

ESI newsletter 6/2020
5 August 2020

An Article 19 Mechanism to save the rule of law in the EU



The EU 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.”

(Article 2, Treaty on European Union)

Dear friends,

What happens when the government of one of the EU's 27 member states undermines the rule of law, subjects all courts to the control of the Minister of Justice and controls all judges through disciplinary measures; and then rejects judgements by the EU's highest court, the Court of Justice of the EU (CJEU) to correct this?

As the European Union is not an Empire, it cannot – fortunately – enforce its rules by force. At the same time, the EU is unable to expel a member state, whatever happens.

However, once one, or more, member state governments take an a la carte approach to the rule of law, why should others abide by the rules? In this way the bond that ties members together dissolves: the belief that all members of the EU are fully committed to the values of the Treaty.

This belief is of existential importance. It needs to be defended and the EU has a vital self-interest in doing so. Recently ESI put forward a proposal how to achieve this: an Article 19 mechanism, backing the Court of Justice of the European Union:

ESI discussion paper: An Article 19 Mechanism –
The need for a robust defence of EU rule of law (23 July 2020)

How to defend the rule of law in the EU

“1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. **It shall ensure that in the interpretation and application of the Treaties the law is observed.**

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

Article 19, Treaty on European Union

“The very existence of effective judicial review designed **to ensure compliance with EU law is of the essence of the rule of law.**”

Court of Justice of the European Union

The July European Council accepted that the EU should make future solidarity conditional on respect for the rule of law. This is progress. The challenge now is to find a mechanism that EU leaders will be prepared to adopt, and once adopted, will be prepared to use.

The core of this proposal is simple: Implementing all Court of Justice of the EU (CJEU) judgements related to the rule of law – where the CJEU finds a state to be in violation of the obligation to "ensure effective legal protection" – should be an unambiguous precondition for receiving funding.

Such a reform would be complementary to ongoing efforts by the European Parliament, which ESI supports, to build on a Commission proposal from 2018, whereby the European Commission should be able to reduce transfers in case of a "generalised deficiency in the rule of law" [... risks affecting ... the financial interests of the union]" unless a qualified majority in the Council rejects this. It could, even, be included in the draft regulation currently on the table.

How would it work? The two main questions for any rule of law protection system are: What should be sanctionable? And: How is sanctionable behaviour to be identified? The goal of a strong mechanism is a clear definition of sanctionable behaviour and an objective measure of when the threshold for the imposition of sanctions has been reached. The ideal regime is one that does not need to be used.

For any rule of law protection regime to be dissuasive in advance, it must satisfy some basic criteria:

- It must be clear what kind of behaviour will trigger sanctions.
- The occurrence of sanctionable behaviour must be indisputable, ideally consisting of an objective triggering event.

- The seriousness of the sanctionable behaviour (the triggering event) must be obvious.

These criteria ensure that states know what to avoid and, likewise, what they must punish. In the end, a sanctions mechanism is only useful if the prospect of its being used is credible. This was never the case with the Article 7 procedure.



The 27 agreed in the end. Now they need to move fast to find credible means.

How would an article 19 mechanism work?

How might these principles be applied to an EU rule of law protection mechanism? Tying EU funding to the implementation of CJEU rulings relating to the rule of law would satisfy these criteria. This would provide an objective trigger, consisting of a confirmed and serious breach of EU law, followed by a strong reaction. Member states would know what to avoid – refusing to implement CJEU judgments.

Which CJEU rulings would trigger such a strong reaction? Given the concern about the rule of law as a precondition for the protection of all other rights there is a simple option: to make EU funding sanctions impossible in the event of the failure to implement a CJEU judgment finding a violation of Article 19 of the Treaty of the EU.

Article 19 requires Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." This is the cornerstone of the EU's legal order. It is also the Article that requires member states to ensure that their judicial systems effectively apply EU law. As the CJEU has noted

“Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice.”

This is the Article on which the CJEU bases the requirement that national judiciaries be independent:

“... every Member State must, under the second subparagraph of Article 19(1) TEU, ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection ... The requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection”.

There have been two such rulings finding a violation of Article 19: the two infringement proceedings relating to Poland's judicial reforms concluded to date, triggered by the most serious challenge to the rule of law in a member state in the history of the EU. These two rulings were complied with. Further infringement proceedings which go to the very core of the Polish government's remodelling of the judiciary are pending.

Such a system would be complementary to, not replace, the need for other mechanisms. But it is a mechanism which the European Parliament and the Council should be able to agree on now. Crucially, it is also a mechanism the Council would be willing to use in the future.

There are advantages to a more expansive rule of law mechanism covering a wider range of offending behaviour. The more expansive the mechanism, however, the more hostage to political fortune its use becomes. This is why it is essential to ensure the strongest possible protection of the most important matter: the effective application of EU law by independent national judiciaries. So long as this is in place, the EU's legal order is preserved, and serious violations of other core values can be corrected.

Unambiguous and non-political

It is crucial to have a rule of law protection mechanism that unambiguously and concretely protects national judiciaries and the effective application of EU law at the national level. A sanction system triggered by the non-implementation of CJEU judgments relating to Article 19 would satisfy all the key criteria for an effective mechanism: the threshold for sanctions would be clear, non-politically determined, linked to established violations of EU law and situated at the point at which the integrity of the EU and the interests of other members are unambiguously threatened.

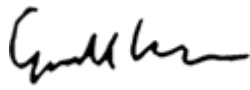
Should a member state refuse to implement a judgement by the CJEU related to access to effective legal remedies the argument to suspend disbursements of EU funds until this situation is remedied would be overwhelming. And if this is a credible sanction it would hopefully never have to be used.

Such a mechanism would reaffirm the obvious: that the EU is a Union based on the rule of law, in which the highest court, the Court of Justice of the European Union (CJEU) has the legitimacy and responsibility to protect the Union's core values as expressed in its treaties. There should never be any doubt that when that court finds that a member state violates the requirement to guarantee the effective application of EU law and refuses to correct this, then sanctions will follow.

Reactions to this proposal in the past two weeks have been encouraging. However, timing is of the essence. The EU needs to find a consensus before a member state challenges the CJEU directly and refuses to implement an Article 19 judgement, leading to a constitutional crisis

unlike any in decades. The sooner the EU acts, the better for every member state and citizens committed to its survival.

Best wishes,



Gerald Knaus

Some media reactions to Article 19 proposal

- **Budapester Zeitung**, Ein Rechtsstaatmechanismus, den man nicht politisieren kann, 01 August 2020
- **Der Spiegel**, Did European Leaders Cave to Hungary and Poland to Reach a Deal? 29 July 2020
- **Die Presse**, Der EuGH als oberste Rechtsstaat-Instanz , 28 July 2020
- **Deutsche Welle**, "Spiegel": Doradca polityczny ostrzega przed "tureckimi stosunkami" w Polsce, 25 July 2020
- **Der Spiegel**, Demokratieverfall in Ungarn und Polen - Wie die EU die Autokraten doch noch zügeln könnte, 25 July 2020
- **World Politics Review**, After Staving Off a Liberal Challenge, Poland's Ruling Populists Dig In, 23 July 2020



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Further reading on rule of law in the EU:

- Carnegie Europe, [What Poland's Presidential Election Means for the EU](#), 14 July 202
- ESI Newsletter, [Beyond the silent cash-machine – smart solidarity](#), 27 April 2020.
- ESI discussion paper, [Poland's deepening crisis – When the rule of law dies in Europe](#), 14 December 2019.
- ESI report, [Under Siege – Why Polish courts matter for Europe](#), 22 March 2019.
- ESI report, [Where the law ends. The collapse of the rule of law in Poland – and what to do](#), 29 May 2018.
- Essay on EU solidarity in Der Spiegel, ["The language of money"](#), 25 April 2020.



GERALD KNAUS

The reelection of Polish President Andrzej Duda represents an existential threat to the European Union's legal order. After more than a decade of talk about conditionality, member states must act now.

Some recent ESI interviews and media:

- **Inforadio**, "Wir schaffen das!" - auch eine neue europäische Asylpolitik? ("We can do it!" - also a new European asylum policy?), Radio interview with Gerald Knaus, 01 August 2020
- **Tagesschau**, Frontex-Pläne der EU - Dämpfer für Seehofer ("EU Frontex plans - detbackfor Seehofer"), 30 July 2020
- **Buka**, Za sve je kriva PISA: Koga briga što su djeca u BiH nepismena? ("PISA is guilty for everything: Does anyone care about children in Bosnia and Herzegovina being illiterate?"), 29 July 2020
- **Buka**, Poznat iznos novca koji se sprema za zemlje Balkana i Turske, stižu li evropske milijarde u Bosnu i Hercegovinu? ("An amount of money being prepared for the countries of the Western Balkans and Turkey is known, are EU billions coming to Bosnia and Herzegovina?"), Interview with Adnan Cerimagic, 22 July 2020
- **Balkan Insight**, How McKinsey put 'Productivity' at the heart of European refugee policy, 22 July 2020
- **Der Standard**, Gefährliche Familienbesuche auf dem Balkan ("Dangerous family visits in the Balkans"), 17 July 2020
- **Focus**, Keine unerlaubte Einreise mehr: Deutsche wollen fundamentalen Wandel in Asylpolitik ("No more illegal immigration: Germans want fundamental change in asylum policy"), 13 July 2020
- **WDR**, Studiogespräch: Gerald Knaus, Soziologe und Migrationsforscher ("Live interview: Gerald Knaus, Sociologist and migration expert"), TV interview with Gerald Knaus, 12 July 2020
- **CNN**, Trump ally battles a liberal challenger. Poland's deep divisions on show in presidential run-off vote, 11 July 2020
- **Die Welt**, Europäische Stabilitätsinitiative wirft EU "rechtswidrigen Umgang mit Flüchtlingen" vor ("European Stability Initiative accuses EU of "unlawful handling of refugees"), 09 July 2020
- **Tiroler Tageszeitung**, "Sea-Watch 3" in Sizilien festgesetzt: Betreiber kritisieren Schikane ("Sea-Watch 3" grounded in Sicily: Operators criticize harassment"), 09 July 2020
- **ZDF.heute**, Knaus: EU-Asylpolitik "rechtswidrig" ("Knaus: EU asylum policy "unlawful"), 09 July 2020
- **Berliner Zeitung**, Brutaler Umgang mit Flüchtlingen: "Die Lager müssen evakuiert werden" ("Brutal handling of refugees: "The camps need to be evacuated"), Interview with Gerald Knaus, 09 July 2020
- **evangelisch.de**, Experte Knaus: In Flüchtlingsfrage nicht auf Bremsstaaten warten ("Expert Knaus: Do not wait for the countries on the brake when it comes to refugees"), 08 July 2020
- **Deutschlandfunk**, Migrationsexperte: "EU verstößt gegen Grundrechtecharta" ("Migration expert: "The EU is violating the Charter of Fundamental Rights"), Radio interview with Gerald Knaus, 08 July 2020

- **Tagesthemen**, Innenminister Seehofer will für "großen Sprung" bei EU-Asylreform kämpfen ("Minister of the Interior Seehofer wants to fight for "great leap" in EU asylum reform"), TV interview with Gerald Knaus, 07 July 2020
- **Tagesschau**, Asylrecht in der EU: Wie kann die Asylreform gelingen? ("Asylum law in the EU: how can the asylum reform be a success?"), 07 July 2020
- **N1 TV**, Adi Ćerimagić: Velika očekivanja od Njemačke ("Adi Cerimagic: High expectations from Germany"), TV interview with Adnan Cerimagic, 03 July 2020
- **SWR Aktuell Kontext**, Migration - wer löst den gordischen Knoten Europas? ("Migration - who will cut Europe's Gordian knot?"), Radio interview with Gerald Knaus, 02 July 2020
- **Klix**, Adi Ćerimagić o kriteriju EU za otvaranje granica: Ova odluka je komad papira i preporuka ("Adi Ćerimagić on criteria for opening EU borders: This decision is a piece of paper and a recommendation"), 30 June 2020
- **Deutsche Welle**, Korona se vratila uz trubače – EU ipak dozvoljava ulazak iz Srbije? ("Corona virus returned with the trumpeters - is the EU going to allow travel from Serbia?"), 29 June 2020
- **Neue Zürcher Zeitung**, Die EU und die Türkei brauchen ein neues Flüchtlingsabkommen ("The EU and Turkey need a new refugee agreement"), 27 June 2020
- **Express**, Za ovim stolom u Bijeloj kući Vučić misli da bi mu Trump mogao spasiti Kosovo ("At this table in the White House, Vučić thinks that Trump could save Kosovo for him"), 26 June 2020
- **Deutsche Welle**, Ništa od sastanka u Vašingtonu ("Nothing from the meeting in Washington"), 25 June 2020
- **Jutarnji List**, Šok u pozadini munjevitog manevra: Kako je propao srpsko-albanski summit u Bijeloj kući ("Shock in the background of a lightning maneuver: How the Serbian-Albanian summit in the White House failed"), 25 June 2020
- **Der Standard**, Zunehmende Gewalt in Flüchtlingslager Moria auf Lesbos ("Increasing violence in refugee camp Moria on Lesbos"), 19 June 2020
- **Katholische Presseagentur Österreich**, Flüchtlingspolitik: Caritas fordert dreistufigen Aktionsplan, ("Refugee policy: Caritas calls for three step plan of action"), 19 June 2020
- **krone.tv**, Gewalt in Flüchtlingslager auf Lesbos nimmt zu ("Increasing violence in refugee camp on Lesbos"), 19 June 2020
- **Kurier**, Setzt die EU Flüchtlinge im Meer aus?, ("Does the EU push refugees back to the sea?"), 18 June 2020
- **Deutschlandradio**, Türkische Grenze: Menschenrechtsverstöße im Namen der EU? ("Turkish border: Human rights violations in the name of the EU?"), Radio interview with Gerald Knaus, 12 June 2020
- **Politikon Network**, When the rule of law is defended: Three examples from Bosnia and Herzegovina, 08 June 2020

Der Spiegel, [Did European Leaders Cave to Hungary and Poland to Reach a Deal?](#) 29 July 2020

Kaczyński, the leader of the ruling PiS party and the man widely held to be in charge in the country, feels more unassailable than ever, not least because of his candidate Andrzej Duda's victory in the presidential elections on July 12.

Observers worry that Kaczyński could now be heading for a showdown with the European Commission and the European Court of Justice. "If PiS gets away with the reform, there will be nothing left of the Polish constitutional state," warns Gerald Knaus, the chairman of the European Stability Initiative (ESI), a Berlin think tank. "Then you will have Turkey-like conditions in Poland."

Poland and Hungary have profited from EU subsidies more than most other countries. Hungary has been promised structural aid of up to 25 billion euros (\$29 billion) for the years 2014 to 2020, while Poland has been allocated almost 83 billion. That hasn't prevented the governments of either countries from agitating against Brussels and undermining democracy in their countries.

Knaus, a political adviser, believes it is crucial that further aid to be linked to compliance with democratic standards. He warns against relying on a rule-of-law mechanism like the one the EU member states discussed at the summit, arguing that it would be too easy to undermine it for the wrong political reasons.

He instead proposes that future payments should be linked to the case law in the European Court of Justice (ECJ). "For a country that has been convicted of violations of the rule of law under Article 19 of the European Treaties by Europe's highest court and does not implement that judgment immediately, there should be an immediate suspension of EU funds."

Der Spiegel, [Did European Leaders Cave to Hungary and Poland to Reach a Deal?](#) 29 July 2020

The European Stability Initiative is being supported by Stiftung Mercator

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