

Commission's Communication on further strengthening the Rule of Law within the Union

A central bank perspective

1. Introduction

The European Commission's Communication of 3 April 2019 is an important step in stimulating in-depth reflections on the ways to strengthen the rule of law within the Union. The rule of law, enshrined in Article 2 of the Treaty on European Union (TEU) as one of the founding values of the Union, applies to both the Union and the Member States. As a value, the rule of law escapes a comprehensive definition.¹ At any rate, the rule of law requires that public authorities act in accordance with constitutional norms, including fundamental rights, and general rules that have been laid down by democratically elected organs, as well as that they actively ensure that the law is observed by private actors.

According to the approach adopted in the Commission's Communication,

“Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights.”²

In view of its specific aim, which partly stems from the experience with recent challenges to the rule of law in certain Member States, the Commission's Communication focuses on the *domestic* dimension of the rule of law, in particular on undue interferences with certain national institutions, such as courts, by other national institutions such as the executive. It therefore emphasises the need for better promoting Union-

¹ For approaches from a comparative-law perspective, see Grewe and Ruiz Fabri, *Droits constitutionnels européens* (Presses Universitaires de France, 1995), pp. 22 et seq.; Grote, “Rule of law, rechtsstaat and état de droit”, in Starck (Ed.), *Constitutionalism, Universalism and Democracy: A Comparative Analysis* (Nomos, 1999), p. 269; Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Daloz, 2002); Krygier, “Rule of law”, in Rosenfeld and Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012), p. 233. From a more theoretical perspective, on the principle of the rule of law in general, see Tamanaha, *On the Rule of Law* (CUP, 2004), pp. 7 et seq.; Waldron, “The concept of law and the rule of law”, 43 *Georgia Law Review* (2008), 1, 6 et seq.; Raz, *The Authority of Law*, 2nd ed. (OUP, 2009), pp. 210 et seq.

² European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, Brussels, 3.4.2019 COM(2019) 163 final (footnotes omitted).

wide rule-of-law requirements and standards in national legal orders and for strengthening early warning and response mechanisms to efficiently tackle potential threats to the rule of law.

The Commission's point of focus, that is the rule of law as a constitutional value throughout national legal orders, finds a specific resonance with regard to the European System of Central Banks (ESCB) and the European Central Bank (ECB).³ First and foremost, domestic rule-of-law deficiencies may affect the ESCB and the ECB through their impact on national central banks. National central banks are independent institutions, with statutes forged at the national level albeit also comprising characteristics determined by Union law, *and at the same time* they are an integral part of the ESCB. The national central banks act in accordance with the guidelines and instructions of the ECB,⁴ and must carry out the tasks conferred upon them by the Treaties independently.⁵ Respect for the national rules that govern their organisation and protect their independence, which have been determined also by the Treaties, is central to the proper functioning of the ESCB.⁶ Additionally, respect for the rule of law at the domestic level, including of the rules governing national central banks and the status of their Governors, is a necessary prerequisite for the proper functioning of the ECB's Governing Council, which is also composed by the Governors of the national central banks of the euro area. In central banking, the rule of law at national level has thus direct and clear implications on the Union legal order.

Second, domestic rule-of-law deficiencies may impact directly the ECB. For example, the reluctance or inability of domestic courts to sanction interferences with ECB privileges and immunities may compromise the ability of the ECB to effectively implement its tasks. This can be the case also when domestic courts deny to the ECB access to effective judicial protection.

Third, from a general economic perspective, legal certainty - one of the fundamental precepts contained within the rule of law, ensuring that people are able to organise their lives relying on the predictable legal consequences of their actions and forming reliable expectations on the basis of the law⁷ - is a prerequisite for economic stability. Where the integrity, stability and proper functioning of the safeguard mechanisms established at national level to secure effective protection for the rule of law falter, the economic stability and prosperity are also at risk. As the Commission notes, effective judicial systems and robust anti-corruption frameworks are essential for the economy. Given that the ECB has been entrusted with a

³ While the ECB and the national central banks alike are subject to the rule of law when exercising the powers and carrying out the tasks conferred upon them by the Treaties, this paper does not engage with this angle given that the debate elicited by the Commission's Communication revolves around the domestic dimension of the rule of law.

⁴ Article 14.3 of the Statute of the ESCB and of the ECB.

⁵ Article 130 TFEU and Article 7 of the Statute of the ESCB and of the ECB.

⁶ This is reflected in the explicit obligation of Member States to ensure that the statutes of their national central banks are compatible with the Treaties and the Statute of the ESCB and of the ECB, Article 131 TFEU.

⁷ Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993), pp. 150–153; Habermas, *Between Facts and Norms* (Polity Press, 1996), pp. 144 et seq.

mandate oriented towards a price stability goal in the economic and monetary union, it has also from this perspective interest in the prevalence of the rule of law in the Union.

2. The perspective of Union law towards central banking

Systemic challenges to the rule of law may also affect the ESCB, including the independence of the national central banks comprising it and the fulfilment of the tasks ascribed to it by the Treaties (2.1). In the field of central banking, the EU and the national levels are more integrated, compared to other composite institutional settings, such as the judiciary. This is because central banks are assigned directly by the Treaty objectives and tasks, the performance of which requires independent policy-making. The Treaties provide for explicit independence guarantees applicable to national central banks as well as for specific, effective remedies against national deficiencies (2.2).

2.1. Systemic threats to the rule of law are often translated also into threats to central banking

The discussion on the rule of law is mainly focused on the independence of national institutions that are also involved in the implementation of Union tasks. First and foremost, this concerns the independence of national courts, which are also responsible for the effective and full application of EU law. According to the Court of Justice of the European Union (CJEU), in this context, independence means that the “body concerned exercise its functions wholly autonomously, being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions, with due regard for objectivity and in the absence of any interest in the outcome of proceedings.”⁸ Threats to the independence of courts, including in the form of undue interference with the status of national judges, are the most prominent current challenges to the rule of law, as evidenced in the case-law of the CJEU⁹ and the Communication itself.¹⁰

Systemic challenges to the rule of law may also affect central banks. The perceptions underpinning challenges to the rule of law are often used also against national central banks. Just like the judiciary and other independent agencies, which are primarily targeted by rule-of-law challenges, independent central banks reflect a constitutional paradigm that recognizes the existence of independent institutions as checks and balances to executive and legislative power. Populist, anti-establishment, and anti-expertise approaches that challenge independent institutions, focusing on their lack of direct connection with the

⁸ Judgment of 24 June 2019, *Commission v Poland*, Case C-619/18, EU:C:2019:531, para. 108.

⁹ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Case C-64/16, ECLI:EU:C:2018:117; Judgment of 7 February 2019, *Escribano Vindel v Ministerio de Justicia*, Case C-49/18, EU:C:2019:106; Judgment of 25 July 2018, LM, Case C-216/18 PPU, EU:C:2018:586; Judgment of 6 November 2012, *European Commission v Hungary*, Case C-286/12, ECLI:EU:C:2012:687.

¹⁰ European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps*, Brussels, 3.4.2019 COM(2019) 163 final, pp. 4, 8, 12, and 13.

“will of the people”, often fuel general mistrust against such institutions and target them sweepingly. This generalized challenge to independent authorities may also extend to national central banks. Considering that central banks resort *inter alia* to economic expertise to support their legitimacy as independent institutions, anti-expertise approaches, inducing mistrust against experts, are also used to undermine their claim for independence. These challenges to central bank independence, that are part of broader challenges to the rule of law as the constitutional model common in the European legal space, need to be demarcated from legitimate reflections on the scope and limits of central bank independence. The latter, if they take place within the appropriate fora and in full respect of democratic rules, are an ordinary part of a polity’s deliberations on the proper allocation of authority between its institutions.

2.2. Central banking enjoys more effective Union guarantees against threats to the rule of law

As the Commission submits in its Communication, the fundamental concern when it comes to the rule of law is that whereas “[a]n issue related to the rule of law in one Member State impacts the Union as a whole”, the ability of the Union to address such situations is sometimes limited. The CJEU has clarified the scope of Union law when it comes to the effective functioning of an independent judiciary, a basic pillar of the rule of law. As concrete expression to the value of the rule of law embedded in Article 2 TEU,¹¹ Article 19(1) TEU requires Member States to provide sufficient remedies to ensure “effective legal protection”. Based on this provision, as well as on Article 267 TFEU, the jurisprudence of the CJEU has developed specific guarantees of judicial independence,¹² including safeguards regarding the length of service and grounds for abstention, rejection and dismissal of its judges. On some occasions, however, Union instruments have been considered inadequate to address systemic national rule-of-law deficiencies that are of Union interest, requiring the Union to develop new tools to protect the rule of law.

When it comes to the ESCB, Union law already provides for strong guarantees of the rule of law. Unlike the independence of national courts, in the case of national central banks that are part of the ESCB their independence is guaranteed explicitly in the Treaties and protected by a specific and effective remedy. These stronger protections reflect the logic of the highly integrated system which the authors of the Treaties envisaged for the ESCB. In the words of the CJEU, “[t]he ESCB represents a novel legal construct in Union law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and *a less marked distinction between the EU legal order and national legal*

¹¹ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Case C-64/16, EU:C:2018:117, para. 32.

¹² Judgment of 24 June 2019, *Commission v Poland*, Case C-619/18, EU:C:2019:531; Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Case C-64/16, EU:C:2018:117; Judgment of 7 February 2019, *Escribano Vindel v Ministerio de Justicia*, Case C-49/18, EU:C:2019:106; Judgment of 25 July 2018, *LM*, Case C-216/18 PPU, EU:C:2018:586; Judgment of 12 February 2019, *RH*, Case C-8/19 PPU, EU:C:2019:110.

*orders prevails.*¹³ The principle of these national institutions' independence is contained in Article 130 TFEU and Article 7 of the Statute of the ESCB and of the ECB. These primary law provisions prohibit *inter alia* the governments of the Member States from seeking to influence the members of the decision-making bodies of the national central banks in the performance of their tasks.¹⁴ As the CJEU has recognized, those provisions are, in essence, intended to shield the ESCB, which comprises national institutions, from all political pressure in order to enable it effectively to pursue the objectives ascribed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law.¹⁵ This rationale of central bank independence runs parallel to that recognized by the CJEU for the independence of national courts, which includes to "exercise [their] functions wholly autonomously, being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions."¹⁶ Moreover, Article 14.2 of the Statute of the ESCB and of the ECB explicitly sets out personal independence guarantees for ESCB central bank Governors. According to this provision, the Governor of a national central bank shall have a minimum term of office of five years and he or she may be relieved from office only in two categories of cases: if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she has been guilty of serious misconduct. National laws had to be amended to comply with these requirements and, while some aspects of the status and mandate of national central bank Governors are governed by national law, the independence-protection afforded by the Treaties in view of the conferred competences has a bearing also on these aspects.

The novelty of a cross-border integrated system such as the ESCB is also reflected in a specific judicial remedy. Article 14.2 of the Statute of the ESCB and of the ECB exceptionally empowers national Governors and the Governing Council of the ECB to bring an action for annulment of a national measure that does not respect the independence of central bank Governors.¹⁷ By allowing a direct change of the legal reality within the national legal order by means of a Union remedy, Article 14.2 of the Statute of the ESCB and of the ECB ensures in a very effective way that the rule of law is upheld. By virtue of such judicial protection at Union level, a national rule-of-law threat against a national central bank can be addressed directly as it is at the same time a violation of Union law and the Union has been given explicit competence to guard the national Governors' independence.

¹³ Judgment of 26 February 2019, *Rimšēvičs/ECB v Latvia*, Joined Cases C-202/18 and C-238/18, EU:C:2019:139, para. 69 (emphasis added).

¹⁴ Judgment of 10 July 2003, *Commission v ECB*, Case C-11/00, EU:C:2003:395, para. 131.

¹⁵ Judgment of 26 February 2019, *Rimšēvičs/ECB v Latvia*, Joined Cases C-202/18 and C-238/18, EU:C:2019:139, para. 47; Judgment of 16 June 2015, *Gauweiler and Others*, Case C-62/14, EU:C:2015:400, para. 40.

¹⁶ Judgment of 24 June 2019, *Commission v Poland*, Case C-619/18, EU:C:2019:531, para. 108.

¹⁷ Judgment of 26 February 2019, *Rimšēvičs/ECB v Latvia*, Joined Cases C-202/18 and C-238/18, EU:C:2019:139, para. 70.

3. Rule of law toolbox as tailored for central banking

The rule-of-law toolbox presented in the Commission's Communication comprises means of ensuring respect for the rule of law in the Union that are of relevance also in the field of central banking. As systemic threats to the rule of law are often translated also into threats to central banking, the instruments based on Article 7 TEU and the Commission's Rule of Law Framework of 2014¹⁸ are not only generally but also particularly relevant for central banking. Similarly, given that an infringement of Union law by a Member State may directly concern rules regarding its national central bank, potential rule of law-driven issues that are addressed by the Commission through infringement proceedings based on Article 258 TFEU are not less significant for central banking. Analogously, the other mechanisms and frameworks which have an early warning and preventive role may have a bearing also on the ESCB and the fulfilment of its tasks.

In addition to the foregoing, in view of the forward-looking reflections on the pillars identified in the Commission's Communication for an effective enforcement of the rule of law in the Union, it is worth noting the specific tools that the ECB can employ in its fields of competence. First, the toolbox specific for central banking includes a particularly effective, albeit exceptional, judicial remedy to protect the independence of central bank Governors within the Union (3.1). Second, central banking-specific tools include actions of the ECB against national central banks for infringement of Union law (3.2). Third, the ECB's specific instruments linked to its advisory role may constitute a means for promoting compatibility with EU requirements that aim *inter alia* at ensuring that the rule of law is upheld (3.3).

3.1. Specific judicial remedy to protect the independence of central bank Governors within the Union
Different from the Commission's toolbox, the toolbox specific for central banking includes a particularly effective, albeit exceptional, judicial remedy through which the CJEU may directly annul national measures relieving Governors of national central banks from office. As discussed above, it follows from the recent jurisprudence of the CJEU that the rationale behind the special nature of actions based on Article 14.2 of the Statute of the ESCB and of the ECB relates to the special nature of the Union's system of central banks.

3.2. Specific infringement proceedings

Complementary to the Commission's toolbox, central banking-specific tools include actions of the ECB against national central banks for infringement of Union law, namely infringement proceedings based on Article 271(d) TFEU and Article 35.6 of the Statute of the ESCB and of the ECB, according to which the Governing Council of the ECB has in respect of national central banks the same powers as those conferred upon the Commission in respect of Member States by Article 258 TFEU. Consequently, if the

¹⁸ European Commission, Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11.3.2014, COM(2014) 158 final.

ECB considers that a national central bank has infringed an obligation under the Treaties, including where the violation has roots in rule-of-law deficiencies, the ECB may bring an action for failure to fulfil obligations against that national central bank before the CJEU.

The first stage of an infringement procedure is the gathering of information on compliance of a national central bank with Union law. As the ECB cannot rely on information from citizens on possible cases of non-compliance in the same way as the Commission, such information gathering typically takes place in monitoring exercises, but is not limited to them. In the absence of a specific legal basis, the ECB may require information on compliance of an NCB with Union law pursuant to Article 4(3) TEU in conjunction with Article 271(d) TFEU. National central banks are obliged to facilitate the achievement of the Union's tasks pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU. Failure to comply with the obligation to cooperate in good faith with the ECB and to provide it with all the information required for the purpose of Article 271(d) TFEU may result in a finding of a failure to fulfil an obligation under the Treaties. In the second, formal stage of the procedure, if a national central bank fails to fulfil its obligations under the Treaties and the Statute of the ESCB and of the ECB, the ECB puts it on notice by way of a formal letter, and if necessary, it would deliver a reasoned opinion on the matter, asking the national central bank to comply within a specified period.¹⁹ Where the CJEU finds that the national central bank has infringed Union law, that national central bank is required to take the necessary measures to comply with the Court's judgment.

3.3. Specific ECB instruments for promoting compatibility with EU requirements

Another category of tools consists of ECB instruments linked to its advisory role,²⁰ which may constitute a means for promoting compatibility with EU requirements that aim *inter alia* at ensuring that the rule of law is upheld.

3.3.1. ECB Opinions

Such are the opinions issued by the ECB on the basis of Articles 127(4) and 282(5) TFEU which require national authorities to consult the ECB on any draft national legislation falling within its fields of competence.²¹ In contrast with the ECB's competence to initiate infringement procedures against national central banks under Article 271(d) TFEU, the objective of which is to ensure compliance of national central banks with Union law, the aim of the obligation to consult the ECB on draft national legislation is to

¹⁹ Article 35.6 of the Statute of the ESCB and of the ECB.

²⁰ In its recent judgment regarding an action for damages relating to an ECB opinion, the General Court stated that the fundamental character of Article 17(1) of the Charter that protects individuals and the corresponding obligation of the ECB to promote its respect implies that the concerned individuals have the right to expect that the ECB denounces the violation of such provision when exercising its competences (Judgment of 23 May 2019, *Steinhoff and Others v ECB*, Case T-107/17, EU:T:2019:353, para. 98).

²¹ See also Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC), OJ L 189, 3.7.1998, p. 42.

ensure that the ECB is formally involved in the legislative process related to its field of competence so that the legislature could benefit from hearing the ECB's opinion in relation to matters pertaining to an area in which it exercises specific functions and it has specific expertise.²² As no other EU institution or body is consulted on draft national legislation, the ECB has a privileged means of directly influencing national legislation in the process of it being adopted, albeit legally non-binding and limited to the ECB's fields of competence.

Notably, the ECB adopted many opinions on draft national legislation concerning the institutional structure and governance of national central banks. A recurring theme in a large number of these opinions was the compatibility of the amendments to the statutes of the national central banks with the Statute of the ESCB and of the ECB, in particular in so far as the obligation of Member States to respect the national central banks' independence was concerned. Central bank independence seeks to shield the national central banks, including the members of their decision-making bodies, from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent performance of the specific tasks entrusted to them for that purpose by the Treaties. Promoting standards in this regard which are available to national authorities when preparing national legislation is important because, as discussed above, the perceptions behind challenges to the rule of law are often used also against national central banks when challenging their independence. Opinions may thus serve as an early warning for certain national authorities, such as the executive, dissuading them from measures that could challenge the rule of law.

3.3.2. ECB Convergence Reports

Another type of ECB instruments falling within the same category are the ECB's Convergence Reports issued on the basis of Article 140(1) TFEU, which requires the ECB (and the European Commission) to report, at least once every two years or at the request of a Member State with a derogation, to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports must include an examination of the compatibility between the national legislation of each Member State with a derogation (including the statutes of their national central bank) and Articles 130 and 131 TFEU and the Statute of the ESCB and the ECB. Whilst this ECB instrument addresses only the legislation of Member States that have not adopted the euro, it is a means of consolidating and developing EU standards, including where rule of law issues might be at stake. Given the specific requirements laid down in their legal basis, the ECB Convergence Reports engage particularly with any signs of pressure being put on the decision-making bodies of the concerned national central banks NCB which would be inconsistent with the spirit of the Treaties as regards central bank independence. However, these instruments pause also on other Union

²² Judgment of 10 July 2003, *Commission v ECB*, Case C-11/00, EU:C:2003:395, para. 110.

law aspects of specific relevance for central banking such as the monetary financing prohibition which, like independence aspects, relates to the relationship between the public sector of the Member States, including governmental authorities, and the national central banks, whereby emerging rule-of-law tensions might also be observed.

4. Conclusion

The rule of law is a fundamental principle of the composite constitutional order of the Union. The domestic dimension of this principle, which has come to the foreground in the last years, is directly relevant also for Union central banking. Systemic challenges to the rule of law, which often seek to undermine independent institutions, have the potential of threatening not only courts but also central banks, one of the basic constitutional pillars of the ESCB and of Union law. Because of the highly integrated nature of the ESCB, which brings together national central banks, and the ECB “in a novel legal construct” within which “*a less marked distinction between the EU legal order and national legal orders prevails*”,²³ challenges to the domestic rule of law affect directly the functioning of the ESCB and of the ECB and thus also the Union legal order. Moreover, the rule of law, in its inherent dimension of promoting predictability and stabilizing normative expectations, is of general relevance also for the price stability-oriented tasks of the ESCB. In terms of instruments to respond to threats to the rule of law, except for the general Union tools, an integrated system comprising EU and national institutions like the ESCB enjoys additional, particularly strong instruments. On the one hand, the ECB instruments linked to its advisory role, such as ECB opinions, may serve as an early warning for certain national authorities, such as the executive, dissuading them from measures that could challenge the rule of law. On the other hand, the action for annulment of national measures that violate national central bank independence is a particularly strong instrument that directly reflects the close interconnection of the national and EU legal orders when it comes to the ESCB. This is why in the field of Union central banking, the Treaties have recognized that threats to the rule of law at the national level are immediate threats to the Union legal order and provide for specific instruments to ensure respect for the rule of law.

²³ Judgment of 26 February 2019, *Rimšēvičs/ECB v Latvia*, Joined Cases C-202/18 and C-238/18, EU:C:2019:139, para. 69 (emphasis added).