martin Selmayr, as Secretary General of the institution to such an extent that the decision was taken in a single college meeting, bypassing the usual selection procedures, the European Parliament called it a coup d'état in the debate and later called on Selmayr to resign in a resolution of 13 December 2018.[26] In a report of 11 February 2019, the European Ombudsman, Emily O'Reilly, identified four irregularities in the procedure. She argued that the European Commission had artificially created a sense of urgency in filling the post of Secretary General, thus justifying the failure to advertise the post.[27] She argued that the rules had been manipulated to make the procedure appear fair and equitable, while in reality the exceptional procedure for urgency was only used to secure Selmayr's appointment. However, the Ombudsman did not call on the European Commission to reverse the decision. The legal basis for the European Ombudsman is Article 228 of the Treaty on the Functioning of the European Union and Article 43 of the Charter of Fundamental Rights of the European Union. This EU institution, created by the Treaty of Maastricht, aims to improve the protection of citizens and natural or legal persons residing or having their registered office in

[26] European Parliament 2018.
[27] European Ombudsman 2018.

a Member State against maladministration in the activities of the EU institutions, bodies, offices and agencies, thereby enhancing the openness and democratic accountability of the decision-making and administration of the Community institutions. Given that the European Ombudsman's mandate is intrinsically linked to holding the EU institutions to account for their democratic functioning and compliance with the rule of law, his role could, accordingly, be significantly enhanced.

In this context, it is particularly surprising that, in the summer of 2022, the three largest political groups in the European Parliament, similarly to the Commission case, made a secret deal in total disregard of procedures, which resulted in the appointment on 12 September 2022 of Roberta Metsola, former Chief of Staff to the President of the European Parliament, Alessandro Chiocchetti,[28] as Secretary General of the European Parliament with effect from 1 January 2023. In return, the other political groups, not party to the agreement, were rewarded with other senior posts, including the creation of an entirely new Directorate-General. To complete the picture, when Transparency International EU carried out a detailed study on the integrity and ethics systems of the EU institutions a few months ago,[29] the European Parliament was the only one of the three major EU institutions to refuse to cooperate. In response to this decision, The Good Lobby Profs, which had been working in the background to the Polish restoration case, turned to the European Ombudsman and formally requested an inquiry into the case in view of the rule of law concerns raised regarding the specific case.[30]

The winner of institutional rivalry: The European Commission

The role of the Court of Justice of the European Union in EU integration is exceptional. First, in the current situation of the European Union, the benefits of economic integration are driving national governments to adopt the Court's expansive interpretations of the Treaties, with the result that the Court's interpretation of the Treaties and the case law based on it, which is the de facto supreme normative level of the European Union, is becoming the engine of EU integration and is leading to the expansion of EU powers.[31]

Secondly, there is also the important issue of the so-called revolving door phenomenon,[32] in the form of the exchange of staff between the permanent and the rotating apparatus of judges and advocates-general of the Court of Justice. This does not allow for an equality between the EU institutions, in particular between the European Commission and the Member States.

Finally, the consequences of what appears to be the emergence of a rule of law monitoring régime – a power struggle – of the procedures, decision-making and general activities of the three major EU institutions – the European Parliament, the European

[28] European Parliament 2022a.
[29] Transparency International EU 2021.
[30] Van Hulten 2022.
[31] Pokol 2019.
[32] Szegedi 2018: 78–94.

Council and the European Commission – are of little threat to the Court of Justice of the European Union. The CJEU is one of the most powerful international courts in the world. In many respects, its workings are still not known to the outside world, nor is it possible to find out much from the public documents available. The investigations carried out so far have been based on data and information provided by the Court's management and administration, and the judges who have served and are serving in it are bound by the Code of Conduct on secrecy, while the European Parliament, among others, has expressed numerous criticisms regarding its transparency and access to its documents.

In the meantime, even the large Member States have criticised its activities in a number of ways, albeit ones that have no real impact. For example, the French National Assembly's objection,[33] published in November 2019, that French economic operators consider that the General Court and the Court of Justice do not exercise any meaningful control over the EU administration in competition matters. Also in this vein is the opinion of the President of the German Federal Supreme Finance Court (Bundesfinanzhof) that certain decisions of the CJEU disrupt the fiscal and tax order of the German State by reopening cases that were closed years ago and violate legal certainty,[34] or even the dispute between the Court of Justice and the Italian Constitutional Court on the issue of the limitation period for VAT, Taricco-I (C-105/14)[35] and Taricco-II (C-42/17)[36] and the reaction of the Italian Constitutional Court (115/2018).[37]

In the context outlined above, it is of particular importance that the rivalry in the field of the rule of law, and in particular the case concerning the conditionality of the Polish recovery plan, provides an excellent opportunity to enhance the Court's standing and reputation among the EU institutions, to the extent that it would have primacy in matters of the rule of law. As the action claims, any EU institution would only be entitled to hold Member States to account for compliance with the rule of law criteria within the framework defined and as interpreted by the Court of Justice, and EU institutions could only accept compliance with these criteria if it met the requirements interpreted by the Court. This goes far beyond the protection of fundamental rights, since the regulation on the rule of law and the mechanisms attached to it provide the Court of Justice with indirect powers to protect the EU budget and to take measures against Member States to that end.

Interpreting the resulting shift of power between the EU institutions and adapting to a new balance will be a particularly challenging task for the upcoming Hungarian Presidency of the European Union.

[33] Report from the French National Assembly's Committee on European Affairs.
[34] Max Planck Institute 2022.
[35] Judgment of the Court of Justice of 8 September 2015 in Case C-105/14.
[36] Judgment of the Court of Justice of 5 December 2017 in Case C-42/17.
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