RULE OF LAW ON THE CROSSROADS (CURRENT LEVEL OF PROTECTION OF THE PRINCIPLE IN THE EU)

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Abstract

The article focused on protection of the Rule of Law in the EU is divided into three parts. The attention is paid to the concept of the Rule of Law, legal basis for possible EU activities and compliance of existing EU instruments with the Treaties. The goal of the first part is to confirm the hypothesis that the Rule of Law at EU level is an autonomous concept. The aim of the second part is to confirm that the Rule of Law as a value has its expression in substantive article(s) of the Treaties. The objective of the third part is to confirm legality of existing EU instruments.

***Key words**: EU, Framework to strengthen the Rule of Law, Annual Political Dialogue, Commission, Council of the EU*

INTRODUCTION

In the last years, the EU has faced several challenges somehow connected with the Rule of Law principle. Such a principle is being highlighted in various situations – with respect to EU activities towards third countries but also with respect to those aimed at Member States of the EU. The Rule of Law principle is mentioned on every occasion. Respecting the principle is mentioned by politicians in their speeches but also by academics and other experts.

Since huge attention has been paid to this principle recently (in comparison to the attention paid to it in previous years of the EC/EU existence), it could lead us to the conclusion that such a principle in the EU is something new. However, such a conclusion would have been far-fetched. From the EU perspective, the Rule of Law principle is nothing new. This principle found its place in the EU (or better-said EC) Law many years ago. For the first time, it was the Court of Justice, which in its Les Verts judgment, confirmed that the European Economic Community was a Community based on the Rule of Law. [Judgment of 23 April 1986, Les Verts v. Parliament (294/83, ECR 1986 p. 1339) (SVVIII/00529 FIVIII/00551)

ECLI:EU:C:1986:166, para 23] However, it should be noted that despite Les Verts judgment, at that time the primary law of the European Communities, contained no explicit reference to the Rule of Law principle.

The situation changed five years later, when in 1992 the Treaty on EU (the Maastricht Treaty entered into force in 1993) incorporated the Rule of Law principle into the primary law. In its preamble, the Maastricht Treaty confirmed the attachment of the Member States of the EU to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the Rule of Law. It should be empasized that the respective paragraph of the Preamble of the Treaty on EU was the first ever provision of the primary law of the EU, which expressly mentioned the Rule of Law principle. Notwithstanding, it was still "only" part of the preamble, not a substantive Article of the Treaty. The incorporation of the principle into the respective Article of the Treaty came only with the Treaty of Amsterdam in 1997 (entered into force in 1999). The treaty of Amsterdam incorporated the new Article 6 into the Treaty on EU. The respective part of the preamble remained unaltered. On the basis of the new Article 6 of the Treaty on EU, the Rule of Law principle was included among principles which are common to the Member States. With this article, the Rule of Law principle became an integral part of the primary law of the EU as one of the common values of the Member States.

A similar perception of the Rule of Law principle was also retained in the Lisbon Treaty in 2007 (entered into force in 2009). Pursuant to the new Article 2 of the Treaty on EU, the Rule of Law principle has still its firm place among the values common to the Member States. In addition to this Article, the Rule of Law principle is also mentioned in the preamble of the Treaty on EU and in its Article 21, which refers to the external dimension of the Rule of Law principle. According to Article 21 of the Treaty on EU, the Rule of Law principle is also one of the guiding principles for the EU's action on the international scene. Finally, the Rule of Law is also expressly mentioned in the Charter of Fundamental Rights of the EU, namely in its preamble as one of the founding principles of the EU. [Mokrá 2008: 24]

Taking into account all facts mentioned above, it is possible to say that the Rule of Law principle has its irreplaceable role in the EU as one of its common values and its founding principle as well. That is why we can say that the EU, as a community of values, was also built on this principle and respect for this principle shall be obvious. However, as we can see that it is not so easy in practice. We are facing various situations that can be marked as challenges to the Rule of Law principle. At this point, we can mention the situation in Poland and Hungary.

For such situations, in which the Rule of Law principle is at stake, the EU has various instruments focused on control and prevention of the Rule of Law deficiencies. Some of them stem directly from the Treaty on EU and from the Treaty on the Functioning of the EU (hereinafter together as "the Treaties"), while others have been established on a basis of legally non-binding instruments (e.g. conclusions of the Council of the EU or communication of the Commission). Perhaps this is also the reason why legality of latter two has been questioned at several occasions.

In this situation, the objective of this article is to focus on the legal aspects of the current instruments on the Rule of Law protection in the EU. The article focuses on several aspects of the Rule of Law protection in the EU. The Aim of the first part is to confirm the hypothesis that the Rule of Law at EU level is an autonomous concept. In this part, the stress is laid on a brief comparison of the major approaches to the Rule of Law in the Member States. On the basis of such a comparison, it is our

ambition to confirm that from a national perspective, the Rule of Law cannot be perceived as something common to all Member States. Therefore, the Rule of Law as a common value (as envisaged in Article 2 of the Treaty on EU) must be perceived as an autonomous EU concept. After the confirmation of this hypothesis, we would like to focus on the analysis of existing EU Law provisions as well as on jurisprudence of the Court of Justice with the aim to find content for the autonomous concept of the Rule of Law at EU level. Since the Rule of Law as a value cannot serve as a legal basis for EU activities, our ambition in the second part of this article is to examine whether there is any adequate legal basis for possible EU activities regarding the Rule of Law. The third part of this article is focused on existing instruments of the EU on Rule of Law protection and on their compliance with the EU Law. This part is divided into two chapters dealing with instruments stemming directly from the Treaties and with instruments created by the Institutions. It is obvious that a thorough analysis is not necessary with regard to legality of the first group of instruments. Since they are an integral part of the primary law, they must be compatible with the Treaties (by their very nature). With respect to the legality of the second group of instruments, some objections from the Member States resonated. That is why the objective of this part is to analyse these instruments and to examine their compliance with the Treaties.
On the basis of the outcomes of these three parts, we would like to come to assess whether the current instruments of the EU on the Rule of Law protection are legally sound and sufficient or whether there is special need for replacement of existing mechanisms by new ones (e. g. by Periodic Peer Review or others).

1. RULE OF LAW (IN THE EU) – CONCEPT

1.1 Unity or diversity at national level?

As it was indicated above, the Rule of Law principle at EU level is perceived as a value that is common to all Member States. Considering such a perception, it is clear that the concept of the Rule of Law should be common to all Member States.
With the aim to confirm the existence of a common concept of the Rule of Law, we should focus on how the Rule of Law is perceived in the Member States. It should be noted that, our intention is not to bring an exhaustive analysis of the approach to the Rule of Law principle in the Member States. We would only like to check whether there is unity among the Member States in interpretation of this principle.
Just a brief look at the situation in selected Member States leads us to the possible conclusion that, at least three different concepts of the Rule of Law exist within the Member States. These are the following - Rule of Law, Etat de droit and Rechtsstaat. Each of them has its own particularities.
In general, it is possible to say that the Rule of Law (originating in the UK) includes procedural obligations (such as a fair hearing before an impartial and independent tribunal) as well as substantive obligations (access to justice; legal certainty; equal application of the law; respect for human rights). [Venice Committee study No. 512/2009]
On the other hand, another concept – Rechtsstaat focuses much more on the nature of the state. Rechsstaat was defined in opposition to the absolutist state, which implies unlimited powers of the executive. Protection against absolutism had to be provided by the legislative power, rather than by the judiciary [Wennerström 2007: 50].
As far as the third approach is concerned, the French concept Etat de droit puts less emphasis on the nature of the state, which it considers the guarantor of fundamental

rights enshrined in the Constitution against the legislator. As such, Etat de droit actually implies (judicial) constitutional review of ordinary legislation. [Heuschling 2002: 380]

As it stems from the particularities of those three concepts, we can say that the Rule of Law, Rechtsstaat and Etat de droit are indeed different concepts. The different nature of those three concepts is not relativized even by some common features they have (the role of the Parliament and the role of review made by judges). [Wennerström 2007: 73]

Taking into account the above-mentioned situation in the EU, with at least three various approaches to the Rule of Law (other combinations and approaches are also possible), it seems very difficult to agree that, at national level, a Rule of Law principle common to all Member States can exist.

1.2 Autonomous concept at EU level?

Based on the comparison of the perception of the Rule of Law within the EU, we concluded that, at national level, there can hardly exist a Rule of Law principle common to all Member States. On the other hand, wording of respective provisions of the Treaties could have justified another conclusion - that besides all existing national approaches to the concept of the Rule of Law, there is another approach that is based on the existence of an autonomous EU concept of the Rule of Law, which is considered to be common to all Member States. With the aim to either confirm or deny such a hypothesis, it is necessary to turn our attention to the way of interpretation of the Rule of Law at EU level.

If there is an autonomous concept of the Rule of Law at EU level, the question is – where can we find its definition (or its characteristics, at least)? In other words, for the existence of an autonomous EU concept of the Rule of Law, it is necessary to confirm, whether there is a definition of the Rule of Law at EU level.

In the introductory part of this article, it was pointed out that there is no express definition of the Rule of Law principle in the primary law of the EU. In addition to that, we can say the same about existing secondary law. Apart from some attempts to define the Rule of Law that were made in currently discussed proposals for legal acts,[1] there is no generally accepted definition of such a principle in the secondary law.

With the absence of an explicit definition in the primary law and in the secondary law, it is necessary to seek a possible definition in the jurisprudence of the Court of Justice. As concerns the jurisprudence of the Court of Justice, it is necessary to say that no judgment contains a comprehensive definition of the Rule of Law principle. On the other hand, various judgments contain elements that can be considered characteristics of the Rule of Law principle. They are the following:

- legality,[2]
- legal certainty,[3]

[1] In particular, it is possible to mention currently (in 2019) discussed proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in the event of generalised deficiencies as regards the Rule of Law in a Member State. See COM/2018/324 final - 2018/0136 (COD).

[2] According to the Court of Justice, "in a community governed by the Rule of Law, adherence to legality must be properly ensured". See Judgment of 29 April 2004, Commission v. CAS Succhi di Frutta (C-496/99 P, ECR 2004 p. I-3801) ECLI:EU:C:2004:236, para 63.

[3] According to the Court of Justice, "the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication and that it may be

- prohibition of arbitrary or disproportionate intervention by the public authorities,[4]
- right to submit acts for a review by the courts,[5]
- separation of legislative, administrative and judicial powers,[6]
- equal treatment[7] and others.

Of course, it is necessary to underline that the list of characteristics of the Rule of Law at EU level is not exhaustive. It may be changed and completed with new judgments and opinions of the Court of Justice.

Anyway, as it seems to be clear from the above mentioned characteristics, the perception of the Rule of Law principle at EU level is similar to the perception of the Rule of Law presented by the Venice Committee in its study on the Rule of Law. The Venice Committee pointed out the following aspects of the Rule of Law principle forming a definition of such a principle - prohibition of arbitrariness, legality, legal certainty, separation of powers, independence and impartiality of the judiciary, respect for (judicial) human rights, hierarchy of norms, non-discrimination and equality before the law. [Venice Committee study No. 512 / 2009: 4 and following] It should be noted that the above-mentioned report of the Venice Committee is widely accepted and the EU is not an exception.

That is why we can conclude that the existence of an autonomous concept of the Rule of Law at EU level was confirmed. On the other hand, we confirmed the existence of the Rule of Law as a value. Therefore, at a latter stage we shall focus on whether there is any legal basis of the EU activities focused on the Rule of Law and its protection.

otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected". See Judgment of 12 November 1981, Meridionale Industria Salumi and others (212 to 217/80, ECR 1981 p. 2735) ECLI:EU:C:1981:270, para 10.

[4] According to the Court of Justice, "in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law." See Judgment of 21 September 1989, Hoechst v. Commission (46/87 and 227/88, ECR 1989 p. 2859) (SVX/00133 FIX/00145) ECLI:EU:C:1989:337, para 19.

[5] According to the Court of Justice, "the EU is a union based on the Rule of Law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights ... Treaty has established, ..., a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, and has entrusted such review to the Courts of the EU". See Judgment of 3 October 2013, Inuit Tapiriit Kanatami and others v. Parliament and Council (C-583/11 P) ECLI:EU:C:2013:625, paras 91 and 92.

[6] According to the Court of Justice, "it should be pointed out, however, that EU law does not preclude a Member State from simultaneously exercising legislative, administrative and judicial functions, provided that those functions are exercised in compliance with the principle of the separation of powers, which characterises the operation of the Rule of Law. It has not been alleged that that is not the position in the Member State concerned in the main proceedings." See Judgment of 22 December 2010, DEB (C-279/09, ECR 2010 p. I-13849) ECLI:EU:C:2010:811, para 58.

[7] According to the Court of Justice, "It must be recalled that the principle of equal treatment is a general principle of EU law." See Judgment of 14 September 2010, Akzo Nobel Chemicals and Akcros Chemicals v. Commission (C-550/07 P, ECR 2010 p. I-8301) ECLI:EU:C:2010:512, para 54.

2. RULE OF LAW (IN THE EU) – LEGAL BASIS

As it was clearly stated above, the Rule of Law (at EU level) is one of the values (common to all Member States) of the EU expressly mentioned in several provisions that found their place in the primary law of the EU. However, as a value only, it cannot serve as a legal basis of EU proceedings aimed at the Rule of Law protection or enforcement.

It should be remembered that in line with Article 5 of the Treaty on EU, the limits of EU competences are governed by the principle of conferral. Under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Therefore, any competence (including the competence to start the proceedings on the Rule of Law protection) of the EU has to be conferred upon it by the Member States in the Treaties. [Koutrakos 2008: 172] We can only agree with Craig and De Búrca that clear evidence of existing competence of the EU is the legal basis – adequate provision of the Treaties.[8] [Craig, De Búrca 2011: 307] That is why, immediately after we confirmed the existence of an autonomous concept of the Rule of Law in the EU, it is necessary to examine, whether there is an adequate legal basis for the EU to start proceedings against the Member States causing deficiencies to the Rule of Law principle.

As concerns the legal basis for the EU activities aimed at the Rule of Law protection, attention has to be paid to the following approaches:

a) EU activities based on various provisions giving legal basis;
b) EU activities based on special legal basis for the Rule of Law related issues.

Ad a) The first approach is linked with the past. Before the Court of Justice confirmed the existence of a special legal basis, the EU could have based its activities focused on the Rule of Law only on legal basis primarily linked with other issues. For example, the EU focused on alleged infringement of the EU law that caused also Rule of Law related deficiencies. In this case, the legal basis for that EU action (aimed at the Rule of Law protection) is the same as for the respective infringement proceedings.

Ad b) The existence of a special legal basis for the Rule of Law related activities of the EU is relatively new. The Court of Justice confirmed it in its several recent judgments. At this point, we can focus on one of them – case C-192/18 relating Polish judiciary. In this judgment, the Court confirmed that Article 19 of the Treaty on EU is the provision, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU. [Judgment of 5 November 2019, Commission v. Poland (Indépendance des juridictions de droit commun) (C-192/18) ECLI:EU:C:2019:924, para 98]. In the light of this judgment, there is no doubt that the EU has the competence over the Rule of Law related issues (even those of the Member States). The Court of Justice further explains that as regards the material scope of the second subparagraph of Article 19 para 1 of the Treaty on EU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51 para 1 of the Charter.

[8] A similar wording found its place in various judgments of the Court of Justice. For example see judgment of 20 September 1988, Spain v. Council, 203/86, EU:C:1988:420, paras 36 – 38

[Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, para 29]
Taking into account the above mentioned we could conclude that the competence of the EU is based on Article 19 para 1 of the Treaty on EU. On the basis of that Article, the EU can take action aimed at the Rule of Law protection in situations in which deficiencies to the Rule of Law occur and provided those deficiencies occur in areas covered by the EU law, irrespective of whether the Member States are implementing the EU law within the meaning of Article 51 para 1 of the Charter.

3. EXISTING INSTRUMENTS OF THE EU – LEGALITY

Once we confirmed the existence of an autonomous concept of the Rule of Law in the EU (that is common to all Member States), as well as the existence of a legal basis, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU, it is necessary to draw our attention to the existing instruments of the EU regarding the Rule of Law protection. With respect to these instruments, we will focus on their compliance with the Treaties. In other words, our goal will be to examine whether the existing instruments have adequate legal basis in the Treaties. We will pay special attention to instruments stemming from the Treaties (we suppose there is no problem with their compliance with the Treaties) and to instruments/mechanisms established by institutions (we will focus on their legality).

3.1. The Rule of Law Protection via Instruments established by the primary law of the EU

Primary law of the EU offers various instruments that can be used for purposes of the protection of the Rule of Law. At this point, we could mention proceedings envisaged by Article 7 of the Treaty on EU, and Articles 258, 259, 260, 267 of the Treaty on the Functioning of the EU [Hillion 2016: 66]. These instruments could be divided into various groups based on several criteria. For the purposes of this article, it seems sufficient to divide them based on their primary purpose. On the basis of this criterion, we can distinguish instruments aimed at the Rule of Law protection only (Article 7 of the Treaty on EU proceedings) and those focused primarily on other proceedings but also applicable for the Rule of Law protection (proceedings based on Articles 258, 259, 260, 267 of the Treaty on the Functioning of the EU).
With respect to any of the proceedings mentioned above it is not necessary to examine their compliance with the EU law. The reason is quite simple – all of the proceedings are directly regulated by provisions of the primary law of the EU. That is why these proceedings (by their very nature) must be compatible with the EU Law.

3.2. The Rule of Law protection via mechanisms adopted by the Institutions of the EU

In addition to various instruments contained in the primary law, the Institutions came with their own mechanisms focused on the Rule of Law, too. At this point, we would like to draw the attention to mechanisms created by the Commission and by the Council of the EU.

New EU Framework to strengthen the Rule of Law

New EU Framework to strengthen the Rule of Law was created by the Commission on 11 March 2014 as its contribution to ensure protection of the Rule of Law in all Member States. The framework was established by the Communication from the Commission to the European Parliament and the Council No. COM (2014) 0158 called A new EU Framework to strengthen the Rule of Law.

The aim of the framework (as declared by the Commission) was to help to find a solution in order to prevent the emerging of a systemic threat to the rule of law in a Member State in which a "clear risk of a serious breach" could develop. [Claes, Bonelli 2016: 283] Based on the Framework, the Commission enters into a bilateral communication with the Member State concerned. The communication with the Member State is divided into three stages – a Commission assessment, a Commission recommendation and a follow-up to the recommendation.

In the first stage (assessment), the Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the Rule of Law.

In the second stage (recommendation), the Commission issues a "rule of law recommendation" addressed to the Member State concerned. Such a step comes after the Commission finds that there is objective evidence of a systemic threat and that the authorities of the given Member State are not taking appropriate action to redress it. A very important thing is that the Commission makes both – the sending of its recommendation as well as its main content public.

The last stage (follow up) is linked with monitoring. The Commission monitors the follow-up given by the Member State concerned to the recommendation addressed to it. If there is no satisfactory follow-up by the Member State within the set time limit , the Commission submits a reasoned proposal for activating Article 7 of the Treaty on EU proceedings.

In practice, the Framework was (so far) used only once – relating Poland. It should be noted that proceedings against Poland triggered many objections against the compatibility of the Framework with the EU Law. Objections were heard in particular from Poland, but also from the Legal Service of the Council (as it was presented in the document of 27 May 2014). [Claes, Bonelli 2016: 285] was The argument that there was no legal basis for such a mechanism and therefore it was incompatible with the principle of conferral, which governs the competences of the institutions of the EU, is common for all objections against the Framework. With regard to these objections, we would like to examine whether the Commission has adequate competences for such a framework.

As concerns the compliance with the Treaties, we need to draw our attention to the basis of the framework first. It should be noted that the communication of the Commission could not be considered as a legal act. That is why the Commission was not obliged to identify legal basis for the framework. On the other hand, we can recall the principle of conferral. Under this principle, the Commission can only act in areas in which the EU has adequate competences. Pursuant to Article 5 para 2 of the Treaty on EU, under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States.

The question is, whether the Rule of Law protection belongs to such areas (in which the competences were conferred upon the EU in the Treaties). The answer is clear - as mentioned above, the Court of Justice confirmed Article 19 of the Treaty on EU as the provision, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU. [Judgment of 5 November 2019, Commission v. Poland (Indépendance des juridictions de droit commun) (C-192/18) ECLI:EU:C:2019:924, para 98] In addition, the framework respects the existing mechanism on the Rule of Law protection created by Article 7 of the Treaty on EU. That is why we can conclude that the EU (and the Commission) has the competence to establish an adequate mechanism aimed at the Rule of Law protection.

Annual Political Dialogue among all Member States within the Council to Promote and Safeguard the Rule of Law in the Framework of the Treaties

On 16 December 2014, the Council of the EU and the Member States meeting within the Council adopted conclusions on ensuring respect for the Rule of Law establishing an annual political dialogue among all Member States within the Council to promote and safeguard the Rule of Law in the framework of the Treaties. The Member States agreed that the dialogue would be based on the principles of objectivity, non-discrimination and equal treatment of all Member States and would be conducted on a non-partisan and evidence-based approach. [Toggenburg, Grimheden 2016: 233]
The dialogue takes place once a year in the Council, in its General Affairs configuration.
The first round was organised by the Luxembourg Presidency of the Council of the EU on 17 November 2015. In the introductory part of the dialogue, the Commission presented the outcome of its annual colloquium on fundamental rights "Tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe". Then, within tour de table, the Member States shared examples of their best practices as well as challenges encountered at national level in relation to the respect for the Rule of Law. Finally, the Member States also had an opportunity to comment the Presidency non-paper on the Rule of Law in the age of digitalization.
The second round of the dialogue took place on 24 May 2016 under the Netherlands Presidency of the Council of the EU and it was thematically focused on integration of migrants. The Member States presented their best practices in the field of integration of migrants.
The third round of the dialogue was organised by the Estonian Presidency of the Council of the EU on 17 October 2017. Thematic debate was focused on the topic "Media Pluralism and the Rule of Law in the Digital Age".
The fourth round of the dialogue (and so far the last one) took place during the Austrian Presidency of the Council of the EU on 12 November 2018. The topic for the discussion was “Trust in public institutions and the Rule of Law”.
Now (in the second half of 2019), there is no substantive discussion envisaged. Instead of that, the Finnish Presidency of the Council organises an evaluation of the previous four rounds of the dialogue carried out so far. It should be noted that it is the second evaluation since 2014. The first mid-term evaluation took place during the Slovak Presidency in the second half of 2016.
After brief information on several rounds of the annual dialogue, with reference to the goal of this article, it is necessary to examine the legal basis for the annual dialogue of the Council. Particular attention will be paid to the compliance of the annual

dialogue with the Treaties. It is a very important fact that the dialogue was established on the basis of the Conclusions of the Council and the Member States of 16 December 2014. We should bear in mind that conclusions in general are the Council's ordinary means of expression when it is not exercising the powers conferred upon it by the Treaties. In principle, they have the status of purely political commitments or positions with no legal effect. As an exception to this principle, the Council sometimes adopts, in the form of conclusions, certain acts having or designed to have a legal effect, such as positions of the EU in the field of Common Foreign and Security Policy. However, this is not the case of "Rule of Law Conclusions".

Based on what was mentioned above, we can say that the Council Conclusions of December 2014 establishing annual dialogue within the Council are not a legally binding act. Consequently, the dialogue itself was established as a political dialogue.[8] There was no intention to treat it as a legally binding instrument. Therefore we can conclude that the scope of the dialogue as such (or its parts at least) does not belong to the competences of the EU and there is no legal basis for its organisation. On the other hand, the existence of the dialogue on the basis of the Council Conclusions is not contra legem. However, for a definite conclusion on the legality of the dialogue it is necessary to examine also the outcomes of the dialogue (and their compatibility with the Treaties) or follow-ups adopted on the basis of the dialogue (if any).

As far as the outcomes are concerned – each round of the annual dialogue was concluded with the Presidency Conclusions (which are also documents outside the scope of the EU) and no other document, even a legally non-binding one, was adopted. That is why we can conclude that annual political dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties established by the Council Conclusions is not incompatible with the Treaties. It is so because none of the aspects of the dialogue establishes effect non-compatible with the EU Law. In addition, the dialogue does not impose any obligations to the Member States. It is only a platform for the discussion on the Rule of Law related topics.

3.3. Legality of existing instruments

After analysing all the above-mentioned instruments and mechanisms of the EU focused on the Rule of Law protection, we can say that no problem with compliance of these instruments with the EU Law was identified.

Firstly, we confirmed that all instruments directly regulated by provisions of the Treaties (namely Article 7 of the Treaty on EU proceedings, as well as proceedings based on Articles 258, 259, 260, 267 of the Treaty on the Functioning of the EU) are compatible with the EU Law. The reason is that these instruments themselves are part of the primary law.

Secondly, with respect to instruments established by the Institutions, we also confirmed their compliance with the Treaties. Although both analysed mechanisms (of the Council as well as of the Commission) were established based on legally non-binding acts, the analysis confirmed that those mechanisms are fully in line with the Treaties. As concerns the mechanism of the Council – annual dialogue – it imposes no obligations, and as such, is a rather political than legal instrument. Its aim is to

[8] Such an idea clearly stems from the founding Council Conclusions. See paragraph 4 of the Council Conclusions on ensuring respect for the Rule of Law – the Council document No. 16134/14

only discuss. That is why no contradiction with the Treaties was identified. With respect to the Commission´s Framework to strengthen the Rule of Law, it should be noted that some voices concerning its incompatibility with the EU law were heard (e.g. Poland during proceedings against the country). Common for all of those voices was the argument of no legal basis for such proceedings by the Commission. It is possible that a short time after the Commission had adopted its framework in 2014 those voices were right to some extent. However, the situation changed after a series of the Court of Justice judgments. This was because the Court of Justice confirmed Article 19 of the Treaty on EU as the provision, which gives concrete expression to the value of the Rule of Law affirmed in Article 2 of the Treaty on EU. [Judgment of 5 November 2019, Commission v. Poland (Indépendance des juridictions de droit commun) (C-192/18) ECLI:EU:C:2019:924, para 98] As a consequence, it is necessary to reject all the objections against an absent legal basis for the Rule of Law related proceedings. Therefore, we can also conclude that the Framework (despite being established by the Commission's communication) has its legal basis in the Treaties and it is full in line with the EU Law.

CONCLUSION

Taking into account the outcomes of the analysis contained in all parts of this article, we can conclude that:

- The EU Law (and in particular Article 2 of the Treaty on EU) perceives the Rule of Law as a value that is common to all Member States.
- There is no unity in the perception of the Rule of Law at national level. At least three different approaches to the Rule of Law exist (Rule of Law, Etat de droit and Rechtsstaat). In addition, other approaches to the concept at national level cannot be excluded. That is why only an autonomous concept of the Rule of Law principle (existing at EU level) can be common for all the Member States.
- However, at EU level, there is no explicit definition of the Rule of Law in the written EU Law (neither primary, nor secondary). That is why special attention shall be paid to existing jurisprudence of the Court of Justice of the EU.
- The concept of the Rule of Law, common to all Member States is based on several judgments. The Court highlighted in particular the following elements of the principle: legality, legal certainty, prohibition of arbitrary or disproportionate intervention by the public authorities, right to submit acts for a review by the courts, separation of legislative, administrative and judicial powers, equal treatment.
- There is no doubt that the Rule of Law is a value of the EU. However, thanks to jurisprudence of the Court of Justice, this value affirmed in Article 2 of the Treaty on EU found concrete expression in Article 19 para 1 of the Treaty on EU. Based on this Article, the EU can take action aimed at the Rule of Law protection in situations in which deficiencies to the Rule of Law occur and provided those deficiencies occur in areas covered by the EU law, irrespective of whether the Member States are implementing the EU law within the meaning of Article 51 para 1 of the Charter.
- EU Law offers various instruments for the protection of the Rule of Law. Some of them are directly regulated in the Treaties. Therefore, their legality (in general) cannot be questioned.

- In addition to instruments offered by the Treaties, there are also instruments created by the Institutions. The most important are the following two - Commission´s Framework to strengthen the Rule of Law and the Council´s annual dialogue on the Rule of Law. As it was proven, despite some objections against their legality, both of them are fully in line with the Treaties.
- Since there are various instruments aimed at (or at least useable) the Rule of Law protection, there is no need to establish new additional mechanisms. From our perspective, the EU should rather focus on better implementation of existing instruments.
- However, we are aware of ongoing discussions at intergovernmental level (discussion on new Periodic Peer Review) as well as on the plan for a new mechanism at EU Level (ideas presented by the Commission with regard to the Rule of Law Review Cycle). We are also aware of some activities of the European Parliament (and its initiative addressed to the Commission in 2016). That is why we cannot completely reject the attempts for a new mechanism. But, it should be stressed that any discussion on a new mechanism could only be legitimate if the outcome is one strong mechanism, a replacement of the existing ones, with added value for the Rule of Law protection in the EU, and with full respect of such a mechanism from all Member States.

REFERENCES

Claes, M., Bonelli, M., (2016), The Rule of Law and the Constitutionalisation of the European Union, In. Schroeder, W., Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation, Hart Publishing, Oxford.

Craig, P., De Búrca, G., (2015), EU Law: Text, Cases, and Materials. Fifth Edition, Oxford University Press, Oxford.

Heuschling, L., (2002), État de droit, Rechtsstaat, Rule of Law, Dalloz, Paris.

Hillion, C., (2016), Overseeing the Rule of Law in the EU, In Closa, C., Kochenov, D. Reinforcing Rule of Law Oversight in the European Union. Cambridge, Cambridge University Press.

Koutrakos, P., (2008), Legal Basis and Delimitation of Competence, In Cremona, M., De Witte, B. EU Foreign Relations Law: Constitutional Fundamentals. Hart Publishing, Oxford.

Mokrá, L., (2008), Ochrana ľudských práv a slobôd v európskom priestore, In. Bulletin slovenskej advokácie, 14 (5).

Toggenburg, G., N., Grimheden, J., (2016), The Rule of Law and the Constitutionalisation of the European Union, In. Schroeder, W., Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation, Hart Publishing, Oxford.

Wennerström, E. O., (2007), The Rule of Law and the EU, Iustus Förlag, Uppsala.