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## **OPINION OF THE LEGAL SERVICE<sup>1</sup>**

Subject: 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

- Compatibility with the EU Treaties

### **I. INTRODUCTION**

1. During the meeting of the Ad Hoc Working Party on the Multiannual Financial Framework (MFF) of 4 September 2018, delegations raised various issues of compatibility with the Treaties of the Commission proposal for the establishment of a mechanism on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States ("the proposal").<sup>2</sup> In particular delegates raised issues concerning the

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<sup>2</sup> Proposal of 2 May 2018 for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, doc. 8356/18.

compatibility of the proposed mechanism with Article 7 of the TEU, the choice of Article 322(1)(a) TFEU as an appropriate legal basis and the legality of the procedure for the adoption of measures under the mechanism. This opinion responds to that request.

## **II. LEGAL AND FACTUAL BACKGROUND**

2. The Commission proposal is based on the premise that respect of the rule of law is an essential precondition to comply with the principles of sound financial management, in accordance with which the budget shall be implemented as provided for in Article 310(5) TFEU,<sup>3</sup> as well as to guarantee the effective protection of the financial interests of the Union (recitals 4 and 11). Thus generalised deficiencies as regards of the rule of law in the Member States entail the risk of financial losses which justify the adoption of measures for the protection of the Union's budget (Article 1).
3. Article 3 of the proposal establishes in broad terms the triggering conditions for the adoption of the measures:

*"Appropriate measures shall be taken where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union".*

4. The provision further provides a list of possible situations in which the malfunctioning of public authorities in a Member State affects the sound and efficient implementation of the Union budget (Article 3(1) of the proposal). Additionally, Article 3(2) of the proposal provides a list of possible examples of generalised deficiencies as regards the rule of law.

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<sup>3</sup> Cf. also Article 2(59) of the Financial Regulation: "'sound financial management' means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness" and Article 6; Several other provisions of the Financial Regulation further detail and refer to this principle.

5. Measures to be adopted are defined in Article 4. They vary depending on the method of implementation of the budget in a specific case. In case of direct or indirect management, measures can be adopted only where a government entity is the recipient of the funding and can consist either in a suspension of payments or in the suspension or termination of a legal commitment or in the prohibition to enter into new legal commitments. In case of shared management a wider number of options are envisaged, including the suspension of the approvals of programmes, a reduction of commitments, the transfer of funding to other programmes and a reduction of pre-financing.
6. Article 4(2) of the proposal aims at protecting the position of the individuals who are the final recipients or beneficiaries of the funds and to that effect clarifies that the imposition of appropriate measures shall not exonerate Member States from their obligation to make the relative payments.
7. The conditions for the determination of the specific measures to be adopted in a given case are defined in Article 4(3) of the proposal, according to which:

*" the measures taken shall be proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law. They shall, insofar as possible, target the Union actions affected or potentially affected by that deficiency".*
8. Finally, Article 5 of the proposal sets out the procedural framework for the adoption of the measures by means of an implementing act of the Council on the basis of a Commission proposal. The Commission shall submit its proposal after having given the concerned Member State the possibility to express its observations on the reasons why the Commission considers that a generalised deficiency as regards the rule of law might exist, and after having taken them into account. The decision is deemed to be adopted unless the Council decides, by qualified majority, to reject the Commission's proposal within one month ("reversed qualified majority"). The Council can also amend the Commission's proposal by qualified majority (Article 5(8)). The same procedure applies for the lifting of measures in case the generalised deficiency as regards the rule of law has been remedied or has ceased to exist (Article 6).

### **III. LEGAL ANALYSIS**

9. The Legal Service will now examine in turn the three questions addressed to it:
- Whether the proposal is compatible with Article 7 TEU.
  - Whether the legal basis proposed for adopting the proposal - Article 322(1)(a) TFEU - is a suitable one.
  - The legal feasibility of the procedure for adopting measures under the mechanism (i.e., the implementing power of the Council to be exercised by reversed qualified majority).

#### **A. WHETHER THE PROPOSAL IS COMPATIBLE WITH ARTICLE 7 TEU**

*i) Preliminary remarks*

10. As the Legal Service had already the occasion to stress the relevant articles of the Treaties with respect to remedies and sanctions against Member States are exhaustive. The only procedures available for dealing with Member States which fail to fulfil an obligation under the law of the Union are those laid down in the Treaties themselves.<sup>4</sup> This is the case of Articles 258 to 260 TFEU (actions for infringement before the Court of Justice) and of Article 7 TEU, that lays down a procedure for verifying and ensuring compliance with the fundamental values on which the Union is founded. This opinion does not directly analyse the proposal under the prism of Articles 258 to 260 TFEU, the action for infringement. However, the elements in the analysis under this point referring to genuine conditionality equally apply in the context of such an assessment.

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<sup>4</sup> Contribution of the Council Legal Service of 26 July 2012, doc. 12944/12, para. 8; contribution of the Council Legal Service of 30 March 2012, doc. 8122/12, para. 5; opinion of the Council Legal Service of 25 September 2009, doc. 13736/09, para 8, and the additional references mentioned in para 1 of this opinion.

11. It has to be stressed that Article 7 TEU plays a very specific role in the system of remedies envisaged by the Treaties since it exceptionally empowers the Union institutions to review the respect by Member States of the fundamental values of the Union also in areas that are not related to a specific material competence of the Union or that exceed its scope, and that are therefore purely internal to the Member State concerned.<sup>5</sup>
12. As a consequence, the procedure envisaged in Article 7 TEU is accompanied by strong safeguards. These include a preventive mechanism that can be triggered in case of risk of a serious breach and that foresees hearing the Member State concerned and the possibility to address recommendations to it (Article 7(1) TEU); an additional two stages mechanism whereby the existence of a serious and persistent breach of the fundamental values of the Union may be determined and - following such a determination - the suspension of certain rights deriving from the application of the Treaties may be decided; a high notional threshold to start the procedures; a decision making process centred on the Council and the European Council, who act by specific reinforced majorities (Article 7(1) and 7(3) according to the specific modalities set out in Article 354 TFEU) or by unanimity (Article 7(2) TEU) in accordance with a peer review approach; and finally the limitation of the jurisdiction of the Court of Justice to solely review the respect of the procedural stipulations contained in Article 7 TEU and solely at the request of the Member State concerned (Article 269 TFEU).

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<sup>5</sup> Opinion of the Council Legal Service of 27 May 2014, doc. 10296/14, notably para 17.

13. The rules in question define the scope of the Union competence as regards the possibility to sanction the breach by Member States of the fundamental values of the Union referred to in Article 2 TEU, including the rule of law, and define the respective role that the EU institutions shall play in such a procedure. As a consequence, and taking into account the fact that Article 7 TEU does not itself set a basis to further develop the procedure it regulates, secondary legislation may not amend, supplement or have the effect of circumventing the procedure envisaged in Article 7 TEU.
14. On the other hand, the Legal Service has already taken the view that the legislator is at liberty to make Member States' entitlement to funding under the Union budget conditional on their compliance with certain obligations and objectives, especially when they are designed to ensure that funding is used for the purpose for which it was intended.<sup>6</sup> In such a context, the decision by an EU Institution to suspend, reduce or terminate the financing in reason of the non compliance with a pre-existent condition is not, and cannot be, regarded as a procedure for verifying compliance with EU law as such or as a sanction.<sup>7</sup>

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<sup>6</sup> Contribution of the Council Legal Service of 26 July 2012, doc. 12944/12, para. 10 and ff.; contribution of the Council Legal Service of 30 March 2012, doc. 8122/12, para. 8 and ff.; opinion of the Council Legal Service of 25 September 2009, doc. 13736/09, para 11 and ff.

<sup>7</sup> Doc. 8122/12, para. 8; doc. 12944/12, para 10; doc. 13736/09, para 11.

15. The recourse to spending conditionality is a well established practice in the context of the EU Funds. A number of conditionality clauses, operating according to different mechanisms and triggered by a variety of conditions, are notably attached to the use of the European Structural and Investment Funds,<sup>8</sup> but can also be found in relation to the funds established under other

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<sup>8</sup> Various types of conditionality clauses are established by the horizontal regulation defining the common provisions for programming and management of EFSI funds, Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 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 ("CPR Regulation").  
See for instance Article 19 and Annex XI of the CPR Regulation which lay down an articulated system of ex ante conditions which are prerequisites for and have a direct and genuine link to the effective achievement of a specific funding objective. The failure to fulfil an ex ante conditionality may lead to the suspension of payments by the Commission. Articles 23 to 25 of the CPR Regulation which introduce a spending conditionality linked to sound macroeconomic governance, and notably to the respect of country specific recommendations or recommendations adopted in the framework of the imbalance procedure. The failure of a member States to follow the request of the Commission to review the funding programmes in order to support the implementation of those recommendations may lead to the suspension of funding. The decision is adopted by a Council implementing act upon proposal of the Commission and by qualified majority (Article 23(6)) or by reversed qualified majority (Article 23(10)).  
Article 85 of the CPR Regulation introduces an ex post conditionality linked to the respect of the relevant EU law provisions linked to the regularity of the expenditure. It allows the Commission to adopt financial corrections so to exclude from the Union financing unlawful expenditures.

EU policies like the Agricultural and Fisheries Policy<sup>9</sup> or the Justice and Home Affairs Policy.<sup>10</sup>

16. In that regard, the Court of Justice already had the occasion to clarify that a conditionality mechanism does not as such circumvent the procedure laid down in Article 258 TFEU for failure to fulfil an obligation under the Treaties (the infringement procedure) provided that each of the procedures are independent from each other because they pursue different aims and are governed by different rules.<sup>11</sup>

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<sup>9</sup> In the domain of agriculture, see for instance the system of conditionality linked to the promotion of agricultural practices beneficial for the climate and environment. This conditionality takes the form of an additional extra payment that Member State shall grant to farmers complying with the practices and that can be suspended or reduced in case of non compliance. See Articles 43 to 47 and Recital 37 of Regulation (EU) No 1307/2013 of the European Parliament and the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009.

<sup>10</sup> See for instance the human rights conditionality included in Home Affairs funds which requires that all financed actions re implemented in compliance with international human rights standards as well as the Charter of Fundamental Rights of the EU. See as an example Article 3(4) of Regulation (EU) No 5151/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC. In case of violations of those standards, corrections may be decided by the Commission under the general correction clause contained in Article 47 of Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014, laying down general provisions on the Asylum, Migration, and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management.

<sup>11</sup> Judgment of 11 January 2001, *Hellenic Republic v Commission*, C-247/98, EU:C:2001:4, para. 13; Order of the Court of 11 July 1996, *An Taische v Commission*, C-325/94 P, EU:C:1996:293, para. 25; Judgment of 7 February 1979, *France v Commission*, Joined cases 15 and 16/76, EU:C:1979:29, para 26.

17. This well established case law provides the yardstick for assessing the compatibility of a given conditionality mechanism with other Treaty based control and sanction mechanisms such as Article 7 TEU. It is therefore necessary to ascertain whether the two procedures - the one laid down under Article 7 TEU and the one envisaged under the proposal - are independent from each other in the sense of the case law referred to above, i.e., whether they are governed by different rules and they pursue different aims.

*ii) Whether the two procedures are governed by different rules*

18. It is clear that both procedures are governed by different rules. In formal terms they are separated: the procedure under the proposal does not build upon, nor is intercalated, nor presupposes that decisions or steps under the procedure of Article 7 TEU have been taken.

*iii) Whether the two procedures pursue different aims*

19. The question whether both procedures pursue different aims deserves special consideration. It must be elucidated whether the conditionality envisaged under the proposal would consist of a genuine mechanism for protecting the financial interests of the Union and the principle of sound financial management or, whether it is to be regarded as a mechanism addressed to ensure respect of a fundamental value of the Union, i.e., the rule of law, for which Article 7 TEU lays down an ad hoc mechanism of control and sanction.

20. The Legal Service has already had the occasion to clarify that if rules on compliance form a logical part of the proper functioning of a particular funding scheme and are necessary for achieving or preserving the goals of such a scheme, such rules constitute genuine conditions compatible with the Treaties. If, on the contrary, the provisions do not identify a sufficient link between the compliance failure and the loss of entitlement to funding or if there is no logical link between the two elements, the loss of funding would not be a genuine condition for the spending but would rather consist in a form of sanction.<sup>12</sup>

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<sup>12</sup> Doc. 8122/12, para.11; doc. 12944/12, para 11; doc. 13736/09, para 12 and 13.

21. In other terms, in order to decide that a provision may qualify as genuine conditionality that provision must identify with sufficient precision the conditions that have to be complied with and those conditions must be sufficiently linked to the purpose for which the funding is provided so that the failure to comply with them would make EU funding incompatible with sound financial management.
22. The Court has endorsed conditionality clauses that link the funding to the respect of substantive obligations related to the purpose pursued by the funding scheme at stake.<sup>13</sup> It has also endorsed conditionality clauses that link the funding to horizontal obligations of a procedural nature which concur at establishing the conditions for the sound implementation of the budget. Thus for instance the Court has validated the recourse to conditionality mechanisms linked to the functioning of the national systems of management and control of EU funds.<sup>14</sup>
23. The Court has also accepted that the indication of a suspected infringement of EU law resulting from the findings contained in a decision of the Commission to open an infringement procedure can justify the suspension of payments in support of operations which have a connection with the alleged infringement, so as to avoid the risk that EU funds may be lost in financing unlawful activities.<sup>15</sup>

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<sup>13</sup> See for instance judgment of 7 February 1979, *France v. Commission*, joined cases C-15/76 and C-16/76, EU:C:1979:29, para 21 and ff. Another example is provided by the judgment of 11 January 2011, *Hellenic Republic v Commission*, case C-247/98, EU:C:2001:4, para. 11 and ff.

<sup>14</sup> See for instance judgment of 26 February 2013, *Kingdom of Spain v Commission*, joined cases T-65/10, T-113/10 and T-138/10, EU:T:2013:93, para. 91. The Court has also clarified that conditionality mechanisms can be linked to systemic irregularities in the functioning of the national authorities which are responsible for the implementation of the EU budget: judgment of 21 November 2012, *Federal Republic of Germany v Commission*, case T-270/08, EU:T:2012:612, para. 5, 24 and ff.

<sup>15</sup> Judgment of 19 April 2013, *Italian Republic v Commission*, Joined cases T-99/09 and T-308/09, EU:T:2013:200, para. 41 and ff. See also judgment of 26 February 2013, *Kingdom of Spain v Commission*, joined cases T-65/10, T-113/10 and T-138/10, EU:T:2013:93.

24. However, the conditionality rules examined by the European Court of Justice in the cases referred to in the paragraph above, entail a direct link between an identified deficiency and the use of the funds in question. Moreover, the Court has made it clear that the Commission is subject to the duty to prove that such a link exists in order for the conditionality clause to be activated. The evidence to be provided by the Commission need not be exhaustive but the Commission must be capable to demonstrate the overall effect of a given case of malfunctioning through serious and reasonable elements of proof and, where applicable, establish a sufficiently direct link between a potential infringement and the risk for the specific operation whose financing is suspended.<sup>16</sup>
25. The application of the above elements to the envisaged proposal calls for the following reflections.
26. First, the proposal does not show in what manner the respect of the rule of law, as a value as well as a set of societal requirements, is linked to the sound implementation of the EU budget and the protection of the financial interests of the Union. Instead, the focus is put by the explanatory memorandum on the fact that the proposal was presented following "a clear request from institutions such as the European Parliament as well as from the public at large for the EU to take actions *to protect the rule of law*" (emphasis added), following "a number of recent events" that "have shown how a lack of respect for the rule of law can become a matter of serious and common concern within the European Union".
27. Recitals (5), (6), (9) and (10) of the proposal refers to the relationship between respect of the rule of law and an efficient implementation of the Union budget, preservation of the financial interests of the Union and compliance with the principle of sound financial management. Still this affirmation is neither explained nor demonstrated.

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<sup>16</sup> Judgment of 26 February 2013, *Kingdom of Spain v Commission*, joined cases T-65/10, T-113/10 and T-138/10, EU:T:2013:93, notably para 91 and 94. Judgment of 19 April 2013, *Italian Republic v Commission*, joined cases T-99/09 and T-308/09, EU:T:2013:200, para. 53.

28. As a matter of fact, the reference to the generalised deficiencies in the rule of law as the premise to activate the mechanism is neither necessary nor sufficient to establish a link with the sound implementation of the budget. It is not necessary because it is possible to identify systemic deficiencies related to the functioning of the authorities of the Member States which can have an impact on the implementation of the budget but which do not relate to the rule of law.<sup>17</sup> It is not sufficient either, because not all the generalised deficiencies as regards the rule of law are susceptible of having an impact on the effective use of EU funding by the Member States.
29. The Court of Justice has established that Member States' obligation to ensure that their courts and tribunals meet the requirement of effective judicial protection to ensure compliance with EU law is of the essence of the rule of law<sup>18</sup>. This is an obligation that stems from the second subparagraph of Article 19(1) TEU according to which "*Member States shall provide remedies sufficient to ensure effective judicial protection in the fields covered by Union law*". However, if the breach of this obligation may endanger the application and respect of Union law in general, it remains to be shown that it can specifically affect, or risk affecting the sound management of EU funds and the financial interests of the Union, so that the conditionality link referred to in paragraph 21 is established.
30. In this sense, neither Article 3 nor Article 5 of the proposal define the standard of proof incumbent on the Commission (as the institution in charge of proposing the measures in case of a general deficiency as regards the rule of law) where the latter is held to provide serious and reasonable elements to justify that the financial interests of the Union are at risk or are actually being affected. Indeed, the case law of the Court of Justice referred to above does not require an exhaustive regime of proof or a direct and specific connection between the breach

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<sup>17</sup> An example in this sense is for instance the correct functioning of public audit authorities.

<sup>18</sup> See judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117 at paragraphs 30 and following and judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586, at paragraphs 48 and following.

and the financial interests of the Union being affected. However it requires at least a sufficiently direct link between the two elements and serious and reasonable elements of proof (see paragraph 24 above). Far from following that indication, the list of pre-identified cases listed in Article 3(1) establishes a presumption that the malfunctioning of public authorities in one of those cases would necessarily affect the sound implementation of the EU budget. This however would lead to the adoption of a measure without it being required to show how an alleged general deficiency as regards the rule of law would undermine, or risk undermining, the financial interests of the Union *in concreto*.

31. A second reflection is to be made: from a functional point of view both procedures – the one in the proposal and the one under Article 7 TEU – may lead to common results. This is clear both at the level of triggering the procedure and at the level of the consequences ensuing its activation. In the two procedures the relevant EU institutions are empowered to determine in law that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU – among which the rule of law – or that a serious and persistent breach exists (Article 7(1) and (2) TEU) and that there is a “generalised deficiency as regards the rule of law in a Member State” (Article 3(1) of the proposal). Although the triggering factor of the two procedures is formulated in different terms, both may lead to a determination of a characterised failure by Member States in respecting the rule of law, the assessment being therefore equivalent in nature. This finding is not altered by the fact that Article 3 of the proposal also requires (when none of the pre-identified cases is relevant) to show that the generalised deficiency affects or risks affecting either the principles of sound financial management or the protection of the financial interest of the Union. The addition of a second step in the assessment does not alter the premise of the examination, i.e. the determination in law that a generalised deficiency as regards the rule of law exists.

32. Moreover, both procedures may entail the same consequences. As it is the case under the procedure envisaged by the proposal, the determination under Article 7(3) TEU that a serious and persistent breach of the rule of law has taken place may lead to the suspension of certain of the rights of the Member State concerned including, also, the right to benefitting from EU funds.<sup>19</sup>
33. Finally, under Article 4(3) of the proposal the measures "*shall be proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law*" but not to the gravity of the actual or potential consequences for the EU budget. This confirms the conclusion that the proposed mechanism does not establish a genuine link between the measures to be adopted and the protection of the budget but rather aims at sanctioning the violation of the rule of law *as such*, as is the case under the procedure laid down by Article 7(3) TEU.
34. In the light of the above, the conditionality regime envisaged in the proposal cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU, as its respective aims and consequences are not properly distinguished and risk overlapping with each other. Therefore, as it currently stands, the proposal would in reality establish a parallel mechanism of verification and control of compliance with a fundamental value of the Union, the rule of law, for which Article 7 TEU provides the relevant procedure.<sup>20</sup>

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<sup>19</sup> A targeted suspension of specific provisions of the pertinent funding regulation under Article 7(3) may achieve the same effects as the budgetary measures identified in Article 4(1) of the Commission's proposal, with the possible exception of the transfer of funds.

<sup>20</sup> This is without prejudice to the possible use of Articles 258 to 260 TFEU (infringement procedure) to verify compliance by Members States with specific aspects of the rule of law, in the framework of the obligations incumbent on them under the Treaties.

35. A specific link between an identified deficiency and the inability to satisfy the objectives of a given measure is at the core of any conditionality attached to EU funding. Yet this would not prevent the adoption of a general regime of conditionality aimed at protecting the sound implementation of the EU budget, provided it did not limit itself to require a global examination of the respect of the principles and values such as the rule of law by the Member State concerned as is currently proposed, but further required an examination of the compliance with clearly defined rules on the basis of explicit standards and criteria.
36. A horizontal conditionality regime could conceivably be activated in the extraordinary circumstance of a generalised malfunctioning of State authorities, including the judiciary and other instances such as those identified by Article 3(1) of the proposal. However such cases of fundamental malfunctioning would have to be identified with sufficient precision (see above point 21), rather than drawn from an open ended list as in current Article 3(1). The malfunctioning may in principle also qualify as a breach of the rule of law, but as indicated above, such a breach would neither be a necessary nor a sufficient element to establish a genuine mechanism of conditionality. Moreover, in order for such a mechanism to constitute genuine conditionality, the malfunctioning would have to affect, or to risk affecting *in concreto* the duty of sound financial management in the implementation of EU funds or the protection of the financial interests of the Union. Hence, throughout the procedure for activating the suspension, reduction or other measure impacting the right to EU funding, it would have to be shown specifically that there is a sufficient direct link between, on the one side, that malfunctioning and, on the other side, the principles of sound financial management and of the protection of the financial interests of the Union (for the standard of proof in relation to conditionality, see paragraph 24 above). Finally, the financial consequences of the breach should be calculated on the basis of the gravity of the actual or potential impact for the financial interests of the Union (and not only on the basis of the nature, gravity and scope of the generalised malfunctioning).

## **B. WHETHER THE PROPOSAL IS BASED ON THE CORRECT LEGAL BASIS**

37. According to the well settled case law of the Court of Justice, the choice of legal basis for a Union measure must rest on objective factors which are amenable to judicial review, including, in particular the aim and the content of the measure.<sup>21</sup>
38. Generally speaking, since genuine conditionality mechanisms form a logical part of the functioning of a particular funding scheme and is necessary for achieving or preserving the goals of such a scheme, they are usually established under the same material legal basis on which the financial instrument that they assist has been adopted.
39. In the present case, however, the Commission bases its proposal on Article 322(1)(a) TFEU which provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the financial rules which determine the procedure for implementing the budget.
40. If the mechanism actually constituted a genuine system of conditionality, in line with the parameters referred to above (see paragraph 36), Article 322(1)(a) TFEU would be a suitable legal basis. First, because of the specific content of such mechanism which would promote the compliance with horizontal and procedural obligations relevant in general for a correct implementation of the budget and not related to the specific purpose of a given fund. Second, because the aim of the measure, namely to promote the conditions for a sound implementation of the EU budget, and in so doing to protect the financial interests of the Union, fits with the proposed legal basis. As a matter of fact, the Financial Regulation already includes various forms of horizontal spending conditionality which promote the regularity of the spending.

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<sup>21</sup> See Judgments of the Court of 11 June 1991 in Case C-300/89, *Commission v Council (Titanium dioxide)*, EU:C:1991:244, paragraph 10; of 17 March 1993 in Case C-155/91, *Commission v Council*, EU:C:1993:98, paragraph 7; of 4 April 2000 in Case C-269/97, *Commission v Council*, EU:C:2000:183, paragraph 43; of 29 April 2004 in Case C-338/01, *Commission v Council*, EU:C:2004:253, paragraph 54; of 26 January 2006 in Case C-533/03, *Commission v Council*, EU:C:2006:64, paragraph 43; of 6 November 2008 in Case C-155/07, *Commission v Council*, EU:C:2008:605, paragraph 34; of 22 October 2013 in Case C-137/12, *Commission v Council*, EU:C:2013:675, paragraph 52.

41. The question whether Article 325(4) TFEU - which allows the legislator to adopt the necessary measures for the prevention of and fight against fraud affecting the financial interests of the Union - would be the legal basis of the proposal alongside the one currently proposed must also be examined. The Court has held that, if examination of an EU measure reveals that it pursues a twofold purpose or that it has a twofold component, of which one is predominant, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant component.<sup>22</sup>
42. Certainly, the protection of the financial interests of the Union is a declared objective of the proposed mechanism, which also identifies in Article 3 various examples of "generalised deficiencies" which relate to the prevention, prosecution and sanctioning of fraud.
43. It should be stressed, however, that the proposed mechanism has a much broader material scope than the prevention of and fight against fraud. The centre of gravity of the proposal is therefore on the proper implementation of the EU budget, the prevention or fight against fraud being a secondary element, incidental to the primary one. Moreover, the implementation of the budget according to the principles of sound financial management already requires the need to have in place controls to prevent and correct instances of fraud (see for instance Article 32 of the Financial Regulations). The establishment of mechanisms aimed at putting in place those controls can therefore be based solely on Article 322(1)(a) TFEU.
44. In light of the above it shall be concluded that Article 322(1)(a) TFEU is the appropriate legal basis for establishing a mechanism of conditionality promoting the compliance with horizontal and procedural obligations relevant for a correct implementation of the budget<sup>23</sup>.

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<sup>22</sup> See among others judgment of 22 October 2013, *Commission v Council*, case C-137/12 EU:C:2013:675, paragraph 52, judgment of 8 September 2009, *Commission v Parliament and Council*, case C-411/06, EU:C:2009:518, paragraph 46 and the case-law cited; judgment of 6 September 2012, *Parliament v Council*, case C-490/10, EU:C:2012:525, paragraph 45 and the case-law cited, judgment of 6 November 2008, *Parliament v. Council*, case C-155/07, EU:C:2008:605, paragraph 35 and ff.

<sup>23</sup> Since Article 322(1)(a) TFEU establishes an exclusive competence for the Union, the principle of subsidiarity, which only operates in areas where both the Union and Member States have competence, does not come into play. Accordingly the mechanism set out in Protocol II to the Treaties for the control of the principle of subsidiarity by national parliament will not apply either.

**C. THE LEGAL FEASIBILITY OF THE PROCEDURE FOR ADOPTING MEASURES UNDER THE MECHANISM**

45. The Commission proposes to confer upon the Council the power to take the appropriate measures under Article 4 by means of an implementing act to be adopted on the basis of a proposal of the Commission. This is in line with the possibility left to the co-legislators to confer implementing powers to the Council in duly justified specific cases, as set out in Article 291(2) TFEU.
46. The proposed decision making calls for two questions: first, whether the implementing power of the Council is compatible with Article 317 TFEU that confers upon the Commission the power to implement the budget on its own responsibility; second, whether the decision modality envisaged, reversed qualified majority, is compatible with the Treaties - reversed qualified majority meaning a procedure according to which only a qualified majority in Council may prevent the proposed measure from being adopted.<sup>24</sup>
47. As to the first question, it is noted that the empowerment of the Council remains compatible with Article 317 TFEU, which confers on the Commission the power to implement the budget on its own responsibility. As the Court of Justice has clarified, the provision at issue, which appears in the part of the TFEU that deals with “Financial Provisions”, shall be interpreted in light of the Treaty provisions governing the institutions and not the other way round. It follows that the notion of “implementation of the budget” in Article 317 TFEU cannot alter the way implementing powers are allocated among the institutions and has to be narrowly construed so as to limit the exclusive authority vested on the Commission to commit the expenditure.<sup>25</sup>

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<sup>24</sup> Reversed qualified majority cannot therefore be regarded as a sub-category of the voting rule for qualified majority.

<sup>25</sup> Judgment of 24 October 1989, *Commission v Council*, case C-16/88, EU:C:1989:397, para 8 and ff. and notably para. 16 and 17.

48. As to the second question, on the legal feasibility of reversed qualified majority, the Council Legal Service has already had the occasion to clarify that it is possible for the legislator to define voting arrangements for the exercise by the Council of its implementing powers that differ from the ones laid down in the Treaties for the adoption of the basic act, as long as the said arrangements do not undermine the balance of powers between institutions or modify the share of powers among members of the institutions, or affect their fundamental prerogatives.<sup>26</sup> This results from the fact that the Treaties do not prescribe the voting rules for the exercise by the Council of implementing powers. Article 16(3) TEU, according to which "*The Council shall act by a qualified majority except where the Treaties provide otherwise*", cannot be interpreted as meaning that all implementing acts of the Council have to be adopted by qualified majority. In that regard, it has to be stressed that Article 291(2) TFEU is not a legal basis directly vesting implementing powers in the Council, but rather provides a legal framework according to which it is possible for the legislator to confer those powers on the Council. When applying that provision, the legislator remains free to establish the procedural modalities for the implementing act to be adopted by the Council, provided that the limitations referred to above are respected. Only when the legislator had not provided for such specific arrangements would Article 16(3) TEU apply.

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<sup>26</sup> See for instance opinion of the Council Legal Service of 20 January 2012, doc. 5551/12 and contribution of the Council Legal Service of 24 October 2018, doc. 13489/18. As far as the Council is concerned, the legislator could not for instance introduce qualified majority arrangements that would be based on different shares of population or member states or that would exclude the voting rights of a given member of the Council when this exclusion is not rooted in primary law.

49. It is true that the Court of Justice has not directly addressed the specific issue of establishing "reversed voting rules" in secondary legislation. However, in a case where the legality of the implementing powers of the Council was put into question, because they were exercised through a procedure different from that laid down in the Treaties for the adoption of the act granting such powers, the ECJ ruled that "[I]t is sufficient for the purposes of that provision [namely, the relevant legal basis laid down in the Treaties] *that the essential elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision, and the provisions implementing the basic regulations or directives may be adopted according to a **different procedure**, as provided for by those regulations or directives*" (emphasis ours).<sup>27 28</sup> The practice of the co-legislators has confirmed in many

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<sup>27</sup> See judgment of 18 June 1996, *Parliament v. Council*, C-303/94, EU:C:1996:238, at paragraph 23. See also the underlying reasoning of the European Court of Justice in its judgement of 6 May 2008, *Parliament v. Council*, case C-133/06, EU:C:2008:257, at paragraphs 43 to 51 and the opinion of Advocate General Poiares Maduro in that case, EU:C:2007:551, at point 17. However, it is not relevant for the present case the judgement of the Court of Justice of 22 September 2016, *Parliament v. Council*, joined cases C-14/15 and C-116/15, EU:C:2016:715, where the Court annulled a Council implementing decision because it had been adopted according to a voting rule (in that case, the basic act provided for unanimity) which differed from the voting rule expressly laid down in the Treaties. That judgment concerned the very specific context of the "third pillar" in the ex-TEU whose Article 34(2)(c), last phrase, provided expressly that "the Council, acting by qualified majority, shall adopt measure necessary to implement those decisions at the level of the Union". Contrary to this ex-third pillar provision, as underlined in point 47 of the present opinion, no express voting rules are prescribed by the Treaties for the exercise by the Council of implementing powers, pursuant to Article 291(2) TFEU (the case of implementing acts in the CFSP area follows specific rules provided for in that particular Title of the TEU).

<sup>28</sup> See in this respect judgement of 30 September 2003, *Eurocoton v. Council*, case C-76/01 P, EU:C:2003:511, where the Court of Justice, in the framework of an anti-dumping procedure based on reversed simple majority, has already established that the failure of the Council to act by the deadline established in secondary legislation for the Council to exercise its implementing powers, amounts to an act of the Council with legal effects reviewable by the Court of Justice and which should be duly motivated. In that case the Court of Justice stated that "(...) *the failure to adopt the proposal for a regulation imposing a definitive anti-dumping duty submitted by the Commission, together with the expiry of the 15-month period, determined definitively the Council's position in the final phase of the anti-dumping proceedings*" (paragraph 65).

instances this approach,<sup>29</sup> notably in the case of macroeconomic conditionality in the context of the current CPR for Structural Funds.<sup>30</sup>

50. When the Council is given the power to adopt implementing measures, this must be duly justified. If the Council is given such powers with a rule on decision making which differs from the fall back voting method established by Article 16(3) TEU, such a choice must also be justified by considerations which relate to the nature and conditions of the measures to be adopted through the implementing procedure. A voting rule that greatly reduces the possibility for the Council not to follow the Commission's proposal must be justified by the objective of minimising the risk of political resistance to the course of action proposed in the given circumstances. In the present case however, the Commission's proposal does not provide such a justification as the reasoning set out in recital 15, last sentence, is merely affirmative.

#### **IV. CONCLUSION**

51. The Council Legal Service is of the opinion that

- the reference to the rule of law in Article 3 of the proposal as a condition for triggering the proposed mechanism is neither necessary nor sufficient to establish a link with the sound implementation of the EU budget, which is required for a genuine spending conditionality;
- a genuine conditionality mechanism cannot be based on the presumption that a risk for the EU budget necessarily exists once certain deficiencies are qualified as generalised. Rather, it requires that the existence of such a risk is established on the basis of explicit standards and criteria;

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<sup>29</sup> See for instances the voting arrangements for Council implementing decisions laid down in the so-called Six Pack and Two Pack.

<sup>30</sup> Art 23(10) of the CPR quoted above in footnote 8.

- the conditionality regime envisaged in the proposal as it currently stands, cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU, as the respective aims and consequences of both procedures are not properly distinguished and risk overlapping with each other;
  - A regime of conditionality aimed at protecting the sound implementation of the EU budget could be activated in a case of generalised malfunctioning of State authorities, but only if:
    - (i) the cases of malfunctioning are identified with a clear and sufficiently precise definition;
    - (ii) the malfunctioning affects or risks affecting *in concreto* the duty of sound financial management in the implementation of EU funds or the protection of the financial interests of the Union;
    - (iii) the existence of a sufficient direct link between the malfunctioning and the use of the budget is established through verifiable evidence and
    - (iv) the measures adopted are proportionate in volume to the negative effects of the malfunctioning on the use of the Union budget;
  - Article 322(1)(a) TFUE is the correct legal basis for the establishment of a genuine conditionality regime of a general character;
  - The adoption of measures through an implementing act of the Council to be adopted unless a qualified majority expresses itself ought to be adequately justified.
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