

Financial responsibility of a Member State towards the EU for a violation of the rule of law

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executive summary

In EU law, the rule of law is one of the core values on which the EU is founded, alongside respect for human dignity, freedom, democracy, equality, and respect for human rights (Article 2 TEU). These values play a fundamental role as the EU is a community of values, a fact recognized by the Court of Justice since the 1980s (294/83, *Les Verts*, para 23). The rule of law requires respect for the principle of legality, which includes a transparent, accountable, democratic and pluralistic lawmaking process; the principle of legal certainty; the prohibition of arbitrariness in the actions of executive authorities; and the functioning of an independent and effective judicial review, as well as an independent and impartial judiciary and equality before the law.

Among the numerous challenges the EU is currently facing is right-wing populism and the constitutional crisis in some Member States – Hungary and Poland in particular, but such concerns are also expressed about Bulgaria, Romania, Slovakia and the Czech Republic. It is frequently posited that systemic violations of the rule of law are at the root of the constitutional crisis in these States and that a ‘rule of law backsliding’ is taking place there. This diagnosis has prompted politicians and researchers of EU law to analyse the existing legal tools available to the EU and look for new legal instruments that could be used to address shortcomings in this area. This is the subject of this research project, which concentrates on those mechanisms focused on EU funds.

The basic mechanism triggered in case of violations of EU fundamental values is laid down in Article 7 TEU. It was intended as an emergency measure, often dubbed the ‘nuclear option’, to be used in the event of particularly serious violations of these values, including violation of the rule of law. In its ultimate scenario, this mechanism can result in the suspension of the rights of the Member State arising from the application of the Treaties, including the right of the Member State to vote in the Council. Until recently, use of this mechanism was considered purely hypothetical due to the high (too high?) thresholds of majority voting necessary to initiate it. However, the launch of this mechanism against Poland (in 2017) and Hungary (in 2018) has clearly demonstrated the need for the EU to resort to emergency measures in some instances. This procedure will be analysed in this research project, but the research will not be confined to it.

The aim of this research project is to establish whether EU law authorizes the EU institutions (mainly the Commission and the Council) to hold Member States financially responsible for violations of the rule of law. In other words, whether EU law – that currently in force or in draft form - allows or will allow EU institutions to use financial deterrence related to EU funds to induce Member States to cease infringements of the rule of law. A research hypothesis put forward is that EU law provides for this possibility. Verification of this hypothesis will be carried out through an examination of four different areas of EU law and the procedures established therein, namely:

- 1) The EU Regulations establishing rules for financing the implementation of the CAP and the cohesion policy from the EU funds, which:
 - are adopted for MFF 2014-2020: regulations No 1303/2013 and No 1306/2013;
 - would be adopted for MFF 2021-2027: COM(2018)393 final and COM(2018)375 final;
- 2) The conditionality mechanism to be established by draft Regulation: COM(2018) 324 final;
- 3) The Article 7 TEU procedure;
- 4) The procedure under Articles 258-260 TFEU.

While the Treaty mechanisms (the Article 7 TEU procedure and the procedure under Articles 258-260 TFEU) are relatively widely examined and discussed by legal scholars, the mechanisms adopted in EU secondary legislation – namely in the EU Regulations concerning financing the CAP and the cohesion policy from EU funds as well as the proposed conditionality mechanism – are a largely unexplored novelty. Research into all these areas of EU law and establishment of the legal interrelationship between them is the main innovative feature of this project. The results of the research will be presented in articles published in the European-wide legal literature on EU law.