From “Nuclear Option” to Damp Squib?

Laurent Pech 2019-11-13T12:17:17

This post will offer a critical assessment of the four Article 7(1) TEU hearings held to date in respect of Poland (26 June, 18 September and 11 December 2018) and Hungary (16 September 2019) based on the data obtained by the present author via repeated freedom of information requests (for an introduction to Article 7 TEU). A number of significant shortcomings can be identified on this basis:

1. The lack of transparency;

2. The decision to understand Article 7(1) as providing for a peer review-type hearing;

3. The lack of a clear rationale at times underlying the choice of hearing topics and the lack of interest for some of these topics;

4. The initial absence of procedural rules followed by the adoption of arguably flawed procedural rules in particular as regards the European Parliament;

5. A hearing format which makes it easy for misleading or false statements to go unanswered;

6. Lastly, the “geography” of Article 7 hearings shows that a significant number of national governments could not be bothered asking questions or making comments at any of the four hearings, an aspect which has gone largely unnoticed due to the lack of transparency (our first point) which has characterised the ongoing Article 7(1) proceedings to date.

These shortcomings will be briefly analysed in turn.

1. The lack of transparency

There is no good reason which may justify that documents relating to Article 7(1) procedures are not systematically made available to the public as it would be difficult to think of more pressing overriding public interest than a situation in which the existence of a clear risk of a serious breach of the EU’s foundational values is alleged in respect of a Member State. In addition, in the absence of a dedicated webpage, when documents are eventually made public due to freedom of information requests, it takes time and expertise to locate them (see here for the results of the joint efforts of Dr Joelle Grogan and yours truly). This lack of transparency may be misconstrued as a deliberate attempt by the Council to prioritise diplomatic considerations over its duty to defend and promote the values laid down in Article 2 TEU and its duty to conduct its “work as openly

as possible" (Article 15(1) TEU). It is similarly difficult to understand why the Commission has refrained from systematically publishing the legal assessments or factual updates it has regularly provided to the Council.

2. The (re)interpretation of Article 7(1) hearings as "peer review exercises"

At the time of the first hearing of Poland, in a document adopted on 21 June 2018 now public but initially kept confidential, the Council decided to interpret Article 7(1) TEU as providing for a hearing in the form of "a peer review exercise" which aims to "enable ministers to have a more in-depth exchange … on the key concerns identified" by the Commission. How the Council understands the notion of "peer review exercise" was not however made clear. Similarly, the Council did not justify in any way this interpretation of Article 7(1) TEU even though it is far from obvious that a Treaty provision previously labelled the EU's nuclear option should be understood as providing for the mere provision of feedback, possibly positive, and cordial exchanges of views no matter how "in-depth" (see point 5 infra to see that there is fact no in-depth exchange). The Council's interpretation may be construed as an attempt to "dedramatise" Article 7(1) proceedings which one may find difficult to reconcile with the purpose and content of this Treaty provision.

3. A not always clear rationale underlying the choice of hearing topics

When the first formal hearing of Poland was organised by the Council, a total of seven issues was identified. But rather than following the structure of the Commission's Reasoned Proposal, the Council decided for instance to make the situation of the Polish Supreme Court the first topic of discussion. This was undoubtedly a crucial and pressing issue but it would have been helpful for the Council to explain the rationale (if any) underlying the order of discussion of the selected topics.

It is also difficult to understand why some topics did not make in onto the list. For instance, the Council did not deem necessary to include a discussion of action (e) in the Commission's Reasoned Proposal, i.e., the need for Polish authorities to refrain from actions and public statements which could undermine further the legitimacy of specific courts, judges, or the judiciary as a whole. By contrast, and positively, the Council decided that the first hearing of Hungary should cover "all the issues raised in the Reasoned Proposal by the European Parliament".

The actual hearings however have shown variable interest in the selected topics. Out of the seven topics selected in respect of Poland, one was never the subject of any question or comment by any national government:

1. Supreme Court: multiple questions (FR; DE; DK; IE; EE; LU; PT; BE; CY; FI; NL)
2. National Council for the Judiciary: several questions (SE; DK; ES; FI)

3. Ordinary Court Judges: several questions (SP; LU; BE; FI)
4. Disciplinary regime: several questions (PT; NL; IE)
5. Extraordinary appeal procedure: several questions (NL; SE; DE; FI; NL; FR)
6. Court Presidents: no (direct) questions
7. Constitutional Tribunal: multiple questions (SP; BE; SE; CY; FR; DE; IT)

The data above is based on the three formal hearings reports published to date. It is worth noting that some governments – out of the 14 which intervened – raised similar issues at more than one of the hearings with some questions being transversal in nature but space constraints preclude a more sophisticated overview. With respect to Hungary, several topics have not been discussed at all:

1. Functioning of the constitutional and electoral system: one (indirect) question (FR)
2. Independence of the judiciary: several questions (DK; FR; DE; PT)
3. Corruption and conflicts of interest: two questions (NL and DE)
4. Privacy and data protection: no question
5. Freedom of expression: several questions (SE; BE; ES; FR)
6. Academic freedom: two questions (BE and ES) and one comment (IT)
7. Freedom of religion: no question
8. Freedom of association: no question
9. Right to equal treatment: no question
10. Rights of persons belonging to minorities: no question
11. Fundamental rights of migrants, asylum seekers and refugees: one question (LU)
12. Economic and social rights: no question

Out of twelve topics therefore six were not raised at all during the hearing of Hungary held on 16 September 2019 with only 10 EU Member States intervening.

4. An unlevel playing field

While the Council may be commended for finally adopting in July 2019 – more than a year after the first formal hearing of Poland – a document outlining the “standard modalities for hearings referred to in Article 7(1) TEU”, a comparison of the first version with the final version of this document shows that two changes – in both cases favouring the governments accused of endangering Article 2 values – were made.

First, the government in the dock gained the option to present its own observations and remarks at the end of the hearing without being subject to any time limit. By contrast, all other actors are subject to various time limits.

Secondly and more importantly, instead of allowing for the possibility of inviting the Parliament to formally present and defend its Reasoned Proposal in a situation where the Parliament is the activating body – as foreseen in the first draft – the Council decided to make the Commission the proxy for the Parliament against the Commission’s own position.

Article 7(1) TEU however does not provide for differential procedural rights between the different actors which have been granted the right to activate this provision. This is why the Commission has been right to repeatedly point out to the Council that it ought to review its position and give the Parliament "the possibility to present its case in procedures it has initiated" so as to respect the principle of institutional balance. As the Commission emphasised at the time of the first hearing of Hungary, the Council must "ensure a fair handling" of the reasoned proposal tabled by Parliament. In other words, the Commission has requested the Council to stop favouring Hungary by excluding the Parliament from the formal hearing. This is far from the only instance where the Council's claim that it aimed to create "a level playing field for all the Member States involved" rings hollow.

5. A deficient format

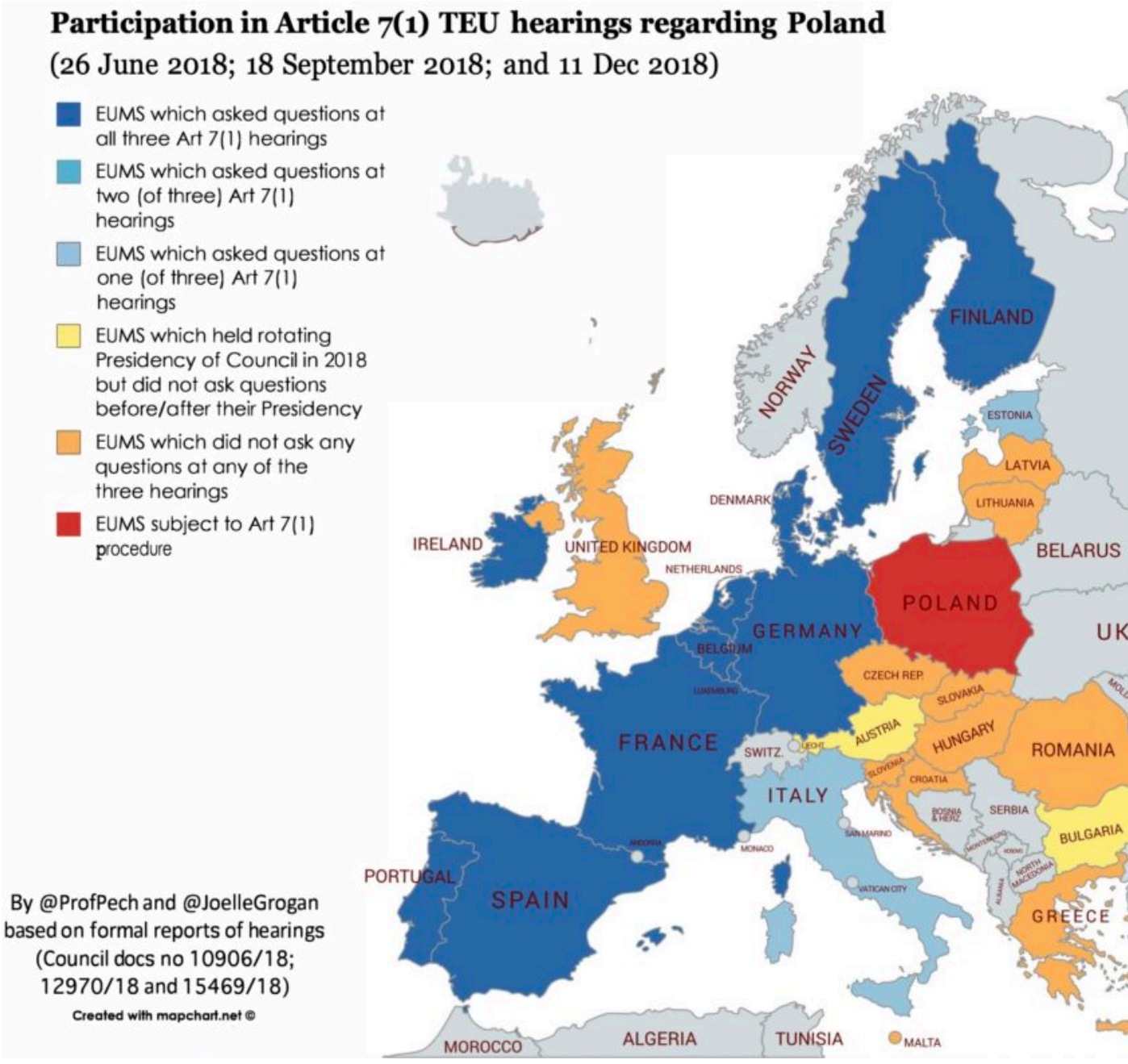
The current format of Article 7(1) hearings has allowed Polish and Hungarian authorities to easily get away with false, misleading and at times plainly absurd statements (see some examples here and here) in hearings which lasted approximately two to three hours each in practice.

Because of the Council's decision to favour timewise the government subject to Article 7(1), an arguably excessive amount of time is spent just listening to presentations from representatives of the said government. To give a single example, the Polish government's representatives spent approximately one (uninterrupted) hour going through a 50-slide PowerPoint presentation. Furthermore, the maximum of two minutes for a maximum of two questions for each national delegation while the representatives of the government subject to Article 7 can spend up to 10 minutes answering *each* question is a recipe for discouraging questions in the first place unless one wishes to be stuck in the Justus Lipsius building for a full day and possibly night should the hearing be scheduled in the afternoon (the first hearing of Poland started at 6.15pm…).

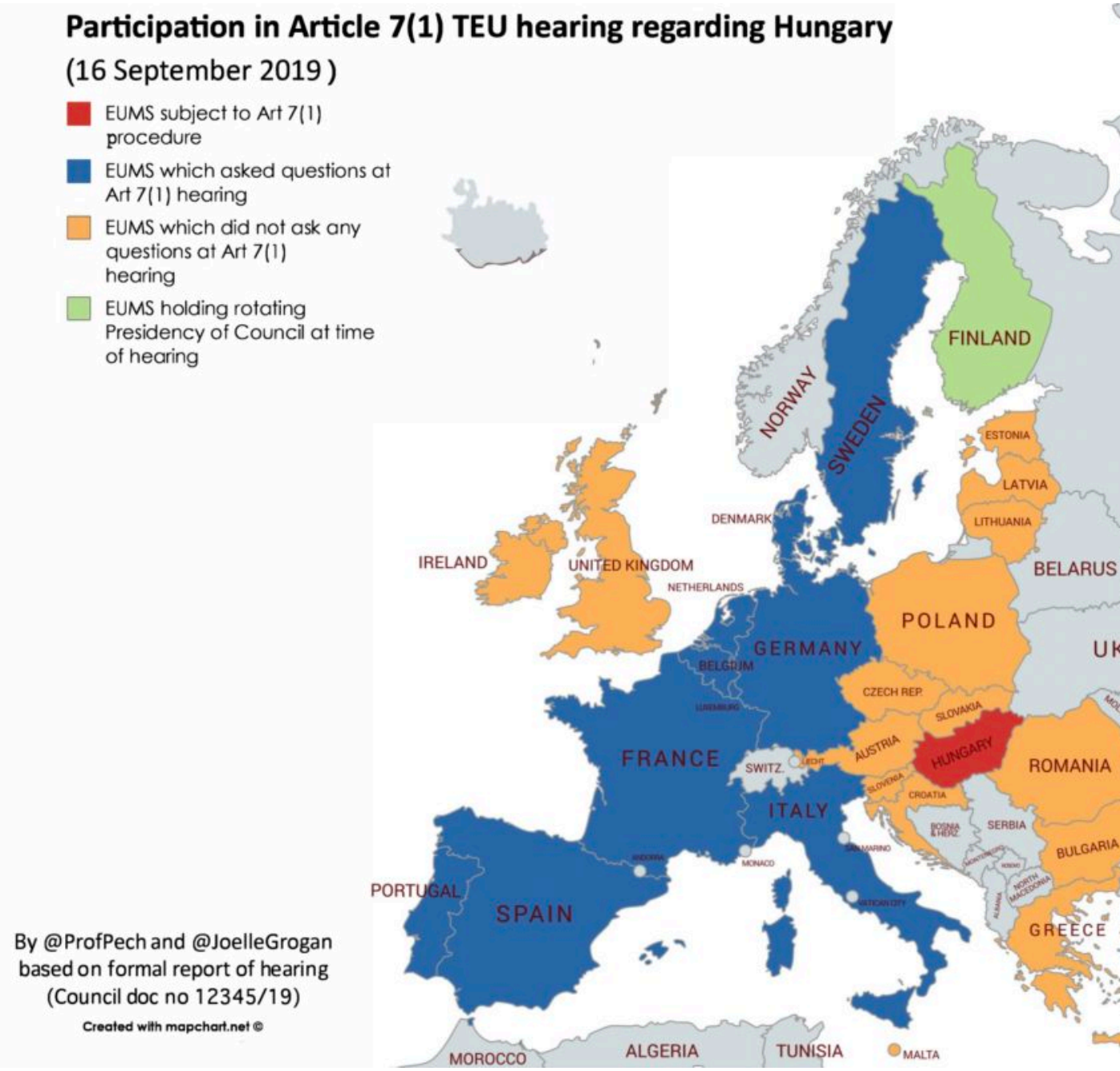
In a situation where not every government may have expertise available to them to quickly spot false or misleading statements and in the absence of any fact checking done by the Council itself either before, during or after the hearings, it is for the activating body to undertake this task. This is however not an easy one for a body like the European Parliament. For instance, in addition to not being able to defend its Reasoned Proposal during the hearing, the Parliament has less resources than the Commission in a context furthermore where the previous rapporteur of the Parliament's Reasoned is no longer available. This means the new rapporteur has had to absorb a multifaceted and lengthy file from scratch which is far from ideal when faced with a government willing to invest time and resources in muddying the waters.

6. Article 7(1) Hearings in Maps

As seen in the maps below (put together with Dr Joelle Grogan): the divisions are clear as between those Member States willing to take two minutes to hold another to account, and those unwilling to do so.



The first, and as yet only, Article 7(1) hearing in respect of Hungary took place in September 2019. As seen in the map below, the pattern of division remained consistent:



I will let the task of explaining the divisions the maps above make more easily visible to colleagues specialising in European politics and other relevant areas. One may just quickly emphasise that out of the post-2004 accession states, only Cyprus (twice) and Estonia (once) asked questions in respect of the rule of law situation in Poland. These two countries joined by Ireland however subsequently failed to ask any questions in respect of Hungary. With respect to the UK, Brexit related considerations have led the governments of Theresa May and then Boris Johnson to abandon the UK's traditional strong stance when it comes to defending respect for the rule of law abroad.

As recently and rightly emphasised by the Commission, "upholding the rule of law is a shared responsibility of all EU institutions as well as of all Member States".

Perhaps someone should tell the twelve Member States whose governments could not be bothered asking questions or merely recalling the importance of complying with one's legal obligations at any of the four Article 7(1) hearings to date.

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