

# TRICK OR TREAT: LINKING EU FUNDS TO RULE OF LAW

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## Abstract

Along with the imposition of financial sanctions in the infringement procedure for failing to fulfil the obligations assumed by the Member States, and whereas in some cases these sanctions are not a sufficiently deterrent factor to determine a certain Member States to comply, it is increasingly more likely creating a mechanism to strengthen the link between EU funding and the rule of law, namely, suspending, reducing or restricting access to EU funds. In this way, respecting the rule of law becomes an essential prerequisite for a sound financial management at Union level.

**Keywords:** EU funds, rule of law, European Union, financial sanctions

## 1. Application of financial sanctions: evolution of the methodology

The lack of financial sanctions has shown that it has a major influence on the compliance of Member States. Since 1996, the Commission has developed principles for the application of financial sanctions, principles which have subsequently been supplemented by increasingly clear and easy-to-use technical methods.<sup>1</sup> The Court of Justice has also played an important role in developing this practice, as it is now almost as a rule the imposition of financial sanctions for breaching EU law if compliance is not achieved within the deadlines.

The financial sanctions that may be imposed on Member States for failure to fulfil their obligations under EU law are a *lump sum* or *periodic penalty payments*, the cumulation of the two types of sanctions<sup>2</sup> being also requested by the Commission and imposed, even on its own initiative, by the Court of Justice.

Their application is based both on the finding of a failure to fulfil obligations (Article 260 (1) and Article 258 in conjunction with Article 260 (3) TFEU) and on the failure to comply with a judgment of the Court of Justice establishing a failure to fulfil obligations (Article 260 (2) TFEU).

Determining the sanction for States not implementing the judgments of the Court of Justice must be based on the purpose of the measure, namely ensuring the effective application of EU law. Thus, if the lump sum reflects the failure of the Member State

to comply with the earlier judgment (in particular where there has been a prolonged delay), periodic penalty payments act as an incentive for the Member State to bring the infringement to an end as soon as possible.<sup>3</sup>

Since there are clear conditions and criteria for imposing and calculating these financial sanctions, any Member State may make an assessment of the sanction that may be imposed on it in the event of a breach of an obligation. Therefore the main purpose is discouragement through these sanctions, the amount of which must be large enough to determine the Member State to correct the situation and to end the infringement (should therefore be greater than the benefit that the Member State has from the infringement), but especially to determine the Member State not to repeat the same infringement.

With regard to the calculation of the proposed financial sanction, the Commission has applied an approach that reflects both the payment capacity of the Member State concerned and its institutional weight, and this is done by the '*n*' factor,<sup>4</sup> adding the gravity of the infringement and the duration of which the Commission takes into account when calculating the amount of a proposed penalty. Under the Treaties, '*n*' factor was calculated by reference to the GDP of a Member State and the number of votes allocated to it in the Council, thus being an appropriate means to reflect the ability of the Member State concerned to pay while

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<sup>1</sup> In 1996, European Commission published a first communication on the implementation of Article 171 TEC, entitled *Memorandum* (published in Official Journal C 242/6 of 21 August 1996), and in 1997 published a second communication which complements and expands the 1996 Communication and deals in particular with the method of calculating periodic penalty payments (published in Official Journal C 63/2 of 28 February 1997). In 2005 European Commission published the Communication on Application of Article 228 of the EC Treaty replacing the previous ones, [http://ec.europa.eu/atwork/applying-eu-law/docs/sec\\_2005\\_1658\\_en.pdf](http://ec.europa.eu/atwork/applying-eu-law/docs/sec_2005_1658_en.pdf) and in 2017 a new Communication from the Commission - EU law: Better results through better application (published in Official Journal C 18 of 19 January 2017).

<sup>2</sup> The Court of Justice has for the first time admitted in its judgment of 12 July 2005, *Commission v. France* the possibility of imposing both a lump sum and a periodic penalty payment in cases where the infringement persisted for a considerable time and still risks to persist.

<sup>3</sup> Loma Woods, Philippa Watson, *EU Law*, 12<sup>th</sup> edition, Oxford University Press, 2014, p. 258.

<sup>4</sup> SEC (2005) 1658, p. 14. Factor "n" is the geometric mean based on the gross domestic product (GDP) of the Member State in question and on the weighting of voting rights in the Council. In conclusion, the bigger and more economically stable the Member State, the biggest "n" factor is, namely the payment capacity of each Member State.

maintaining the variation between Member States within a reasonable timeframe.<sup>5</sup>

However, the Court of Justice has recently established that the Council voting rules can no longer be used for this purpose since starting 1st of April 2017 the voting system has changed in the Council and replaced by the double majority system as set out in Article 16 (4) TEU.<sup>6</sup> Consequently, when calculating 'n' factor, the number of votes of a Member State in the Council is no longer of similar relevance, the predominant factor being the Member States' Gross Domestic Product (GDP).<sup>7</sup>

As regards the Member States' institutional weighting when calculating the 'n' factor, the Commission considers that the 'n' factor should not be based solely on the demographic or economic weight, but should also take account of the fact that each Member State has an intrinsic value in the institutional structure of the European Union. Thus, in order to maintain the balance between the payment capacity and the institutional weight of a Member State, the Commission will calculate the 'n' factor on the basis of two elements: the GDP and the number of representatives in the European Parliament allocated to each Member State.<sup>8</sup>

To this end, the Commission will in future use as algorithm the number of representatives in the European Parliament allocated to each Member State. The amounts resulting from the application of this algorithm will not create unjustified differences between Member States and will remain as close as possible to the amounts resulting from the current calculation method, which are both proportionate and sufficiently dissuasive. Under the new methodology, the Commission's approach will continue to be firm, balanced and fair to all Member States.<sup>9</sup> However, the adapted methodology may lead to lower financial penalties compared to the current situation, but the resulting amounts are closer to the Court's practice, which generally sets fines lower than those proposed by the European Commission.

## 2. Rule of law: condition of membership of the European Union

### 2.1. The rule of law principle

The rule of law is a legally binding constitutional principle which is one of the basic principles characteristic of all the constitutional systems of the Member States of the European Union.<sup>10</sup>

Considering the provisions of Article 2 TEU, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, **the rule of law** and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Compliance with these principles is a membership condition to the Union, and Article 7 TEU and Article 354 TFEU give the EU institutions the means to ensure that these values are respected by all Member States.

Therefore, the need to classify a particular action as complying with the rule of law has emerged. Thus, all approaches have been taken into consideration and the rule of law has been defined as guaranting: the separation of powers; the legality of the administration, in particular legal certainty and unity and fundamental rights and freedoms and equality before the law.<sup>11</sup>

### 2.2. Rule of Law test

Once the criteria for accession to the European Union have been formulated<sup>12</sup>, the rule of law has explicitly become a condition that any state wishing to join the European Union must fulfill. For this reason, the problem of the rule of law was treated as a separate chapter in all the European Commission reports on the conduct of the negotiations<sup>13</sup>.

Although compliance with the Copenhagen criteria is a mandatory rule for accession to the European Union, enlargement has, over time, shown that they may create difficulties for the Union's ability to ensure respect for its fundamental values once a state has become a member. European Commissioner

<sup>5</sup> Case C-93/17, *Commission v. Greece* [2018], EU:C:2018:903, p. 132.

<sup>6</sup> See Communication from the Commission, *Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringements proceedings before the Court of Justice of the European Union* (2019/C 70/01) (published in Official Journal C 70/1 of 25 February 2019).

<sup>7</sup> Case C-93/17, *Commission v. Greece* [2018], EU:C:2018:903, p. 138 and 142.

<sup>8</sup> Communication from the Commission (2019/C 70/01), cited above.

<sup>9</sup> [http://europa.eu/rapid/press-release\\_IP-19-1288\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1288_en.htm)

<sup>10</sup> Koen Lenaerts, *Curtea de Justiție și metoda dreptului comparat*, Revista Română de Drept European nr. 3/2016, p. 59 et seq.

<sup>11</sup> Stefanie Ricarda Roos, *The "Rule of Law" as a requirement for accession to the European Union*, Rule of law Program, Lecture no. 3, Konrad Adenauer Stiftung, 2008, p. 4.

<sup>12</sup> In 1993, the European Council set out three criteria to be met to become a EU member. These criteria, also called the "Copenhagen Criteria", are: 1. the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; 2. the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; 3. the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the *acquis communautaire*.

<sup>13</sup> See Radu Carp, *The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism*, <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.252/>

Viviane Reding called this situation "Copenhagen Dilemma".<sup>14</sup>

This creates a problem that needs to be addressed by introducing mechanisms able to make Member States comply with the obligations they have assumed at the time of accession.

### 2.3. Serious and persistent violation of values

The Treaty of Lisbon brought changes to the procedure laid down in Article 7 of the TEU as regards the Treaty establishing the European Community by referring to the "values of the Union", previously referring to "the principles referred to in Article 6 (1)" - namely, human rights as general principles of Union law.<sup>15</sup>

The Article 7 safeguard procedure for EU values was introduced in the Treaty of Amsterdam in 1997 and includes two mechanisms - *preventive measures*, if there is a clear risk of breaching EU values and *sanctions* if such a violation has already occurred.<sup>16</sup>

The so-called 'Article 7 procedure', entitled 'nuclear option',<sup>17</sup> has the following features:<sup>18</sup> it regulates the procedure for sanctioning a Member State's violation of Union values as set out in Article 2 TEU; has a strict scope of application; establishes a prevention mechanism in the case of a risk of breaches of these common values; establishes a sanction mechanism in case of violation of these values; is considered the most severe sanction; allows the suspension of voting rights in the event of a "serious and persistent breach" of EU values by a Member State.

Implementation of Article 7 TEU means that the infringement or the risk of an infringement meets certain essential conditions as listed by the Commission in 2003:<sup>19</sup> (1) either a "clear risk of serious breach" of the values listed in Article 2, for the prevention mechanism; (2) either a "serious and persistent breach" of the values in Article 2 for the sanctioning mechanism. In both cases the violation must be serious. This criterion can be judged on the subject of the violation (i.e. the target population, for example) and its result (violation of a single common value is sufficient to trigger the mechanism, but violation of several values may be a sign of a serious violation).

This procedure does not apply to individual situations of violation of fundamental rights, which fall within the jurisdiction of national, european and

international courts, but to violations that meet the dimensions of a systematic problem or threat to the rule of law.

In 2014, the European Commission adopted a framework for analyzing the conditions for the implementation of Article 7 TEU. The Communication adopted by the Commission to this end - "A new EU framework for strengthening the rule of law"<sup>20</sup> - aims to clarify the situations in which the prevention and sanctioning mechanisms can be triggered in case of breach or risk violation of the common values of the Union.

The objective of the framework is to enable the Commission to identify a solution with the Member State concerned in order to prevent a systemic threat to the rule of law, which would become a "clear risk of serious infringement", which could trigger the application of Article 7 TEU. If there are clear indications of a systemic threat to the rule of law of a Member State, the Commission may launch a 'pre-procedural procedure for the Article 7 procedure', initiating a dialogue with that Member State.<sup>21</sup>

The new rule of law framework has the role to complete infringement procedures and to give effect to monitoring within the Union of Member States' compliance with the rule of law.

Creating a new framework certainly provides a mechanism that can solve the "Copenhagen Dilemma". The success of the infringement procedure that somehow inspires this new framework ensures confidence in the Commission's implementation of this procedure. Thus the failure of the "soft power" of the influence of politics and of the "nuclear option" as set out in Article 7 TEU is overcome.<sup>22</sup>

But to give effect to this procedure, an essential step is to amend the Treaty and include this mechanism. Moreover, the lack of financial sanctions could deprive this framework of efficiency. The European Parliament proposed to sanction by freezing the funds allocated.<sup>23</sup>

From the application perspective, Poland is the first Member State against which the Commission has decided to initiate the procedure provided in Article 7 TEU and has also been subject to the new early warning framework through which a dialogue has been initiated on threats to the rule of law and the identification of solutions before resorting to the existing legal mechanisms referred to in Article 7. Hungary is the

<sup>14</sup> Viviane Reding, Safeguarding the rule of law and solving the „Copenhagen dilemma”: Towards a new EU-mechanism, [http://europa.eu/rapid/press-release\\_SPEECH-13-348\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm)

<sup>15</sup> Ion Gâlea, *Tratatele Uniunii Europene, Comentarii și explicații*, C.H. Beck, București, 2012, p. 28.

<sup>16</sup> *Rule of law concerns in member states: how the EU can act (infographic)*, <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180222STO98434/rule-of-law-concerns-how-the-eu-can-act-infographic>

<sup>17</sup> In September 2012, President Barroso stated in his annual speech on the State of the Union: "We need a better developed set of instruments— not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty".

<sup>18</sup> COM(2003) 606 final, *Communication from the Commission on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003DC0606&from=RO>

<sup>19</sup> *Ibid.*

<sup>20</sup> COM(2014) 158 final, p. 1, <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1.Pdf>

<sup>21</sup> *Ibid.*

<sup>22</sup> Speech on the State of the Union 2012, [http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm). See also Werner Schroeder, *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Bloomsbury Publishing, 2016, p. 201.

<sup>23</sup> [https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law\\_en](https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en).

second Member State against which the procedure provided in Article 7 TEU was triggered, the European Parliament being the one who exercised the right of initiative given the existence of a clear risk of a serious breach of the values on which the Union is founded, a serious deterioration of the rule of law, democracy and fundamental rights.

### 3. Liability of Member States for systemic infringements<sup>24</sup>

In general, procedures based on Article 258 TFEU are intended to signal and subsequently sanction specific and concrete infringements of EU law by Member States. It is assumed, however, that these violations are isolated, given that Member States are respecting their obligations deriving from the institutional treaties.<sup>25</sup>

Still, a solution is not provided for situations where a Member State's action is no longer in line with EU law, especially when a Member State disregards the fundamental EU principles of democracy, rule of law and protection of human rights.

The idea of a *systemic infringement action* has arisen in response to the question: *What can the European Union do about the Member States that no longer reliably play by the most fundamental European rules?*<sup>26</sup> This question is extremely present, as the Union faces a strong wave of actions contrary to the fundamental principles of EU law by some Member States (Poland, Hungary, Romania).

A *systemic infringement* is not defined by EU law, neither in primary law nor in secondary law. On the other hand, no regulations can be identified prohibiting the initiation of such a procedure. Further analysis also points out that "the distinction between an isolated violation and systemic or systematic violations is substantial. The difference is not just about repetition or duration, but also about the intensity of the violations."<sup>27</sup>

An action establishing a systemic infringement would enable the Commission to refer to the Court of Justice a general problem of deviating from basic EU principles. This is not possible in the context of a general infringement procedure.<sup>28</sup> In a case which can be considered as a pioneer in defining general and

persistent violations, ruled against Ireland in 2005, the Court has held that the existence of a general administrative practice can be deduced from a number of individual breaches so that it can be established a "general and persistent violation" in charge of a state.<sup>29</sup>

If the Commission had the possibility to initiate several infringement actions against the same Member State by grouping complaints on the same subject (eg under Article 2 or Article 4 (3) TEU) in one action, it would be possible to demonstrate that all the collected and analyzed infringements would constitute a more serious infringement than the sum of the individual infringements<sup>30</sup> - so that the systemic breach can be demonstrated, where appropriate.

Amending the EU secondary legislation was suggested in the literature in order to provide the Commission and the Court of Justice with instruments able to determine the Member State concerned to comply with the judgment finding systemic breaches. Practically, secondary legislation could give the Commission the power to suspend EU funds for a Member State that refuses to comply as long as the infringement continues.<sup>31</sup>

Watching the current evolution of some Member States behaviour, the Commission needs to adapt the instruments made available by EU primary law to play its role as "Guardian of the Treaties" and thus respond to the new types of breaches. The initiation of a systemic infringement procedure where the Commission suspects that the Member State in question violates in a generalized manner the fundamental values of the European Union may represent such a development, a right answer which the Court of Justice should confirm.

### 4. Sanctioning Member States with the suspension of EU funds

#### 4.1. Theoretical premise

Along with the imposition of financial sanctions in case of non-compliance with Courts judgments finding serious violations of EU law, and in particular because of the fact that in some situations these sanctions do not benefit from a deterrent factor strong enough to determine certain Member States to comply, we are in favor of amending European Union law to

<sup>24</sup> On the "systemic" notion in the context of the European Convention on Human Rights, see the Resolution of the Committee of Ministers Res (2004)3 of 12 May 2004 on judgments indicating the existence of a fundamental systemic problem (point 13), that states that certain structural or general deficiencies are being taken into account the legislation or practice of the State, or in case of repetitive cases triggered by causes that covers the same situation.

<sup>25</sup> Kim Lane Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions*, *Verfassungsblog*, 2013, p. 1.

<sup>26</sup> *Ibid.*

<sup>27</sup> S.B.P., *Enforcing the Rule of Law in the EU. In the Name of Whom?* European Papers, vol. 1, 2016, no. 3, p. 771-776, [http://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_eJ\\_2016\\_3\\_2\\_Editorial.pdf](http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_3_2_Editorial.pdf)

<sup>28</sup> Paul Craig, Gráinne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu, București, 2017, p. 504.

<sup>29</sup> Case C-494/01, *Commission v. Ireland* [2005], ECLI:EU:C:2005:250, p. 139, 151.

<sup>30</sup> Carlos Closa, Dimitry Kochenov, *Reinforcement of the rule of law. Oversight in the European Union, in Strengthening the rule of law in Europe. From a common concept to mechanisms of implementation*, Bloomsbury, 2016, p. 185.

<sup>31</sup> Kim Lane Scheppele, *cited above*, p. 9-10.

confer competence to the Commission and the Court of Justice to suspend EU funds granting<sup>32</sup> to a Member State that refuses to comply. We believe that this sanction could be proposed especially for those Member States which consistently refuse to respect the fundamental European values and when systemic breaches of EU law occur. Such a change can even be included in the Treaty on the Functioning of the European Union either as a complement to Article 260 TFEU or as a complement to the procedure set out in Article 7 TEU and 354 TFEU.

#### 4.2. The EU budget and the rule of law

Commission has proposed in May 2018<sup>33</sup> a pragmatic and modern long-term budget<sup>34</sup> for 2021-2027.<sup>35</sup> A major innovation within the proposed budget is to strengthen the link between EU funding and the rule of law. Respect for the rule of law is an essential prerequisite for sound financial management and for the effectiveness of EU funding. The Commission therefore proposes a new mechanism to protect the EU budget from the financial risks linked to the general weaknesses affecting the rule of law in the Member States.

With the new instruments, the European Union will be able to suspend, reduce or restrict access to EU funding according to the nature, gravity and scale of deficiencies affecting the rule of law. Such a decision would be proposed by the Commission and adopted by the Council by a qualified majority vote.

In turn, European Commission President Jean-Claude Juncker stressed the need for this mechanism: "We will ensure sound financial management through the first ever rule of law mechanism. This is what it means to act responsibly with our taxpayers' money."<sup>36</sup>

The new rule of law mechanism has the role of protecting taxpayers' money in the EU. One of the prerequisites for sound financial management and effective EU funding is the successful functioning of rule of law in sectors such as the proper functioning of the judiciary and the prevention and punishment of fraud or corruption.

Although the role of this instrument is to sanction the Member States concerned, it is important that this mechanism does not affect the individual beneficiaries of EU funds as they can not be held responsible for the overall rule of law functioning.

#### 4.3. Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States

In this context, the European Commission presented the Proposal for a Regulation on 3rd of May 2018.<sup>37</sup> In Parliament, the proposal was submitted to the Committee on Budgets (BUDG) and to the Committee on Budgetary Control (CONT), being requested also opinions from three other committees: the Committee on Civil Liberties, Justice and Home Affairs (LIBE), the Committee on Constitutional Affairs (AFCO) and the Committee on Regional Development (REGI).

The European Court of Auditors gave its opinion on the proposal on 17th of August 2018 and made recommendations for clear and specific criteria to define what constitutes a generalized rule of law deficiency that should be established, stressing the need to protect the legitimate interests of EU funds beneficiaries.

On 3rd of October 2018 co-rapporteurs BUDG and CONT presented the draft report on the proposal with a number of amendments. The European Economic and Social Committee (EESC) and the European Committee of the Regions (CoR) endorsed the proposal on 18 September (EESC) and 9 October (CoR).

The report was voted on 13th of December 2018 and presented to the plenary on 18 December 2018. A plenary debate took place on 16th of January 2019 and on 17th of January 2019 Parliament adopted resolution T8-0038/2019<sup>38</sup> on the protection of the Union budget in case of generalised deficiencies as regards the rule of law in the Member States.<sup>39</sup> Subsequently, the draft regulation was sent back to the BUDG and CONT committees for interinstitutional negotiations.

On 4th of April 2019 Parliament adopted the first reading legislative resolution on the proposal for a regulation. For this act to be considered adopted, it is also necessary for the Council of the European Union to approve it, whose presidency is assured for 6 months, starting with January 2019, by Romania. The application of this Regulation shall be effective from 1st of January 2021.

The Explanatory Memorandum states that there must be a close link between the obligations assumed by the Member States under Article 2 TEU (including the defense of the the rule of law values) and the possibility of accessing European funds. In these conditions, considering consistent gaps in the rule of

<sup>32</sup> The main sources of funds are the European Regional Development Fund, the Cohesion Fund and the European Social Fund.

<sup>33</sup> [https://europa.eu/rapid/press-release\\_IP-18-3570\\_en.htm](https://europa.eu/rapid/press-release_IP-18-3570_en.htm)

<sup>34</sup> The EU's long-term budget, also referred to as the Multi-annual Financial Framework (MFF), provides a stable framework for the implementation of the EU's annual budget. It gives effect to the Union's political priorities in financial terms for a number of years and sets maximum annual amounts ("ceilings") for all EU spending and for the main expenditure categories/priorities ("budget lines").

<sup>35</sup> [https://ec.europa.eu/commission/publications/factsheets-long-term-budget-proposals\\_en](https://ec.europa.eu/commission/publications/factsheets-long-term-budget-proposals_en)

<sup>36</sup> [https://ec.europa.eu/malta/news/eu-budget-commission-proposes-modern-budget-union-protects-empowers-and-defends\\_en](https://ec.europa.eu/malta/news/eu-budget-commission-proposes-modern-budget-union-protects-empowers-and-defends_en)

<sup>37</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0324&from=RO>

<sup>38</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0038\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0038_EN.html)

<sup>39</sup> <http://www.europarl.europa.eu/news/en/press-room/20190109IPR23011/member-states-jeopardising-the-rule-of-law-will-risk-losing-eu-funds>

law and deviations from the rule of law principles in certain Member States, it has become desirable to create a mechanism for Member States to be sanctioned for non-compliance with the rule of law.

As set out in the Regulation, the rule of law requires that all public powers act within the bounds of the law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial tribunals, especially as the principles of legality, legal certainty, prohibition of arbitrariness of power executive, separation of powers in the state, and effective judicial protection of individuals by an independent court be respected. The rule of law is also a prerequisite for protecting the other EU fundamental values, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

Article 3 of the Regulation details the reasons for triggering the rule of law mechanism while setting out cases where it may be considered a situation of generalised deficiencies as regards the rule of law:

- a) endangering the independence of judiciary;
- b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;
- c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

Limiting European funds to a Member State may also be possible for another category of reasons:

- a) the proper functioning of the authorities of that Member State implementing the Union budget, in particular in the context of public procurement or grant procedures;
- b) the proper functioning of investigation and public prosecution services in relation to the prosecution of fraud, corruption or other breaches of EU law relating to the implementation of the EU budget;
- c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a) and (b);
- d) the prevention and sanctioning of fraud, corruption or other breaches of EU law relating to the implementation of the EU budget;
- e) the recovery of funds unduly paid;
- f) the effective and timely cooperation with the European Anti-fraud Office and with the European Public Prosecutor's Office.

According to the Regulation, Union actions affected or likely to be affected by the deficiency will be assessed as far as possible (Article 4 (3)).

Sanctions or appropriate measures which may be imposed under the Regulation (Article 4) and which must meet the requirement of proportionality to the nature, gravity and extent of the general rule of law deficiency are: 1. a suspension of the approval of one or more programmes or an amendment thereof; 2. a suspension of commitments; 3. a reduction of commitments, including through financial corrections or transfers to other spending programmes; 4. a reduction of pre-financing; 5. an interruption of payment deadlines; 6. a suspension of payments.

On the application of sanctions, the European Commission has the power to make a proposal to the Council of the European Union which shall become enforceable upon expiry of one month. The Council may invalidate the measure proposed by the Commission if, by a qualified majority, it votes against this proposal.

The Regulation also provides a procedure to lift measures, the Member State concerned being able to prove at any time that the generalised deficiency as regards the rule of law has been remedied (in full or in part) or has ceased to exist (Article 6).

The Regulation is binding in its entirety and directly applicable in all Member States and shall apply from the next multiannual financial framework, 2021-2027.

#### **4.4. Commission concerns on strengthening the Rule of Law**

In the series of actions undertaken by the Commission on strengthening the rule of law, a field subjected to improvements, the Commission published in April 2019 the Communication 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"<sup>40</sup>, takes stock of the experience of recent years and sets out some possible avenues for reflection on future action. The Communication has as its starting point the public debate on the rule of law in the European Union and calls on the Union institutions - the European Parliament, the European Council, the Council - and the Member States and other stakeholders, including the judiciary and civil society, to contribute ideas to how the rule of law toolbox could develop in the future.

In the Commission's view, strengthening the rule of law could make an essential contribution to the future of the European Union. This would create greater clarity and consistency, help to ensure that all Member States are treated equally and would protect the common interests of all by effectively enforcing EU law in all Member States.

The Communication reviews the tools available for monitoring, assessing and protecting the rule of law

<sup>40</sup> <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-163-F1-EN-MAIN-PART-1.PDF>

in the EU.<sup>41</sup> Experience gained in recent years has shown, in particular, the need for a better promotion of the rule of law, an early prevention of risks or violations of the rule of law, and an effective response to such problems in the Union. The Commission has identified three pillars that could help promote effective enforcement of the rule of law: 1. Better promotion; 2. Early prevention; 3. An adapted response.

As regards effective application, the Commission supports the opportunity of different approaches in specific policy areas, such as the proposal on the protection of the EU's financial interests and some improvements to the existing rule of law framework, including providing early information to European Parliament and the Council, and receiving support from these two institutions, but also setting clear deadlines for the duration of the dialogues.

European Commission will return to this issue with its own conclusions and proposals in June 2019, following the reactions of the institutions and society at large, as well as the evolution European Court of Justice the case-law.

## 5. Conclusions

The justification for the tightening of the sanctioning system also results from the fact that the founding states (but also the richest in the Union) are the ones that most frequently violate EU law and are subject to the highest financial sanctions, unlike the newer member states of the European Union that demonstrates a higher degree of compliance.

Also, EU Cohesion Funds are important support for Central and Eastern European states to help them overcome the gap between the richer and poorest parts of the continent<sup>42</sup>.

However, the proposal to condition the granting of European funds to respecting the rule of law supports the struggle between Brussels and Poland and Hungary on democratic standards. This creates a new conditionality mechanism in terms of respecting the fundamental values of the EU and thus provides a solution to the Copenhagen Dilemma.

Although Jean-Claude Juncker, President of the European Commission, insisted that the plan to protect the EU budget in the case of rule of law generalised

deficiencies does not concern a particular Member State, we can clearly interpret it as a strong notice to Poland and Hungary.

The Commission's plan also sends a warning message to other Member States where the rule of law principles are being threatened, such as Romania,<sup>43</sup> Slovakia and Malta.<sup>44</sup>

On the other hand, the big contributors to the EU budget (western Member States) welcome this measure of sanctioning states that, although they are the main beneficiaries of large sums of EU funds, choose not to respect European values.

Among the arguments put forward by the Member States concerned, the pressure of Brussels to respect the rule of law principles has been interpreted as a violation of their sovereignty. Without undermining the importance of state sovereignty, in our opinion these arguments are losing substance in view of the following: a) values and principles have been ratified by national parliaments and signed by heads of state at the time of EU accession; b) the state of democracy in a Member State affects the state of democracy of the whole European Union; c) heads of State or Government have the right to vote in the Council, effectively controlling the future of the EU; d) the credibility of the EU as a normative power is affected if one of the states does not respect the values of the Union itself.

The different positioning of the Member States is likely to aggravate the very problem it seeks to solve, namely a deep gap between the two halves of the continent.

To address this, the plan was presented as a separate measure that could be adopted by EU member governments with so-called qualified majority, representing 55% of Member States and 65% of the EU population. European Union could apply this measure when it decides that there is a rule of law deficiency or a problem with financial management - and the Member State concerned would need a qualified majority vote to stop it.

The required conditionality thus makes it possible for Member States to take advantage of EU financial support only if they respect the rule of law principles. In other words, *tricking rule of law will leave EU Member States with no treats*.

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<sup>41</sup> We mention that on 11 March 2014, the European Commission adopted a new framework for addressing systemic threats to the rule of law in all EU Member States. This framework sets up an instrument within European Commission can initiate a multi-step dialogue with the Member State concerned to prevent the intensification of systemic threats to the rule of law. The most emblematic, but exceptional, instrument for defending the rule of law is the procedure under Article 7 TEU, which allows the EU to act in the event of a serious violation of the rule of law in a Member State. See above.

<sup>42</sup> COM(2017) 583 final, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - My region, My Europe, Our future: The 7th report on economic, social and territorial cohesion (SWD(2017) 330 final), [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2017/0583/COM\\_COM\(2017\)0583\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0583/COM_COM(2017)0583_EN.pdf)

<sup>43</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0446\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0446_EN.html)

<sup>44</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0328\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0328_EN.html)

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