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Suspension of EU funds paid to Member States breaching the rule of law – could the Commission have done it better?

Keywords: rule of law, EU funds, illiberal democracy, financial interests of the European Union, Art. 2 TEU, Art. 7 TEU, general infringement procedure

In the European debate over the alleged breaches of the rule of law by Hungry and Poland it is increasingly pointed out that the EU does not have effective legal instruments to stop such violations.[1] Those who believe in the driving force of enforcement measures argue that maybe changes could bring about the threat of suspending EU funds dispersed to these Member States from the EU budget, and increase the political consequences their illiberal governments could experience at the national level.[2] In response, the Commission presented, on 2 May 2018, a Draft Regulation authorizing the Council to suspend EU funds if a Member State is found to be in non-compliance with the rule of law (known as 'the conditionality mechanism'). [3] This paper comments on the proposed model for this mechanism, which is supposed to apply after January 2021.

It can be said at the outset that the premises required for launching this mechanism have been formulated extremely broadly, leaving the Commission and the Council, who will initiate it, with a considerable margin of manoeuvre. The Member States whose EU funds are

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[1] Carlos Closa, Dimitry Kochenov, *Reinforcing rule of law oversight in the European Union* (Cambridge University Press, 2016); András Jakab and Dimitry Kochenov, *The enforcement of EU law and values: ensuring Member States' compliance* (Oxford University Press, 2017); Werner Schroeder, *Strengthening the rule of law in Europe* (Hart Publishing, 2016); Armin Hatje, *Liability of member states for the violation of fundamental values of the European Union* (Baden-Baden, Nomos, 2018); Marios Costa, *The accountability gap in EU law* (London, New York, Routledge, 2017); Theodore Konstadinides, *The rule of law in the European Union* (Oxford, Portland, Oregon: Hart Publishing, 2017).

[2] However, some authors rightly point out that there are already some legal instruments available that the Commission could use to stop breaches of the rule of law. See: Daniel Kelemen, Kim Lane Scheppele, "How to Stop Funding Autocracy in the EU'', VerfBlog (10.9.2018), https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/. These authors claim that such a breach could be treated as a serious deficiency in the effective functioning of the management and control system and lead the Commission to impose financial corrections on the violating State, thus recovering from it the EU funds paid. See: Art. 145 (7) Regulation (EU) No 1303/2013.

[3] Proposal for a regulation of the European Parliament and of the Council on the protection of the Union budget in the event of generalized gaps in the rule of law in the Member States (COM (2018) 324 final), hereinafter: Draft Regulation. See also comments by Gábor Halmai, "The possibility and desirability of economic sanction: the rule of law against the EU Member States", 2018/06, EUI Working Paper LAW, http://cadmus.eui.eu/handle/1814/51644.

to be suspended can easily lose them forever if, within two years from the year of suspension, they do not eliminate the alleged breach of the rule of law and have both the Commission and the Council lift the suspension. Even though the suspension should only affect Member States, beneficiaries of EU funds (including e.g. farmers) may also suffer from it, with no legal protections established. Doubts also arise as to the relationship between the conditionality mechanism and the Art. 7 TEU procedure. All these reservations lead to the question: Could the Commission, the author of this Draft, have done it better?