

EDITORIAL COMMENTS

About Brexit negotiations and enforcement action against Poland: The EU's own song of ice and fire

“Winter is coming”. The plot thickens in the 2016 season of the universally acclaimed fantasy drama television series *Game of Thrones*.¹ The gloomy title leaves no doubt about the direction of the central storyline about the power conflicts between dynastic noble families claiming the Iron Throne of the Seven Kingdoms or vying for independence. Also in the real world, in the cooperative construct comprising twenty-eight independent States that is the European Union, the outlook for the future at the beginning of 2017 was not particularly blossoming. For one thing, the Union was still coming to terms with the historic outcome of the June 2016 Brexit referendum, and remained still completely in the dark about Downing Street’s views on the future relationship between the EU and the UK. The European Council was anxiously awaiting the UK’s formal notification of its intention to withdraw from the Union, which would trigger the two-year period prescribed in the Treaty for the divorce negotiations. In Central Eastern Europe, Member States such as Hungary and Poland showed worrying signs of backsliding in terms of respect for democracy, human rights or the rule of law, with their governments at times openly defying the stance of the Union on issues such as migration. Meanwhile, the surge in the national polls of populist, mostly right-wing, political parties with an EU-sceptic or even downright anti-European agenda in the polls ahead of upcoming elections in several key Member States was another cause for serious concern in EU headquarters in Brussels.

“Winter is here”. Whereas in the latest season of *Game of Thrones*’ fictitious world of King’s Landing, the dwarf, the dragons and the watchers on the Wall, the inevitable dramatic scenarios unfold, in the EU the tide has rather dramatically turned in the last couple of months. It started in Austria, with the victory of the pro-European candidate Van der Bellen over the far-right Freedom Party candidate Hofer in the December 2016 re-run of the presidential elections.² In March 2017, the parliamentary election victory of the governing liberal party in the Netherlands was heralded as a halt to the rise

1. The series is based on George R.R. Martin’s series of novels *A Song of Ice and Fire*.

2. In the original vote in May 2016, former Green Party leader Van der Bellen had already edged past his opponent with the slimmest of margins: 50.35% vs. 49.65%. On 22 July 2016 the constitutional court ordered the annulment of the result due to voting irregularities. In the re-run, support for Van der Bellen increased to 53.8%.

of – to use the words of Prime Minister Rutte – “the wrong kind of populism” such as that of Geert Wilders’ Party for Freedom.³ A little more than a month later, what may have seemed singular events became something of a trend when the negative discourse and the promise of a “Frexit” referendum managed to propel Front National leader Marine Le Pen into the second round of the French presidential elections. Ultimately, however, French voters preferred a relative political novice with outspoken pro-European ideas to be the new inhabitant of the Elysée.⁴ On top of it all, Theresa May’s political gamble to ask the UK electorate for a strengthened mandate to negotiate a hard Brexit dramatically backfired when the general elections she called for in June resulted – against all odds – in a hung parliament with the Conservative Party losing its majority. It spurred French President Macron to claim that the door to the EU remained open for the UK and that the decision to leave could be reversed until the end of the Brexit negotiations.

These events, the outcome of the French elections in particular, were greeted with a sigh of relief in European circles. For there seems to be a common understanding that Brexit, despite unmistakably constituting a major set-back, can and shall ultimately be overcome by the Union, whereas France leaving the Union would effectively signal the end. Besides relief, they also injected a welcome dose of renewed optimism into the EU project after a particularly difficult period. But the new-found confidence should not spill-over into hubris: in the Netherlands, Wilders still leads the second biggest party in Parliament.⁵ In France, Marine Le Pen may have lost the presidential elections, but she obtained an unprecedented score of 34 percent of the votes. It is therefore crucial that the problems Europe faces are convincingly addressed in the years to come, or the populist expressions of discontent are bound to resurface – probably reinforced – during the next round of elections. Underlying problems which have led so many voters to distrust the political establishment and seek refuge in populist parties – the functioning of EMU and the internal market, the asylum and migration crisis, the social face of the Union, etc. – have not disappeared. Now is the moment to seize for the Union and sail on these waves of – albeit still fragile – optimism, with both Berlin and Paris determined to give “a new impetus” to the bilateral alliance that has been at the core of European integration for decades. To borrow from the political movement of the French leader, the message for the Union is “en marche”!

3. <www.nu.nl/verkiezingen-2017/4544538/rutte-nederland-zegt-ho-verkeerd-populisme.html>.

4. Van Middelaar, “Een revolutie sluimert in het land van de revolutie”, 22 April 2017, *NRC Handelsblad*.

5. Moreover, following the 2017 elections, another populist and EU-sceptic political party, *Forum voor Democratie* (Forum for Democracy), made a remarkable political entry (two seats) into the Dutch parliament.

Clearly, this won't be a walk in the park. It will require the Union to undertake initiatives, taking the Commission's reflection process – e.g. in the White Paper on the Future of Europe⁶ or the Reflection Paper on the deepening of the Economic and Monetary Union – as a starting point of debate.⁷ At the same time, the Union needs to face the acute manifestations of dissatisfaction that have already surfaced: Brexit and the increasingly acrimonious confrontation with the government in Poland.

Exit negotiations

In the aftermath of the Brexit referendum, and despite the insistence of European leaders to start “as soon as possible” with the exit negotiations, the UK government took its time before officially giving notice of its intention to leave the EU. What is more, even after the formal letter of notification had landed in the hands of European Council President Tusk on 29 March 2017, nine months after the referendum, those who thought the UK would finally want to start making haste with the exit negotiations were proved wrong. Instead Prime Minister May decided to focus her undivided attention on the general national election she had called for 8 June. Valuable time was lost. And time is of the essence, for Article 50 TEU makes it clear that the UK has in principle only two years to conclude a withdrawal agreement with the Council, after obtaining the consent of the European Parliament. Thereafter, the EU Treaties in principle cease to apply to the withdrawing Member State, unless the European Council, in agreement with the departing Member State, unanimously decides to extend this period. For now, at least, this appears to be a mere remote theoretical possibility. Two years is an extremely short period to disentangle a strong relationship between States that has spanned more than four decades, let alone also agree on the outlines of what a future relationship might look like. From that perspective, May's decision to call elections and let almost three months of precious time slide away is difficult to comprehend. It strengthens the impression that the outcome of the referendum caught even the UK government itself by surprise and that, the continuous repeat of the “Brexit means Brexit” mantra notwithstanding, the Prime Minister is struggling to reach consensus between the hardline Brexiteers and the proponents of “Remain” in the Conservative party on the actual shape Brexit should take.

6. <ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf>. The White Paper presents five different scenarios of how Europe could evolve by 2025. See “Editorial Comments: The EU-27 quest for unity”, 54 CML Rev. (2017), 681–694.

7. <ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf>.

The UK Government's split position is clearly reflected in the position papers it has been sending to Brussels since the middle of August, after months of deafening silence.⁸ In the first of these so-called future partnership papers, the UK seeks a new customs agreement that facilitates "the freest and most frictionless trade possible in goods between the UK and the EU", while also allowing it to forge new relationships with other partners all over the world.⁹ Clearly, the UK wants to have its cake and eat it: it does not want to be part of the EU Customs Union any more, but it still wants to reap its benefits. To achieve these goals, the position paper outlines two possible approaches: the first consists of "a highly streamlined EU-UK customs arrangement", leaving as few additional requirements on EU trade as possible; the second entails "a new customs partnership with the EU", possibly involving the UK mirroring the EU's requirements for imports from the rest of the world where their final destination is the EU.¹⁰ The former appears to be a classic reinvention of the wheel: the UK proposes an arrangement that is very much akin to the Customs Union, only without being called this way, and less effective, for it will inevitably entail an increase in administration. The "new customs partnership" still appears vague, confusing and difficult to implement in practice. Furthermore, to minimize disruption and to provide certainty for businesses and individuals, the UK proposes a model of close association with the EU Customs Union for a time-limited period. This seems, yet again, an unnecessary complication of things: if the principal objective of the new customs agreement truly is to facilitate "the freest and most frictionless" trade in goods between the EU and the UK, why then not simply envisage staying a little longer in the Customs Union, which is, by the UK's implicit own admission, the most effective means to achieve this? Or is this simply an option which has become completely unimaginable for the Prime Minister after her unequivocal election promise "to take back control"?

8. See e.g. also HM Government, *Position Paper on Northern Ireland and Ireland*, available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf>; or HM Government, *Enforcement and dispute resolution – A Future Partnership paper*, available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf>.

9. HM Government, *Future customs arrangements – A Future Partnership Paper*, available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf>.

10. For further early comments and analysis, see e.g. Pelkmans, "The Brexit customs vision: Frictions and fictions", *CEPS Commentary*, 22 Aug. 2017, available at <www.ceps.eu/system/files/CEPS%20Commentary%20Pelkmans%20BrexitCustomsUnion.pdf>; or Sampson, "UK government's customs position paper fails to answer key questions", *LSE Brexit Blog*, available at <blogs.lse.ac.uk/brexit/2017/08/15/uk-governments-customs-position-paper-fails-to-answer-key-questions/>.

So far, the Union has not reacted on the substance of the UK proposition papers. It has merely reasserted its firm negotiation position that “sufficient progress” must be realized on the terms of the divorce before it wants to start discussing the future relationship.¹¹ Concretely, this means that steps must be made towards a settlement on the UK’s financial engagements towards the Union, the rights of EU citizens residing in the UK (and UK citizens in the EU), and the border specifications between Ireland and Northern Ireland. On all these issues, however, the UK position papers remain vague, unrealistic or silent. Furthermore, the EU has issued a number of negotiating documents of its own on the divorce negotiations, which appear, at times, rather uncompromising (*inter alia* the insistence on the CJEU as the competent court for dispute resolution, as opposed to possible other dispute resolution mechanisms).¹² The Union’s icy position is understandable. In the words of the Commission president, the EU-UK relationship has never been a true love affair. A break-up is then not the moment to start handing out gifts, which could also provide incentives to other Member States to leave. Time is ticking in favour of the Union. Ultimately though, however hard the exit negotiations may turn out to be, it is to be hoped that common sense will prevail and that the arrangements to be made on the future EU-UK relationship will be mutually satisfactory, for the EU and the UK are bound to remain important partners, for trade and other matters.

Enforcement action against Poland

Besides being preoccupied with exit negotiations, the Union is also confronted with Member States that do want to remain in the Union, but nevertheless fail to adhere to its cardinal rules. Poland is a case in point. Since 2015, the Polish Government is under the control of the nationalist conservative Law and Justice Party. The sweeping reform of the judiciary the government initiated soon came under close scrutiny of the European Commission for ostensibly undermining respect for the rule of law, one of the

11. See EU Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, available at <www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>; see also “EU dismisses Britain’s post-Brexit customs plan”, 15 Aug. 2017, available at <www.politico.eu/article/eu-dismisses-britains-post-brexit-customs-plan/>.

12. European Commission, Negotiating documents on Article 50 negotiations with the United Kingdom, available at <ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en>.

Union's fundamental values enshrined in Article 2 TEU.¹³ The Commission's concerns relate primarily to the effective functioning and independence of the Polish Constitutional Tribunal, in particular the appointment of judges, and the effectiveness of an independent and legitimate constitutional review of new legislation. These concerns were set out in the Recommendations of 27 July and 21 December 2016,¹⁴ adopted in accordance with the Commission's 2014 Rule of Law Framework.¹⁵ This Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State in question to prevent the escalation of "systemic threats to the rule of law" into a "clear risk of a serious breach" which would potentially trigger the use of the procedure in Article 7 TEU. The Recommendations fell on deaf ears. In the summer of 2017, the situation in Poland deteriorated with the Parliament's adoption of four legislative acts¹⁶ which, in the Commission's assessment, raise grave concerns about judicial independence and amplify the systemic threat to the rule of law. In a third Recommendation of 26 July 2017, targeting these four new acts, the Commission requested the Polish authorities to address the problems within one month. It specifically urged Poland not to take any measure interfering with the tenure of the Supreme Court judges. The Commission also explicitly indicated its readiness to activate the mechanism of Article 7(1) TEU should Poland not comply with this request.¹⁷

The mechanism of Article 7 TEU aims at ensuring that all EU Member States respect the common values of the Union, including the rule of law.¹⁸ The preventive mechanism of Article 7(1) TEU can be activated if there is a

13. See also Konieczny, "Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond", 53 CML Rev. (2017), 1753–1792.

14. Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, O.J. 2016, L 217/53; Commission Recommendation (EU) 2017/146 of 21 Dec. 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, O.J. 2017, L 22/65.

15. Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014)158 final/2.

16. In the meantime, two of the four laws – the *Law on the National Council for the Judiciary* and the *Law on the Supreme Court* – were vetoed by the President and sent back to Parliament (the *Sejm*). The third, the *Law on the National School of Judiciary*, was published in the Polish Official Journal on 13 June 2017 and entered into force on 20 June 2017. The fourth, the *Law on the Ordinary Courts Organization*, was approved by the Senate on 15 July 2017 and signed by the President on 25 July.

17. Commission Recommendation (EU) of 26 July 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146, C(2017)5320 final.

18. Besselink, "The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives", in Jakab and Kochenov (Eds.), *The Enforcement of EU Law and Values* (OUP, 2017); Hillion, "Overseeing the Rule of Law in the EU: Legal mandate and means", in Closa and Kochenov (Eds.), *Reinforcing the Rule of law Oversight in the EU* (Cambridge University Press, 2016).

“clear risk of a serious breach” of one of the values of Article 2 TEU by one of the Member States. Evidently, this is a politically very contentious issue. So far, this mechanism has never been triggered. In May 2017, though, the European Parliament passed a resolution which did call for the triggering of the Article 7(1) procedure relating to Hungary, the other Member State which is considered to be backsliding with regard to respect for the Union’s values.¹⁹ The situation in Poland does not appear to be much better.²⁰ There seems thus to be no reason for the Council to wait any longer before determining that there is a clear risk of a serious breach by Poland of the rule of law. Under Article 7(1) TEU, upon a reasoned proposal by the European Commission, the European Parliament or one-third of the Member States, the Council may act with a majority of four-fifths of its members. Such a move could send a stronger political signal to Poland than the Commission’s third recommendation currently does (and the one does not preclude the other). This would still avoid a total escalation of the conflict. That scenario would arguably become inevitable in the event the mechanism of Article 7(2) were subsequently triggered: this provision requires the European Council to actually determine the existence of a serious and persistent breach by a Member State of one of the values of Article 2 TEU. These conditions also appear to be fulfilled in the case in point: the allegations about disrespect for the rule of law are serious and they have persisted for some time. Such a determination would allow the Council to suspend certain rights of Poland deriving from the application of the Treaties, such as its voting rights in the Council. One might want to investigate possibilities of suspending some of the Union’s generous funds to the country (amounting to approx. €105 billion for the period 2014–2020). The problem, however, is that to start the sanctioning mechanism, the European Council must make its determination unanimously. And Hungary has already made it quite clear that it will veto such a decision. Unless the Hungarian position changes, the Article 7(2) TEU mechanism is thus deprived of all practical relevance. In light of the seriousness and the duration of the allegations, this is unfortunate.

Acutely aware of the current political stalemate, the European Commission has now decided also to walk the legal line by launching an infringement procedure under Article 258 TFEU following the official publication of the

19. European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)).

20. Pech and Lane Scheppele, “Poland and the European Commission, Parts I, II and III, <verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law/>; <verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>; <verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>.

new Polish Law on the Ordinary Courts Organization.²¹ The Commission's "key legal" concern about this law relates to gender discrimination, as it considers the introduction of a different retirement age for female judges (60 years) and male judges (65 years) to amount to a breach of Article 157 TFEU and Directive 2006/54 on gender equality in employment. However, the Commission also raises concerns in the letter of formal notice that by giving the Minister of Justice the discretionary power to dismiss and appoint Court Presidents, and to prolong the mandate of judges which have reached retirement age, the independence of Polish courts will be undermined. According to the Commission, this breaches Article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights. It is the first time an infringement procedure addresses such a violation of Article 19(1) TEU in combination with Article 47, because the independence of the judiciary is affected to such an extent that it fails to provide an effective remedy in the sense of these provisions.²²

The Commission's decision to launch an an infringement procedure against Poland shows that it takes its task of monitoring observance of the rule of law seriously. Admittedly, Poland did not leave the Commission much choice; for a start, the difference in retirement age amounts to a blatant violation of the prohibition of gender discrimination. At the same time, this aspect of the procedure may appear a little odd: Poland is apparently being prosecuted primarily for gender discrimination, whereas the entire rule of law is in jeopardy. Moreover, the dialogue within the Rule of Law Framework has as yet failed to produce the desired effects. The Commission had to do something. The Article 258 TFEU procedure is yet again expected to take time, since various procedural steps must be taken: after the publication of the Law, the Commission sent a formal letter of notice, to which Poland had to respond within a period of one (instead of two) month; the Commission subsequently sent a reasoned opinion, to which Poland can react; then, if the question remains unresolved, the Commission can send the matter to the Court of Justice. It also remains to be seen what the effect of a Court ruling would be. In principle, of course, Poland is expected to abide by a negative ruling. Compliance with a ruling from the Union's highest judicial authority is a special feature of the Union's legal order. However, the Polish authorities do not seem to be inclined to give in to the Union's demands, often not eschewing strong language. On the contrary, when the infringement procedure was

21. "European Commission launches infringement procedure against Poland over measures affecting the judiciary", Press Release, 29 July 2017.

22. See, however, also Case C-286/12, *Commission v. Hungary*, EU:C:2012:687. Vincze, "The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 *Commission v Hungary*", 19 EPL (2013), 489–500.

launched, Jaroslaw Kaczynski, the leader of the Law and Justice party, pledged that the overhaul of the judiciary would continue. Moreover, Poland's apparent refusal to abide by a recent Court order to stop large-scale logging in Białowieża Forest, one of Europe's last ancient forests, is set to intensify the crisis between Poland and the Union further.²³ Warsaw vehemently denies the accusations, claiming the need to continue cutting down trees for public safety purposes. Clearly, Poland is intent on playing hardball...

The current stand-off between the Union and Poland is also illustrative of the more general problem: as the EU integration process has continued and the Union enlarged, the task of policing Member States' compliance with EU law has become increasingly difficult. The EU institutions do have a toolbox with legal and political instruments at their disposal to monitor and ensure observance of the law. Ultimately, however, confronted with an unwilling Member State which does not play by the rules, they remain relatively powerless when the only effective political means of response is *de facto* paralysed and the alternative legal route fails to yield the desired outcome. Seen from this perspective, the situations of Poland and the UK provide quite a contrast. The UK, now intent on leaving, did tend to play by the rules... Poland wants to remain a Member State of the EU, yet fails to live by its rules...

23. "Poland vows to continue logging in Białowieża forest despite court ban", 31 July 2017, *The Guardian*, available at <www.theguardian.com/world/2017/jul/31/poland-continue-logging-bialowieza-forest-despite-eu-court-ban>. Case C-441/17 R, *Commission v. Poland*, EU:C:2017:622.