



## EUROPEAN POLICY ANALYSIS

# Suspension of EU funds for breaching the rule of law – a dose of tough love needed?

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### Summary

The view from Brussels and some European capitals is that some Member States need a dose of tough love. These Member States have been pleased to take the benefits of EU membership, but their commitment to European values, particularly the rule of law (Article 2 TEU), has been lacking. Suspending transfers of EU funds to these recalcitrants has been touted as the type of tough love needed.

Accordingly, the Commission has presented a Draft Regulation that authorises the EU institutions to suspend EU funds if a Member State is found to engage in systematic breaches of the rule of law. In other words, the transfer of EU funds to the Member State would be made conditional upon their continuous respect for the rule of law (therefore known as ‘the conditionality mechanism’). This paper comments on this Draft as first proposed by the Commission and amended during the first reading in the European Parliament. The analysis reveals that, although the conditionality mechanism could be lawfully introduced in EU law, the proposed model of its application raises serious doubts in terms of legal certainty. In addition, rather than being solely targeted at Member States that systematically breach the rule of law, its application may inadvertently lead to a loss of EU funds by those who should benefit from them.

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## 1 Introduction

The European Union is a community of law<sup>1</sup> and values<sup>2</sup> in which the rule of law takes a prominent place. The rule of law is the backbone of modern constitutional democracies and ensures that all public powers 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<sup>3</sup>. In recent years, however, some Member States have systemically breached the rule of law, and it is a common diagnosis that the EU lacks effective legal instruments to stop these violations<sup>4</sup>. Many politicians and citizens believe that this illegitimate situation could be changed by suspending EU funds earmarked to these States. In response, the Commission presented the Draft Regulation which aims to make transfers of EU funds to Member States conditional upon their respect of the rule of law (known as the rule of law conditionality).

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This paper will comment on this Draft as first proposed by the Commission<sup>5</sup> and as amended during the first reading in the European Parliament<sup>6</sup>. It focuses on the following elements of rule of law conditionality that raise the most concerns as regards their legality, namely

- the vagueness of the notion of ‘generalised deficiency as regards the rule of law in a Member State’;
- unknown measures to be applied under the rule of law conditionality;
- voting on the initiation of the process of suspension in the Council by reverse QMV;
- the impact of [an adverse finding on] the rule of law conditionality on the Member States and the end beneficiaries of EU funds.

### 1.1 The rule of law and EU funds

EU funds are significant drivers for social and economic growth in many Member States<sup>7</sup>. However, even Member States with a lengthy history of violations of the rule of law receive extensive amounts of EU funds. For example, Poland<sup>8</sup> is the largest overall recipient taking in 86 billion EUR from various European Structural

and Investment Funds (the ESIF) in the MFF 2014–2020, and Hungary<sup>9</sup> is the largest recipient of EU funds on a *per capita* basis, with more than 95% of all public investments in the MFF 2014–2020 co-financed by the EU<sup>10</sup>. Maintained by strong electoral mandates, the populist governing parties in these States *inter alia* interfere with the independence of the national judiciary and increase state control of other institutions, including the media. The Court of Justice of the European Union (CJEU) has already found breaches of the rule of law in some cases brought against these States. The case against Hungary (see C-286/12 *Commission v. Hungary*) concerned equal treatment of judges and prosecutors in employment relations. Cases against Poland (see C-619/18 *Commission v. Poland*, C-192/18 *Commission v. Poland*, and C-47/20 *Commission v. Poland*, the latter case is pending) also concerned the independence of judges and the system of organisation of the judiciary.

In this situation, it is often commented that respect for EU values must be ensured throughout all EU policies, including the EU budget<sup>11</sup>, and that it is ‘a curious omission’ that the EU does not insist on observance of the rule of law as a condition for the receipt of EU funds<sup>12</sup>. Many suggest that the suspension of EU funds would be a significant motivator for Member States to restore the rule of law as well as a clear message that the EU does not subsidise States that violate it<sup>13</sup>. Two possibilities for effecting such suspensions are examined:

1. using the EU secondary legislation currently in place;
2. adopting a new piece of secondary legislation, one specifically designed to protect the rule of law by potentially suspending the provision of EU funds.

Some legal scholars suggest that EU secondary law already allows the Commission to suspend transfers of EU funds to Member States that violate the rule of law<sup>14</sup>. They claim that the Common Provisions Regulation (hereafter: CP Regulation) provides for such a possibility<sup>15</sup>. The CP Regulation contains rules on the distribution of the European Structural and Investment Funds (ESIF), which are to be used to finance implementation of the cohesion policy. A similar approach could also allow for the suspension of EU agricultural funds that are transferred for the implementation of the Common Agricultural Policy (CAP)<sup>16</sup>. Under the CP Regulation, the

Member States in receipt of ESIF must establish a ‘management and control system’ and ensure its effective functioning<sup>17</sup>. This system, comprised of national bodies undertaking specific tasks related to the distribution of EU funds in the Member State, should guarantee that these funds are spent in accordance with EU law. If the Commission finds a serious deficiency in the effective functioning of this system or irregular spending of these funds in a Member State, it is authorised under the CP Regulation and CAP/EFSI Regulations to suspend the payments of these funds to the Member State<sup>18</sup> or to recover it from this Member State by imposing financial corrections<sup>19</sup>, thereby leading to the possibility of a definitive loss of the EU funds by this Member State. It is claimed that systemic violations of the rule of law by a Member State, for example, that undermine its judicial independence, could be classified as a serious deficiency in the effective functioning of the management and control system<sup>20</sup>.

So far, the Commission seems not to have explored either of these possibilities provided under the CP Regulation and the CAP regulation. Instead it has proposed the new Draft Regulation to establish the rule of law conditionality. This is the subject of this paper. The reason for the Commission’s hesitation is the lack of a clear legal basis that allows it to suspend EU funds or impose financial corrections on Member States for breaches of the rule of law. Both the CP Regulation and CAP/ESIF Regulations put forward closed definitions of the circumstances in which one of these sanctions can be imposed, and a breach of the rule of law is not mentioned in these definitions. Both instruments lead to serious financial consequences for the Member State since they result in a temporary discontinuation of the transfer of EU funds (suspension of the EU funds) or an obligation to return the funds already obtained (financial corrections). This makes both options look like sanctions, which, in light of the CJEU case law, requires a solid legal base. According to the CJEU, respect for the principles of legal certainty requires that provisions imposing sanctions must be formulated clearly and precisely<sup>21</sup>.

## 1.2 Conditionality in EU law

Conditionality is an EU policy tool which has been in use since the late 1980s<sup>22</sup>. Its core tenet is that Member States are prompted to comply

with requirements established under EU law in return for advantages to be received. Additionally, compliance should continue because, if it does not, the States risk losing the advantages, particularly the financial ones.

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Conditionality was initially applied in the EU’s external relations: the EU made the granting of humanitarian aid to third countries conditional upon their respect for human rights<sup>23</sup>. Increasingly, conditionality is being used in the EU’s internal relations as well. ‘Macroeconomic conditionality’ was introduced in 1994 to support the establishment of the European Monetary Union. It conditioned access to the Cohesion Fund by the less developed Member States (then Greece, Ireland, Spain and Portugal) on their compliance with the EU budgetary deficit rules. It has been enforced only once, against Hungary in 2012, when EU funds were suspended for three months, albeit there was no actual cut-off in funding<sup>24</sup>.

In the MFF 2014–2020, two new types of financial conditionality were adopted: *ex-ante* conditionality and *ex-post* macroeconomic conditionality. To receive initial payment from the ESIF under ‘*ex-ante* conditionality’, the Member States had to fulfil specific conditions related to their capacity to properly absorb these funds by the end of 2016. The EU funds could be suspended if, during any interim review, it was discovered that the Member States had stopped fulfilling the conditions. According to ‘*ex-post* macroeconomic conditionality’, if Member States suffer from macroeconomic imbalances during the budget cycle, the Commission can ask them either to rearrange their plan for ESIF or to suspend it. Legal scholars claim that the new CP Regulation for the MFF 2021–2027 should explicitly demand respect for the rule of law as a precondition to the receipt of EU funds, and foresee suspension if this rule is breached<sup>25</sup>. It is also stated that access to EU funds should be limited to those Member States that participate in the European Public Prosecution Office.

Such a use of conditionality marks a shift towards a more generalised ‘conditionality culture’ in the relations between the EU and its Member States.

The compliance function that conditionality is aimed to ensure was initially intended to be fulfilled by the principle of sincere cooperation (Article 4 (3) TEU). The shift from the principle of loyal cooperation to the rule of conditionality was brought about by the 2004 enlargement, with its concern that some ‘new Member States might be reluctant to fully fulfil their EU obligations.’<sup>26</sup> Calls for the establishment of the rule of law conditionality, which allows for the suspension of EU funding to Member States that systematically breach the rule of law, goes further down this route.

## 2 Characteristics of the instrument

### 2.1 Legal basis

The Commission bases the Draft Regulation that establishes the rule of law conditionality on Article 322 (1) (a) TFEU. This provision authorises the European Parliament and the Council to adopt regulations containing financial rules determining *inter alia* procedures for establishing and implementing the EU budget. This provision is commonly applied as a legal basis for adopting Financial Regulations—the main EU secondary budgetary law (presently the Financial Regulation no 2018/1046).

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This legal basis indicates that the rule of law conditionality is conceived as an instrument to ensure sound implementation of the EU budget (Article 317 TFEU). By checking the rule of law observance and suspending EU funds if infringements are detected, the Commission would perform its roles as the guardian of the Treaty (Article 17 (1) TEU) and as the EU institution responsible for implementation of the EU budget (Article 317 TFEU).

### 2.2 Requirements

One requirement for launching the rule of law conditionality consists in finding that there is a ‘generalised deficiency as regards the rule of law’ in a Member State. Such a generalised deficiency is defined as a widespread or recurrent practice or

omission or a measure by public authorities which violates the rule of law and affects or risks affecting the principle of sound financial management or the protection of the financial interests of the EU.<sup>27</sup> Violations of the rule of law must have a systematic or a common character in a Member State. A single infringement of this rule would not suffice<sup>28</sup>. Moreover, a systematic infringement of the rule of law should affect, or risk affecting, EU funds, more specifically, the sound management and protection of EU funds. Both notions have their roots in EU treaties.

The principle of sound financial management<sup>29</sup> relates to the implementation of the EU budget, a task which is entrusted to the Commission (Article 317 TFEU). According to Financial Regulation no 2018/1046 (the main EU secondary budgetary law act), the implementation of the EU budget requires the Commission to carry out different activities, for example, to manage, monitor, control and audit.<sup>30</sup> The Commission implements the EU budget in cooperation with the Member States, on its own responsibility and within the limits of the appropriations, showing proper regard for the principles of sound financial management. The EU budget must also be implemented in accordance with the principles of economy, efficiency and effectiveness<sup>31</sup>. The CJEU holds that the principle of sound financial management (applied in the area of the EU funds) corresponds to the principle of sincere cooperation (as applied more generally in EU law)<sup>32</sup>. The CJEU often recalls this principle in the context of EU rules that establish tasks related to the management and spending of EU funds to underline the necessity of ensuring the integrity of their distribution<sup>33</sup>.

The rule of law conditionality should also protect the financial interests of the EU against losses derived from systemic infringements of the rule of law by the Member States<sup>34</sup>. The notion of ‘protection of the financial interests of the Union’ as used in the TFEU<sup>35</sup> is defined in EU secondary law<sup>36</sup> and has been clarified by the CJEU.<sup>37</sup> It applies to revenues, expenditures and assets covered by the EU budgets; the budgets of the EU institutions, bodies, offices and agencies established under the EU Treaties; and budgets managed and monitored by these institutions, bodies, offices and agencies. Article 325 TFEU, the main Treaty provision relating to the financial interests of the Union, obliges the Member States and the

EU institutions to counter fraud and any other illegal activities affecting these interests through deterrent measures, and such deterrent measures should ensure the effective protection of these interests. In turn, the Member States should take measures to counter fraud that affects the financial interests of the EU in the same way as they counter fraud affecting their own financial interests (the assimilation principle).

### 2.3 Procedure

While the Commission and the European Parliament generally agree on the idea of launching the rule of law conditionality, their proposals for the procedures for its application considerably differ. A key issue is the EU institution that would adopt a decision initiating the rule.

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The Commission proposes that it would conduct a rule of law inquiry by itself. When assessing the situation in a Member State, the Commission could request information from this Member State and take into account all data, including judgments of the CJEU, reports of the European Court of Auditors (ECA) and recommendations of international organisations. If the Commission finds a generalised deficiency as regards the rule of law in a Member State, it shall submit a proposal to the Council for an act to implement the appropriate measures<sup>38</sup>.

The European Parliament has proposed two modifications to this procedure.

- The first concerns the establishment of an advisory panel of independent experts (hereafter: the Panel) entrusted with the task of continuous monitoring of the rule of law situation in all the Member States<sup>39</sup>. The Panel would perform its task in a twofold manner. It would adopt *ad hoc* opinions on specific cases of generalised deficiencies as regards the rule

of law, with such cases being brought to its attention by the Commission. In addition, the Panel would annually assess the health of the rule of law in all Member States and publish its findings.

- The other modification introduced by the European Parliament would oblige the Commission to apply the ‘Copenhagen criteria’ (Article 49 TEU) for assessing compliance with the rule of law by Member States<sup>40</sup>.

After the Commission has identified a generalised deficiency as regards the rule of law in the Member State, the subsequent action consists of adopting a proposal for an act to implement the appropriate measures to be taken by the Council. Given the individual and specific nature of this proposal, it may be assumed it would be a decision (Article 288 (4) TFEU). Particular attention needs to be paid to the majority necessary to approve this proposal because it would be voted on by the Council by *reverse QMV*<sup>41</sup>. This means that a proposal would be deemed to have been adopted unless the Council rejects it by a QMV within one month of the submission of the proposal by the Commission. Additionally, the Council may amend this proposal by a QMV, with no time limit established for such an amendment (see point 3.3). *Reverse QMV* avoids the unanimity requirement of Article 7 (2) TEU as well as the 4/5 majority required by Article 7 (1) TEU, both of which have been exploited by Hungary and Poland, who have formed a coalition in which each State makes the imposition of sanctions against the other impossible.

The European Parliament foresees the adoption of two decisions, both by the Commission. In the first decision, which would be addressed to the Member State concerned, the Commission would indicate a specific measure to be imposed on this Member State under the rule of law conditionality (e.g., suspension of EU funds, see point 3.2). In the second decision, which would be addressed to the European Parliament and to the Council (the EU budgetary authority), the Commission would indicate an amount of EU funds adopted in the first decision (e.g., the amount of EU funds suspended) and that amount would be classified as an EU budgetary reserve. Both decisions are considered to be adopted unless the European Parliament (acting by a majority of the votes cast) or the Council (acting by QMV), amend or reject it within four weeks of its receipt<sup>42</sup>.

The sanctioned Member State would be authorised at any time to provide the Commission with evidence that it has remedied or eliminated the generalised deficiency. On this basis, the Commission would assess the situation in this Member State with a view to the adoption of a proposal for a decision lifting the measures applied under the rule of law conditionality<sup>43</sup>. This decision would be issued by the EU institutions that have adopted it—by the Council (as the Commission proposes) or by the Commission (as the European Parliament proposes)<sup>44</sup>.

### 3 The relationship to Article 7 TEU

Since a suspension of EU funds as envisaged under the rule of law conditionality (Draft Regulation) could also be the consequence of a suspension of rights of the Member States enshrined in the EU Treaties under Article 7 (3) TEU, the relationship between these two instruments needs to be clarified.

The legal nature of the suspension undertaken, based on Article 7 (3) TEU, is not determined by the Treaties. The provision simply provides an example (suspension of the voting right in the Council); otherwise the provision describes such actions by using the neutral term ‘*measure*’. It is broadly accepted that the Council’s actions based on Article 7 (3) TEU constitute political sanctions<sup>45</sup>. It should thus be determined whether, under Article 7 TEU, the suspension of EU funds is permitted.

*Prima facie*, suspension of EU funds is permitted under Article 7 (3) TEU. Receiving EU funds is a right that the Member States benefit from as a result of their EU membership, and the amounts received are set out in the MFF Regulations. By suspending transfer of the EU funds, a Member State is temporarily deprived of the possibility to enjoy its right to the receipt of funds that derives from the Treaties.

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It thus follows that the suspension of EU funds to Member States that are systematically breaching the rule of law would be possible both under Article 7 (3) TEU and the Draft Regulation. The question is how to understand such ‘dedoublement’ and whether it amounts to an illegal circumvention of the structures of Article 7 TEU.

One way to construe the relationship between the provisions is that Article 7 TEU has a primary role and the rule of law conditionality supplements it. Article 7 TEU provides a general framework for a suspension of rights of the Member States that derives from the application of the EU Treaties, which includes transfers of the EU funds for breaches of the rule of law, and the Draft Regulation which ensures its practical implementation. Based on this reasoning, the suspension of EU funds under the rule of law conditionality would, in legal terms, constitute a ‘*measure*’ within the meaning of Article 7 (3) TEU. Following this logic, the suspension of EU funds would first have to be imposed under Article 7 (3) TEU and only then under the rule of law conditionality. In this scenario, however, one breach of the rule of law would be double-checked in two different procedures – first under Article 7 TEU and then under the Draft Regulation. At a glance, this seems counterproductive. It should also be noted that decisions made under Article 7 TEU and under the rule of law conditionality would differ, depending on the political ambience, not to mention how unpractical and time-consuming this may be. If one assumes that the reason to create the rule of law conditionality is to overcome the difficulties of the Article 7 procedures, the idea to merge the Article 7 TEU and the rule of law conditionality makes little sense.

The second option is based on the argument of procedural effectiveness, or the *effet utile* principle. Under this option, Article 7 TEU and the rule of law conditionality are parallel and independent of each other because their legal nature is different. The Article 7 TEU procedure is a political one, while the rule of law conditionality is a legal proceeding. Under Article 7 TEU, decisions are made by a political body (the Council and the European Council) based on political assessments. The judicial control of the legality of these decisions made by the CJEU is limited only to reviewing the procedural requirements stipulated in Article 7 TEU (Article 269 TFEU). This

procedure aims exclusively to eliminate breaches of the values on which the EU is based, including the rule of law. In contrast, the objective of the rule of law conditionality is more clear-cut, as it should safeguard EU funds or, more precisely, their sound management (Article 317 TFEU) and protection (Article 325 TFEU) against losses resulting from systematic breaches of the rule of law in the Member State. Decisions are based on an assessment of the legal criteria established under the Draft Regulation, namely the existence of a generalised deficiency as regards the rule of law in the Member State. The key decisions are taken by the Commission—the guardian of the EU Treaties (Article 17 TEU) and a body which is also responsible for the EU budget (Article 317 TFEU). The legality of these decisions is fully controlled by the CJEU under an action for annulment (Article 263 TFEU). This kind of jurisdiction of the CJEU significantly strengthens the legal position of the targeted Member State in comparison to the purely procedural checks performed by the CJEU under Article 7 TEU. It can thus be concluded that Article 7 TEU and the rule of law conditionality are parallel and independent of each other.

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On this basis, the question to be tackled can be stated as: Is the rule of law conditionality (the Draft Regulation) an illegal circumvention of Article 7 TEU? Article 7 TEU does not contain an explicit statement as to whether other EU institutions may defend European values using other instruments. Thus, the general rules apply. It is well established that a specific procedure designed to deal with a certain problem does not exclude the development of other instruments<sup>46</sup>, a core doctrine since the *Van Gend en Loos* judgement<sup>47</sup>. Accordingly, it is, in principle, legally possible to develop new instruments<sup>48</sup> or to use the EU budget to defend European values.

## 4 Problems

### 4.1 The notion of generalised deficiency

The Draft Regulation defines a generalised deficiency (a premise necessary to launch a rule of

law conditionality) as the systematic conduct of public authorities in a Member State in violation of the rule of law which affects or is likely to affect EU funds or their management. To limit this broadly worded definition which leaves considerable room for interpretation, the Commission and the European Parliament have established specific examples of such deficiencies.

The Commission provides for two lists of such examples.

- The first list includes, generally speaking, the conduct of national authorities (administrative, investigative and judicial) related to EU funds. Deficiencies defined here do not have to be very serious, for example, practices of a national authority affecting the effective and timely cooperation with the European Anti-Fraud Office (OLAF) or European Public Prosecutor’s Office.<sup>49</sup>
- The second list of examples is related exclusively to the national judiciary and concerns its constitutional requirements (e.g., judicial independence), its good administration (e.g., lack of relevant financial and human resources) and its repressive actions (e.g. prosecuting, sanctioning). In this instance, deficiencies do not have to directly affect or risk affecting the financial interest of the EU.

The European Parliament has also created two lists of examples of generalised deficiencies.

- The first list relates to the conduct of national administration and courts. It lists the following actions: the failure to prevent, correct and sanction arbitrary or unlawful decisions made by public authorities; limiting the availability and effectiveness of legal remedies; the lack of implementation of judgments; limiting effective investigation and prosecution; and sanctioning breaches of the law. This list also includes ‘endangering the administrative capacity of Member States to respect the obligations of Union membership, including the capacity to effectively implement EU law’. Last, but not least, measures that weaken the protection of confidentiality of communications between lawyers and clients are also incorporated<sup>50</sup>.
- The second list contains examples of general deficiencies that specifically endanger, or risk endangering, financial interests of the EU<sup>51</sup>. This list encompasses the general deficiencies of the Commission’s first list<sup>52</sup> as well as two

new breaches, one concerning the Copenhagen criteria<sup>53</sup> and the other fundamental rights.<sup>54</sup>

To sum up, the notion of generalised deficiencies as regards the rule of law and the premise necessary to launch the rule of law conditionality have been extremely broadly formulated. This general formulation might be crucial from the point of view of the principles of legal certainty. According to CJEU, this principle requires that provisions imposing sanctions on entities must be formulated clearly and precisely, so that the entities can determine with certainty the scope of their rights and obligations and take appropriate action<sup>55</sup>. This principle should be rigorously observed, particularly in the case of provisions that have or may have a financial impact. Viewed in this light, the notion of a generalised deficiency as regards the rule of law might be attacked for not being sufficiently clear and precise, at least not if one considers the deterrent nature that the rule of law conditionality may have on the Member State and other beneficiaries (see point 4.4). In taking actions against Member States for breaching the rule of law, EU institutions must be careful not to frustrate the rule of law<sup>56</sup>.

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#### 4.2 The measures to be applied

Under the rule of law conditionality, specific measures would be imposed on the Member States. For EU funds under the so-called shared management<sup>57</sup> for implementation of the CAP and the cohesion policy (70% of the EU's budgetary expenditures)<sup>58</sup>, the following measures would apply: suspension of the approval of programmes or amendments thereof;

- suspension of commitments;
- reduction of commitments, including through financial corrections or transfers to other spending programmes;
- reduction of pre-financing; an interruption of payment deadlines;
- suspension of payments<sup>59</sup>.

The Draft Regulation does not establish what these measures should look like or how they

would operate in practice. The application of these measures requires that they are linked to the specific sectoral regulations which provide rules for the spending of the EU funds for specific EU policies. However, the Draft Regulation does not contain such references. Thus, such references at this point in time present the problem that these sector regulations are currently in the legislative processes heading towards the new MFF 2021–2027<sup>60</sup>.

These measures can be taken at various stages of the implementation of EU policies: from the stage of approval of national programmes by the Commission to the stage of making legal commitments by the Commission, followed by the payment of the EU funds to the Member States. These measures consist of suspending EU funds, and this will be the primarily focus of the remainder of this paper.

As to the measures, the same criticism of vagueness applies. The CJEU requires that any provision imposing sanctions should be formulated clearly and precisely. Viewed in this light, neither the premise of launching the rule of law conditionality nor measures imposed under it are clear or precise.

At the same time, some credit should be given to the Draft Regulation as it provides criteria which the EU institutions should consider when imposing measures under the rule of law conditionality. Accordingly, these measures should be 'proportionate to the nature, gravity, and scope of the generalised deficiency as regards the rule of law'<sup>61</sup>. The requirement of proportionality between the generalised deficiency, on the one hand, and measures adopted, on the other hand, signifies that these measures are deemed as sanctions imposed upon the Member State for systematic breaches of the rule of law. Under EU law, the principle of proportionality is the *sine qua non* condition of the adoption of any sanctions imposed as the result of an infringement of a law.

#### 4.3 Reverse QMV

The Draft Regulation provides that a decision imposing measures under the rule of law conditionality would *not* be adopted under the standard legislative procedures provided by the EU Treaties (the most commonly applied are the ordinary or special legislative procedures<sup>62</sup>), but rather under a specific procedure. It foresees that the Council would *not* vote on this decision by the

QMV, which is the standard method for casting votes provided by the EU Treaties, but by *reverse* QMV, which has no explicit basis in the Treaties.

In the case of *reverse* QMV, a proposal submitted by the Commission is adopted unless the legislature (the Council) *rejects* or *amends* it by QMV in a vote held in a given time period. Following this period, a decision is considered adopted. Thus, in the case of *reverse* QMV, a failure to obtain the QMV necessary to block or change a proposal results in its *adoption* (in the wording of the Draft Regulation, ‘the decision shall be deemed to have been adopted’). Under *reverse* QMV, abstention counts as positive votes, forcing the Member States to take a clear position and obliging them to explicitly vote against the proposal, rather than following a more politically expedient route of abstention. It follows that if the Commission seeks to suspend EU funds to a Member State, it will be much easier under *reverse* QMV than under QMV. According to the Commission, the idea of voting on a decision launching the rule of law conditionality by *reverse* QMV is dictated by the necessity to protect EU funds<sup>63</sup>.

It is not the first time that voting in the Council by *reverse* QMV is to be introduced as a remedy to ensure its effective implementation. Such voting was established in 2011 to strengthen enforcement of the EU fiscal policy. Under EU fiscal rules (Article 126 TFEU), Member States must avoid excessive government deficits (3% of GDP) and debt (60% of GDP) and must maintain sound and sustainable public finance. The Member States have signed the Stability and Growth Pact (the SGP) to facilitate implementation of these rules by establishing a system to monitor their budgetary situation. Under the SGP (‘preventive arm’), Member States submit yearly compliance reports that present expected fiscal development plans. If a Member State does not comply with EU fiscal rules, an ‘Excessive Deficit Procedure’ (EDP) is initiated under the SGP (‘corrective arm’). If despite multiple warnings this situation remains, sanctions can be imposed on this Member State. In 2011, in the face of the world financial crisis, enforcement of the SGP was strengthened by the adoption of the ‘Six Pack’, ‘Two Pack’ and ‘Fiscal Compact’. These acts provide for financial sanctions: interest-bearing deposits, non-interest-bearing deposits and fines to be imposed on the Member States for recurrent breaches of the EU

fiscal rules<sup>64</sup>. Under the Fiscal Compact, these sanctions are imposed by the Council by *reverse* QMV.

In both cases, that is, the rule of law conditionality and sanctions imposed for breaches of the EU fiscal rule, voting on their adoption by the Council by *reverse* QMV facilitates adoption of sanctions against Member States. This procedure is not foreseen under the EU Treaties. Article 16 (3) TEU foresees that the Council acts by QMV except where the Treaties provide otherwise. There is no provision under the EU Treaties that authorises the Council to vote under *reverse* QMV. This inevitably raises questions about the legality of the provisions in the Draft Regulation.

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One might respond by noting that applying the sanction is not a legislative act but an executive one. It certainly is an executive measure because it applies a regulation in a concrete situation. As an executive measure, it could be completely in the hands of the Commission. Therefore, giving some voice to the Council cannot make the procedure illegal. Since legality of sanctions adopted for breaches of the EU fiscal rules by the Council under *reverse* QMV was not contested before the CJEU, its position on this issue is unknown.

## 4.4 On the impacts

### 4.4.1 On Member States

According to the Draft Regulation, if EU funds are suspended under the rule of law conditionality, the relevant amounts are re-entered into the EU budget subject to the provisions of Article 7 Draft MFF Regulation<sup>65</sup>. This re-entering allows their future reutilisation. It is proposed that EU funds suspended in year ‘n’ due to a generalised deficiency as regards the rule of law may not be re-entered into the EU budget later than in the year ‘n+2’<sup>66</sup>. On top of this, from year ‘n+3’, suspended EU funds are entered in the Union Reserve for Commitments (hereafter: Union Reserve)<sup>67</sup>. This Union Reserve is a new financial instrument to be financed from, *inter alia*, funds committed to the EU budget but ultimately not spent for the implementation of EU programmes.

At face value, the rule of law conditionality should only lead to a temporary suspension of EU funds, thus motivating errant Member States to promptly eliminate the breaches. If the rule of law situation improves, the EU funds should be returned to the States. However, this may not happen because of the 'n+2' rule as it authorises the Commission to enter into the EU budget only the amounts of EU funds suspended under the rule of law conditionality which were lifted within two years (year 'n'+2) from the year they were suspended (year 'n'). After these two years, the Commission will no longer have a legal basis to enter these amounts into the EU budget. They would then be entered into the Union Reserve and distributed among all Member States. A Member State whose EU funds have been suspended under the rule of law conditionality has only two years from the year of suspension (year 'n') to remedy the generalised deficiency<sup>68</sup>. If the Member State fails to undertake these actions during the two-year period, it loses the suspended EU funds. Conducting all these actions within two years can be extremely difficult, considering that the elimination of the breaches of the rule of law is usually time-consuming and further time is necessary for the proceedings in the EU institutions to lift the suspension. It follows that application of the rule of law conditionality may relatively easily result in the permanent loss of EU funds.<sup>69</sup>

#### 4.4.2 On the beneficiaries

In principle, the rule of law conditionality should solely affect the Member State that is systematically breaching the rule of law, and the suspension of EU funds should not in any way influence the beneficiaries of these funds (e.g., entrepreneurs, employees, researchers). To achieve this objective, the Draft Regulation foresees that, unless the decision initiating the rule of law conditionality provides otherwise, its adoption does not affect the obligation of the Member State to implement the programme or fund those affected by the suspension and, in particular, the obligation to make payments to the beneficiaries of EU funds<sup>70</sup>. The State must continue to implement programmes financed from these funds and make payments to beneficiaries from its own revenue.

One can assume that there is a need to protect the beneficiaries against the possibility that Member States will cease to make payments to them due to the suspension of EU funds. Thus, the Draft Regulation should provide for legal measures to

protect beneficiaries. Unfortunately, this is not the case<sup>71</sup>. Thus, cutting the EU funds of the Member States systematically breaching the rule of law, or to be more specific their governments, can easily end up penalising the beneficiaries rather than these States. Suspending EU funds could end up harming the very people it is trying to protect. This creates a moral dilemma for the EU on how to prompt the government to improve the rule of law situation without involuntarily punishing its citizens. A potential solution could be that the Commission itself manages the EU funds and disburses them directly to beneficiaries or through other channels, such as NGOs or a body of national experts<sup>72</sup>. However, such a solution does not appear in the Draft Regulation nor is it on the horizon.

**"Suspending EU funds could end up harming the very people it is trying to protect."**

The European Parliament has tried to remedy this problem and to strengthen the legal protection of beneficiaries<sup>73</sup>. It has proposed that the Commission should provide guidance for beneficiaries, *via* a website, on the obligations of Member States to implement the programme and in particular to make payments to them. The Commission should also provide, on the same website, tools allowing beneficiaries to inform it of any breaches of these obligations. Such information should be accompanied by a proof that beneficiaries have lodged a complaint to the competent national authority. Beneficiaries informing the Commission would be protected under the proposed Directive on whistle-blower protection.<sup>74</sup>

The above rules would establish a communication channel between the Commission and beneficiaries on eventual negative effects. It is, however, rather doubtful whether such communication itself may effectively protect beneficiaries. What could be done? There are three potential solutions.

- First, beneficiaries could apply for the legal remedies established under national law to claim continuation of payments of EU funds from national authorities. This may, however, be difficult in Member States in which the executive has captured the national administration, the prosecution and the judiciary.

- Second, the beneficiaries could initiate an action for damages against the Member State claiming it has infringed its obligation under the Draft Regulation to make payments of EU funds (*Francovich* liability). The success of such a claim also depends on the effectiveness and independence of the national judiciary.
- The Commission's legal position is more meaningful, as it could—as a third solution—initiate a general infringement action (Article 258 TFEU) against a Member State ceasing to make the payments of EU funds to beneficiaries, but this does not bring the money to the beneficiaries. The suspension of EU funds does not change the legal situation of beneficiaries who can claim payments of these funds only from the national administration, not from the Commission.

## 5 Conclusions

The Draft Regulation does not specify the relationship between the rule of law conditionality and other EU Treaty procedures that may be applied in cases of breaching the rule of law by the Member States (see point 1.1). There are, *prima facie*, no legal obstacles to introduce the rule of law conditionality to EU law as its legal character (objectives, premises and procedure) significantly differs from EU Treaty procedures aimed at safeguarding the rule of law. The Article 7 TEU procedure is political in nature and safeguards all EU values, while the general infringement procedure (Articles 258–260 TFEU) is aimed at any kind of infringement of EU law. In contrast, the rule of law conditionality is a clear-cut procedure, regulated by EU secondary law, aimed at safeguarding EU funds from losses that result from systemic infringements of the rule of law by the Member States. It is mainly in the hands of the Commission as the guardian of the EU Treaties (Article 17 TEU) and the body responsible for management of the EU budget (Article 317 TFEU). Any legal disputes could be settled by the CJEU under the action for annulment (Article 263 TFEU).

Although the general idea [...] deserves credit, some provisions should be reconsidered.

Although the general idea of suspending the EU funds earmarked to the Member States that are

systematically breaching the rule of law deserves credit, some provisions should be reconsidered.

- First of all, the premise for applying the rule of law conditionality, namely 'a generalised deficiency as regards the rule of law', is set extremely broad (point 4.1). It helps that the Draft Regulation provides some examples, but this list is not particularly precise. This might be problematic in light of CJEU case law. The provisions might be better framed by taking into account the standards established in the case law of the CJEU and the ECtHR for the imposition of sanctions.
- The same can be said about the measures to be imposed under the rule of law conditionality (point 4.2). These measures are not regulated by the Draft Regulation but under EU sector regulations that establish spending rules for the MFF 2021–2027 to be applied in specific EU policies (e.g., agricultural, cohesion). Since these regulations are presently under EU legislative processes and run independently from the Draft Regulation, the final outcome and impact of the rule of law conditionality cannot be assessed. Surprisingly, the Draft Regulation does not refer to these instruments, and this is a deplorable omission.
- There are serious doubts about the legality of the procedure of imposing sanctions. This decision would be adopted by *reverse* QMV. This procedure places the Commission in a privileged position and facilitates the adoption of decisions. If the Council is unable to obtain QMV to reject the decision (within a month), the proposal would become a legally binding decision. Establishing such a procedure for casting votes that is outside the EU Treaties toolbox raises serious legal concerns, although one might respond that it is an executive act and, for that reason, completely in the hands of the Commission.
- The rule of law conditionality should only lead to temporary suspension of EU funds. However, a State can easily lose them for good because it is difficult to remedy a situation within two years (point 4.4.1). The rule of law conditionality may turn out to be a far more severe financial penalty than envisioned.
- The Draft Regulation provides beneficiaries of EU funds with weak legal protection if the Member State stops making payments (point 4.4.2). The E-communication channel does not

look strong. The financial impact of suspension may be passed on to the beneficiaries. A legal remedy could be an action for damages brought against a Member State (the *Francovich* liability). For its part, the Commission could bring a general infringement action against this Member State to the CJEU (Article 258–260 TFEU).

To conclude, work needs to be done on the Draft Regulation so that it protects the rule of law in a Member State, all without compromising it at the European level. European tough love needs tough legal credentials.

## Notes

- <sup>1</sup> CJEU Case 294/83 *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para 23.
- <sup>2</sup> Article 2 TEU.
- <sup>3</sup> COM(2014) 158 final.
- <sup>4</sup> Closa C, Kochenov D (2016) *Reinforcing rule of law oversight in the European Union*, CUP; Jakab A and Kochenov D (2017) *The enforcement of EU law and values: ensuring Member States' compliance*, OUP; Hatje A (2018) *Liability of member states for the violation of fundamental values of the European Union*, Baden-Baden, Nomos; Konstadinides T (2017) *The rule of law in the European Union*, Oregon Hart Publishing.
- <sup>5</sup> Proposal for a regulation of the European Parliament and of the Council on the protection of the Union budget in the event of generalized gaps in the rule of law in the Member States (COM(2018) 324 final).
- <sup>6</sup> European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018)0324 – C8-0178/2018 – 2018/0136(COD)), [https://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_adoptes/provisoire/2019/04-04/0349/P8\\_TA-PROV\(2019\)0349\\_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2019/04-04/0349/P8_TA-PROV(2019)0349_EN.pdf).
- <sup>7</sup> Matsuura M, *Contribution of EU Funds to Economic Growth in Poland*, January 2015, DOI: 10.5823/jarees.2015.87; C Talbulescu, D Goyeau, EU Funds Absorption Rate and the Economic Growth, Timisoara Journal of Economics and Business, Year 2013, Volume 6, Issue 20, p. 153, ISSN: 2286-0991, [www.tjeb.ro](http://www.tjeb.ro); EC websites, e.g., [https://ec.europa.eu/regional\\_policy/en/policy/what/investment-policy/esif-contribution/](https://ec.europa.eu/regional_policy/en/policy/what/investment-policy/esif-contribution/); [https://ec.europa.eu/info/business-economy-euro/growth-and-investment\\_en](https://ec.europa.eu/info/business-economy-euro/growth-and-investment_en).
- <sup>8</sup> Kelemen R D, *The Assault on Poland's Judiciary – The Danger is Not Gone, and the EU Must Step Up*, Foreign Affairs, 26.7.2017; Pech L, *Systemic Threat to the Rule of Law in Poland: What should the Commission do next?*, VerfBlog, 31.10.2016; Pech L, Scheppele K L, *The EU and Poland: Giving up on the Rule of Law?*, VerfBlog, 15.11.2016; Pech L, Scheppele K L, *Poland and the European Commission*, Part I - III; Taborowski M (2019) *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego*; Warszawa, Sadurski W (2018), *Constitutional Crisis in Poland* (in:) M. A. Graber, S. Levinson, M. Tushnet, *Constitutional Democracy in Crisis?* OUP, p. 257.
- <sup>9</sup> Bugarič B (2016) *Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism* in C Closa, D Kochenov, *Reinforcing Rule of Law Oversight in the European Union*, p. 81; Carrera S, Bárd P, 'The European Parliament Vote on Article 7 TEU Against the Hungarian Government: Too Late, Too Little, Too Political?' CEPS Commentaries; G. Halmai, *A Coup Against Constitutional Democracy: A case of Hungary* (in:) M. A. Graber, S. Levinson, M. Tushnet, *Constitutional Democracy in Crisis?* OUP 2018, p. 243; G. Attila Tóth, 'Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism' (in:) M. Adams, A. Meuwese, E. Hirsch Ballin (eds.) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, CUP 2017, p. 386; Szenté Z. (2017) *Challenging the Basic Values – Problem in the Rule of Law in Hungary and the Failure of the EU to Tackle Them* in A. Jakab, D. Kochenov, *The Enforcement of EU and Values. Ensuring Member States' Compliance*, OUP, p. 456.
- <sup>10</sup> Kelemen R D, Scheppele K L (2018) *How to Stop Funding Autocracy in the EU*, *Verfassungsblog*, 10.9.2018, <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>, The situations of Poland and Hungary differ, since there are no well-proven cases of breaches of the rule of law by the Polish authorities that have led to the misspending of EU funds (Brauneck von J (2019) *Gefährdung des EU-Haushalts durch rechtsstaatliche Mängel in den Mitgliedstaaten?* in: *Europarecht (EuR)* 2019, pp. 37–60), while such is the case in Hungary (Kelemen, Scheppele, op. cit.) and Romania (Pech L, Perju V, Platon S (2019) *How to Address Rule of Law Backsliding in Romania: The case for an infringement action based on Article 325 TFEU*, *Verfassungsblog*, 2019.5.29, <https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania>, <https://doi.org/10.17176/20190529-121940-0>).
- <sup>11</sup> COM(2018) 98 final.
- <sup>12</sup> Kelemen R D, Scheppele K L (2018) *How to Stop*, op. cit., <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>; Šelih J, Bond I, Dolan C (2017) *Can EU funds promote the rule of law in Europe?* The Centre for European Reform, p. 3, <https://www.cer.eu/publications/archive/policy-brief/2017/can-eu-funds-promote-rule-law-europe>.
- <sup>13</sup> Scheppele K L (2016) *Systemic Infringement Actions* (in:) Closa C, Kochenov D, *Reinforcing rule of law oversight in the European Union*, CUP, p. 127.
- <sup>14</sup> Butler I (2018) *Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs*, *Liberties*, 7.03.2018, <https://www.liberties.eu/en/news/european-values-fund-two-proposals-mff/14471>, p. 9-13; Pech L, Kochenov D (2019) *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*. RECONNECT Policy Brief, June 2019, <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>; Scheppele K L, Pech L, Kelemen R D (2018), *Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism*, *Verfassungsblog*, 2018.11.12, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism>, <https://doi.org/10.17176/20181115-215538-0>.
- <sup>15</sup> Articles 23–24 Regulation No 1303/2013.
- <sup>16</sup> Article 58 (2) Regulation No 1306/2013.
- <sup>17</sup> Articles 72–74 and 122 (1) CP Regulation. On agricultural spending: Article 58 (2) 2 and 67–73 Regulation No 1306/2013.
- <sup>18</sup> Article 142 (a) CP Regulation.

- <sup>19</sup> Article 144 (1) (a) CP Regulation. Financial corrections are withdrawals of funding that take place when payments to EU-backed projects have been made in error due to irregularities. The Commission is committed to recovering funds that have been obtained or used fraudulently. Deployment of financial corrections could include cancelling all or part of an EU contribution to an operational programme [https://ec.europa.eu/regional\\_policy/en/policy/what/glossary/f/financial-corrections](https://ec.europa.eu/regional_policy/en/policy/what/glossary/f/financial-corrections). More: Łacny J (2017) *Korekty finansowe nakładane przez Komisję Europejską na państwa członkowskie za niezgodne z prawem wydatkowanie funduszy UE*, Wolters Kluwer, Warszawa.
- <sup>20</sup> See footnote 14.
- <sup>21</sup> CJEU Cases: 70–83, *Kloppenburg*, EU:C:1984:71; 325/85, *Ireland v Commission*, EU:C:1987:546, para 18; C-143/93, *Gebroeders van Es Douane Agenten*, EU:C:1996:45, para 27; C-177/96, *Banque Indosuez*, EU:C:1997:494, para 27; C-439/01, *Cipra, Kvasnicka*, EU:C:2003:31, para 49; C-110/03, *Belgium v Commission*, EU:C:2005:223, para 30; C-158/06, *Stichting ROM-projecten*, EU:C:2007:370, para 25–26.
- <sup>22</sup> Vita V (2017) *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, 19 Cambridge Yearbook of European Legal Studies, p. 136.
- <sup>23</sup> Bartels L A (2005), *Human Rights Conditionality in the EU's International Agreements*, UOP, DOI: 10.1093/acprof:oso/9780199277193.001.0001.
- <sup>24</sup> Council Implementing Decision 2012/156/EU of 13.03.2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013, OJ L 78/19.
- <sup>25</sup> Pech L, Kochenov D (2019) *Strengthening...*, p. 11; Šelih J, Bond I, Dolan C (2017) *Can EU funds...*, p. 7, 11.
- <sup>26</sup> Cremona M (2005) *EU enlargement: solidarity and conditionality*, 30 (1) European Law Review, p. 19.
- <sup>27</sup> Article 2 (b) Draft Regulation.
- <sup>28</sup> More: von Bogdandy A (2019) *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-14, <https://ssrn.com/abstract=3431303> or <http://dx.doi.org/10.2139/ssrn.3431303>.
- <sup>29</sup> Article 287 (2) 2, Article 310 (5) and Article 317 TFEU.
- <sup>30</sup> Article 2 (7) Financial Regulation no 2018/1046.
- <sup>31</sup> Article 2 (59), Article 6 and Article 33 Financial Regulation no 2018/1046.
- <sup>32</sup> Article 4 (3) TEU.
- <sup>33</sup> CJEU, cases C138/03, C324/03 and C431/03 *Italy v Commission*, ECLI:EU:C:2005:714, para 44; CFI, T345/03 *Evropaiki Dynamiki v. Commission*, ECLI:EU:T:2015:168, para 77; CFI, T-549/08 *Luxemburg v. Commission*, ECLI:EU:T:2010:244, para 47; T-265/08 *Germany v. Commission*, ECLI:EU:T:2012:434, para 40; C-500/99 *P Conserve Italia v. Commission*, ECLI:EU:C:2002:45, para 88; T308/05, *Italy v. Commission*, ECLI:EU:T:2007:382, para 109.
- <sup>34</sup> Articles 1 and 2 Draft Regulation. See also paras 9–11 ECA opinion no 1/2018.
- <sup>35</sup> Article 310 (5) and Article 325 TFEU.
- <sup>36</sup> Article (1) (a) Directive 2017/1371.
- <sup>37</sup> Opinion of AG Jacobs in Case C-11/00 *Commission v ECB*, EU:C:2002:556; CJEU, cases: C-617/10 *Åkerberg Fransson*, EU:C:2013:105; C-42/17, *M.A.S. i M.B.*, EU:C:2017:936; C-524/15 *Menci*, EU:C:2018:197.
- <sup>38</sup> Article 5 Draft Regulation (EC proposal).
- <sup>39</sup> The Panel would be composed of specialists in constitutional law and financial and budgetary matters. Each national parliament would nominate one expert to this Panel and the European Parliament would appoint five experts. Representatives of relevant organisations and networks could be invited to the Panel as observers (Article 3a Draft Regulation, EP proposal).
- <sup>40</sup> The criteria include: requirements included in chapters negotiated during the accession of the new Member States to the EU related to the *aquis* on judiciary and fundamental rights, justice, freedom and security; financial control and taxation; as well as requirements of the Cooperation and Verification Mechanism (CVM). The CVM is a transitional measure established to assist Romania and Bulgaria to progress after their accession to EU in the fields of judicial reform, corruption and organised crime. The Commission assesses progress under CVM based on benchmarks established for each State.
- <sup>41</sup> Article 5 (6–8) Draft Regulation (EC proposal).
- <sup>42</sup> Article 5 (6 a) (6 b) (6 c) Draft Regulation (EP proposal).
- <sup>43</sup> Article 6 (2) Draft Regulation (EC proposal).
- <sup>44</sup> On the procedure Article 6 (2) Draft Regulation (EC proposal and EP proposal).
- <sup>45</sup> Geiger R (2015) *Commentary to Article 7 TEU* in: European Union Treaties. Commentary, München, Beck; Mangiameli S, Saputelli G (2013) *Commentary to Article 7 TEU* in: Blanke H-J, Mangiameli S (eds.) *The Treaty on European Union*, Berlin – Heidelberg, Springer, p. 350; Dumbrovský T (2018) *Beyond voting rights suspension. Tailored Sanction as Democracy Catalyst under Article 7 TEU* in: Hatje A, Tichý L (eds.) *Liability of Member States for the violation of fundamental values of the European Union*, Baden-Baden Nomos, p. 203.
- <sup>46</sup> Bast, *Grundbegriffe der Handlungsformen der EU* (Springer, 2006), pp. 60–63.
- <sup>47</sup> CJEU, Case C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1, p. 11.
- <sup>48</sup> Bast, op. cit., pp. 42–67.
- <sup>49</sup> Article 3 (1) (f) Draft Regulation (EC proposal).
- <sup>50</sup> Article 2 (a) Draft Regulation (EP proposal).
- <sup>51</sup> Article 3 Draft Regulation (EP proposal).
- <sup>52</sup> Article 3 (1) Draft Regulation (EC proposal).
- <sup>53</sup> Article 3 (1) aa Draft Regulation (EP proposal).
- <sup>54</sup> Article 3 (1) fa Draft Regulation (EP proposal).
- <sup>55</sup> See footnote 21.
- <sup>56</sup> The ECA was also critical on this. See: ECA opinion No 1/2018, paras 12–16, 19.
- <sup>57</sup> Article 62 (1) (c) Financial Regulation no 2018/104.
- <sup>58</sup> COM(2018) 98 final.
- <sup>59</sup> Article 4 (1) (b) Draft Regulation (EC proposal).
- <sup>60</sup> COM(2018)393 final and COM(2018)375 final.
- <sup>61</sup> Article 4 (3) Draft Regulation (EC proposal) and Article 5a Draft Regulation (EP proposal).

- <sup>62</sup> Articles 289 and 294 TFUE.
- <sup>63</sup> Recital 15 preamble Draft Regulation. See critics: the ECA opinion No 1/2018, para 12.
- <sup>64</sup> Articles 4–6 Regulation No 1173/2011, Article 3 Regulation No 1174/2011, Article 10 (4) Regulation No 1176/2011; Article 7 Fiscal Compact.
- <sup>65</sup> Article 6 (3) Draft Regulation (EC proposal).
- <sup>66</sup> Article 7 Draft MFF Regulation, Article 6 (3) Draft Regulation (EC proposal).
- <sup>67</sup> Article 12 Draft MFF Regulation.
- <sup>68</sup> Article 6 Draft Regulation (EC proposal).
- <sup>69</sup> Para 8 of the ECA opinion No 1/2018.
- <sup>70</sup> Article 4 (2) Draft Regulation (EC proposal).
- <sup>71</sup> See critics: the ECA opinion No 1/2018, para 27.
- <sup>72</sup> Butler I (2018) *Two proposals...*, p. 14; Šelih J, Bond I, Dolan C (2017) *Can EU funds...*, p. 12.
- <sup>73</sup> Recital 14 preamble and Article 4 (3) (a) and (3) (b) Draft Regulation (EP proposal).
- <sup>74</sup> COM(2018) 218 final.