

# Kluwer International Tax Blog

## Poland and Hungary versus the European Commission: The Pot Calling the Kettle Black

Edwin Heithuis (Universiteit van Amsterdam) · Thursday, October 21st, 2021

For some time now, Poland and Hungary have been under scrutiny from the European Commission for their violation of the rule of law, as we read with some regularity in the daily press. Recently, Poland was even fined by the European Commission. One of the defenses of these Member States is that the EU itself does not take the rule of law very seriously either. It is therefore a case of the pot calling the kettle black. This raised the question for me of how the democratic rule of law actually operates in the EU.

Let us begin with the element of democracy. The democracies as we know them in Western Europe and which form part of the EU derive their justice from the voice of the people. That voice is heard on a regular basis, usually every four years, through elections. The citizens of a country then elect their representatives, who are united in political parties. After the elections, these political parties form a cabinet, preferably one that can boast a majority in parliament. One may think all kinds of things about this process – once every four years is too little, the necessary compromises dilute election programmes, etc. – but at the heart of it all, the Cabinet does represent the voice of (the majority of) the people.

How does this work in the EU? Here too, elections are held on a regular basis, every four years, in which the EU citizens elect representatives of political parties to the European Parliament. But this is where the similarities with national elections end. If we take the most recent European elections as an example, they can at best be described as a show for the public and, more unfavourably, as a deception for the people. You will remember that European political parties put forward so-called ‘first choice candidates’ – for example Manfred Weber and Frans Timmermans – suggesting that if their party won the elections, their ‘first choice candidate’ would become the new President of the European Commission. We now know the outcome. Following backroom dealings between the Heads of Government of what were then 28 Member States, Ursula von der Leyen – a completely unknown German whom nobody outside Germany had ever heard of, let alone played a part in electing – became the new President of the Commission. The European Parliament, with its ‘Spitzenkandidaten’ (prime candidates), stood by helplessly.

To take the issue closer to what all of us is dear, the development of tax ‘legislation’ in the EU, by means of directives and regulations, takes place in an entirely diffuse manner for EU citizens. The European Commission makes increasingly far-reaching proposals for directives and regulations, which are adopted by the EU Council, consisting of the relevant ministers of the national member states, with or without amendments. A directive is then implemented in national legislation, while

a regulation even has direct effect in the national legal system without implementation. We are increasingly finding that this EU legislation has a very profound impact on the lives of EU citizens, including in the area of taxation. Just think of the ATAD1, ATAD2 and DAC6 directives. One would then at least expect that a directive or regulation of this kind could expect a thorough parliamentary scrutiny, as is the case with national legislation. After all, it is discussed in the national parliament and, if it agrees to it, eventually becomes law.

But not so in the EU. The development of EU tax legislation takes place entirely behind closed doors. Nobody knows anything about the internal deliberations in the Council, what positions were exchanged, why a provision was or was not included, etc. Out of this ‘*black box*’ suddenly comes a text for a directive or regulation, with the maximum ‘explanation’ being an often vaguely worded recital. Not to mention the fact that the European Parliament is sidelined and has no (formal) role whatsoever in this process. So much for democracy in the EU! I do understand the British.

Then the element of the rule of law: what is the state of this in the EU? The essence of the rule of law is that if a citizen has a conflict with the government, he can present that conflict to an independent judge. How does this work in the EU? If a citizen thinks that a national regulation is in conflict with the directive or regulation, he or she has to go to the national court. The latter is faced with the impossible task of interpreting something that has been cobbled together entirely in-house (see above). Since the Dutch court may not refrain from interpreting the law, it will do its best to make something of it. The highest national court, the Supreme Court in the Netherlands (*Hoge Raad der Nederlanden*), is generally required to ask the Court of Justice of the EU to interpret the provision(s) concerned. The Court of Justice of the EU is however faced with the exact same impossible task. And if the highest national court refuses to ask these preliminary questions – allegedly because something cannot reasonably be doubted (*acte clair*) – the citizen is left empty-handed. He cannot appeal against the judgment of the highest national court to the Court of Justice of the EU in Luxembourg. He then has two options: 1. file a complaint with the European Commission, which can initiate infringement proceedings against the member state in question for inadequate implementation of the directive, or 2. find a lower national court that is willing to ask the Court of Justice for a preliminary ruling. The best-known tax example of the latter in the Netherlands is the *Van der Steen*-decision for the VAT. After the Supreme Court had ruled entirely independently, without asking any preliminary questions, that a director and major shareholder who holds 100% of the shares in ‘his’ BV qualifies as an entrepreneur for VAT purposes, a lower court of the Amsterdam Court of Appeals did ask those preliminary questions and thus gave the Court of Justice of the EU the opportunity to put matters right. This Court ruled that a director and major shareholder is *not* an entrepreneur for VAT purposes. The Dutch Supreme Court thus had an egg on its face. In the end, things did turn out all right, but there were years of uncertainty. If the taxpayer or the tax inspector had simply been able to bring the matter before the Supreme Court in Luxembourg after the ruling – as is possible before the other European court in Strasbourg, the ECHR – it would not have come to this. Indeed, the rule of law of the EU is also far from being upheld!

In relation to Poland and Hungary, it is a case of “the pot calling the kettle black”. Neither democracy nor the rule of law are much better off in the EU. This does not mean, of course, that everything is fine in Poland and Hungary. What I am saying is that in the EU itself, the democratic rule of law is not all it’s cracked up to be. I would say, put your own EU house in order first. Until then, it would be better if the European Commission sang a little lower.

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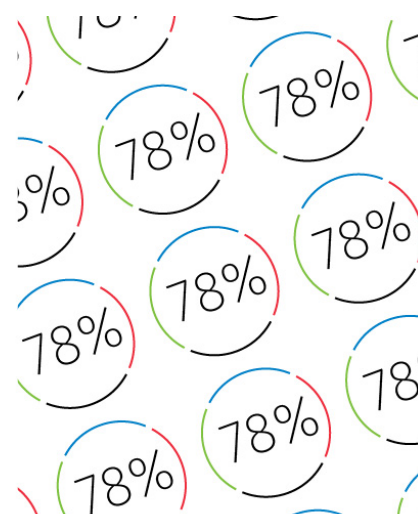
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