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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Ad hoc Working Party on the Multiannual Financial Framework (MFF) 2021-2027
Subject:	Added value of the Commission 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

Delegations will find attached the above-mentioned document from the Commission.

26.02.2019

Added value of the Commission 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

There is currently no mechanism that could serve the same purpose as the proposed Regulation.

The Union's sectoral legislation allows protecting the Union budget against deficiencies in the implementation of the specific spending programmes or items within such programmes, in particular deficiencies in the management and control systems. Major malfunctioning in the executive, normative or judicial chain result in governance deficiencies with a negative impact on the rule of law. Problems of such scale can only be addressed in a horizontal manner. The proposal fills a gap as regards situations in which the deficiencies are generalized and cannot be effectively addressed by the sectoral instruments for one or more following reasons:

- deficiencies of that nature (rule of law) are not addressed in those instruments;
- the overall financial risks exceed risks which can be addressed by the measures in one sectoral instrument;
- measures available under this proposal are not available in the sectoral instruments;
- the combined effect of a series of different sectoral deficiencies can be addressed more efficiently by a comprehensive mechanism than by sectoral instruments.

• In such circumstances, the proposed Regulation would allow for:
  - the adoption of measures in case of deficiencies which cannot be currently addressed by sectoral legislation because of their nature (rule of law);
  - the adoption of a single set of measures specifically designed to address generalised deficiencies when they affect or risk affecting the Union's budget;
  - the protection of the Union's budget by covering potentially all Union expenditure at stake, and not only the expenditure of a particular programme;
  - the swift adoption of precautionary or corrective measures covering all risks for the Union budget.

• The proposed procedure is independent from the procedure of Article 7 TEU and from the infringement procedure (Articles 258-260 TFEU), as it pursues different aims and is governed by different rules: the procedure under this Regulation can only be started if there is an effect on, or the risk for, the Union budget. The Article 7 TEU procedure and infringement proceedings are not aimed at and do not guarantee as such the protection of the Union's budget. Moreover, the protective measures under the proposal could last until such generalized deficiency is solved.

Non-exhaustive examples for illustration:

1. **No effective judicial review of decisions by the competent national authorities**

• A national law is adopted to exclude the competence of national courts to review decisions of the national authorities implementing EU funds on grant procedures.

- As a consequence, the legality of decisions taken by the managing authority cannot be subject to effective judicial review and, in addition, national judges are prevented from referring cases to European Court of Justice. In that situation, breaches of the applicable law and cases of fraud or mismanagement of the Union's funds implemented in that Member State cannot be effectively examined and corrected.
- Risk for the Union budget: cases of fraud or mismanagement of the Union's funds are not sanctioned and the misused funds are not recovered, creating a risk in terms of overpayment.

2. No effective prosecution of fraud

- Due to systematic political intervention in prosecution services, the investigations of fraud cases affecting the Union's funds are not launched, or systematically closed. Prosecution of fraud affecting the EU's budget is not ensured (no follow-up to OLAF reports).
- Measures in sectoral legislation (e.g. financial corrections) cannot be activated, as fraud cases are not detected or are not subject to proper follow-up.
- Risk for the Union budget: crimes affecting the financial interests of the Union are not effectively prosecuted and sanctioned, creating a risk in terms of overpayment. Moreover, the lack of prosecution undermines the dissuasive effect of criminal provisions.
- Protective measures could, in line with the principle of proportionality, take the form of a suspension of commitments, to avoid further fraudulent use of the Union's funds. Once the fraud cases are settled, the Commission can also apply financial corrections for the amounts unduly paid, in accordance with the applicable sectoral legislation, and taking into account the measures adopted under the proposed Regulation.

3. No independent judicial examination and sanctioning of fraud

- A Member State establishes a criminal court competent for examining and sanctioning cases of fraud including those related to the Union's funds. The independence of this court is not guaranteed (the executive has discretionary power on the allocation of cases, on appointing and dismissing judges and to decide on disciplinary proceedings against them). As a consequence, there is no guarantee that cases of fraud relating to the Union's funds will be sanctioned by an independent criminal court.
- Risk for the Union budget: frauds affecting the Union's financial interest are not sanctioned. Moreover, the lack of sanctions undermines the dissuasive effect of criminal provisions.
- Protective measures could, in line with the principle of proportionality, take the form of suspension of commitments of the Union's funds in that Member State, to avoid that they are fraudulently used.

4. Systematic legislative developments compromising anti-fraud action

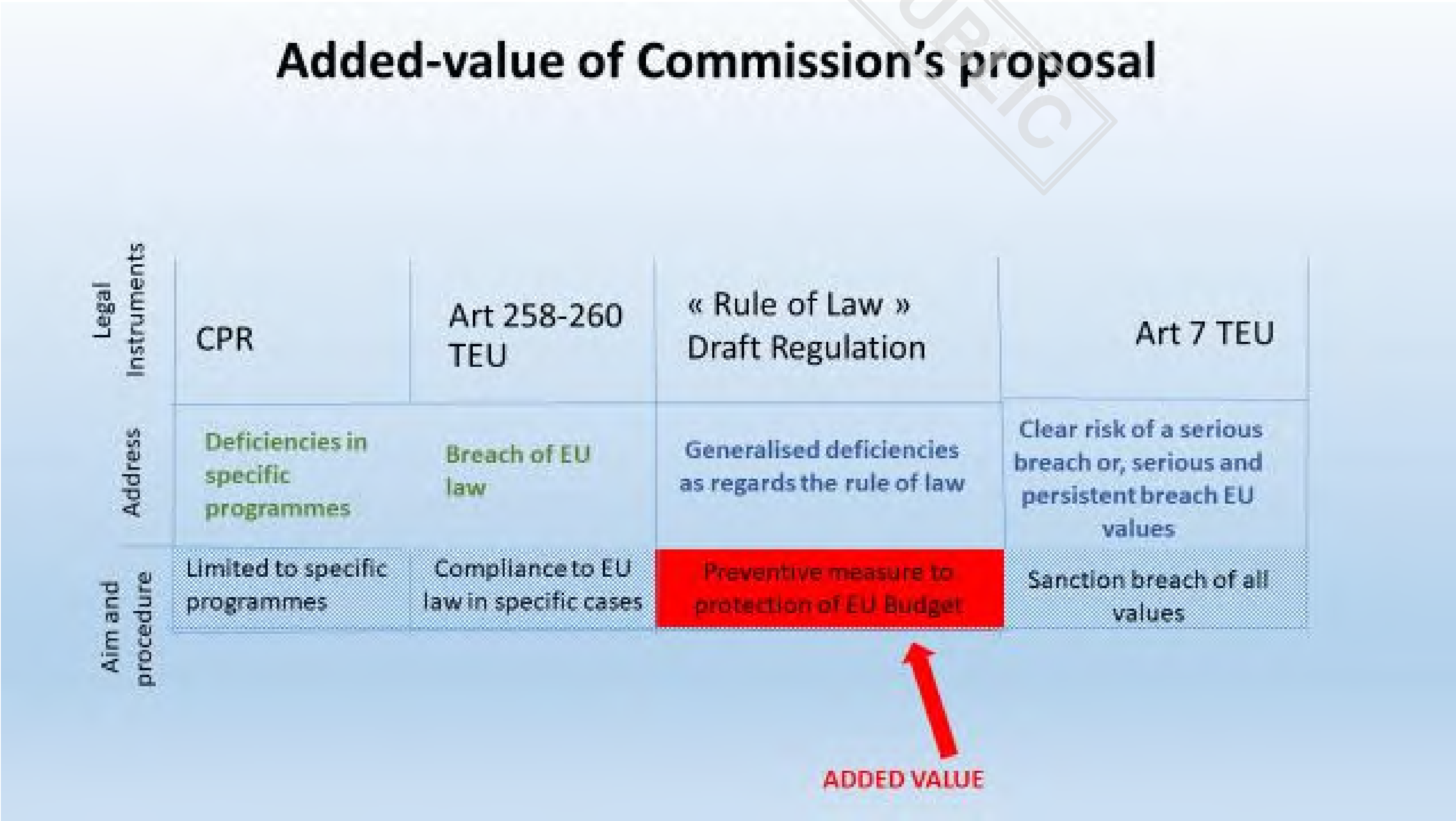
- A Member State passes legislation with the cumulative effect of systematically undermining the proper protection of the Union's financial interests: e.g. shielding officials from criminal liability for fraud, systematic failure to transpose Directives in a way which represents a systemic weakening of the anti-fraud legal framework in that State.

- Risk for the Union budget: frauds affecting the Union's financial interests are not effectively investigated and prosecuted, inside the Member State as well as in cooperation with other Member States and Union's bodies. This creates a risk of overpayment and undermines the dissuasive effect of criminal provisions.
- Protective measures could be adopted until a proper investigation system is reestablished in that Member State, through correct transposition and implementation of the relevant *acquis*.

5. National court decisions are no longer enforced

- In a given Member State, judicial decisions are no longer respected and implemented by the competent national authorities. As a result, decisions against the Member State, requiring a public institution to award damages to a private party after a public procurement procedure is declared unlawful or are no longer enforced. The justice system as such continues to work, but its decisions are either not implemented at all, or with severe delays.
- Risk for the Union budget: e.g. recovery orders are not implemented in practice.

Annex: Graphic illustration of added value


Added-value of Commission's proposal
Legal Instruments
CPR
Art 258-260 TEU
« Rule of Law » Draft Regulation
Art 7 TEU
Address
Deficiencies in specific programmes
Breach of EU law
Generalised deficiencies as regards the rule of law
Clear risk of a serious breach or, serious and persistent breach EU values
Aim and procedure
Limited to specific programmes
Compliance to EU law in specific cases
Preventive measure to protection of EU Budget
Sanction breach of all values
ADDED VALUE