

Article 7 or Catch 22



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Wicke van den Broek

Born in the Netherlands in 1995. Has been studying the combined master degree of Visegrad Studies at Jagiellonian University and in the other V4 countries. Holds a Bachelor degree in European Studies from Maastricht University and worked as an intern at CIR for the winter semester of 2017-2018. Is especially interested in Poland and EU politics.

On the 20th of December 2017, the European Commission initiated the procedure of Article 7 of the Treaty of the European Union against the Republic of Poland. This can potentially end with stripping Poland of its voting rights in the Council of Ministers. However, the proceeding with Article 7 would mean an institutional crisis within the EU itself and could cause severe backlash in Europe. In the same time, Poland's new Prime Minister gives signals of openness for a real dialogue. Indeed, both sides are interested to find a solution to avoid a further conflict.

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The Treaty

Article 7 was put in the Treaty of the European Union (TEU) to reassure the EU's capability to sanction a member state when this member seriously and persistently violates the Union's fundamental values, which are outlined in Article 2 of the TEU.

Article 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

However, Article 7 has not been used up to this date. It was initiated by the liberal ALDE Group in the European Parliament in 2013 against Hungary, but it was not endorsed by this parliament when it came to the vote. In the case of Poland, we find

ourselves in the second half of paragraph 7.1, as the initiative came this time from the European Commission and consent of the European Parliament is obtained.

Article 7 was triggered by the Commission out of its concern over reforms in the judiciary, which has a profound impact on the independence and functioning of courts and judges. The reforms are, in the eyes of the Commission, a breach of the rule of law and thus a breach of the fundamental values outlined in Article 2 of TEU. The Polish government argues that the reforms improve the system, restore citizens' faith in the judiciary and even deepen democracy.

Opposite views

The Commission has been worried about the judicial reforms in Poland since 2016. It has tried to get a dialogue going with the government of Poland, but the two sides have not been in tune. Throughout, the Polish government continued to pass and implement reforms, with a minor bump in the road when president Andrzej Duda vetoed to laws in

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July 2017. The Commission meanwhile has been vocal in its worries about these reforms, which *inter alia* lead to the removal of top judges and the appointment of new ones being controlled by the Sejm, the Polish parliament.

Article 7.1 TEU

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

In opinion of Frans Timmermans, Deputy President of the European Commission, the reforms are a “systemic threat to the rule of law in Poland”, and “the rule of law is essential for the functioning of the European Union”. As a “guardian of the treaties”, the Commission decided to act on this against Poland, since “EU citizens have a right to an independent judiciary”.¹

From the European Commission’s point of view, it is not just a matter of keeping the judiciary independent. It is also a test of the resilience of the Union and its credibility as an international actor. As the Union declares to act as an ethical force for good in the world through the ‘export’ of the rule of

¹ For more remarks of Timmermans on the reforms, see here:

<https://www.bloomberg.com/news/videos/2017-09-18/timmermans-says-poland-must-respect-rule-of-law-video>

And here:

https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/opening-remarks-first-vice-president-frans-timmermans-rule-law-poland-european-parliaments-committee_en

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law, it cannot let the internal rule of law deteriorate. Here, the Commission must make a choice, whether to risk the political unity of Europe over its so called ‘normative’ unity and credibility.

This trade-off politics versus principled politics are also present in other areas of conflict between the member states and the EU institutions. In December 2017, European Council’s president Donald Tusk said that the relocation system of the EU for moving migrants around Europe does not work and that it should be abandoned. This is line with the Visegrad Four countries, but it prompted remarks from the EU commissioner Avramopoulos to call the remarks “anti-European”.² It can be argued, however, that the trade-off approach which was adopted by Tusk, thereby keeping the Union’s unity at a high expense, should also be applied to the case of Article 7.

² For more on the issue, see here: <https://euobserver.com/migration/140255>

Difficult choice

Once the matter has been given by the European Commission to the European Council, the countries will decide what to do next. The first argument not to continue with Article 7 is that it will not make it through the European Council. At the beginning of January 2018, the newly instated Polish prime minister Morawiecki made his first official trip abroad to Budapest to meet Poland’s closest ally Victor Orban. The Hungarian Prime Minister has been constant in declaring to veto if the European Council wants to discipline Poland, as the unanimous decision there is needed (art. 7.2).³

The motivation of Victor Orban to support Poland results from the simple fact that he could be next to be sanctioned.

³ For more on the meeting between Orban & Morawiecki, see here: <https://euobserver.com/justice/140385>

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Article 7.2 TEU

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

The motivation of Victor Orban to support Poland results from the simple fact that he could be next to be sanctioned. The initiation of Article 7 in 2013 could be repeated and put through the European Parliament, leaving Hungary in the need of an ally. Should Orban go along with the proceeding of Article 7, it will lose its ally. Moreover, Mr Orban claims vetoing the proceeding would be simply what the Hungarian people want. His ‘call it populism, but I do simply what the people

expect me to do’ attitude, backed up by voters’ confidence, make the use of Article 7 thus ineffective.⁴ Moreover, it would make the divisions between the EU member states deeper and more visible to the world.

The second argument for the Commission not to bring the voting of Article 7 into the European Council is that the very fact of doing so is likely to backfire with rise of Euroscepticism in Poland, and possibly throughout the EU. This might transgress into more votes for anti-European parties which will make the Union less stable and more vulnerable. This trend has been present in Europe for 2 decades, first spotted in Austria.

Austrian case

In 2000, a far-right party took power in a European member state for the first time since the Second World War. The leader

⁴ For more on Hungarian opinion polling, see: http://nezopontintezet.hu/analysis_category/political-polling/

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of the FPÖ, Jörg Haider, was also known for his anti-migration politics and rhetoric. On the day of the instalment of the Haider Coalition, action was taken against Austria throughout the EU. The Belgian foreign minister could be quoted that “Europe can very well do without Austria. We do not need it”.⁵ Suspension of Austrian membership was debated in the European Parliament. The Dutch bank ABN Amro NV stopped financial help to a child support programme in Austria, and various other member states postponed visits to and from Vienna.

Back then there was fear of backlash, of “trying to combat intolerance with intolerance”. The feared backfiring did happen. Anti-EU sentiment surged in Austria and Haider’s popularity went up. In the meantime, the Austrian coalition did not hold back. Rather, riding on the anti-EU sentiments, it was strengthened in its

resolve. After a few months the sanctions were lifted.⁶

The Polish case today is not the same but similar. The Polish government is already portraying the use of Article 7 as an attack on Polish sovereignty. It is consistent with the argument that the reforms of the judiciary are a purely domestic matter. Furthermore, it has previously taken the moral high ground at home when faced with a defeat in Brussels. The 27 to 1 vote on the re-election of Donald Tusk as the president of the European Council last year, where Poland was outvoted by all the other member states, was presented as a moral victory of Poland in its struggle for European values. It may well do so again and make Poles less pro-European than they are today (over 80 per cent of the society support the European integration).

⁵ For this quote, and other sanctions, see here: <https://www.theguardian.com/world/2000/feb/04/austria.ianblack>

⁶ For more on the lifting of the sanctions against Austria, see here: <https://www.theguardian.com/world/2000/sep/12/austria.ianblack>

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“Catch 22”

Article 7 seems a Catch 22 situation: by trying to hold the EU together through protecting one of the fundamental principles of the EU - the rule of law, the Commission would plunge the EU into a constitutional and effectivity crisis, rendering it nigh impossible to operate in other policy fields the Union covers.

In the same time, a complete withdrawal from the process on the Commission's side is also not an option. The argument that the rule of law should always be above the executive branch of government stays and is justified by the treaties and European traditions. Individual Commissioners will also not let the Commission withdraw, as it would incur political loss of face and a show of weakness. The same argument can be said about the Polish government: accepting the Commission's recommendations would mean weaving in its aim to establish a strong executive branch of government. It is also politically impossible, with the current government, that the laws

will be changed. Since the laws are already in place and since they set in motion hard-to-reverse processes, Poland cannot and will not back down either. On top of that, there is support for judicial reform in Poland, which gives the government another argument to use.⁷

Even though two of the institutions of the so called 'legislative triangle' have endorsed the triggering of Article 7, it remains unlikely that the procedure will move from its step one – dialogue. It may turn into a never-ending story with hope for a political change. The Commission and the Council will try to gain time, reasoning that talking to a member state is always better than starting the “family war”. Let's hope this dialogue keeps European unity intact.

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⁷ On the opinion polls concerning this, see here: <http://www.bbc.com/news/world-europe-42420150> and here: <http://blogs.lse.ac.uk/europpblog/2017/07/26/judicial-reforms-in-poland-getting-the-public-on-board/>

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CENTRE FOR INTERNATIONAL RELATIONS ul. Mińska 25, 03-808 Warszawa t: +48 22 646 52 67

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