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To cite this article: Michael Blauberger & Vera van Hüllen (2020): Conditionality of EU funds: an instrument to enforce EU fundamental values?, Journal of European Integration, DOI: 10.1080/07036337.2019.1708337

To link to this article: https://doi.org/10.1080/07036337.2019.1708337

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Published online: 08 Jan 2020.
Conditionality of EU funds: an instrument to enforce EU fundamental values?

Michael Blauberger and Vera van Hüllen

Abstract

In order to tackle democratic backsliding in EU member states, the European Commission proposed a new financial conditionality in May 2018 that would allow the suspension of EU funds in cases of systematic rule of law infringements. This article seeks to evaluate the Commission’s proposal in terms of its chances at successfully deterring or redressing such infringements. Drawing on both the literature on EU enlargement and on international sanctions, we identify a list of scope conditions for conditionality in order to systematically evaluate the institutional design and analyze the context of application of the proposed rule of law conditionality on EU funds with regard to its expected effectiveness. We find that the current proposal would indeed improve the speed and likelihood of sanctions compared to existing mechanisms, but lacks in the determinacy of conditions and procedures, thus undermining its perceived legitimacy and chances of success.

Introduction

The EU’s ‘democratic deficit’ has been deplored and debated for decades. More recently, however, concerns have grown about another democratic deficit, which is due to democratic backsliding and eroding rule of law in individual EU member states such as Hungary or Poland: ‘Today, clearly, the greatest threats to democracy in Europe are found not at the EU level, but at the national level in the EU’s nascent autocracies’ (Kelemen 2017).

Discussions about the EU’s role in protecting democracy at the member state level mostly center on Article 7 of the EU Treaty, but increasingly calls are made to search for alternative – more feasible and effective – EU democratic safeguards (for a comprehensive overview, see Closa and Kochenov 2016). One proposal receives particular attention and has prominent support among EU governments in the context of ongoing EU budgetary negotiations: the idea of making EU funding conditional upon respect for EU fundamental values. In May 2018, the Commission proposed a regulation ‘on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States’ (European Commission 2018).
The aim of this article is twofold. Theoretically, we revisit the literature on EU enlargement (Schimmelfennig and Sedelmeier 2004; Sedelmeier 2011) to identify a list of scope conditions of effective conditionality. Since we are interested in negative conditionality, we also draw on the literature on international sanctions discussing the context of application, the perceived legitimacy and potential unintended consequences of outside inference (Schlipphak and Treib 2017). While an empirical test of the effects of EU rule of law conditionality will only be possible after its adoption and actual imposition, we seek to use existing knowledge to inform the current debate. We use the list of scope conditions derived from the literature to evaluate the Commission’s proposal on the rule of law conditionality of EU funds with regard to its expected effectiveness.

Our analysis is based on and limited by two assumptions: First, we do not enter the normative debate on the legitimacy of EU interference into domestic politics. We rather start from the observation that all EU member states have committed themselves to the fundamental values in Article 2 TEU, including democracy, rule of law and respect for human rights (Müller 2015). Secondly, we are aware that EU interference alone cannot prevent democratic backsliding and much depends on domestic societal resilience against authoritarian tendencies. But even if the EU can play a supportive role at best, it is worthwhile to understand if and under what circumstances the conditionality of EU funds may help to protect democracy and rule of law.

In the next section, we provide an overview of the EU’s existing enforcement instruments against democratic backsliding and present the current state in the discussion on making EU funds conditional upon respect for rule of law. Section three revisits the literatures on EU accession conditionality and on international sanctions to identify a set of scope conditions under which one may expect EU interference to have a positive effect on domestic democracy and rule of law. These scope conditions are used in section four to evaluate the Commission’s draft regulation. The final section concludes.

**Political background: instruments and proposals against democratic backsliding**

The proposal to introduce rule of law conditionality for EU funds has emerged in light of growing dissatisfaction with existing instruments to enforce EU fundamental values. First, the Article 7 TEU procedure suffers from its high decision-hurdles. The inclusion of a preventive mechanism into Article 7 TEU (Sadurski 2010) and the Commission’s ‘pre-Article 7’ Rule of Law Framework (European Commission 2014) have facilitated earlier EU involvement, but the threat of actual sanctioning, i.e. the unanimous suspension of membership rights, remains hardly credible (Sedelmeier 2017). The common depiction of Article 7 TEU as the ‘nuclear bomb’ has complicated its application even further (Kochenov 2017). Secondly, the Commission’s most powerful instrument to address ‘normal’ violations of EU law, the infringement procedure, is often regarded as insufficient to deal with violations of EU fundamental values. Clearly, infringement proceedings can play a role in countering democratic backsliding and their use could be strengthened (Schmidt and Bogdanowicz 2018), but they typically target specific violations of EU law and cannot grasp the systemic nature of many small reforms adding up to significant democratic backsliding (Scheppele 2016). Thirdly, despite recent ECJ jurisprudence
Regarding the forced retirement of Polish judges, there are serious limits to what courts can do against democratic backsliding (Blauberger and Kelemen 2017). Judicial enforcement of EU fundamental values depends on an independent judiciary at the domestic level, which is often questionable in cases of rule of law violations. And unless Article 51 of the EU Charter of Fundamental Rights is revised or reinterpreted expansively (Jakab 2017), it applies to member states ‘only when they are implementing Union law’, but not in purely internal situations.

These shortcomings of existing EU safeguards against democratic backsliding pose a credibility dilemma for the European Commission as the ‘guardian of the Treaties’ (see also Closa 2019): reluctance to activate Article 7 may be seen as a lack of commitment to protecting EU fundamental values – proposals to activate Article 7 without firm backing by member state governments may be dismissed as ‘bark without bite’. Against this background, calls for alternative tools to enforce EU fundamental values have been made, not the least by the Commission itself. In a speech in February 2017, the Commissioner for Justice Věra Jourová launched the idea of introducing some form of fundamental values conditionality for EU funds.1

The political brisance of this idea is obvious, as it touches upon EU money and member state politics, but it received considerable support from various sources. The European Parliament (EP) had already referred to the possibility of ‘financial sanctions or the suspension of Union funding’ as an additional measure in its own initiative report from 2016 (EP 2016, No. 20). In a letter to then-Commission President Barroso, various member state governments had argued already in 2013 that in order to promote member state respect for rule of law ‘[a]s a last resort, the suspension of EU funding should be possible’.2 Some of these governments, including Germany and France, also signalled their support for introducing rule of law conditionality into future budgetary provisions.

The Commission’s budgetary proposal published in May 2018 comprises a draft regulation on the protection of the Union’s budget, which provides for sanctions in case of rule of law deficiencies (European Commission 2018). The Commission argues that this rather narrow focus is justified because rule of law ‘is a prerequisite for other fundamental values … such as democracy, equality and respect for human rights’ (Recital 3 of the Preamble) and it is closely linked to the ‘efficient implementation of the Union budget’ (Recital 10 of the Preamble). The legal basis of the draft regulation is Article 322 of the Treaty on the Functioning of the European Union (TFEU) according to which financial management rules can be adopted by the EP and a qualified majority of the Council. In its ‘Blueprint for action’ from July 2019, the Commission sets out a broader strategy to protect the rule of law in the EU and calls upon the EP and the Council to rapidly adopt its proposed regulation (European Commission 2019, 16).

Theoretical framework: scope conditions for effective negative conditionality

In order to assess the proposed conditionality of EU funds and the scope conditions under which it is likely to be effective, we draw on two major bodies of literature. First, research on EU enlargement has established an elaborate set of scope conditions for the effectiveness of accession conditionality (Sedelmeier 2011). Importantly, however, the Commission’s current proposal breaks with the accession logic of ‘reinforcement by
reward’ and seeks to introduce negative conditionality. Secondly, we, therefore, complement our discussion of scope conditions for effective conditionality of EU funds with insights from the literature on international economic sanctions. Even though economic sanctions (rather than trade wars) are rare among friendly democracies (Portela 2010, 41), this literature is particularly relevant for its emphasis on potentially counterproductive effects of outside interference (Schlipphak and Treib 2017; Sedelmeier 2017). In bringing together these two strands of the literature, we develop an analytical framework of five scope conditions for evaluating the likely effectiveness of EU negative conditionality.

Lessons from accession conditionality

Frank Schimmelfennig and Ulrich Sedelmeier were the first to theorize and systematically test scope conditions for the effectiveness of the EU’s accession conditionality as an instance of ‘reinforcement by reward’ (Schimmelfennig and Sedelmeier 2004, 2019). Even though their original set of scope conditions has been adapted and expanded over the years, it is still at the core of most research on the effectiveness of EU conditionality, reaching well beyond its original scope of accession conditionality regarding the targets and types of conditionality (Sedelmeier 2011; Schimmelfennig 2015). We, therefore, take their rationalist ‘external incentives model’ as the starting point for deriving and operationalizing evaluation criteria for the proposed conditionality of EU funds. We begin with three scope conditions, which mostly relate to the design of EU conditionality and are easily adapted for our analytical framework: the determinacy of conditions, the size and speed of rewards, and the credibility of conditionality.

(i) The determinacy of conditions refers to the ‘clarity and formality of a rule’ (Schimmelfennig and Sedelmeier 2004, 664) with the expectation that greater clarity and formality of the conditions set will increase the effectiveness of conditionality. Greater determinacy of conditions is expected to increase their ‘informational value’ (664) and provide the target government with the necessary knowledge on ‘what they need to do if they decide to comply’ (Sedelmeier 2011, 12). Assessing the determinacy of conditions in the Commission’s proposal thus requires an analysis of whether or not the conditions to be met are – explicitly or implicitly – defined, and if so, of their level of detail and their ‘behavioural implications’ (Schimmelfennig and Sedelmeier 2004, 664). The expectation is that explicitly codified, precise, and operational conditions are easier to meet as they give less room for uncertainty and interpretation (Sedelmeier 2011, 12). The clarity of rules may vary across issue areas and critics of EU accession policies have deplored early on that ‘any hard-core definitions … of democracy and Rule of Law were avoided by the Commission’ (Kochenov 2008, 118; for a more favourable view, see Janse 2019, 64).

(ii) In the design of conditionality, the size and speed of sanctions are centrepiece to counterbalancing the costs of compliance. While the original debate on accession conditionality focused on the chances of the promised reward to outweigh adoption costs, creating a net benefit of compliance, the threat of sanctions can only work if the costs of non-compliance exceed the costs of compliance. This is first of all a matter of size, with research on neighbourhood and accession conditionality showing that accession worked as the ‘golden carrot’, whereas, by comparison, financial and political incentives as tried in the European Neighbourhood Policy and beyond (e.g.
additional aid, cooperation agreements, and visa facilitation) seem to lack in attractiveness. Dealing with financial sanctions (reduction or withholding of funds), the challenge is to assess the material, but also the potential symbolic, costs of the EU’s proposed measures. This can relate to questions of which funding programmes are subjected to conditionality and if they cover a significant share of the national GDP. Still, the speed or ‘temporal distance’ or ‘proximity’ (Schimmelfennig and Sedelmeier 2004, 665; Sedelmeier 2011, 13) of incentives have also proven crucial, as politics usually functions within a limited time horizon defined by the electoral calendar rather than long-term goals. Thus, the quicker the sanctions follow onto instances of non-compliance, the greater their chance at changing the domestic cost-benefit calculation.

(iii) In contrast to Schimmelfennig and Sedelmeier, we suggest interpreting the factor of credibility narrowly in terms of likelihood of application of negative conditionality. According to their original framework, both of the above factors feed into and are ultimately trumped by the credibility of conditionality. Similarly, other factors added by different scholars often relate to credibility in one way or another (Sedelmeier 2011). The question of credibility has become a catch-all category. In order to analytically disentangle and operationalize the various factors, we, therefore, focus on likelihood of application as the institutionally defined aspect of credibility. It is crucially shaped by decision-making procedures within the EU. These can create higher or lower hurdles for adoption, e.g. through specific voting rules (unanimity vs. qualified/simple majority requirements) and the involvement of more or less actors with potential veto power (European Commission, EP, Council of the EU). Everything else being equal, it is easier to adopt sanctions if fewer actors are involved with less demanding majority requirements. In a similar vein, economic sanctions have been found to be more effective, the more responsive they are to compliance-enhancing changes in the behaviour of the targeted country (Portela 2010, 39). This can be achieved through clear procedures for adopting and lifting sanctions, but also through setting smaller, intermediate, incentives as opposed to one ultimate, larger incentive (Sedelmeier 2011, 14).

In addition to these three scope conditions, Schimmelfennig and Sedelmeier analyzed domestic adoption costs in order to explain the varying effectiveness of accession conditionality. While there is a broad consensus that adoption costs are the most important scope condition for the EU’s chances of tipping the balance towards compliance through the use of conditionality, the factor is even more difficult to capture empirically than credibility. Sedelmeier acknowledged that ‘a better conceptualisation of domestic politics through a clear ex ante specification of the factors through which adjustment costs arise at the domestic level’ (2011, 30) was still needed, despite a multitude of attempts at operationalization (13–15). For the purpose of this article, we adapt the factor of domestic politics in two regards. First, we move beyond the rationalist incentives model and take also the perceived legitimacy of conditionality in potential target countries into account. Secondly, we embed our assessment of the design of EU conditionality in a broader discussion of the domestic context of application, which is (mostly) out of the EU’s hands. While both aspects are also addressed in parts of the literature on EU enlargement, their theoretical discussion is arguably more advanced in the sanctions literature.
Lessons from economic sanctions

(iv) Probably due to the negative and often punitive character of sanctions, the literature has paid greater attention to the perceived legitimacy of economic sanctions than of accession conditionality. If sanctions came to be regarded as an ‘outside … attack on the group as a whole, not only a fraction of it’, Galtung (1967, 389) argued already in one the founding text of this strand of research, they might actually reinforce public support for the government by triggering a ‘rally around the flag’ effect. In addition to the humanitarian problems caused by encompassing economic sanctions, this has led to increasing interest in ‘smart’ or ‘targeted sanctions’, which aim at political elites, while minimizing the negative impact on the general population (Portela 2010, 7). Bernd Schlippahk and Oliver Treib build on sanctions research, when they warn that governments subject to EU negative conditionality can resort to strategies of ‘blame avoidance and blame shifting’ (2017, 354) and highlight the relevance of the perceived legitimacy of EU interventions in domestic politics. They identify a number of measures that should make it more difficult for governments to frame the EU’s intervention as illegitimate, which can be translated into evaluation criteria for the design of conditionality (Schlipphak and Treib 2017, 361–362). Regarding the rule transfer through conditionality, formal procedures and sufficient capacities for a systematic monitoring are important, as is the question of impartiality of the actors entrusted with this task and/or the direct participation of the member states (governments) as the targets of conditionality. Finally, another important element for the fairness of conditionality is equality with regard to its applicability to all member states. By contrast, singling out a group of or individual member states will impair the perceived legitimacy as opposed to an equal treatment of all member states.

(v) As regards the context of application of negative conditionality, the literature on economic sanctions also finds that the ‘nature of the target regime and of the sender’s relations with it’ (Hufbauer et al. 2007, 161) are important scope conditions for the effectiveness of sanctions. At a basic level, sanctions seem to be more effective when targeting democracies than autocracies (Hufbauer et al. 2007, 55, 61; Bapat and Kwon 2015, 133, 154). Looking more deeply into the domestic political context, it is, in particular, the existence of an opposition that can be mobilized or empowered by external actors against the incumbent government that facilitates the success of sanctions (Kaempfer and Lowenberg 1999, 51–52; Portela 2010, 41). These findings resonate with findings in the EU enlargement literature and research on external Europeanization. Illiberal (and/or nationalist, authoritarian) governments have proven to be the hard cases for EU conditionality, especially in the case of democratic conditionality where the EU’s demands pertain to the polity rather than to policies. This implies high, if not prohibitive, costs of compliance ‘where strongly nationalist and authoritarian governments were in power’ (Schimmelfennig and Sedelmeier 2004, 669–670). In these cases, the EU was unable to directly influence governmental policies and its ultimate ‘success’ depended on changes in government that brought ‘reform-minded governments’ (Schimmelfennig and Sedelmeier 2004, 670) to power. In both research agendas, it is, therefore, a combination of the external intervention’s goal and the domestic political context that determine the compliance costs in terms of challenges to its ‘grip on power’ (Portela 2010, 41). In addition, research on international sanctions suggests that the ‘warmth of prior relations’ (Hufbauer et al. 2007, 55) also shapes their
effectiveness in that ‘friends’ are more likely to give in to external pressure than ‘foes’ (60), adding a ‘psychological element’ (Portela 2010, 41) to the idea of cost-benefit calculations.

In sum, we evaluate the potential effectiveness of the EU’s proposed conditionality along five criteria (see Table 1) that are based on the original scope conditions identified by Schimmelfennig and Sedelmeier (2004) and complemented by insights from the sanctions literature: the determinacy of conditions, the size and speed of sanctions (rather than rewards), the credibility of conditionality in terms of its likelihood of application, and the domestic adoption costs dependent on the perceived legitimacy and the domestic context of application of EU sanctions.

### Evaluation: the Commission’s draft regulation

In the remainder of the text, we use these factors to evaluate the Commission’s draft regulation from May 2018. Given what we know about accession conditionality and international economic sanctions, what are the chances of success for tackling violations of EU fundamental values by the proposed conditionality of EU funds?

### Context of application

Assessing the context of application for the EU’s proposed conditionality, we see a mixed picture. On the one hand, the objective of countering democratic backsliding implies that the domestic political context presents a great challenge to the effectiveness of the EU’s efforts. On the other hand, the very fact of dealing with member states that are fully integrated into the EU’s material and ideational structures suggests that not all is lost for the EU’s attempt at protecting the rule of law through the threat of financial sanctions.

The EU has always prided itself on being a ‘community of values’ built around its member states’ firm commitment to and realization of democracy, human rights, and the rule of law, setting high standards for the Western model of liberal democracy. While all of the EU’s member states still qualify as liberal or at least electoral democracies (Lührmann, Tannenberg, and Lindberg 2018), it is clear that the proposed mechanism is meant to counter tendencies of democratic backsliding and ‘autocratization’ (Lührmann and Lindberg 2019). As a worldwide phenomenon, it is also manifest in EU member states

<table>
<thead>
<tr>
<th>Scope Condition</th>
<th>Operationalization</th>
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<tbody>
<tr>
<td>Determinacy of conditions</td>
<td>● formally codified (vs. implicit, informal)</td>
</tr>
<tr>
<td></td>
<td>● precise (vs. vague, ambiguous)</td>
</tr>
<tr>
<td></td>
<td>● operational (i.e. clear behavioural implications vs. abstract principles)</td>
</tr>
<tr>
<td>Size and speed of sanctions</td>
<td>● share of GDP</td>
</tr>
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<td></td>
<td>● clear timeframe</td>
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<tr>
<td>Likelihood of application</td>
<td>● voting rules, majority requirements</td>
</tr>
<tr>
<td></td>
<td>● (number of) actors involved (veto-players)</td>
</tr>
<tr>
<td></td>
<td>● responsiveness (gradual approach)</td>
</tr>
<tr>
<td>Perceived legitimacy</td>
<td>● targeted and proportional sanctions (vs. general)</td>
</tr>
<tr>
<td></td>
<td>● impartial monitoring (systematic, experts vs. ad hoc, political)</td>
</tr>
<tr>
<td></td>
<td>● fairness of application: equality in applicability to (all) member states</td>
</tr>
<tr>
<td>Context of application</td>
<td>● regime type (competitive democracy vs. autocracy)</td>
</tr>
<tr>
<td></td>
<td>● bilateral relationship (friendly, close vs. antagonistic)</td>
</tr>
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such as Hungary and Poland and highlights the challenges to effective conditionality in light of the ‘initial’ domestic conditions in potential target countries. Anti-democratic or de-democratizing reforms and practices are in all likelihood not adopted ‘by mistake’ but as deliberate government policies designed to maintain and strengthen the political power base of the ruling elites by undermining established checks and balances and/or hampering political competition. The EU’s attempt at protecting the rule of law, therefore, goes against the interests of ruling elites, making compliance costly with regard to their ‘grip on power’. Compared to fully fledged authoritarian regimes, however, the EU still faces a domestic context of competitive politics and overall free and fair elections. The EU’s chances of successfully promoting compliance, therefore, depend heavily on the strength – or empowerment – of pro-democratic and pro-EU forces, placing the government under pressure ‘from below’ through political opposition and popular opinion. This highlights the crucial role of the perceived legitimacy of the EU’s intervention in domestic politics in order to avoid a rally around the flag effect and, on the contrary, to empower domestic opposition (see below).

In contrast to the EU’s prior experience in promoting – rather than protecting – fundamental values in external relations, however, it now addresses its own member states. The relationship between the target of sanctions, on the one hand, and the EU and its other member states, on the other hand, is therefore much closer than the cases usually considered in the literature on international sanctions. Through integration in the EU, relations are extremely close and highly institutionalised, both in terms of economic interdependence and overall political cooperation. In addition, a shared European identity can increase the EU’s direct leverage vis-à-vis the targeted government, but also the resonance of its demands in public opinion. Taken together, the context of application is certainly challenging, but not hopeless. This makes it even more important to evaluate the specific design of the proposed conditionality in terms of its likelihood of application, the determinacy of conditions, the size and speed of sanctions as well as their perceived legitimacy.

**Likelihood of application**

If adopted, the regulation would clearly increase the credibility of the Commission’s enforcement action regarding EU fundamental values, particularly in comparison to the current Article 7 TEU procedure. Decision-making hurdles would be lowered and the set of enforcement measures available to the Commission would become more nuanced.

Compared to Article 7 TEU, the procedure proposed in the draft regulation poses much lower decision-making hurdles and, therefore, increases significantly the chances of application of EU measures against violations of EU fundamental values. The suspension of membership rights according to Article 7(3) TEU presupposes a unanimous decision of the European Council and a two-thirds majority in the EP. Awareness of these ultimate decision-hurdles also hampers the activation of the earlier stages of Article 7(1) and the Commission’s pre-Article 7 Rule of Law Framework (Closa 2019). By contrast, Article 5 of the draft regulation would entitle the Commission to propose measures against generalized rule of law-deficiencies, which would be deemed ‘adopted by the Council, unless it decides, by qualified majority, to reject the Commission proposal’. This reverse-majority rule would set the decision-making threshold even lower than in the ordinary legislative procedure, where a qualified Council majority is needed in support of the Commission’s
proposals. Even though the EP proposes an additional veto right for itself (EP 2019, Amendment 58), this would increase decision-making hurdles only slightly. It would only play a role in the unlikely case that member states do not oppose a Commission measure in the Council, but a majority of MEPs objects.

Moreover, whereas Article 7 TEU might ultimately trigger vast, but largely unspecified sanctions and is often labelled the EU’s ‘nuclear bomb’, the proposed regulation provides for a much more specific arsenal of ‘smart’ financial weapons. Article 4 of the draft regulation lists a differentiated set of measures, including the suspension of payments, but also a reduction or redirection of payments or an embargo on new commitments. In addition, Article 6 of the draft regulation would allow lifting sanctions in full or just in parts, depending on member state remedies of rule of law violations. The broader the Commission’s toolbox, the more credible it is that some measures are actually applied: it is easier for the Commission to argue that its measures are proportionate to the respective rule of law problem, that continued non-compliance will trigger additional measures and steps towards compliance will be rewarded by a quick easing or removal of sanctions.

In sum, EU enforcement action against rule of law violations would become more credible with the adoption of the draft regulation. At the same time, granting significant decision-making powers to the Commission is likely to prove highly contentious among member state governments during legislative negotiations, in particular given the great substantive discretion the Commission would enjoy.

**Determinacy of conditions**

The meaning of fundamental values such as democracy or rule of law is essentially contested and the Commission will hardly settle these debates. At the very least, the regulation would establish an explicit, formal legal basis for the conditionality of EU funds. However, the proposed regulation falls short of clearly defining and operationalizing rule of law deficiencies and leaves great discretion to the Commission.

The Commission’s decision to focus on rule of law deficiencies, rather than EU fundamental values more broadly as proposed by the EP (2016), is meant to facilitate operationalization and judicializability of the main concept. The definition of rule of law in Article 2a of the draft regulation corresponds to the elements listed in a three-page annex to the Rule of Law Framework, in which the Commission elaborated elements of the rule of law in the case law of the ECJ and the interpretation by the Council of Europe (European Commission 2014, Annex I). While the draft regulation thus points to a comparably detailed definition of the rule of law, the rules for assessing ‘generalized deficiencies as regards the rule of law’ in individual member states are far from clear. Article 2(1b) of the draft regulation merely defines a ‘generalized deficiency’ as ‘widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law’. How will the individual elements of the rule of law such as legal certainty or independent and effective judicial review be operationalized? Will these elements be weighed in an overall assessment and, if yes, how?

To answer these questions, the Commission might partly draw on its annual ‘Justice Scoreboard’, but the scoreboard has been repeatedly criticized for its neglect for aspects other than judicial efficiency (Sedelmeier 2017, 347). With respect to these other aspects such as judicial independence, the Commission rejected proposals for formalizing a more
detailed, let alone quantifiable operationalization in the past.\(^3\) Instead, it emphasized the need for discretion and the abundance of existing sources of rule of law standards on which its qualitative assessment ‘could be based’ (Recital No. 12 of the draft regulation) – including not only sources of EU institutions, but also ‘of relevant international organisations and networks, such as the bodies of the Council of Europe and the European networks of supreme courts and councils for the judiciary’. It remains unclear, however, which of these sources would actually be used by the Commission and in what way.

Even commentators who are largely satisfied by the Commission’s rule of law definition criticize the vagueness of its threshold for identifying ‘systemic’ violations in the context of the rule of law framework (Kochenov and Pech 2015, 523) or ‘generalized deficiencies’ in the terms of the draft regulation. The argument that Commission measures would only target ‘obvious cases’ (Friedrich Ebert Stiftung 2018, 11) of rule of law violations anyway and that existing criteria are sufficient for this purpose, is highly problematic in terms of clarity of rules, in particular if respect for rule of law is the issue. In its opinion on the Commission’s draft regulation, the European Court of Auditors, therefore, concludes that ‘there is a need for developing criteria that allow for a critical appreciation of the consistency in applying the provisions with a view to ensure equal treatment of Member States in case of generalised deficiencies as regards the rule of law, which puts sound financial management at risk’ (European Court of Auditors 2018, 11). In fact, the EP proposes to introduce a more detailed definition of ‘generalized deficiencies’ in a new Article 2(a) (EP 2019, Amendment 32) and to include an explicit reference to the Council of Europe’s detailed ‘Rule of Law Checklist’ (Venice Commission 2016, 8) as well as to the Copenhagen criteria and the EU’s own accession acquis (EP 2019, Amendment 20). In its recent ‘Blueprint for action’, the Commission acknowledges that the said ‘Rule of Law Checklist’ would be ‘particularly relevant in identifying specific risks and weaknesses’ (European Commission 2019, 10).

In sum, the Commission’s standards for assessing the rule of law and for identifying generalized deficiencies are vague and this lack of clear rules cannot simply be overcome by reference to numerous external sources. To improve legal certainty, the Commission would need to elaborate with greater precision its assessment criteria in the draft regulation or implementing rules as recommended by the Court of Auditors and the EP. And even below the level of EU legislation, the Commission could envisage a range of measures to further clarify its own approach – by making the EU acquis on the rule of law more easily accessible (e.g. by providing a collection of EU legal sources such as the Rule of Law Framework, standards from accession negotiations or the Cooperation and Verification Mechanism) or by developing the Justice Scoreboard into a more comprehensive and easier to interpret set of indicators regarding member state respect for the rule of law.

**Size and speed of sanctions**

If adopted, new rules on the conditionality of EU funds will only become effective after 2020 in the context of the next EU Multiannual Framework (2021–2027). Once implemented, however, the proposed regulation would speed up the process from the initiation of EU proceedings to actual sanctions in comparison to existing enforcement instruments. Article 7 TEU does not provide for any deadlines. For example, the Commission initiated its pre-
Article 7 procedure against Poland in January 2016 and recommended the activation of Article 7(1) in December 2017. The decision whether to activate Article 7(1) is still pending in the Council and, in any event, would only constitute a preliminary step towards actual sanctions according to Article 7(3). Infringement proceedings may also take several years before resulting in financial penalties. The Commission can only impose financial penalties after a second negative judgment of the ECJ according to Article 260 TFEU (or after a first negative judgment, if it concerns the implementation of an EU directive) and only depending on member states’ ‘ability to pay’ (Wenneras 2012, 157). On average, Court proceedings take 16 months. By contrast, the draft regulation proposes strict deadlines for member states in cases of rule of law violations. According to the procedural rules in Article 5, individual member states may be required to respond to the Commission’s findings within a specified time limit of one month to three months, according to the EP’s amendments (EP 2019, Amendment 53) and sanctioning measures could only be rejected by a qualified Council majority within 1 month after the Commission’s proposal. In sum, these rules would potentially increase the speed of sanctioning as they rule out delaying tactics by individual member states or the Council, but not by the Commission itself.

The size of potential sanctions as proposed by the Commission is considerable, if the comparative yardstick is not (withholding) EU accession, but the sanctions based on existing enforcement instruments. The question whether EU institutions could impose any financial sanctions at all according to the Article 7 TEU procedure is legally controversial. Infringement cases are mostly settled after second ECJ judgments, but the actual sums imposed are very low (Falkner 2016, 42). By contrast, the Commission’s draft regulation would apply to large parts of the EU budget and amount to non-negligible shares of member states’ GNI. According to Article 4 of the Commission’s proposal, rule of law conditionality could affect any EU funding under ‘shared management’ by the Commission and member governments. Currently, 80% of the EU’s budget is spent under shared management, including all major structural and investment funds. For example, according to the Commission’s financial report of 2017, EU expenditure in Poland and Hungary was spent almost to 100% under shared management for agriculture and cohesion, amounting to €11.9 billion (2.67% of GNI) in Poland and to €4 billion (3.43% of GNI) in Hungary. In brief, the sanctioning potential is immense according to the draft regulation – in practice, the actual amount of sanctions would depend heavily on the Commission’s choice of measures, which are ‘proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law’ (Article 4(3) of the draft regulation).

**Perceived legitimacy**

Arguably, in terms of legitimacy, new EU safeguards against democratic backsliding can only get better than existing ones. The unequal and unpredictable treatment of Poland and Hungary in recent years – quick activation of the Rule of Law Framework and hesitant threat to activate Article 7(1) TEU against Poland; no comparable Commission action, but only infringement proceedings against Hungary – have incurred strong criticism (Closa 2019, 2–3). The proposed regulation, however, promises little improvement regarding procedural legitimacy, overall coherence and targetedness for several reasons.

If adopted, the regulation would establish a procedure which consists mainly of a non-public, exclusive dialogue between the Commission and member state governments –
initially the member state government concerned, eventually also all other governments in the Council. Before reaching the Council, the procedure resembles traditional infringement procedures, which have also been criticized for their lack of transparency regarding internal decision-making in the Commission and communication with member states. What is more, the draft regulation does not provide for any formal opportunity for third-party complaints, let alone a mechanism for the systematic monitoring of member states’ respect for EU fundamental values (Friedrich Ebert Stiftung 2018, 8). In the past, the Commission has repeatedly rejected calls for a new monitoring mechanism as unnecessary and has referred to the multitude of existing reports by the Council of Europe, NGOs and others. Yet, this leaves the question of how systematically or selectively the Commission would draw on external sources. Moreover, given that EU fundamental values are at issue, one may challenge the very idea of ‘outsourcing’ their protection (Grabbe 2014, 46) rather than entrusting genuine EU institutions such as the Fundamental Rights Agency (FRA) or the Commission with the task of systematic monitoring.

There is also little reason to expect the proposed procedure to fare any better than existing instruments in terms of fair and equal treatment of all member states. Due to the lack of clear standards of assessment discussed above and the absence of systematic monitoring, the Commission would enjoy great discretionary power according to the proposed procedure (see also European Court of Auditors 2018, 7). As we know from past experience, the Commission is not immune against using this discretion in ways that undermine overall coherence and, thus, procedural legitimacy as in the cases of Poland and Hungary – be it due to party political influence (Kelemen 2017, 225) or due to strategic considerations (Closa 2019). Moreover, the proposed conditionality of EU funds may be perceived as discriminatory and, therefore, illegitimate as not all EU member states are equally vulnerable, i.e. they depend on EU funds to different degrees. According to the proposal, the threat of financial sanctions would mainly affect countries which are net beneficiaries and which receive significant sums from European structural and investment funds. By contrast, countries which depend on EU money to a lower degree and mainly in areas such as research and innovation would be less vulnerable since these EU funds are largely exempted from the Commission’s proposal.

Finally, the draft regulation shows that the Commission is certainly aware of the need to use sanctions in a targeted and proportionate way. What remains partly unclear, however, is how this could work in practice. Article 4(3) of the draft regulation obliges the Commission to take measures which are proportionate ‘to the nature, gravity and scope’ of the rule of law deficiency and lists a whole range of possible measures. Hence, much depends on the Commission’s interpretation of ‘proportionate’ in practice. Given its long-established enforcement preference for dialogue and compromise (Closa 2019) and the Council’s right to reject measures, the Commission is unlikely to propose disproportionately harsh sanctions.

The targetedness of sanctions, i.e. ensuring that sanctions affect the respective government and do not alienate other recipients of EU funds and potential domestic allies of the Commission, is much harder to achieve. In its explanatory memorandum to the draft regulation, the Commission emphasizes ‘that the consequences (should) fall on those responsible for identified shortcomings’ (European Commission 2018, 2). Article 4(2) of the draft regulation holds that sanctioning measures ‘shall not affect the obligation of government entities … to implement the programme or fund affected by the measure,
and in particular the obligation to make payments to final recipients’. According to this provision, a government under EU sanctions would have to step in and substitute EU funds for additional own resources. Yet, there may not be sufficient domestic budgetary resources to replace EU funding. More importantly, one can easily imagine a situation in which the concerned government would even stop payments entirely and shift the blame to the EU level. In its current form, the regulation does not contain specific provisions on how to avoid the unintended consequences of ill-targeted sanctions for the perceived legitimacy of EU interference (see also European Court of Auditors 2018, 13).

In sum, the proposed regulation would reinforce rather than alleviate the deficits regarding the legitimacy of the Commission’s enforcement instruments against democratic backsliding (see Table 2). The main thrust of the EP’s proposed amendments is to tackle these potential problems of perceived legitimacy, e.g. through safeguards for the recipients of EU funds against member state breaches of their financial obligations (EP 2019, Amendments 49 and 50) and through an annual rule of law monitoring of all EU member states by an independent panel of experts (EP 2019, Amendment 45). Regarding the latter aspect, the Commission has moved closer to the position of the EP with its ‘Blueprint for action’ from July 2019: as part of its broader strategy, the Commission announced the establishment of an annual ‘Rule of Law Review Cycle’ to monitor rule of law-related developments across all member states (European Commission 2019, 9).

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<th>Table 2. Evaluation of proposal.</th>
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<td><strong>Scope Condition</strong></td>
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<td>Determinacy of conditions</td>
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<td>Size and speed of sanctions</td>
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<td>Likelihood of application</td>
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<td>Perceived legitimacy</td>
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Conclusion

Throughout our evaluation of the proposed rule of law conditionality, there was evidence of the Commission’s dilemma: being torn between a normatively tough and, above all, (rule-) consistent stance, on the one hand, and political exigencies and a belief in the superiority of dialogue over sanctions, on the other. In terms of the institutional design of conditionality, this is reflected in the Commission’s obvious wish for discretion and flexibility. While this is understandable in light of highly complex situations in domestic politics and the all too obvious risk of adverse effects of heavy-handed interventions, it is nevertheless counterproductive with regard to our assumptions about credibility and legitimacy.
and their relevance for maximizing the EU’s positive and minimizing potential negative effects. This is even more relevant when we consider the probable effect of a predictably inconsistent application in one case for the chances of effectiveness in future conflicts. This trade-off between rule-based credibility and political flexibility reflects the debate about the respective benefits and drawbacks of judicial versus political instruments and the question of their respective (de-)politicalization (Kelemen and Blauberger 2017).

Furthermore, insights into the probable complementarity of different strategies of rule transfer and Europeanization suggest that recommendations for effective safeguards by the EU should go beyond the design of the proposed conditionality itself and consider its embeddedness in a broader set of mechanisms. Even if (accession) conditionality proved to be the EU’s most effective instrument for rule transfer, there are also other promising mechanisms for influencing domestic politics that could be useful for complementing conditionality, not least capacity building. Taking the form of technical or financial assistance, it could be directed either at state institutions (building capacities for/reducing costs of compliance) or non-state actors, facilitating, e.g., the diffusion of ideas through exchange and learning in transnational networks or building capacities for acting as ‘watchdogs’ in domestic politics. Another way could be attempts at social pressure or persuasion (Sedelmeier 2017, 344). Depending on the design of conditionality, its procedures could, in fact, be used to generate social pressure (and/or opportunities for learning) through naming and shaming, e.g. if the results of a comprehensive and systematic monitoring by an independent or impartial institution were published. While the simultaneous threat of sanctions might not be conducive to persuasion, the EU could still try to maintain or create channels of contact that allow for ‘a depoliticized setting and a highly deliberative quality of interactions with the target government’ (345).

Notes


Acknowledgments

We would like to thank the panel participants at the 2018 congress of the German Political Science Association and at the 2019 Biennial Conference of the European Union Studies Association and in particular Bernd Schlipphak and Milada Vachudova as well as two anonymous referees for their valuable feedback on earlier versions of this article.

Disclosure statement

No potential conflict of interest was reported by the authors.
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