Compliance with the Rule of Law in the EU and the Protection of the Union's Budget

Further reflections on the Proposal for the Regulation of 18 May 2018

Lorena Bachmaier

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ABSTRACT

Strengthening the rule of law – and in particular judicial independence – has been on the EU agenda for several years and it is still a high priority. The situation in Poland and Hungary has confirmed that the measures provided in the Treaties are not sufficient to effectively counteract certain risks or infringements of the rule of law that may occur in the Member States. On May 2018, the Commission presented the Proposal for a Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States. In general, the proposed Regulation allows activation of a system to block access to EU funds in order to protect the Union's financial interests from the risk of financial loss in the event of "generalised deficiencies" as regards the rule of law are detected.

This paper will discuss the justification of this proposed Regulation and highlight the difficulties in assessing risks for the rule- of- law affecting the financial interests of the Union and the perils that the proposed monitoring procedure could entail. The issue is not whether the rule of law needs to be protected more effectively, the question is how to do it, without endangering other equally important values in the European Union.

AUTHOR

Lorena Bachmaier
Full Professor of Law
Universidad Complutense Madrid

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I. Introduction

On 24 June 2019, the ECJ rendered its judgment on the infringement procedure launched against Poland in October 2018, holding that Poland has failed to comply with EU obligations as regards Art. 2 TEU and Art. 47 of the Charter.[1] This judgment confirms the jurisdiction of the ECJ to check compliance with judicial independence by national courts under Art. 19(1) TEU, as done previously in the benchmark judgment *Associação Sindical dos Juízes Portugueses*.[2] In the present judgment, the Court underlines the significance of respecting the common values upon which the EU is founded – to respect the rule-of-law principles in order to maintain mutual trust. And the Court will continue to play a decisive role in ensuring compliance with the rule of law. However, there is still the question whether the existing mechanisms at the EU level are sufficiently effective to protect the rule of law and, in particular, to protect the financial interests of the EU.

In 2012, former President of the European Commission, *José Manuel Barroso* already said: "We need a better developed set of instruments not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Art. 7 TEU."[3]

Strengthening the rule of law – and in particular judicial independence – has already been on the EU agenda for several years[4] and it is still a high priority.[5] The situation in Poland and Hungary has confirmed that the measures provided in the Treaties are not sufficient to effectively counteract certain risks or infringements of the rule of law that may occur in the Member States.[6] On 2 May 2018, the Commission presented the Proposal for a Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States (hereinafter "the Proposal" or PR RoL).[7] In general, the proposed Regulation allows activation of a system to block access to EU funds[8] in order to protect the Union's financial interests from the risk of financial loss in the event of "generalised deficiencies" as regards the rule of law.

The EU has realised that the extensive control and conditionality undertaken at the accession stage as to compliance with the rule of law is, if not completely absent, quite inefficient at a later stage. Bearing in mind the crucial value of the principle of the rule of law set out in Art. 2 TEU – as the backbone of modern constitutional democracy –[9] and its significance for the EU, the Commission endeavours to avoid future cases when it would again face the lack of sufficient means to uphold respect for the rules of the game.[10] Although there are already different checks in place to ensure that the EU funding is being implemented effectively and correctly, the Proposal seeks to interlink sound management of the long-term budget with respect for the rule of law.[11]

I do not intend here to analyse the actual and historical meaning of the concept of the rule of law, as there is certain consensus on the main elements of the rule of law, which are explicitly listed in the Proposal, following – with slight differences – the elements already set out in the leading international documents and guidelines.[12] It is also not my intention to address the deficiencies of the present mechanisms – namely the Art. 7 TEU procedure, the infringement procedure before the ECJ, or the RoL Framework – when dealing with systemic risks detected in certain Member States.[13] There is no doubt that the rule of law in the EU needs to be further strengthened, the risks better assessed, and that an integral monitoring system might be necessary. The question is how to do it and which mechanism should be adopted.

This paper will discuss some aspects of the proposed Regulation, in particular its justification and the system provided for assessing the rule-of-law risks affecting the financial interests of the Union. Using the example of judicial independence, which is one of the core elements of the separation of powers and the rule of law, I will attempt to show how difficult it is in practice to assess the level of judicial independence in a

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country and thus how risky it could be to link financial sanctions to those deficiencies. Unless otherwise indicated, the text analysed here is the amended text of the Proposal for a Regulation of 17 December 2018 after the first reading at the European Parliament.

II. Financial Sanctions for Non-Compliance with the Rule of Law: The Main Features of the Proposal

Financially sanctioning EU Member States for non-compliance with the rule of law is an approach that has been very much contested, as it implies a risk of loss of cohesion among the States. Moreover, the mechanism would only be efficient with those poorer countries that are net recipients of European funds and might "cement economic disparities between Member States."[14] It could also be argued that these types of sanctions would have counterproductive effects in relation to populism and anti-European feelings in the countries affected by these measures.[15] Ultimately, by targeting certain non-compliant governments, the consequences of the sanctions could end being supported by the citizens and by the EU itself. Contrary to these arguments, it can be said that the conditionality system is not new in the EU: it applies to the EU enlargement process (Copenhagen criteria)[16] with regard to compliance with the excessive deficit prescriptions and also with regard to the major EU spending programmes, where the payments can be cut if the required conditions are not met. And there is no evidence that such a conditionality system has produced adverse effects for EU integration or cohesion.[17]

To monitor the situation as regards the rule of law, the Proposal foresees the setting up of a panel of independent experts to assist the Commission in identifying generalised deficiencies. This panel is to be made of experts in constitutional law and financial matters who are appointed by the national parliaments and five experts by the EU Parliament to assess the situation in all Member States – on the basis of quantitative and qualitative criteria and taking into account all available information mentioned under Art. 5 PR RoL. The panel shall publish a summary of its findings every year.

The procedure for adopting financial measures – mainly the suspension of payments – shall follow the principles of transparency and proportionality set out in Art. 5 PR RoL: upon finding a possible situation of generalised deficiencies as regards the rule of law in a Member State – taking into account the assessment of the panel of experts and all other sources of information –, the Commission shall notify the relevant Member State, the Council, and the European Parliament of the existence of a possible risk for the financial interests of the EU.

After having heard the observations of the relevant country and having analysed all the information received if the Commission considers a generalised deficiency to exist, it will adopt a decision proposing "to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted" (Art. 6a PR RoL). The EU Parliament and the Council shall deliberate on this proposal within four weeks of receipt, and the decision will be considered approved if neither the European Parliament (by majority of votes cast) nor the Council (by qualified majority) amend or reject it. After adoption, the financial measures will be lifted as soon as the deficiencies cease to exist in the Member State concerned.

This mechanism targets the authorities and should not affect the citizens as ultimate beneficiaries of the EU funds. It seeks to provide for a swift and quick response in case of violations of the rule of law as defined in the Proposal. It avoids requirements of unanimity and lengthy proceedings, providing for adoption unless there is a reverse majority on the part of the EP and the Council. Although a major involvement of the Parliament by requiring a majority vote for adopting the sanctions would be more in line with the principle of democratic legitimation, it is also logical that the proposed Regulation opts for the adoption upon a reversed

majority, as such system certainly promotes the swiftness of the whole procedure. This procedure can run in parallel to the other EU mechanisms provided to ensure the rule of law.

III. Strengthening the Rule of Law or Protecting Union's Budget?

The Proposal is justified not so much as a mechanism to ensure compliance with the rule of law through the possible adoption of financial measures but instead the other way round, as a system to protect the Union's financial interests in a swift and effective way, namely when they are endangered by generalised deficiencies of the rule of law affecting, in particular, institutions dealing with the Union's budget, its spending, and the investigation of fraud.[18]

If the rule of law conditionality seeks primarily to protect the financial interests of the Union, some kind of link should be present between the deficit detected and any risks for the sound financial management of the EU budget. It goes without saying that any institutional weakness – for example, the institutional setting of the justice system – can have an adverse impact on implementation of the law and thus also on the protection of the financial interests of the EU. In abstract, any deficit in the proper functioning of the States' institutions poses a risk for the Union's budget, be it because spending is not adequately controlled, because fraud occurs, or because fraud is not investigated or sanctioned.

The proposed Regulation establishes such an automatic link, so that economic measures could eventually be adopted, even if, in practice, deficiencies in the rule of law have had no impact on the Union's budget or there is no evidence of an actual risk to the financial interests of the EU. The Proposal's approach suggests that the aim is to monitor compliance with the rule of law, even if there is no direct link on the financial interests of the EU, just because the rule of law is defined as a pre-condition for the sound management of the Union's budget.

This objective approach indeed allows for broad monitoring of the public administration or the justice system of any Member State. A closer look at Art. 2a PR RoL (generalised deficiencies) and Art. 3 PR RoL (risks for the financial interests of the Unions), reveals that they confirm the breadth of the control the Commission may exercise upon the Member State's institutional setting. For example, the following shall, in particular, be considered "generalised deficiencies" as regards the rule of law (Art. 3.2 PR RoL, text of 17.12.2018):

"(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;"

Under Art. 3.1 PR RoL, the risks to the financial interests are, *inter alia*:[19]

"(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;

(aa) the proper functioning of the market economy, thereby respecting competition and market forces in the Union as well as implementing effectively the obligations of membership, including adherence to the aim of political, economic and monetary union;

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(ab) the proper functioning of the authorities carrying out financial control, monitoring and internal and external audits, and the proper functioning of effective and transparent financial management and accountability systems;

(b) the proper functioning of investigation and public prosecution services in relation to the prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget;

(c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (a b) and (b);"

Ultimately, the ample concept of "generalised deficiency" under Art. 2a PR RoL coupled with the risks to the Union's budget identified in Art. 3.1 PR RoL gives the EU Commission full-scale power to assess the functioning of almost every institution in a given country. In other words, the type of generalised deficiencies that are to be prevented – and that can eventually lead to sanctions – allow compliance with the rule of law to be controlled, even when there is no clear connection with a risk to the financial interests of the EU for the simple reason that the proper functioning of the public administration and the justice system is a prerequisite for sound financial management of the Union's budget.

In view of these monitoring/sanctioning powers, it appears that the general aim of the proposed Regulation is to control compliance with rule of law standards, regardless of their actual impact on financial management, upon the assumption that any improper functioning of the institutions may theoretically affect the protection of the EU's financial interests. Therefore, even if the detected deficiencies do not clearly fit into the traditional understanding of generalised infringement of rule of law principles, sanctions could be adopted under this instrument.

This discussion could be considered irrelevant and it could be argued that, in the end, it does not matter what the primary aim of the proposed Regulation is, as long as the two objectives –strengthening the rule of law and protecting the financial interests of the EU – are ensured. However, to my mind, this question is not completely irrelevant, as the task of the panel of experts and the scope of the assessment of the EU Commission will necessarily be determined by the objective pursued. Should the panel of experts focus their evaluations and possible opinions (recommendations) on general breaches of the rule of law principles or only on those that may affect the sound financial management of the Union's budget, as listed under Art. 3 PR RoL? Should the EU trigger the sanctioning procedure, even if the infringements found may hardly have any impact on the financial management of EU funds?

The problems of the broad scope of application of the sanctioning system in the proposed Regulation might be better illustrated with one example. Let us say that in a certain Member State the self-governing body of the judiciary (e.g., the council for the judiciary) is considered to be politicised, because its composition is not compliant with the European standards for ensuring judicial independence, due to the fact that the majority of its members are appointed by the executive. Such a system would clearly not be in compliance with the rule of law requirements as regards to the judicial independence.[20] But, at the same time, the same country neither presents problems with the public administration handling EU funds, nor does it present problems of corruption, and the fraud offences are investigated and sanctioned effectively. According to the Proposal, could the Commission trigger the procedure to suspend payments to this country? If the aim is to protect the rule of law – in general –, the answer is clearly yes; but, if the objective is to protect the Union's budget, in our example there would not be a risk for the "proper functioning" of sound financial management but only a remote or indirect risk for the financial interests of the EU.

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Clarification on what the primary aims of this mechanism are is also relevant for the activities of the panel of experts set out under Art. 3 PR RoL.[21] As their findings will be published on an annual basis, it can happen that, even before any mechanism is triggered by the EU Commission, there is already a "blame and shame" action damaging the reputation of a Member State for issues unrelated to the sound financial management of the Union's budget.

While the impact of some deficiencies in the sound management of the EU's financial interests appears to be only hypothetical or diffuse, this is not the case with regard to the risk defined under Art. 3.1 (f) PR RoL:

"(f) the effective and timely cooperation with the European Anti-fraud Office and, subject to the participation of the Member State concerned, with the European Public Prosecutor's Office in their investigations or prosecutions pursuant to their respective legal acts and to the principle of loyal cooperation;"

Following this provision of the proposed Regulation, the lack of cooperation with the EPPO or OLAF – when widespread and recurrent – should/could lead to the adoption of financial cuts to a relevant country, even if this infringement would traditionally not be considered a generalised breach of the rule of law (but only a dysfunction in an investigative body). The same would apply to the risk described under Art. 2a PR RoL.[22]

IV. The Difficulties in Assessing "Generalised Deficiencies": The Example of the Judicial Independence

As already seen, the concept of "generalised deficiencies" as regards the rule of law (Art. 2 in connection with 3 PR RoL) is so broad that gives a wide margin for action to the EU Commission in assessing the proper functioning of the institutions in a Member State. The methodology in making such an assessment together with the process for adopting the decision to impose financial measures on a Member State shall ensure that sanctions be imposed only when strictly necessary.

Assessment on the existence of generalised deficiencies with regard to the rule of law is to be objective, impartial, and transparent, constituting a thorough qualitative and quantitative evaluation.[23] The EU Commission shall take into account all relevant information and also apply the Copenhagen criteria used in the context of Union accession negotiations – which, it goes without saying, should continue to apply after accession. Art. 5.2 PR RoL attempts to ensure the adequate procedure and methodology, by listing the opinions, reports, and other criteria that are at least to be considered by the EU Commission. These are:

"opinions of the Panel, decisions of the Court of Justice of the European Union, resolutions of the European Parliament, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations and networks."[24]

While this approach is positive, it still leaves a wide margin of discretionary power to resort to this sanctioning scheme, as certain deficiencies of the rule of law are not only difficult to assess but can also be assessed quite differently by different bodies and international organisations.

To highlight the complexity this assessment entails, I will focus on the judicial independence of national courts, due to its relevance for the rule of law as well as for EU law, as they are the first guardians who ensure that the rights and obligations provided under EU law are enforced effectively.[25] In this context, it can be said that checking whether a given legal framework complies with the principle of judicial independence and provides for the necessary safeguards is usually not very difficult: there is general agreement on the

standards that are to be applied, as set out in the Council of Europe Recommendation (2010)12 entitled "Judges: independence, efficiency and responsibilities" adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. If the law is not in conformity with these standards, the rule of law deficit can be directly identified at the legislative level.

However, it is more complicated to establish to what extent judicial independence is safeguarded in practice: legislation is one thing and implementation is another. And it is at this point that the assessment leaves a lot of space for uncertainties, because collecting reliable data is not easy.[26]

Most assessments on the judiciary focus more on the quality and efficiency of the justice system, where the indicators are more clearly defined and more objectively applied. This is the case, for example, for the CEPEJ reports elaborated within the Council of Europe.[27]

Within the EU, the Justice Scoreboard[28] provides for a comparison tool that seeks to assist the EU and the Member States in improving the effectiveness of their national justice systems by providing objective, reliable, and comparable data on a number of indicators relevant for the assessment of the quality, independence, and efficiency of justice systems in all Member States.[29] The Justice Scoreboard uses CEPEJ data and perception indicators (of citizens, court users, and of the judges themselves) and, following this assessment, recommendations are sent to the Member States for improvement of their justice systems. Even if these assessments provide useful statistical data, they are not in themselves conclusive as to compliance with the rule of law principles and need to be interpreted correctly.[30] Analysing, for example, the EU Justice Scoreboard's comparative table for 2017 "On the perceived independence of courts and judges among the general public," it can be seen that Poland scores better than Spain (one position) and much better than Belgium. And this does not necessarily mean that Spain or Belgium present "generalised deficiencies" as to judicial independence but that the citizens show such perception – which may be influenced by many factors, the media, or their understanding of the required separation of powers.

This example shows that assessing compliance with the rule of law or the generalised deficiencies affecting the financial interests of the EU is extremely difficult – save when the shortcoming is at the legislative level. The panel of experts and the EU Commission will have to be careful in this regard, because such assessments are not immune to political interests and majorities. The risk that certain countries may be put under stronger scrutiny than others presenting similar risks undoubtedly exists in the mechanism set out in this Proposal for a Regulation. And the risk that the focus is put on the legal framework rather than on actual implementation is also present.

V. Concluding Remarks

I fully share the opinion that it is necessary not only to strengthen compliance with the rule of law in all Member States but also to establish mechanisms that allow EU institutions to correctly assess the possible risks or actual infringements of the rule of law – preferably at a preventive stage – and to be able to reinforce the EU's most important values.

The proposed Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States was developed in response to the acknowledgement that no swift, effective response is currently coming from the Union institutions, in particular to ensure sound financial management (Recital 10a). But when dealing with infringements of or risks for the rule of law detected in a certain Member State, it is important that the steps taken and the decisions adopted under this new mechanism do not cause an even greater detriment to the EU's values.

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The broad definition of the concept of "generalised deficiencies" of the rule of law related to the sound financial management of the Union's budget, practically opens the door for an assessment on the functioning of all public institutions, as most of them have an impact on the administration of financial funds and thus on the EU budget.

The proposed Regulation not only induces a reactive response – in case of risks detected – but a preventive monitoring system to assess compliance with the rule of law in every Member State. This relevant task – carrying out an integral monitoring system – is entrusted to a panel of experts. While an extensive monitoring action might be necessary to take stock of the situation or risks and provide an objective assessment, there is also the risk that such a generalised monitoring mechanism may end up undermining the principle of mutual trust among the Member States. If the EU is trying – by way of an amendment, to Art. 3 PR RoL – to introduce its own "EU Venice Commission," a clear mandate should be agreed upon for this new EU body. As the proposed panel of experts will publish the results of their monitoring activity, and its opinions shall be taken into account by the EU Commission in the adoption of any sanctions – although not binding –, this panel needs to meet the highest standards in integrity, independence, and capacity.

Lastly, the peril that sanctions could be applied in a selective, politicised way, according to political majorities existing in the panel of experts or the other bodies involved in the decision, needs to be avoided: targeting certain Member States for risks that are also present in other Member States may ultimately lead to the undermining of essential values within the European Union, e.g., loyal cooperation, solidarity, and the mutual trust. Lack of respect for the rule of law can undermine the EU's values, but enforcing the rule of law with a financial sanctioning system can have even more damaging effects.

The introduction of a financial sanctioning system, such as the one foreseen in this Proposal, although it can undoubtedly be very effective and have a strong deterrent effect in preventing infringements of rule of law principles, can also lead to a polarisation within the EU. In the end, this could have a negative impact on the cohesion and integration needed. "Only by acting together and defending our common values the EU can tackle the major challenges of our time while promoting the well-being and prosperity of its citizens."[31] In opting for strong responses to non-compliant Member States, the risk of dividing the European Union should not be overlooked.[32]

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1. ECJ of 24 June 2019, C-619/18 *Commission v Poland,* in which the Court finds that the measure lowering the retirement age of the Polish Supreme Court judges and applying that measure to the judges in post appointed to that court, is not justified by a legitimate objective and goes against judicial independence.↩
2. ECJ of 27 February 2018, C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.↩
3. See Annual State of the Union speech to the European Parliament, September 2012, http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm↩
4. See the Communication from the Commission to the European Parliament and the Council "A new Framework to strengthen the rule of law", COM(2014) 158 final/2, 19 March 2014.↩
5. As seen on the agenda of the recent informal meeting of Justice and Home Affairs Ministers, 18-19 July 2019, Helsinki on "Future of Justice: strengthening the Rule of Law. Independence, quality and efficiency of national justice systems and the importance of a fair trial".↩
6. Problems already highlighted in the EP Report of 23 June 2013 (rapporteur Rui Tavares) "On the situation of fundamental rights: standards and practices in Hungary" (pursuant to the European Parliament resolution of 16 February 2012, (2012/2130(INI)).↩
7. 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 of 2 May 2018, COM/2018/324 final – 2018/0136 (COD), adopted under Art. 322(1) (a) TFEU and Art. 106 a Treaty Euratom. As often happens in EU legislation, the text of the proposed Regulation is very brief, comprising only eight short provisions, while the initial 18 Recitals and the Explantory Memorandum contain the more detailed approach.↩
8. The Proposal avoids using the term "sanction" and uses the term "financial measures" (Art. 4 PR RoL), although they amount to economic sanctions in the final analysis.↩
9. See the *Explanatory Memorandum* of the Proposal.↩
10. D. Lilkov, "A step too far? The Commission's proposal to tie EU budget payments to compliance with the rule of law", in *London School of Economics: EUROPP Blog*, 2.10.18, accessible at http://blogs.lse.ac.uk/europpblog/2018/10/02/a-step-too-far-the-commissions-proposal-to-tie-eu-budget-payments-to-compliance-with-the-rule-of-law/.↩

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11. As T. Wahl puts it: "This new legal framework would go beyond the current rules by which the EU Member States and its beneficiaries must already show that their rules and procedures for financial management of EU money are robust and that funding is efficiently protected from abuse or fraud." *eucrim* 1/2018, 13. On the main features of this Proposal, see also B. Ward and T. Gardos, "EU Looks to Rein in Funding to Abusive EU Governments", *Human Rights Watch: News*, 3.5.18, at https://www.hrw.org/news/2018/05/03/eu-looks-rein-funding-abusive-eu-governments.↩
12. See, for example, the 2016 *Venice Commission Check List*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), or the UN Rule of Law Indicators of 2011 (focused on criminal justice institutions). For a comprehensive approach to the rule of law "ingredients," see T. Bingham, "The Rule of Law"*, Cambridge Law Rev.* 67 (2007), pp. 67–85.↩
13. The problems detected in Poland and Hungary have already been described in detail, and it is neither my intention to recall the steps taken by the EU institutions and the Council of Europe in this regard nor to analyse the deficiencies of the Art. 7 TEU procedure or the limits of the infringement procedure before the ECJ. The results of all these efforts are known, as is the lack of progress in the dialogue established within the RoL Framework. For a detailed description, see of D. López Garrido and A. López Castillo for the European Parliament's AFCO Committee, "The EU Framework for enforcing the respect of the rule of law and the Union's fundamental principles and values", Policy Department for Citizen's Rights and Constitutional Affairs, January 2019, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU(2019)608856_EN.pdf↩
14. See J. Selih, I. Bond, C. Dolan, "Can EU Funds Promote the Rule of Law in Europe?", Centre for European Reform, November 2017, p. 12, available at https://cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf.↩
15. For F. Heinemann, the arguments against this conditionality system do not necessarily hold true; see "Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework", *Intereconomics*, Vol. 53, No. 6 (Nov.–Dec. 2018), pp. 297–298, accessible at: https://archive.intereconomics.eu/year/2018/6/going-for-the-wallet-rule-of-law-conditionality-in-the-next-eu-multiannual-financial-framework/.↩
16. See F. Schimmelfennig and U. Sedelmeier, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", (2004) 11 *Journal of European Public Policy*, 661–679.↩
17. In this sense, F. Heinemann, *op. cit.*, p. 6.↩
18. See *Recital* 10 (a), Art. 3 PR RoL, and *Recital* 11. Also, *Recital* 4 of the PR RoL, where it is stated that the rule of law is "an essential precondition" to complying with the principles of sound management of the Union's budget. *Recital* 10 establishes the clear relationship between the rule of law and the efficient implementation of the Union's budget.↩
19. According to the text after the amendments adopted by the EU Parliament as of 17 January 2019, available at http://www.europarl.europa.eu/doceo/document/TA-8-2019-0038_EN.html. On the decision of the EU Parliament, see T. Wahl, *eucrim* 1/2019, p. 16.↩
20. See Council of Europe Recommendation CM Rec(2010)12, para. 27.↩
21. This panel of experts was not foreseen in the initial text of the Proposal for a Regulation. While being useful in assisting the EU Commission in assessing the situation in a relevant country with regard to compliance with the rule of law and to the risks for the EU's financial interests, the EU ultimately seems to be creating a sort of monitoring system through the back door to control and "blame and shame" the Member States; this is something that will have an impact far beyond the protection of the Union's budget.↩
22. Art. 2.a (e) PR RoL, after the amendments adopted by the European Parliament as of 17 January 2019: *"measures that weaken the protection of the confidential communication between lawyer and client."* I fully agree that this is a serious violation of the fundamental right to defence, but it is unclear why this infringement is introduced here and not other severe violations of human rights. The Explanatory Memorandum does not give any further indication on the reason for specifically mentioning this safeguard here and not others.↩
23. *Recital 12* E.M.↩
24. See also *Recital* 12 PR RoL, which includes a more comprehensive list of sources to be taken into account, expressly mentioning the judgments of the ECtHR and the Venice Commission opinions as well as the resolutions of the EU Parliament and the reports of the Court of Auditors. *Recital* 8 (a) advocates integrating the diverse monitoring mechanisms already existing in the EU, such as the Cooperation and Verification Mechanism, the Justice Scoreboard, and the Anti-Corruption Reports.↩
25. As underlined by the ECJ (Grand Chamber) in its judgment of 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.↩
26. See L. Bachmaier, "Judicial Independence in the Member States of the Council of Europe and the EU: Evaluation and Action", (2019) *ERA Forum*, 113–127.↩
27. Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ). It undertakes annual evaluations of the judicial systems of the 47 Member States, focusing not only on their efficiency but also on their quality and effectiveness. Certainly, specific questions, e.g., those related to the recruitment or transfer of judges, have an impact on judicial independence, but CEPEJ does not aim to provide an assessment on judicial independence.↩
28. For the 2019 Justice Scoreboard, see T. Wahl, "2019 EU Justice Scoreboard: Downward Trend for Judicial Independence", *eucrim* 1/2019, 7.↩
29. For a detailed analysis on the methodology used when elaborating the EU Justice Scoreboard, see E. Mak and S. Taekema, "The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application", (2016) 8 *Hague Journal Rule Law,* 25, 31 *et seq.*↩
30. L. Bachmaier, *op. cit.* (n. 26), 118. In the same sense, E. Mak and S. Taekema, *op. cit.* (n. 29), 40, who are critical as to the use of the EU Justice Scoreboard to assess constitutional values and compliance with the rule of law.↩
31. Discussion paper for the informal meeting of Justice and Home Affairs Ministers of 18–19 July 2019, Helsinki, p. 1, available at https://eu2019.fi/en/events/2019-07-18/informal-meeting-of-ministers-for-justice-and-home-affairs.↩
32. As Commission President *Juncker* said with regard to the German proposal to link budgetary transfers to the rule of law "but I believe it won't be helpful divide the European Union […] that would be poison for the Continent", as quoted by F. Eder, "Juncker: German plan to link funds and rules would be 'poison'", *Politico*, 6 January 2017, at www.politico.eu/article/ juncker-german-plan-to-link-funds-and-rules-would-be-poison/.↩

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