Does the Commission have the Competence to Monitor Compliance?

verfassungsblog.de/does-the-commission-have-the-competence-to-monitor-compliance/

Kim Lane Scheppele , Laurent Pech Mo 5 Mrz 2018 Mo 5 Mrz 2018

The Commission is often called "the guardian of the Treaties,"including in its own account of its primary legal responsibilities. The Commission's "guardian" function requires the Commission to take steps to ensure that all Member States follow EU law. If a Member State is no longer engaged in good-faith compliance with EU law, then it is the Commission's responsibility to attempt to bring that Member State into line. While the usual tool in the Commission's toolkit for this purpose is the infringement procedure, infringements are not the only options that the Commission possesses to discipline and correct wayward Member States.

Article 7 TEU itself envisions a strong role for the Commission. To borrow from a recent Commission factsheet, Article 7 aims to ensure "that all EU Member States respect the common values of the EU, including the Rule of Law". It "foresees two legal possibilities in such a situation: a preventive mechanism in case of a "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU) and a sanctioning mechanism in the case of "the existence of a serious and persistent breach" of the Union's value, including the Rule of Law (Article 7(2) and Article 7(3) TEU)". The Commission, significantly, has the power under the TEU to initiate either arm of the procedure. If the Commission has the power to put before the Council and the Parliament a proposal to warn or sanction a Member State, then it must have some systematic procedure for determining whether triggering Article 7 would be warranted.

Toward that end, in 2014, the Commission created the rule of law framework to provide it with a way to engage in a dialogue with a Member State in order to gather information about that State's compliance with the Treaties and to warn the Member State that its conduct might be problematic. In many ways, this is just what the Commission does with its infringement procedures, in which it first notifies Member States of the legal problems it sees, engages in multiple rounds of interaction with that Member State to see if the problems can be amicably fixed, and then ultimately, where no agreement can be reached, refers the case to the Court of Justice. The rule of law framework is quite similar, with a recommendation to advance to a stage of Article 7 TEU at the end instead of a referral to the Court of Justice.

But there is one major difference between the infringement action and the assessment required to recommend triggering any part of Article 7 TEU. As the Commission itself noted in a 2003 Communication: "The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously." In short, the Commission's understanding of Article 7 TEU is that it is not limited to the boundaries of the acquis. This provision therefore gives

the Union a power of action that is “very different from its power to ensure that Member States respect fundamental rights when implementing Union law (see Question 6 for more on this point).

On this analysis, Article 7 allows the Commission to move forward where, in its view, the Member State has violated core principles of the EU in such a way that the basic constitutional order of the EU is threatened. Article 7 can therefore reach violations of the core principles underlying the Treaties, as those principles are expressed in Article 2.

In January 2016, the European Commission activated for the first time its new self-created rule of law framework against Poland. This mechanism is informally labelled the “pre-Article 7” procedure because the Commission has portrayed it as the procedure through which it would attempt to work with the Member State in question to avoid a resort to Article 7. The rule of law mechanism essentially organises a period of structured dialogue between the Commission and the relevant national government in order “to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law” which could, if left untreated, eventually develop into a situation requiring the activation of Article 7.

Rather than engaging in good faith dialogue with the Commission, however, Polish authorities have instead sought to challenge the competence of the Commission. In December 2016, for example, Polish President Andrzej Duda claimed that the European Commission had “overstepped its bounds”. Prior to this intervention, in May 2016, Jarosław Kaczyński, Poland’s de facto leader threatened to bring the Commission before the CJEU but this (empty) threat never materialized. More recently, the Polish Foreign Ministry issued a statement in which it claimed that Poland was “ready to defend its claims at the Court of Justice” and argued that it is “for the Court of Justice to decide whether a member state has failed to fulfill an obligation imposed on it by the Treaties” (forgetting either deliberately or incompetently that it is for the Commission to first decide whether a Member State has failed to fulfill an obligation under Article 258 TFEU).

The Polish government is not the only party to have argued that the Commission lacks power when it comes to the pre-Article 7 procedure: In May 2014, shortly after the rule of law mechanism was announced by the Commission, the Legal Service of the Council argued that the Commission’s pre-Article 7 procedure would not be “compatible with the principle of conferral which governs the competences of the institutions of the Union”. This opinion has however been criticised for its weak reasoning by Professors Baratta; Bogdandy et al; Besselink; Hillion; Kochenov & Pech, among others. In addition, no Member States other than the ones potentially under review in this framework have denied its applicability to them.

In fact, it is hard to see how the objections could be grounded in EU law. The pre-Article 7 framework organises a structured dialogue, not the adoption of legally binding acts. Furthermore, Article 7 TEU compels the Commission to make a reasoned proposal should it decide to activate this provision (which it did in December against Poland). It would be difficult to understand how the Commission, should it be the author of such a proposal, could properly substantiate it without the power to seek more information from the Member State in question as well as to more generally monitor respect for the values laid down in

Article 2 by the Member States. If anything, the rule of law framework provides a more rule-governed and transparent structure for that monitoring, which makes the Commission's actions more rather than less bound by rule of law principles. Interpreting the pre-Article 7 procedure as laying out the necessary steps that must be taken in order for the Commission to carry out its responsibilities under Article 7 is furthermore in line with the Commission's policy based on Article 49 TEU, which governs accession to the EU, as first argued in this article by Professors Kochenov and Pech. The Commission drafts "supervisory" documents to this effect on a regular basis assessing the progress made by the EU candidate countries in relation to the values included in Article 2, even though Article 49 does not make any explicit provision for this power.

Since the Commission has the power to trigger Article 7 TEU, it is logical also to recognise that it has the power to clearly define the practical means for the exercise of its power through gathering evidence and substantiating (or not) its rule of law concerns. The Council itself, by agreeing to discuss not once but twice the Commission's pre-Article 7 findings regarding the rule of law situation in Poland, may be said to have in effect repudiated the opinion of its own Legal Service. What's more, on these two occasions, according to Frans Timmermans, a "very broad majority of Member States supported the Commission's role and efforts to address this issue," with other Member State governments calling upon "the Polish government to resume the dialogue with the Commission with a view to resolving the pending issues". And just a few days ago, the Council discussed the "situation" in Poland for the third time with however the same usual torpor when it comes to defending the rule of law as the Council merely noted its support for a "continuation of the dialogue between the European Commission and Poland" (as we have however explained repeatedly what we have had instead since 2016 is a dialogue of the deaf during which time Polish authorities have been able to capture or undermine most national checks and balances)

As for the argument, recently repeated by Poland's new Foreign Minister that the EU's Court of Justice should be involved in the procedures against Poland because it would be "the only institution that is entitled" to decide whether the EU law and standards are being respected, Poland begs the question of how a case would get before the ECJ. The Commission could bring an infringement procedure but, as we have said, that is not the Commission's only option here. Among other things, Poland ignores the traditional and long-established role of the European Commission as the Guardian of the Treaties with a wide range of powers to be used toward that end.

Poland's argument also reveals a misunderstanding of the Court of Justice's jurisdiction in the context of Article 7, which the EU Treaties explicitly limit to the review of the "legality of an act adopted by the European Council or by the Council pursuant to Article 7 … in respect solely of the procedural stipulations contained" in the same provision. Article 7 itself puts the Commission front and centre in the enforcement of Treaty principles; it would be odd indeed if the Commission did not have the power to design a framework for meeting its responsibilities.

In our next Q&A we will explain why some EU officials have called Article 7 the EU's "nuclear option" and discuss whether this is an appropriate label.

SUGGESTED CITATION Scheppele, Kim Lane; Pech, Laurent: *Does the Commission have the Competence to Monitor Compliance?, VerfBlog,* 2018/3/05, https://verfassungsblog.de/does-the-commission-have-the-competence-to-monitor-compliance/.