

# THE RULE OF LAW, THE FORCE OF LAW AND THE POWER OF MONEY IN THE EU

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*Abstract: This paper discusses the strengths and weaknesses of the rule of law conditionality contained in the 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. The proposed Regulation establishes a link between a Member State's violation of the rule of law and the suspension of EU payments. The text examines the effects of the connection between the rule of law and EU money, both for the erring Member State and for the EU as a whole. The discussion shows that, despite the fact that the EU-level approach to the rule of law has significant benefits, it, at the same time, creates new risks. It may undermine the balance of powers in the EU by expanding the political and economic power of certain Member States over others, the power of EU institutions over Member States, and the power of the European Commission over other EU institutions. It is also questionable whether there is a sufficiently strong causal relation between the rule of law deficiency and threats to the EU's financial interests. Most importantly, it is uncertain to what extent the rule of law conditionality will lead to the true transformation of negative, anti-rule-of-law trends in some Member States, which raises the question of whether the Rule of Law Proposal is capable of responding to the current challenges.*

*Keywords: rule of law, conditionality, legal basis, sufficiently direct link, Art 7 TEU, Commission, Hungary, Poland.*

## 1 Introduction

The rule of law at the EU level has moved from being a mere political statement and something to be taken for granted to becoming a functioning legal principle that is protected not only by the Court of Justice, but also by the EU political institutions. As a consequence, new and more powerful legal mechanisms are emerging that are relying on the role of EU political institutions and processes in preserving the rule of law and in altering Member States' behaviour accordingly.<sup>1</sup> This paper

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<sup>1</sup> See section 4.1.

discusses the most recent legislative initiative in this area, which establishes a link between a Member State's violation of the rule of law and the suspension of EU payments, by making payments from EU funds conditional upon Member States' respect of the rule of law. This initiative is embodied in the newly drafted 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 (hereinafter: Rule of Law Proposal).<sup>2</sup>

This paper discusses the strengths and weaknesses of the rule of law conditionality, contained in the Rule of Law Proposal. The text examines the effects of the link between the rule of law and EU money, both for the erring Member State and for the EU as a whole. By doing so, it aims to assess the impact of the rule of law conditionality on further EU dynamics. The discussion shows that, despite the fact that the EU-level approach to the rule of law has significant benefits, it, at the same time, creates new risks. On the positive side, it elaborates what is meant by the rule of law as a common EU-level standard. This is particularly important due to the developments in some Member States, which have undermined the perception that there is a common Union understanding of the rule of law. It also enables the establishment of common EU-level norms on the rule of law that can increase the power, legitimacy, and protection provided by the rule of law across the EU, by creating common criteria and effective mechanisms for establishing and punishing its violation. On the other hand, the new Rule of Law Proposal, as it now stands, may undermine the balance of powers in the EU by expanding the political and economic power of certain Member States over others, the power of EU institutions over Member States to control their judiciary and other state authorities, and the power of the European Commission over other

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<sup>2</sup> Commission, 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 COM(2018) 324 final.

The Proposal was put forward by the Commission on 2 May 2018. It was then referred to the Budgets Committee and the Budgets Control Committee, with opinions from the Civil Liberties, Justice and Home Affairs Committee, the Constitutional Affairs Committee and the Regional Development Committee. Their report (2018/0136(COD)), suggesting a number of amendments, in particular by putting the Parliament on the same footing as the Council when adopting and lifting measures, was put to the vote on 18 December and tabled to plenary. In the meantime, on 17 July 2018, the European Court of Auditors delivered its opinion on the Proposal, recommending that the Proposal needs to be improved by setting more specific criteria for its application and clearer safeguards for beneficiaries of EU programmes (ECA Opinion No 1/2018). On 17 January 2019, in its first reading, the European Parliament backed the Proposal, with 397 votes in favour and 158 against the Committee report and 69 abstentions (Amendments adopted by the European Parliament on 17 January 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, P8\_TA-PROV(2019)0038). They suggested a number of amendments, in particular the introduction of a detailed definition of what creates 'general deficiencies'.

EU institutions. It opens up the question of who in the EU should take the lead as the guardian of the rule of law – should it be the Member States or the EU institutions, and, if the EU institutions, should it be the Court of Justice, the Commission, or somebody else? It is also questionable whether there is a sufficiently strong causal relation between the rule of law deficiency and threats to the EU's financial interests. Most importantly, it is uncertain to what extent the rule of law conditionality will lead to the true transformation of negative, anti-rule-of-law trends in some Member States, which opens up the question of whether the Rule of Law Proposal is capable of responding to the current challenges.

The discussion sets off by exploring the logic of the Rule of Law Proposal in the second section, and its expected effectiveness, linking it to the question of fairness, in the third section. The fourth section moves on to the issue of its legality, which is discussed from four different perspectives. The first part scrutinises the legal basis of the Proposal and places it in the context of the inadequacy of the existing rule-of-law instruments. The second part examines whether there is a sufficiently strong link between a Member State's violation of the rule of law and the risk that this would impact on the successful implementation of EU funding. The third part of this section questions the compatibility of the Proposal with Art 7 TEU, while the last part examines the pros and cons of granting considerable powers to the Commission. The concluding section aims to summarise why the EU needs an efficient rule-of-law mechanism and the boundaries the new mechanism should not cross.

The paper does not engage in discussion of the various meanings of rule of law in legal theory,<sup>3</sup> the history of codification of the principle of the rule of law in EU primary law,<sup>4</sup> or the recent case law of the Court of

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<sup>3</sup> See, for example, AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1959) 114; FA Hayek, *The Road to Serfdom* (University of Chicago Press 1944) 75–90; J Raz, 'The Rule of Law and Its Virtue' in J Raz *The Authority of Law* (OUP 1979); LL Fuller, *The Morality of Law* (rev ed, Yale University Press 1965) ch 2; R Dworkin, *A Matter of Principle* (Harvard University Press 1985). On different facets of the rule of law, see B Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004); J Tasioulas, 'The Rule of Law' King's College London Law School Research Paper No 018-21, forthcoming in J Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (CUP 2019). On the distinction between the formal and substantive conceptions of the rule of law, see PP Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.

<sup>4</sup> The principle of the rule of law is mentioned in several places in the TEU. First, in the TEU's preamble, the Member States confirm their attachment to the rule of law. The principle of the rule of law is one of the EU values listed in Art 2 TEU. The rule of law is indirectly referred to in Art 7 TEU, which lays down the procedure in the case of a Member State's violation of one of the values listed in Art 2 TEU. Further, according to Art 21(1) TEU, the Union's action on the international scene shall be guided by the rule of law. Finally, according to Art 21(2)(b) TEU, the Union shall pursue its external policies and actions in order to consolidate and support, among other things, the rule of law. The rule of law, as one of the

Justice on this issue.<sup>5</sup> It starts from the premise that the concept of the rule of law, as understood at the EU level and in this text:

includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including protection of fundamental rights; separation of powers and equality before the law.<sup>6</sup>

## 2 The logic behind the Rule of Law Proposal

Several years ago, I read a text by Professor Audrey Macklin titled 'The Rule of Law, the Force of Law and the Rule of Force'.<sup>7</sup> The text dealt with a matter which is unrelated to the discussion in this paper. However, inspired by this title, I would like to suggest that linking a violation of the rule of law to the suspension of EU funds is a strong manifestation of the 'force of law'. This statement – as well as the link between the rule of law, the rule of force, and the force of law – can be exemplified in Hungary and Poland. First, the developments in Hungary and Poland have been characterised by EU institutions as a deviation from the rule of law towards a combination of a 'rule by law' and the 'rule of force'.<sup>8</sup> In this context 'rule by law' can be understood as a distorted version of the rule of law, where social behaviour is still regulated by law, but it is not important what the content or the objectives of this law are, ie it does not matter whether it satisfies the criteria of liberal democracy.<sup>9</sup>

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Union's values, is also mentioned in the preamble of the Charter, while a number of elements of the rule of law are provided in the provisions of the Charter, in particular Art 41 (the right to good administration) and Art 47 (the right to an effective remedy and to a fair trial).

<sup>5</sup> See, in particular, Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117; Case C-216/18 PPU *LM* ECLI:EU:C:2018:586; Case C-192/18 *Commission v Poland* (case in progress); Case C-619/18 *Commission v Poland* (case in progress, but see the Order of the Vice-President of the Court in Case C-619/18 R). For a discussion on this topic, see, for example, Tamara Čapeta's contribution (entitled 'Sudovi i vladavina prava' ['Courts and the Rule of Law'] to the online proceedings of the conference 'EU as a Global Leader in the Rule of Law', held in Zagreb on 22 February 2019, available at <[www.pravo.unizg.hr/EJP/conference\\_series/eu\\_kao\\_globalni\\_lider\\_u\\_vladavini\\_prava](http://www.pravo.unizg.hr/EJP/conference_series/eu_kao_globalni_lider_u_vladavini_prava)> accessed 30 June 2019.

<sup>6</sup> Definition of the rule of law provided in the Rule of Law Proposal, Art 2(a).

<sup>7</sup> A Macklin, 'The Rule of Law, the Force of Law, and the Rule of Force' in J Williamson (ed), *Omar Khadr, Oh Canada* (McGill Queens University Press 2012).

<sup>8</sup> To that effect, the European Commission activated the Rule of Law Framework and the Art 7 TEU procedure against Poland, while the European Parliament activated the Art 7 TEU procedure against Hungary.

<sup>9</sup> See the Venice Commission of the Council of Europe 'Rule of Law Checklist', adopted by the Venice Commission at its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016), where the Venice Commission 'warned against the risks of a purely formalistic concept of the Rule of Law, merely requiring that any action of a public official be authorised by law' and stated

On the other hand, the EU institutions and some of the EU Member States are trying to work out how to urge Member State like Hungary and Poland to respect the (EU-level understanding of the) rule of law and, in doing so, they plan to use the ‘force of law’, manifested through the ‘power of money’. The ‘force of law’ gets to the heart of the Rule of Law Proposal, as it aims to achieve respect of the rule of law by applying compulsion based on law, by sanctioning Member States that violate the rule of law. It is no coincidence that a Member of the European Parliament and former EU Commissioner for Justice and Fundamental Rights, Vivien Reding, stated that making a link with EU money ‘would be the most effective way to influence the behaviour of a government like the Polish one’ as it is ‘the only thing they understand’.<sup>10</sup>

### **3 Estimating effectiveness: can the Rule of Law Proposal achieve its aim?**

According to the Rule of Law Proposal, its sole objective is to protect the Union’s budgetary interests. Protection of the rule of law itself is not an objective set by the Proposal, but only a means for the protection of the EU budget. The Proposal explicitly states that its only objective is ‘to avoid that the Union budget is harmed by situations where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the sound financial management and the protection of the financial interests of the Union’.<sup>11</sup> It is, consequently, based on Art 322(1)(a) TFEU.<sup>12</sup> The legality of this legal basis and whether there is a sufficiently strong causal relation between the rule of law deficiency and threats

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that “‘Rule by Law”, or “Rule by the Law”, or even “Law by Rules” are distorted interpretations of the Rule of Law’ para 15. See also the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (‘the Copenhagen document’) of 1989 (cited in footnote 4 of the Venice Commission ‘Rule of Law Checklist’), where the participating states proclaimed that ‘the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression’ para 2, available at <[www.osce.org/odihr/elections/14304?download=true](http://www.osce.org/odihr/elections/14304?download=true)> accessed 7 May 2019. See also Victor Orban’s speech on his plan to build an illiberal state, available at Budapest Beacon 29 July 2017 <<https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>> accessed 5 May 2019.

<sup>10</sup> J Stearns, ‘Europe’s Eastern Rebels Expose Next Fault Line for EU Leaders’ (2017) Bloomberg, 30 July 2017 <[www.bloomberg.com/news/articles/2017-07-30/europe-s-eastern-rebels-expose-next-fault-line-for-eu-leaders](http://www.bloomberg.com/news/articles/2017-07-30/europe-s-eastern-rebels-expose-next-fault-line-for-eu-leaders)> accessed 10 March 2019.

<sup>11</sup> Explanatory Memorandum and Art 1 of the Rule of Law Proposal.

<sup>12</sup> Art 322(1)(a) TFEU provides: ‘The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts’.

to the EU's financial interests will be explored below. At this point, it is proposed that the primary objective of the Rule of Law Proposal is not to protect the EU budget, but to compel EU Member States to respect the rule of law, and that this objective is more dominant or at least as important as the budgetary objective, even though this is not visible from the Proposal. In other words, it is suggested that the preservation of the rule of law is the actual objective of the Proposal – as suggested by the statement of MEP Reding – whereas the Union's budgetary interests are only a means of achieving the rule of law objective, and not the other way round, as it would have appeared from the Proposal.

Consequently, if we start from the premise that it is not the protection of the Union's budget, but of the rule of law itself, that is the true aim of the Proposal, it is questionable whether the Proposal is capable of achieving this aim. Measuring the effectiveness of the Proposal depends on how we define the rule of law objective. There are two possibilities here. If the objective is limited to forcing certain legislative changes in a Member State, there is the likelihood that this objective will actually be achieved, provided the respective Member State is a net recipient and, therefore, dependent on EU funds.<sup>13</sup> If the respective Member State is a net contributor, the carrot-and-stick approach, embedded in the rule of law conditionality, will be far less motivating.<sup>14</sup> Consequently, such a divergent or even discriminatory effect of the rule of law conditionality on net recipients, in comparison to net contributors, can be perceived as unfair, thus leading to open or covert disapproval by the net recipient Member States.

On the other hand, if the objective of the Rule of Law Proposal is deeper than mere legislative change, ie if the intention behind the bond between the rule of law and EU funds is a profound change of legal culture and the adoption of new patterns of political behaviour in Member States such as Hungary and Poland, it is highly questionable whether

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<sup>13</sup> Both Hungary and Poland are net recipients of EU funds. In 2015, Poland was the largest net beneficiary of EU funding, receiving EUR 6.6 billion (source: 'Netherlands Largest Net Contributor to EU This Century' CBS, available at <[www.cbs.nl/en-gb/news/2016/50/netherlands-largest-net-contributor-eu-this-century](http://www.cbs.nl/en-gb/news/2016/50/netherlands-largest-net-contributor-eu-this-century)> accessed 5 May, 2019. Also, the share of EU cohesion policy funding for public investment in Poland in 2015-2017 was 61.17%, whereas in Hungary it was 55.46% (source: <<https://cohesiondata.ec.europa.eu/Other/-of-cohesion-policy-funding-in-public-investment-p/7bw6-2dw3/data>> accessed 5 May 2019).

<sup>14</sup> Nevertheless, even in the case of net contributors, the suspension of EU funding could create significant political problems in the respective Member State. On the link between the positive perception of Hungarian citizens of Hungarian EU membership and the financial support gained from the Union, based on recent public polls, see 'European Union: The Cash Cow and the Curse of Migrants, Hungarian Spectrum', 26 April 2019, available at <<http://hungarianspectrum.org/2019/04/26/european-union-the-cash-cow-and-the-curse-of-migrants/>> accessed 5 May 2019).

this objective can be achieved by the Proposal. A truly accepted and internalised form of rule-of-law-compliant behaviour can hardly be achieved by coercive and sanctioning methods, as it requires political and societal support from within. Unless the respective Member State has a critical mass of citizens and organisations which share a European understanding of the values prescribed by Art 2 TEU, the rule of law conditionality is likely to be perceived as forcefully imposed from the outside – instead of being wanted, needed or consented to internally.<sup>15</sup> Consequently, the external imposition of legal and political standards and its linking to financial sanctions is not likely to result in a profound transformation of legal culture and political behaviour unless there is real commitment and support in the respective Member State. As a result, the uncertain effectiveness of the link between the rule of law and EU money, and, even more importantly, the questionability of a sanction-based method as the right way to tackle rule of law compliance are two major weaknesses of the Rule of Law Proposal.

The accession negotiations of the former candidate countries for EU membership – such as Croatia, as the youngest EU Member State – are a good example of this claim. Every new EU accession is more and more strictly grounded on the principle of conditionality, which makes it ever more demanding for a new state to join. All candidate countries, including Croatia, had, among other obligations, to fulfil the Copenhagen political criteria in order to join the EU.<sup>16</sup> The Copenhagen political criteria to a large extent coincide with the EU values listed in Art 2 TEU and, since 1993, they have been part of the conditions for EU accession for any new Member State.<sup>17</sup> However, the Croatian experience has shown that the fulfilment of the Copenhagen criteria was accomplished relatively successfully, as there is usually strong commitment to EU membership – both among domestic policy-makers and among citizens in the candi-

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<sup>15</sup> A number of measures in Hungary, such as those targeted against the Open Society and NGOs in Hungary, aim to reduce the critical mass of citizens and organisations supporting the EU understanding of the rule of law. By doing this, there is less and less chance that the transformation will happen from within. On recent public opinion polls in Hungary, see 'The Storm Created over Calling the Orban Regime What It is – a Fascist State' (2018) Hungarian Spectrum, 27 December 2018, available at <<http://hungarianspectrum.org/2018/12/27/the-storm-created-over-calling-the-orban-regime-what-it-is-a-fascist-state/>> accessed 5 May 2019). On modes used by Victor Orban to steer public opinion in Hungary, see: Zoltan Simon, 'Orban's Propaganda Machine Keeps Hungarian Protests in Check' (2019) Bloomberg, 11 January 2019, available at <[www.bloomberg.com/news/articles/2019-01-11/orban-s-propaganda-machine-keeps-hungarian-protests-in-check](http://www.bloomberg.com/news/articles/2019-01-11/orban-s-propaganda-machine-keeps-hungarian-protests-in-check)> accessed 5 May 2019.

<sup>16</sup> The Copenhagen political criteria are the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

<sup>17</sup> European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1.

date country – which enables the better adoption and internalisation of external standards.<sup>18</sup> Consequently, EU accession becomes a trigger and catalyst of internal political and institutional reforms, which – in ideal circumstances – lead to the true adoption of EU values.<sup>19</sup> From this perspective, the Rule of Law Proposal could be expected to be productive: if conditioning accession on political and societal harmonisation with EU values leads to the acceptance of these values, then conditioning access to EU funds on the acceptance of EU values could achieve the same result. On the other hand, the developments in Hungary and Poland open up the question of the efficacy and irreversibility of the accomplished pre-accession reforms. The Rule of Law Proposal is an indirect EU acknowledgement that significant differences in legal cultures and patterns of political behaviour are immanent in the Union today – especially since the Central and Eastern European enlargements in 2004 and 2007. From this perspective, it is questionable whether the Proposal is capable of bridging these differences and achieving the targets it sets.

#### **4 The legality of the Rule of Law Proposal**

The following subsections will examine the legality of the Rule of Law Proposal by looking at its legal basis, by questioning the credibility of the link between the violation of the rule of law and the non-implementation of EU-funded operations, by examining the compatibility of the Proposal with Art 7 TEU, and by estimating the powers granted to the European Commission.

##### **4.1 Legal basis**

The Rule of Law Proposal is based on Art 322(1)(a) TFEU which provides for the adoption of financial rules which determine the procedure for establishing and implementing the EU budget. This legal basis is linked to the proclaimed ‘sole objective’ of the Proposal, ie with the protection of the Union’s budget in the case of ‘generalised deficiencies as regards the rule of law’ where such deficiencies ‘affect or risk affecting

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<sup>18</sup> On this topic, see, in particular, T Čapeta, ‘Courts, Legal Culture and the Enlargement of the EU’ (2005) 1 *Croatian Yearbook of European Law and Policy* 23; I Goldner Lang, Z Durdevic & M Mataija, ‘The Constitution of Croatia in the Perspective of European and Global Governance’ in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press, forthcoming 2019).

<sup>19</sup> On the catalyst effect of the enlargement policy, see M Cremona, ‘Enlargement: A Successful Instrument of EU Foreign Policy?’ in T Tridimas (ed), *European Union Law for the Twenty-First Century: Vol 1, Rethinking the New Legal Order* (Hart Publishing 2004). See also I Goldner Lang, ‘The Impact of Enlargement(s) on the EU Institutions and Decision-Making’ (2012) 31(1) *Yearbook of European Law* 473.



the principles of sound financial management or the protection of the financial interests of the Union'.<sup>20</sup>

How does one determine whether the choice of the legal basis is the correct one? The Court of Justice long ago held that that the Union's choice of the legal basis for a measure 'may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors which are amenable to judicial review' and which 'include in particular the aim and content of the measure'.<sup>21</sup> It also stated that if the examination of the measure

reveals that it pursues a twofold purpose or that it has a twofold component, and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.<sup>22</sup>

Its other elements cannot have the effect of altering or transforming the character of the measure.<sup>23</sup> Exceptionally, if a measure simultaneously pursues several objectives, which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal basis.<sup>24</sup>

According to the Commission, the 'aim and content' of the Rule of Law Proposal is the protection of the Union's financial interests and the principle of sound financial management from generalised deficiencies

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<sup>20</sup> See the Explanatory Memorandum and Arts 1 and 3(1) of the Rule of Law Proposal. It has been noted by the Council Legal Service, in its Opinion on the Rule of Law Proposal, that the proclaimed objective of the Rule of Law Proposal is narrower than the scope of Art 322(1)(a) TFEU, which could have implied that its proper legal basis should have been Art 325(4) TFEU, which sets out the procedure for the adoption of 'measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union'. However, as stated in the Council Legal Service Opinion, the fact that the scope of Art 322(1)(a) TFEU is broader than the objective stated by the Rule of Law Proposal should not be a problem, as the material scope of the Rule of Law Proposal is broader than the objective it sets forth. What the Rule of Law Proposal actually claims to enable is the proper implementation of the Union's budget according to the principles of sound financial management, which actually presupposes the existence of preventive and corrective measures against fraud (Opinion of the Legal Service, 13593/18, LIMITE, Brussels, 25 October 2018, para 43. Despite the fact that the Opinion is not a public document, the author managed to gain access to it).

<sup>21</sup> See, among others, Case C-300/89 *Titanium Dioxide* ECLI:EU:C:1991:244, para 10; Case C-155/07 *European Parliament v Council* ECLI:EU:C:2008:605, para 34; Case C-411/06 *Commission v European Parliament* ECLI:EU:C:2009:518, para 45.

<sup>22</sup> See, among others, Case C-137/12 *Commission v Council* ECLI:EU:C:2013:675, para 53; Case C-411/06 *Commission v European Parliament* ECLI:EU:C:2009:518, para 46; Case C-155/07 *European Parliament v Council* ECLI:EU:C:2008:605, para 35.

<sup>23</sup> Opinion 2/00 ECLI:EU:C:2001:664.

<sup>24</sup> See, among others, Case 165/87 *Commission v Council* ECLI:EU:C:1988:458, para 11; Case C-300/89 *Titanium Dioxide* ECLI:EU:C:1991:244, para 17.

as regards the rule of law.<sup>25</sup> Accordingly, the Commission has formulated the measure as essentially a financial rule and not as a rule of law mechanism. The rule of law has, for pragmatic reasons, been given only a secondary role as a mere tool/instrument for the protection of the Union's financial interests. The pragmatic reason for this circuitous approach is the (unfortunate) fact that there is currently no legal basis in the Treaties to enable the adoption of a 'pure' rule of law measure. Art 2 TEU cannot be the legal basis of a new instrument on its own, but would require recourse to another Treaty provision – as manifested in *Associação Sindical dos Juizes Portugueses*.<sup>26</sup> Considering this legal constraint, the Commission's recourse to a budgetary legal basis and its insistence on the financial objective can be viewed as a pragmatic and creative manoeuvre intended to avoid gridlock, just as many internal market measures were in the past.

This does not mean that the link between the rule of law and EU spending is not real. Quite the reverse, the rule of law is certainly an important precondition for the sound implementation of the Union's budget in EU Member States. The malfunctioning of public authorities and judicial bodies could affect or risk affecting the proper spending of EU funds in the respective Member State. From this perspective, it seems only natural that the EU wishes to protect its financial interests by suspending payments in cases where they could be misspent due to generalised deficiencies in the rule of law. Such a salient link between the rule of law and the way EU money is spent gives credibility to this Proposal. Equally important, both the EU political institutions and the Court of Justice have shown a (political) will to protect the rule of law at the level of the EU. Consequently, provided that the Rule of Law Proposal articulates the link between the Union's financial interests and the rule of law in a sufficiently precise and clear manner,<sup>27</sup> we can expect it to receive the green light from all EU institutions, including the Court of Justice (if asked).

However, the fact that the Rule of Law Proposal is likely to be adopted and accepted by all the EU institutions (most probably, provided the current draft undergoes certain changes), as well as the fact that there is a tangible link between the rule of law and the spending of EU money, cannot conceal the true motive behind the Proposal. The dominant motive and target of the Rule of Law Proposal is not the protection of the Union's budget, but the protection of the rule of law itself. Testimony to this is the legal and political developments in the period between the

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<sup>25</sup> Rule of Law Proposal, Recitals 4 and 11 and Arts 1 and 3(1).

<sup>26</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117.

<sup>27</sup> The issue of the existence of an (in)sufficiently strong link between the Union's financial interests and the rule of law will be discussed in the following subsection.

adoption of Art 7 TEU and the Rule of Law Proposal, which show that the Rule of Law Proposal is a measure with a rule-of-law agenda, which emerged as yet another attempt among a series of EU measures aimed at preventing Member States' violations of the rule of law. Consequently, despite its legal basis in a budgetary Treaty norm, the Rule of Law Proposal can only be understood in the context of the Union's increased concerns over the rule of law crisis in certain Member States, its inability to respond to these violations with the measures at hand, and its efforts to find a new and efficient mechanism to remedy the violations, while lacking a Treaty basis to adopt a straightforward rule of law targeted measure.

The aim of the following paragraphs is to address the inadequacy of the rule of law instruments that have been used by the EU so far, and explain the chain of developments leading to the Rule of Law Proposal, thus supporting the statement that the Proposal was drafted with the primary motive to protect the rule of law and not the EU budget.

The political and judicial mechanisms that have been used as a response to rule of law violations so far have been a mixture of three types: those adopted exclusively for the protection of the rule of law (Rule of Law Framework and Art 7 TEU); those aimed at any type of state violation of EU law (infringement proceedings);<sup>28</sup> and those having a completely different objective, which does not encompass and should not be used for the protection of the rule of law (suspension of payments from the Cohesion Fund under the excessive deficit procedure). For different reasons, none of these instruments has proven sufficiently effective to protect the rule of law.

So far, the most striking example of an EU measure which had a completely different objective than the rule of law, while being instrumentalised for a rule of law purpose, was the Commission's proposal of 22 February 2012 to suspend the disbursement of EUR 495 million from the Cohesion Fund for Hungary for 2013, due to its failure to address excessive deficit.<sup>29</sup> The proposal was based on the then Cohesion Fund Regulation, which provided for the possibility to suspend the total or part of the disbursement from the Fund in the case of an excessive government deficit and the absence of effective action to correct it.<sup>30</sup> The

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<sup>28</sup> In addition to infringement proceedings, the Court of Justice has been using its power to interpret EU law under the preliminary reference procedure to decide on matters that deal with the rule of law.

<sup>29</sup> Press release available at <[http://europa.eu/rapid/press-release\\_IP-12-161\\_en.htm](http://europa.eu/rapid/press-release_IP-12-161_en.htm)> accessed 15 March 2019.

<sup>30</sup> Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94 [2006] OJ L210/79, Art 4(1).

Proposal was adopted as a Council Implementing Decision on 13 March 2012.<sup>31</sup> This has been the only time in EU history that a decision has been adopted to suspend payments from the Cohesion Fund due to an excessive deficit. In the end, Hungary took measures to correct the excessive deficit and the Council decided to lift the suspension before the beginning of 2013.<sup>32</sup> Nevertheless, the suspension decision remains an unprecedented (and harsh) sanction for projected violations of EU law (projected excessive deficit), as it would have applied to a future period (2013) and was targeted at a Member State whose deficit, at that time, was among the lowest in the EU.<sup>33</sup>

Significantly, almost in parallel to this measure, the relations between Hungary and the Commission became increasingly tense for different reasons. In 2011 Hungary adopted several controversial rules under the new constitution, which the Commission saw as undermining the independence of the Hungarian Central Bank, its judiciary and the its data protection authority. As a response, on 17 January 2012, the Commission launched three accelerated infringement proceedings against Hungary.<sup>34</sup> In the end, the Commission was satisfied with the changes Hungary made to its Central Bank statute, but referred Hungary to the Court of Justice on matters of the independence of the data protection authority and the measures affecting the judiciary.<sup>35</sup> The case on the data protection authority was decided by the Grand Chamber judgment on 8 April 2014.<sup>36</sup> The Court ruled that the abrupt termination of the Hungarian Data Protection Commissioner's term of office by the government constituted an infringement of the independence of the data protection authority and was hence in breach of EU law. In the second case on the Hungarian judiciary, the Court of Justice found that the radical lowering of the retirement age for Hungarian judges, prosecutors and notaries from 70 to 62 constituted discrimination based on age which was not proportionate as regards the objectives pursued. Consequently, the

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<sup>31</sup> Council Implementing Decision of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013 [2012] OJ L78/19.

<sup>32</sup> 11648/12, PRESSE 278, 22 June 2012.

<sup>33</sup> F Guarascio, 'EU to Cut Hungary's Regional Funds over Deficit' (2012) Euractiv, 23 February 2012, available at <[www.euractiv.com/legacy\\_byline/francesco-guarascio/](http://www.euractiv.com/legacy_byline/francesco-guarascio/)> accessed 15 March 2019.

<sup>34</sup> Press release available at <[http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm)> accessed 15 March 2019.

<sup>35</sup> In the end, the Commission was satisfied with the changes Hungary made to its Central Bank statute, but referred Hungary to the Court of Justice concerning the independence of the data protection authority and the measures affecting the judiciary (Press Release available at <[http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm)> accessed 15 March 2019.

<sup>36</sup> Case C-288/12 *Commission v Hungary* ECLI:EU:C:2014:237.

Court concluded that Hungary failed to fulfil its EU obligations under Directive 2000/78 on equal treatment in employment and occupation.<sup>37</sup>

Taking into consideration the political tension between Hungary and the Commission – which escalated with the launching of infringement proceedings – it is difficult not to link these developments with the Commission's proposal to suspend disbursement to Hungary from the Cohesion Fund due to its excessive deficit. Two other facts, noted above, indicate that the Commission's proposal to suspend payments to Hungary had a different motive from tackling its excessive deficit. First, this has been the only instance the proposal to suspend funds due to excessive deficit has been launched and, second, at that time there were Member States with worse deficits than Hungary, but which were not threatened by the same type of procedure. All this suggests that the actual target of the Commission's proposal was not Hungary's excessive deficit, but that the proposal pursued a different objective.<sup>38</sup> It calls into question the credibility of the excessive deficit procedure, which has been instrumentalised for a different aim than the one it was designed for. It also brought to the surface the gaps in the EU system which obviously lacked another mechanism, apart from Art 7 TEU, and infringement proceedings by which it could tackle deficiencies in Member States' rule of law.

The need for an efficient new instrument to protect the rule of law was consequently enunciated in September 2012 by the then President of the European Commission in his State of the Union address, in which he declared that the Union needed a better developed set of instruments for the protection of the rule of law – not just an alternative between the 'soft power' of political persuasion and the 'nuclear option' of Art 7 TEU.<sup>39</sup> Finally, on 11 March 2014, the Commission put in place the Rule of Law Framework with the aim of strengthening the EU's capacity to protect the rule of law and prevent threats to the rule of law from escalating to the point where the Commission has to trigger Art 7 TEU.<sup>40</sup> Even though the Rule of Law Framework did not mention any Member State in par-

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<sup>37</sup> Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

<sup>38</sup> The link between the excessive deficit procedure and infringement proceedings has been suggested by a number of commentators. However, when asked about this link, the then EU Commissioner for Economic and Monetary Affairs stated that it was a 'different procedure'. S Taylor, 'Commission Plans to Suspend Hungary's Cohesion Funds' (2012) *Politico*, 22 February 2012, available at <[www.politico.eu/article/commission-plans-to-suspend-hungarys-cohesion-funds/](http://www.politico.eu/article/commission-plans-to-suspend-hungarys-cohesion-funds/)> accessed 15 March 2019.

<sup>39</sup> State of the Union Address on 12 September 2012, available at <[http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm)> accessed 15 March 2019.

<sup>40</sup> Commission, 'A New EU Framework to Strengthen the Rule of Law' (Communication) COM(2014) 0158 final.

ticular, it was clearly established with the aim of disciplining Hungary<sup>41</sup> – but also any other Member State in a similar situation. So far, the Commission has activated the Rule of Law Framework and the Art 7 TEU procedure against Poland, while the European Parliament activated the Art 7 TEU procedure against Hungary.<sup>42</sup> However, the past few years have shown that the Rule of Law Framework is not an efficient mechanism, while the Art 7 TEU procedure is (unfortunately) dysfunctional, as identifying a ‘serious and persistent breach’ requires the unanimity of all Member States (excluding the state concerned) in the European Council and it is unrealistic to expect this ever to happen in reality.

On the other hand, infringement proceedings are also not always the ideal solution to tackle the rule of law crisis, partly due to the uncertain grounds on which an infringement can be based and partly due to their limited potential to respond to systemic deficiencies. The Court of Justice has found a way to respond to the problem of restricting judicial independence by combining Art 2 TEU, as the legal basis for the rule of law, with Art 19 TEU, stipulating the principle of effective judicial protection, which ‘gives concrete expression to the value of the rule of law’.<sup>43</sup> However, it is questionable whether the same legal basis could be used if the rule of law is not violated by restricting judicial independence, but another element of the rule of law concept. It is also doubtful whether infringement proceedings could adequately respond to systemic deficiencies in the rule of law and other values contained in Art 2 TEU in cases such as the one in Hungary, where the European Parliament expressed concern with regard to twelve different issues.<sup>44</sup>

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<sup>41</sup> KL Scheppele, ‘Hungary and the End of Politics’ (2014) *The Nation*, 6 May 2014, available at <[www.thenation.com/article/hungary-and-end-politics/](http://www.thenation.com/article/hungary-and-end-politics/)> accessed 15 March 2019.

<sup>42</sup> Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, C/2016/5703 [2016] OJ L217/53. For the triggering of the Art 7 TEU procedure against Poland, see the ‘Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law’ COM(2017) 835 final. For the triggering of the Art 7 TEU procedure against Hungary, see European Parliament resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

<sup>43</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 32. This legal basis will probably be used in the pending infringement proceedings in Case C-619/18 *Commission v Poland*, where the Court issued an Order granting interim measures (Order of the Court in Case C-619/18 R *Commission v Poland* ECLI:EU:C:2018:1021).

<sup>44</sup> These issues are: the functioning of the constitutional and electoral system; the independence of the judiciary; corruption and conflicts of interest; privacy and data protection; freedom of expression; academic freedom; freedom of religion; freedom of association; the right to equal treatment; the rights of persons belonging to minorities, including Roma and Jews; the fundamental rights of migrants, asylum seekers and refugees; and economic and social rights (European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the

The inadequacy or insufficiency of the existing mechanisms, which have been used to respond to Member States' violations of the rule of law, has forced the Commission to search for a new and more efficient measure. When compared to the measures currently at hand, the Rule of Law Proposal is certainly a step in the right direction. It is both legally stronger and politically wiser than the (ab)use of the excessive deficit procedure for rule of law purposes. It is also far more powerful than the Rule of Law Framework, Art 7 TEU, and infringement proceedings. For this reason, there are fair chances that, if adopted, it will turn into the most potent mechanism for the protection of the rule of law in the EU.

Does it matter that the true motive behind the Rule of Law Proposal is not openly stated in the Proposal, but is disguised as a financial rule? Yes and no. It matters because of transparency. If legally possible, it would be better to call a spade a spade. It also matters in terms of the ability to measure the results of the Proposal. The only way to determine the efficiency of the Rule of Law Proposal, once it is adopted, is to be honest about its true objective. If the Proposal aims to prevent Member States' violations of the rule of law, its efficiency should be measured by analysing the status of the rule of law across the EU, and especially in problematic Member States, and not only by looking at whether EU money has been properly spent.

On the other hand, perhaps being honest about the motive is not essential in the end, as long as the budget-oriented approach, legally backed by Art 322(1)(a) TFEU, is accepted by the EU institutions – including the Court of Justice – and by the Member States. Formulating the Rule of Law Proposal as a financial rule has both legal and logical reasons and can work in practice. This is also certainly not the first time in the history of EU integration that a second-best legal basis has been used for the accomplishment of a desired political or economic change, due to the lack of a better legal basis or for other political reasons. The adoption of the European Stability Mechanism (ESM), the Fiscal Compact and the Single Resolution Fund, in the context of European fiscal and banking integration, illustrates how the EU has managed to find ways to adopt measures necessary to achieve its political and economic goals, despite unwillingness or the lack of an adequate Treaty basis.<sup>45</sup>

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existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), Art 1). For the suggestion that the infringement procedure has the potential to be an effective means for addressing systemic deficiencies in the rule of law, see M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) 55, CML Rev 1061, 1069-1073.

<sup>45</sup> On the discussion of the instrumentalisation of legal tools in the area of fiscal and banking integration, see I Goldner Lang and M Lang, 'Croatia - National Report' in Gy Bándi and others (eds), *European Banking Union* (Wolters Kluwer 2016).

Past experience has shown that even though this is neither legally nor politically the best option, it is clearly better than nothing. Despite its shortcomings, such an instrument can turn out to be a credible and successful tool accepted by all the relevant stakeholders. Nevertheless, it raises moral questions whether it is acceptable for the EU to do what is politically desirable, even if under the rule of law this cannot be done. And what if the same were not done for a 'good cause'?

#### **4.2 A sufficiently direct link**

As noted by the Council Legal Service, not all generalised deficiencies as regards the rule of law are susceptible to having an impact on the effective use of EU funds by the Member States.<sup>46</sup> One could envisage a situation where there is a violation of the rule of law, which is not reflected in the successful use of EU funds. On the other hand, for the suspension of payments to be acceptable under EU law, there needs to be a sufficiently direct link between the potential violation and the risk for the specific operation supported by EU financing.<sup>47</sup> When applied to the Rule of Law Proposal, this would mean that the rule of law conditionality is permissible only provided there is a sufficiently direct link between the violation of the rule of law and the risk of the non-implementation of the operation whose financing is being suspended.

However, when compared to the other existing conditionalities in EU law, the rule of law conditionality contains a less direct link between the violation and the risk of the non-implementation of the intended operation. To give an example, one can compare the rule of law conditionality with the bailout conditionality, used in relation to the European Stability Mechanism (ESM).<sup>48</sup> ESM is one of the measures adopted as a response

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<sup>46</sup> Opinion of the Legal Service on the Rule of Law Proposal, 13593/18, LIMITE, Brussels, 25 October 2018, para 28.

<sup>47</sup> Joined Cases T99/09 and T308/09 *Italian Republic v Commission* ECLI:EU:T:2013:200, para 53.

<sup>48</sup> Even though conditionality is mostly associated with the pre-accession phase, it is also contained in some, though less frequent, instances of the post-accession *acquis*, such as in the measures adopted as a response to the financial crisis in 2010, including the ESM, and in relation to EU funds. For example, for conditionality linked to the European Structural and Investment Funds, see Art 19 and Annex XI (ex ante conditionality), Arts 23 to 25 (spending conditionality), and Art 85 (ex post conditionality) of Regulation 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 ('the Common Provision Regulation' – CPR). For conditionality in the area of the EU agricultural policy, see Art 43 and 47 and Recital 37 in Regulation 1307/2013 establishing rules for direct payments to farmers under support schemes within the frame-



to the financial crisis in 2010. It links a bailout, ie financial assistance to a Member State faced with bankruptcy, with the respective Member State's commitment to reforms and austerity.<sup>49</sup> The ESM contains a direct and precisely defined link between the objective of the ESM and the set conditions of carrying out reforms and austerity measures or, in other words, between the violation of these conditions and the risk of the failure of the ESM. The aim of the ESM is the financial stability of the euro area. Bailout loans to a failing Member State aim to prevent any threats to such stability, whereas the reforms and austerity conditions aim to set the failing Member State on the right economic path, thus preventing new threats to the euro area.<sup>50</sup> On the other hand, the non-implementation of reforms and austerity measures by a failing Member State directly threaten the stability of the euro area. Consequently, there is a sufficiently direct link between the Member State's failure to comply and the proper functioning of the ESM scheme, which results in the Member State's loss of entitlement to ESM financial assistance.

As opposed to the bailout conditionality, the rule of law conditionality contains a less direct link between the objectives and operations performed under EU funds, whose payment can be suspended, and the rule of law condition. Quite the reverse, the Rule of Law Proposal can indirectly change and expand the objectives of EU funds.<sup>51</sup> To give an example, the aim of the European Regional Development Funds (ERDF) is

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work of the common agricultural policy and repealing Regulation 637/2008 and Regulation 73/2009. For conditionality in the area of justice and home affairs, see, for example, Art 3(4) of Regulation 513/2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA. For a discussion of EU spending conditionality, see Viorica Vita, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 *Cambridge Yearbook of European Legal Studies* 116. For a discussion of conditionality in the context of EU bailouts, see, for example, C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10(3) *European Constitutional Law Review* 393.

<sup>49</sup> Treaty Establishing the European Stability Mechanism, D/12/3 Brussels, 1 February 2012 (in particular Arts 3 and 12-18). On the link between the bailout conditionality and solidarity, see I Goldner Lang, 'The EU Financial and Migration Crises: Two Crises – Many Facets of Solidarity' in A Biondi, E Dagilyte and E Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018).

<sup>50</sup> Over the past decade, there has been heated discussion among some of the world's most renowned economists whether austerity is the right answer to a financial crisis. One of the anti-austerity supporters has also been the Nobel Prize winner Paul Krugman. See, for example, P Krugman, 'The Case for Cuts Was a Lie. Why Does Britain Still Believe It? The Austerity Delusion' *The Guardian* (London 29 April 2015) available at <[www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion](http://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion)> accessed 7 April 2019.

<sup>51</sup> This and a number of other critiques have been put forward by several Central and Eastern Member States, such as Poland, Hungary and Slovakia. See E Zalan, 'Poland, Hungary Push Back at EU Budget "Conditionality"' (*EUobserver*, 15 May 2018) <<https://euobserver.com/institutional/141808>> accessed 5 April 2019).

to strengthen economic, social and territorial cohesion in the European Union by correcting the main regional imbalances through investments into sustainable jobs, infrastructure, and SMEs.<sup>52</sup> Even though the success of ERDF investments partly depend on the functioning of the rule of law in the respective Member State, the rule of law need not be the key factor to lead to the successful implementation of a cohesion instrument. There are a number of structural conditions that ensure successful investments, such as education reforms, strengthening research, technological development and innovation, digital plans, energy efficiency, and enhancing the competitiveness of SMEs.<sup>53</sup> Consequently, the causal link between the rule of law condition and the successful implementation of the cohesion measure is not particularly strong here.

In fact, since ERDF investments could be suspended in the case of violation of the rule of law, the rule of law objective could reach an objective diametrically opposed to the one promoted by the ERDF. It can contribute to the continued lagging behind of underdeveloped regions, thus resulting in further divergence among EU Member States and regions – instead of promoting cohesion. This development, coupled with the trend of large-scale emigration (in particular the brain and youth drain) from poorer to richer parts of the EU, and with significant public debt in certain Member States, would make it even more difficult for such Member States to finance current expenditure and public debt, and would result in further economic and social divergence between the poorer and richer parts of the EU. The Rule of Law Proposal does indeed try to ensure that the consequences of the suspension of the funding do not affect the final recipients of the funding, such as local schools, SMEs, Erasmus students, researchers and civil society organisations. The Proposal, thus, envisages that the obligation to implement the programme, and in particular the obligation to make payments to final beneficiaries, falls on the violating Member State and its entities.<sup>54</sup> However, it is highly questionable whether the violating Member State will actually respect its obligation, especially if it is faced with financial difficulties.<sup>55</sup>

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<sup>52</sup> Regulation (EU) No 1301/2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 [2013] OJ L347/289, Arts 2 and 3.

<sup>53</sup> See *ex ante* conditionalities in Regulation 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320.

<sup>54</sup> Rule of Law Proposal, Art 4(2).

<sup>55</sup> It is interesting that, despite the likely impact of the suspension of payments on beneficiaries, the Commission did not carry out an impact assessment. The Commission's deci-

### 4.3 Compatibility with Art 7 TEU

In its Opinion on the Rule of Law Proposal, the Council Legal Service stated that it is necessary to ascertain whether the rule of law conditionality mechanism is compatible with other Treaty-based control and sanction mechanisms, such as Art 7 TEU.<sup>56</sup> A similar issue has already been discussed in several decisions of the Court of Justice, where the Court stated that the conditionality mechanism discussed therein was independent of the infringement procedure contained in Art 258 TFEU, as they served ‘different aims and were subject to different rules’.<sup>57</sup> The Council Legal Service decided to set off from the same starting points – these being that for the Rule of Law Proposal to be compatible with Art 7 TEU, it needs to be based on different rules and have different aims from Art 7 TEU.<sup>58</sup> Otherwise, according to the Council Legal Service, the Proposal would be a mere duplication of Art 7 TEU, which the Treaties would not permit, since the only legal basis in the Treaties that allows sanctions against the rule of law is Art 7 TEU (and infringement procedures), and it does not allow for another mechanism than the one prescribed in this article.

The Council Legal Service first stated that the two procedures were governed by different rules.<sup>59</sup> On the other hand, in order to decide whether the two mechanisms pursued different aims, the Legal Service concluded that it needed to elucidate whether the rule of law conditionality is a genuine mechanism for protecting the financial interests of the Union, and not a sanctioning mechanism for which Art 7 TEU is intended.<sup>60</sup> Upon analysis, it concluded that the Rule of Law Proposal ‘cannot be regarded as independent or autonomous from the procedure laid down in Art 7 TEU, as its respective aims and consequences are not properly distinguished and risk overlapping with each other’, and inferred that the Proposal ‘would in reality establish a parallel mechanism of verification and control of compliance with [...] the rule of law, for which Art 7 TEU

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sion was based on its reasoning that the sole objective of the Proposal is to avoid the Union’s budget being harmed by generalised deficiencies of the rule of law (see the Explanatory Memorandum of the Rule of Law Proposal). According to the Commission, this implies that there the Proposal has no direct economic, environmental or social impacts, which is highly debatable. The opposite view was also expressed in the Opinion of the Court of Auditors, which considered that carrying out an impact assessment before publishing the Proposal would have allowed for better informed decision-making by the legislative bodies (Opinion 1/2018 of the Court of Auditors, 2018/C 291/01, para 18).

<sup>56</sup> Opinion of the Legal Service, 13593/18, LIMITE, Brussels, 25 October 2018, para 17.

<sup>57</sup> Joined Cases 15 and 16/76 *France v Commission* ECLI:EU:C:1979:29, para 26; Case C-325/94 P, Order of the Court, *An Taisce v Commission* ECLI:EU:C:1996:293, para 25; Case C-247/98 *Hellenic Republic v Commission* ECLI:EU:C:2001:4, para 13.

<sup>58</sup> Opinion (n 56) para 17.

<sup>59</sup> Opinion (n 56) para 18.

<sup>60</sup> Opinion (n 56) para 19.

provides the relevant procedure'.<sup>61</sup> The Opinion, therefore, calls upon the legislators to modify the Proposal by strengthening the link between the respect of the rule of law and the protection of EU financial interests, which would, according to the Council Legal Service, make the Proposal compatible with Art 7 TEU.

In a similar tone, when reviewing the legality of the Rule of Law Framework in 2014, the Council Legal Service also stated that 'there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the rule of law by the Member States, additional to what is laid down in Art 7 TEU, neither to amend, modify or supplement the procedure' contained in Art 7 TEU. The Council Legal Service, therefore, concluded that the Rule of Law Framework 'is not compatible with the principle of conferral'.<sup>62</sup> Despite this, the Rule of Law Framework has been in operation since 2014, even though it has not been particularly successful.

What both Opinions try to point out is the lack of a Treaty basis for another rule of law sanctioning mechanism apart from Art 7 TEU (and the infringement procedure contained in Art 258 TFEU). In other words, the logic behind the Opinion of the Council Legal Service on the Rule of Law Proposal is that the Proposal must not represent a parallel mechanism of control of compliance with the rule of law, for which Art 7 TEU is intended, as this is not permissible by the Treaties.<sup>63</sup> According to this reasoning, the Rule of Law Proposal can be based on Art 322(1)(a) TFEU only provided the Proposal is a genuine EU financial management instrument and not a disguised sanctioning mechanism. The way to prove this, according to the Legal Service, is by determining whether there is a sufficiently strong link between the functioning of the rule of law and the implementation of the Union budget. If not, the measure is a disguised sanctioning mechanism and, therefore, a duplication of Art 7 TEU. This would imply that, in such a case, Art 322(1)(a) TFEU would be an incorrect legal basis, even though the Council Legal Service does not say this.

Is this really so? In the previous subsection on the sufficiently direct link, I suggested that the link between the violation of the rule of law and

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<sup>61</sup> Opinion (n 56) para 34.

<sup>62</sup> Opinion of the Legal Service on the Commission's Communication on a new EU Framework to strengthen the Rule of Law – compatibility with the Treaties, 10296/14, LIMITE, 27 May 2014, paras 16 and 28.

<sup>63</sup> For a different view, see KL Scheppele, L Pech and RD Kelemen, '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*, 12 November 2018) <<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/>> accessed 7 April 2019.

the non-implementation of the Union's budget can, indeed, in certain instances, be distant and indirect. From that perspective, I suggested that relying on Art 322(1)(a) TFEU could be problematic, as we are not being honest about the Proposal's key aim and this could also be reflected in how we measure its effectiveness. However, I stated that the link between the rule of law and the use of EU funds certainly exists and, provided EU institutions – including the Court of Justice – accept it, it could turn into a robust instrument with strong effects on Member States' rule of law.

However, two questions need to be addressed before embarking on an examination whether the Rule of Law Proposal is a sanctioning or a financial instrument. First, is it true that Art 7 TEU does not allow the adoption of secondary law instruments? And second, is it true that no other Treaty provision can control Member States' compliance with the rule of law and have a sanctioning effect in the case of a Member State's violation. In other words, can an instrument be a financial instrument with a simultaneous sanctioning effect? If so, such a mechanism could co-exist with Art 7 TEU.

As regards the first question, Art 7 TEU does not seem to envisage the adoption of secondary law instruments. However, the second question is more complex. Art 7 TEU does not state or imply that no other mechanism to protect the values contained in Art 2 TEU would be allowed, so there is nothing to suggest that Art 7 is the exclusive mode of protecting EU values. Consequently, the issue is not whether Art 7 TEU allows another mechanism triggered by violations of the rule of law – as it does not ban it – but rather whether such a mechanism can find an adequate legal basis in the Treaties. (For a discussion on this issue, see the subsection on legal basis.)

Along these lines, the statement of the Council Legal Service that the Rule of Law Proposal must be based on different rules and pursue different aims from the Art 7 TEU mechanism can be read as an assertion of the need to make sure that the Rule of Law Proposal really is a financial instrument correctly based on Art 322(1)(a) TFEU, and not a disguised rule of law instrument. Here, it can be said that, provided the current Proposal is amended to make the interconnection between the rule of law and EU payment more direct, Art 7 TEU and the rule of law conditionality mechanism could be viewed as distinct and autonomous from each other, despite the fact that both instruments aim at ensuring Member State compliance with the rule of law. For the Art 7 TEU mechanism, the preservation of the rule of law and other values contained in Art 2 TEU is its only purpose and target, whereas for the Rule of Law Proposal, the rule of law is the aim to be achieved by EU financial means.

The fact that the suspension of EU payments under the Rule of Law Proposal would in reality have a sanctioning effect does not make this procedure a duplication of Art 7 TEU. This statement is supported by other conditionality mechanisms, which also indirectly protect some of the values contained in Art 2 TEU. As an example, the existing ex ante conditionality, contained in the Common Provisions Regulation, makes Member States' access to funding from the European Structural and Investment Funds conditional on a number of requirements, including anti-discrimination, protection of the rights of persons with disabilities, and gender equality (whereas equality is one of the EU values also proclaimed by Art 2 TEU).<sup>64</sup> The Common Provisions Regulation, and the adhering ex ante conditionality, is based on Art 177 TFEU which regulates the procedure for the definition of the tasks, objectives and the organisation of Structural Funds. Consequently, it has a different legal basis from Art 7 TEU, even though it also promotes one of the EU values contained in Art 2 TEU and has a sanctioning effect on a Member State whose institutional and legal framework does not ensure the protection of equality in the implementation of EU-funded programmes. Nevertheless, the use of ex ante conditionalities in relation to Structural Funds is independent of Art 7 TEU and cannot be seen as its duplication. Similarly, the Proposal for the draft Common Provisions Regulation for the programming period 2021–2027 further strengthens the conditionality mechanism by introducing four horizontal and 16 thematic enabling conditions, some of which are linked to fundamental rights and equality.<sup>65</sup> Again, a Member State's failure to fulfil these conditions could block its access to funds.

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<sup>64</sup> Art 19 and Annex XI of Regulation 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320.

<sup>65</sup> Commission, 'Proposal for a Regulation laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument' COM(2018) 375 final. According to Art 11(1) and Annex III of the draft Common Provisions Regulation, two horizontal enabling conditions are related to fundamental rights. These are the 'effective application and implementation of the EU Charter of Fundamental Rights' and the 'implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in accordance with Decision 2010/48'. In addition, according to Art 11(1) and Annex IV, some of the thematic enabling conditions are related to fundamental rights, such as the requirement to have a National Roma Integration Strategy, national strategic frameworks for gender equality and for social inclusion and poverty reduction.

It is likely that all these conditionality mechanisms, including the rule of law conditionality, would be used, at least partly, because Art 7 TEU is not functional. However, this fact should not be classified as a circumvention of Art 7 TEU, as long as there is an adequate Treaty basis enabling EU institutions to choose and rely on the existing conditionality mechanisms.

#### **4.4 Too much discretion to the Commission?**

The current version of the Rule of Law Proposal lacks sufficiently specific criteria for what constitutes generalised deficiencies of the rule of law which affect or risk affecting EU financial interests.<sup>66</sup> It also lacks clear criteria for the Commission's initiation and handling of the procedure and for determining the extent of a suspensive measure.<sup>67</sup> The authority to establish deficiencies is entirely left to the Commission, which submits a proposal for an implementing act on the appropriate measure to the Council.<sup>68</sup> The decision is automatically adopted by the Council, unless it decides by a qualified majority to reject the Commission proposal within one month of its adoption by the Commission (reverse qualified majority).<sup>69</sup> Authorising the Commission to establish a violation of the rule of law without clear benchmarks, combined with the procedure of adopting the decision based on a reverse qualified majority in the Council, gives too much discretion to the Commission, and opens up the question of its control.

Reverse qualified majority voting ensures the effectiveness of the procedure, but it also significantly increases the Commission's powers and opens up the question of its accountability, especially in circumstances where the Proposal lacks clear criteria for defining the deficiency, handling the procedure, and determining the scope of the suspensive measure.<sup>70</sup> It significantly lowers the majority threshold necessary for

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<sup>66</sup> The definition of a 'generalised deficiency as regards the rule of law' is not sufficiently precise. Art 2(b) of the Rule of Law Proposal states that a 'generalised deficiency as regards the rule of law ... means a widespread or recurrent practice or omission, or a measure by public authorities which affects the rule of law'.

<sup>67</sup> Art 4 of the Rule of Law Proposal envisages the possibilities of suspending commitments, interrupting payment deadlines, reducing pre-financing or suspending payments, all depending on the scope of the deficiency and the budget management procedure. The Proposal provides only very generalised guidelines by saying that the measures taken have to be 'proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law' (Art 4(3)).

<sup>68</sup> Rule of Law Proposal, Art 5(7).

<sup>69</sup> Rule of Law Proposal, Art 5(8).

<sup>70</sup> Reverse majority voting is only rarely applied in EU law. It is used in EU anti-dumping policy (reverse simple majority) and in EU economic governance, in relation to the Six Pack

the adoption of a decision, thus making the adoption of the Commission's proposal almost automatic.<sup>71</sup> Once the Commission has submitted a proposal for an implementing act to the Council, only four Member States representing more than 35% of the EU population suffice for the adoption of the proposal. A short one-month deadline for gathering enough votes against a proposal, as well as the fact that abstentions count as votes in favour of the decision, while the Member State which is the subject of the decision-making cannot take part in the voting, all contribute to the effective adoption of the Commission's proposal. This mechanism not only prevents dead-end situations that arise based on Art 7 TEU, but makes the adoption procedure almost automatic. However, the Commission's increased powers in relation to EU legislative institutions are likely to have an impact on the inter-institutional balance of powers, thus emphasising even more the importance of amending the Proposal by setting clearer criteria to limit its powers.

The deficiencies of the current version of the Proposal have been acknowledged in the opinions on the Rule of Law Proposal by the European Parliament,<sup>72</sup> the European Court of Auditors,<sup>73</sup> and the European Committee of the Regions.<sup>74</sup> All these institutions submitted recommendations for amending the Proposal, which are on the same track. They require clearer criteria and a clearer procedure and scope of suspensive measures and insist on demonstrating how the legitimate interests of the final beneficiaries would be safeguarded. Additionally, the European Parliament requests a stronger role for itself, as the current version of

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and Fiscal Compact (reverse qualified majority). It is also used in the WTO dispute settlement system (reverse consensus). On the pros and cons of reverse majority voting, see W Van Aken and L Artige, 'A Comparative Analysis of Reverse Majority Voting: The WTO's Dispute Settlement Mechanism, the EU Anti-Dumping Policy and the Reinforced SGP and Fiscal Compact', EUSA Thirteenth Biennial Conference, Baltimore, USA, 2013, available at <<https://ssrn.com/abstract=2202787> or <http://dx.doi.org/10.2139/ssrn.2202787>> accessed 7 April 2019.

<sup>71</sup> The votes are counted in accordance with Art 16(4) TEU and Art 238(2) and (3) TFEU. According to Art 16(4) TEU, a qualified majority is defined as 'at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union', whereas a blocking minority must include at least four Council members representing more than 35% of the population of the participating Member States.

<sup>72</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, P8\_TA-PROV(2019)0349.

<sup>73</sup> European Court of Auditors Press Release, 'Plans to Link EU Funding to Rule of Law Are Welcome but Need Better Criteria and More Safeguards, Say Auditors', 17 July 2018.

<sup>74</sup> Opinion of the European Committee of the Regions, 'The Multiannual Financial Framework Package for the Years 2021-2027', COTER-VI/042.



the Proposal grants it solely the right to be informed by the Commission about the proposed or adopted suspensive measure.<sup>75</sup>

## 5 Conclusion

The rule of law, as a construct in today's EU liberal democracy, requires a certain form of political and social behaviour, which is agreed upon by all EU Member States upon accession to the Union. It forms part of the EU social contract and deviations therefrom, especially systemic ones, endanger the functioning of the EU as a whole. Violations of the rule of law also undermine citizens' trust in the EU legal order and can shatter their legitimate expectations of the current system, which is supposed to provide them with legal certainty and protection against arbitrary powers. This legitimises certain forms of legislative force, aimed at protecting the rule of law. The Rule of Law Proposal is an example of such a forcible legislative response to the current political reality in the EU. By the use of the force of law and the power of money – as suggested by the title of this paper – the Rule of Law Proposal aims to compel EU Member States to behave according to the standards they agreed upon when joining the EU. To this effect, the Rule of Law Proposal makes a statement that the health of a Member State's rule of law is not just its internal affair, but that it concerns the EU directly (including the taxpayers of other Member States) through its impact on EU financial resources.

Current trends in a number of EU Member States are a forewarning that inaction could have dangerous political, social and economic consequences. It can stimulate a further weakening of the EU founding values in the respective Member State. It can also have a spillover effect by encouraging the spread of similar behaviour in other Member States. Finally, and of most concern, a passive attitude could lead to a change of standards by which we define the rule of law at the EU level.

Proactive EU-level protection of the rule of law and other EU values is imperative, not only for the sake of preserving these values in the Union, but also for preserving the Union's inward and outward credibility. Past experience, such as the use of mild diplomatic measures of Member States (not the EU itself) against Austria in 2000, as a response to the entry into the Austrian government of Haider's radically right-wing party *Freiheitliche Partei Österreichs*, reveals that the Union's inaction or inadequate reaction to the violation of one of the fundamental EU values in one of the Member States puts at stake both the preservation and perception of these values in the EU, as well as the Union's credibility. The

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<sup>75</sup> Rule of Law Proposal, Art 7.

EU's inaction in these matters means the acceptance of standards different from those aspired to in the Founding Treaties. However, the necessity to act cannot excuse any type of action, unless it is based on EU law.<sup>76</sup> Otherwise, we would end up with the absurd result of a measure aimed at protecting the rule of law, while itself not satisfying rule-of-law standards. The ends cannot justify the means. For this reason, the final verdict would be to go forward with an efficient rule of law mechanism, but to make sure that it satisfies the following two conditions. First, that it legally measures up to the standards it aims to promote. Second, that it does not do more harm than good by increasing economic and social divergence and dissatisfaction among Member States, which would create a climate prone to nationalistic and anti-EU emotions and to new and increasing violations of the rule of law and other EU values.



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<sup>76</sup> For other initiatives that have been put on the table as possible mechanisms aiming at protecting EU values, see A Jakab and D Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017).