Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism

Kim Lane Scheppele, Laurent Pech & R. Daniel Kelemen

12.11.2018 doi: 10.17176/20181115-215538-0

If *The Decline and Fall of the European Union* is ever written, historians will conclude that the EU's two key intergovernmental institutions – the European Council and the Council – should bear the greatest responsibility for the EU's demise. As illiberal rot spread throughout the Union, eating away first at one government and then at another with centralizing autocrats destroying the rule of law in plain sight, history will show that both the European Council and the Council of Ministers failed to act and, in the end, deferred to national autonomy instead of defending the Union's fundamental values. The EU is facing an existential crisis because Member governments refuse to recognize that the common values are the cornerstones of their common project. Democracy, human rights and the rule of law are more than simply normative aspirations; they are in fact central to the operation of the European Union. If the EU fails to defend its common values, the EU won't merely fail as a normative project, it will cease to function. But the Council appears unable to act to defend the rule of law and democracy, while the European Council has been doing its best to look the other way.

Regrettably, we now need to add the Council's Legal Service (hereinafter: CLS) to the list of key EU actors that seem intent on ignoring the existential threat to the Union posed by the spreading rule of law rot amongst EU member governments. In a (non-public) opinion on the proposed regulation of the Commission to create rule of law conditionality in the multi-annual financial framework (MFF) adopted on 25 October 2018 (and first reported here), the CLS indeed put forward multiple unpersuasive legal arguments to claim that the Commission's proposal as it currently stands cannot be adopted. In particular, the CLS is of the view that the conditionality regime envisaged in the Commission's proposal "cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU."

While the MFF may seem like a highly technical subject, budgets are the best indicators of what organizations value. The European Structural and Investment Funds (ESIFs) are the monetary transfers that redistribute funds across the Union in order to reduce disparities between regions and to promote economic and social cohesion. The Union's established autocracy and its most clearly nascent one – Hungary and Poland – are, respectively, the largest *per capita* and the largest absolute recipients of ESIFs. As EU funds keep flowing to these two countries, Viktor Orbán and Jaroslav Kaczynski are not only emboldened, but also subsidized, as they undermine the basic moral and legal foundations of the EU through, for instance, their systemic attempts to annihilate judicial independence. This is why a number of key actors in the EU – for example, the European Parliament, the German government, and European Commissioner for Justice Vera Jourová – have been wondering aloud why the EU goes on paying for autocracies in the EU's midst. Gradually the debate has centered on how to stop the flow of funds to Hungary and Poland – and eventually to any state that might head down that path – so that at least EU funds are not used to undermine EU values.

The Commission's proposed regulation would allow it to suspend or redirect funds to a Member State on the grounds that it has a "generalised deficiency as regards the rule of law" (in the words of the draft regulation). According to the CLS, however, the Commis-

sion's proposal needs a massive overhaul if it is to comply with the Treaties. The CLS helpfully and correctly noted that the Commission is not in principle barred from attaching conditionalities to the distribution of EU funds – and pointed out that indeed such conditionalities already exist in a number of different legal authorities established as EU secondary law. The CLS opinion also agreed that Article 322(1)(a) TFEU "is the correct legal basis for the establishment of a genuine conditionality regime of a general character."

But the CLS also argued that the Commission's proposal to make EU funds conditional on observing the rule of law was not compatible with the Treaties because withholding EU funds in this case would (allegedly) tread on the territory covered by Article 7 TEU. In the view of the CLS, Article 7 is the *lex specialis* for Article 2 TEU and no other legal authority can cover the same ground. The CLS also objected that, by failing to put Member States on more precise notice about just what would get a state into trouble under the proposed regulation and why those precise weaknesses in the rule of law violations would necessarily lead a state to mismanage EU funds or threaten the financial interests of the EU, the Commission did not use conditionality mechanisms appropriately.

The real purpose of the CLS opinion was clear: It aimed to establish that while the Commission was well within its power to prevent EU funds from being misspent, the Commission was powerless to prevent the basic values of the EU from being subverted. That task, instead, remained the sole preserve of the Council.

In the rest of this post, we will explore what the CLS said and why they got it so wrong.

1. Article 7 TEU as the Only Enforcement Mechanism for Article 2 TEU

According to the CLS, Article 7 TEU is the only mechanism available under the Treaties for enforcing the values of Article 2 TEU. Moreover, says the CLS, Article 7 is a complete and comprehensive procedure to which nothing can be added. Agreeing with an earlier opinion of the Commission that the invocation of Article 7 is not limited to the scope of EU law, the CLS used this fact to bolster its argument that no other sanctioning mechanism can be used to ensure Member States comply with Article 2. Because of the wide sweep of Article 7 and the potentially legally significant consequences for a Member State subjected to Article 7 sanctions, the CLS argued that the Commission may not use budget conditionality to circumvent the safeguards of multi-institutional and supermajority approval built into Article 7: "Secondary legislation may not amend, supplement or have the effect of circumventing the procedure envisaged in Article 7 TEU" (para. 13).

The CLS is mistaken about the nature of Article 7 in many ways. First, Article 7 cannot be considered a single procedure: it instead provides for two procedures to deal with two different factual situations (risk of a breach and a breach) and there is no obligation, for instance, to activate the preventive procedure laid down in Article 7(1) before triggering the sanctioning procedure laid down in Article 7(2) and (3).

More decisively, the CLS is deeply mistaken in its insistence that Article 7 is the only way to enforce Article 2. Consider a helpful metaphor. If your city has a fire department to put out fires that might destroy not just your house, but also the houses of your neighbors (as Article 7 was designed not only to prevent damage to the offending Member State, but also to its neighbors in the EU), then does this mean that ONLY the fire department may be called when there is a fire? Certainly not. We might take the establishment of a fire department as a sign that it is so important to control fires that the state has a special responsibility in this regard, but this does not mean that other actors who detect the outbreak of a fire are prohibited from intervening to squelch the flames before they spread. The fire department is the last and most powerful resort, not the first and only one when it comes to preventing a spreading threat. Similarly with Article 7. If values violations can be stopped before they spread and destroy the neighborhood, then at a minimum the institutions charged with enforcing EU law should try to stop the conflagration before it is necessary to call on the Article 7 fire department. Article 7 is there when all else fails. But all else will fail if others don't

share the responsibility for putting out fires when they start.

In fact, the ECJ has already subscribed to the fire department model of Article 7. Having pledged to uphold the Article 2 values when they joined the Union, all Member States have obligations to do what they can to uphold these values – including putting adherence to values above and beyond following the black letter of secondary law. Moreover, it is not just Member States but their component institutions that share this obligation. It is hard to make sense of the ECJ's judgments in *Aranyosi* and *Celmer* in any other light. In both cases, referring judges were told that they must avoid sending a person to another Member State if they believe that the person's rights would be put at risk with the transfer. Values – including the protection of rights guaranteed in Article 2 – must come above compliance with the European Arrest Warrant. These ECJ decisions empower every single judge to uphold EU values by making exceptions to the general obligations of EU secondary law. Why should it be any different for the institutions of the Union which, after all, also have obligations to uphold the basic values of Article 2? Surely if any national judge can interpret EU law in light of EU values and set aside ordinary legal obligations to ensure the realization of those values, the Commission should – indeed must – be able to do so too.

In our view, all EU institutions must commit to and act upon preserving the values of the Union. For the CLS to insist that the Commission is violating the Treaties when it tries to protect EU values is the worst sort of legalism. (Unfortunately, this is not the first time this has happened: in 2014, the CLS argued that the Commission's 2014 "pre-Article 7 procedure" would not be "compatible with the principle of conferral which governs the competences of the institutions of the Union." This opinion has however been almost unanimously criticised for its weak reasoning by Professors Baratta; Bogdandy et al; Besselink; Hillion; Kochenov & Pech,Oliver and Stefanelli among others). To continue the fire department metaphor: if no one can legally do anything to fight fires because only the fire department has this power, the neighborhood will burn to the ground before the fire is contained. In our present context, the rule of law is seriously threatened in two Member States because the signature element of the rule of law is the independence of the judiciary, and the governments of Poland and Hungary have fired judges, packed courts with political loyalists, limited the jurisdiction of courts, and established disciplinary procedures for judges when those judges fight the government's attempts to control them. It is hard to imagine a more comprehensive destruction of the rule of law and a bigger threat to the integrity of the EU, which relies on law above all else.

This suggests another reason why Article 7 cannot be the only mechanism for enforcing Article 2. Under Article 7(2), a unanimous agreement of all Member States save the one in question is necessary for sanctions to follow. But if there are two Member States in violation of EU's basic values, does this mean that both states get a free pass – as if there is a bulk discount for norm violation? As one of us has argued, the principle of *effet utile* should allow the Article 7(2) voting procedure to exclude any Member State that has been sanctioned under Article 7(1) so that no fellow-traveler vetoes are permitted. But, of course, it would be far better if any Member State headed in that direction could be diverted back to the rule of law before the damage from its conduct spread to other states. If, as the CLS insists, Article 7 must be interpreted literally as the only authority to put out fires in the EU, then the fact that there are two fires burning at once means that no fire trucks will be dispatched at all. Article 7 has to be understood as one way to solve a serious problem in the EU, not the only way to address it.

It simply does not follow from the language of Article 7 that the other institutions of the EU cannot or should not work in concert to prevent rule of law violations from occurring in the first place or from spreading when they do. In fact, the CLS opinion almost admits as much. It notes that the Commission can, of course, bring infringement actions against Member States for violating EU law under Article 258 TFEU and that Member States can bring actions against each other under Article 259 TFEU as well. Both sorts of actions can be accompanied by serious

sanctions for non-compliance with ECJ judgments under Article 260 TFEU. If some potential infringement might bear on the rule of law, does that mean that the Commission or another Member State is barred from bringing the infringement action because Article 7 is *lex specialis* for Article 2? The logic of the CLS opinion seems to suggest as much. But clearly that would be a preposterous result.

The CLS is moving in the opposite direction of other EU institutions, where real challenges to Article 2 value have been met with responses that make Article 2 more rather than less enforceable outside the framework of Article 7. While commentators had once generally taken as common wisdom that Article 2 values could not be enforced directly by the ECJ, the ECJ itself has already disabused commentators of that notion. In the Portuguese judges' case decided in February 2018, the ECJ invoked Article 19(1) TEU together with Article 2 TEU to arrive at the logical conclusion that each Member State had a direct obligation under EU law to guarantee the independence of its national judiciary. As the ECJ said in that case: "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals."

The legitimate spread of Article 2 enforcement across the institutions of the EU did not stop with the ECJ's invocation of it. Having previously eschewed referring to basic values in its infringement actions, the Commission promptly took the hint and brought an infringement action against Poland for violating Article 19(1) through its systemic attempt to annihilate the independence of the Polish judiciary – and when Polish authorities refused to halt the purge of Poland's Supreme Court, the Commission returned to the ECJ to ask for interim measures to ensure that the independent Supreme Court judges could remain in their jobs until the matter was judicially settled. The ECJ agreed and imposed interim measures, at last staying the hand of the Polish government before the judicial purge was completed. If the CLS believes that only way to enforce the values of Article 2 is through Article 7, then both the ECJ and the Commission have already and profoundly disagreed.

In a previous opinion analyzing the Commission's 2014 Rule of Law Framework, as previously noted, the CLS had similarly opined that Article 7 was a complete and self-contained system for enforcing Article 2 and therefore this pre-Article 7 procedure exceeded the Commission's mandate. Even though the Commission said that the goal was to try to bring the Member State back into line before asking the Council and the Parliament to trigger Article 7, as the Treaties give the Commission the power to do under Article 7(1), the CLS found the Rule of Law Framework *ultra vires*. Ignoring the negative opinion of the CLS, the Commission used the Rule of Law Framework with Poland anyway, up to the point when the Commission issued its Reasoned Proposal to the Council on triggering Article 7 TEU. Given that the Council had repeatedly asked the Commission to report on the pre-Article 7 dialogue it was having with Poland in the run-up to issuing this proposal, it can be safely concluded that the Council also ignored the CLS opinion on the Commission's Rule of Law Framework and found the Commission's framework both legal and appropriate. Now that the ECJ and the Commission have both endorsed enforcing Article 2 values through infringement actions and the Commission has used its Rule of Law Framework to propose a formal warning to a Member State, the CLS is clearly mistaken in its rigid view that only the precise procedures given in Article 7 can enforce the values in Article 2. We hope that the Council will again ignore this flawed opinion of the CLS and approve the Commission's proposed regulation rather than looking for every possible legalistic excuse to torpedo the efforts of those trying to uphold Article 2 values in the face of a mounting authoritarian threat.

2. The limits of budget conditionality

Once the CLS concluded that the Commission had no business enforcing the values of Article 2, it then proceeded to scrutinize the proposed regulation for signs that the Commission was trying to do just that.

The CLS opinion exudes suspicion about the intentions behind the Commission's proposal.

First, the CLS cast doubt on the Commission's motivation, noting that it had been drafted in response to a parliamentary request, backed by requests from the general public, to "take actions *to protect the rule of law*" (emphasis in original at para. 26). That suggested to the CLS that the real reason behind the proposed regulation was not to safeguard efficient financial management (something the CLS acknowledged could be an appropriate justification for budget conditionality) but instead to enforce Article 2 (which, as we have seen, the CLS opined that the Commission did not have the power to do).

Relatedly, the CLS argued that the Commission had not demonstrated that there was any link between compliance with the rule of law and "an efficient implementation of the Union budget, preservation of the financial interests of the Union and compliance with principles of sound financial management" (para. 27). As the CLS explained, connections between proper use of EU funds and the rule of law are neither necessary nor sufficient because a) problems with financial management can occur for reasons other than rule of law problems and b) rule of law problems don't always translate into financial management concerns. This is specious reasoning. The fact that not all rule of law problems lead to the misuse of EU funds and that not all misuse of EU funds stems from rule of law problems does nothing to undermine the justifications for the proposal put forward by the Commission. The proposed regulation (Article 3) only calls for measures (such as the suspension of payments) to 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*." In other words, the Commission proposal calls for funds to be suspended only when rule of law deficiencies do in fact undermine financial management and put the EU's financial interests at risk.

Implying that a Member State without the rule of law could still be a reasonable steward of EU funds, the CLS called upon the Commission to make a more detailed and precise argument about just how rule of law troubles could possibly lead to financial mismanagement. The assertion that the absence of rule of law would not necessarily interfere with the sound use of EU funding is, quite simply, preposterous. Quite to the contrary, there can be no guarantee of sound financial management without the rule of law.

If a country's rule of law institutions have been captured so that they can no longer make independent decisions, then how on earth can a country be trusted to spend funds in an accountable way? If the judges do what their political masters say and police investigators are capable of finding only the crimes committed by the opposition, then what is to stop the government from putting EU funds into the pockets of friends and family? Indeed, for these reasons, Israel Butler and two of us have argued elsewhere that – even without the Commission's new proposal – the current Common Provisions Regulation already allows the Commission to suspend European Structural and Investment Funds (ESIFs) where a Member State does not uphold the rule of law. The Commission now seeks explicit authorization to suspend ESIFs for rule of law violations which precisely puts all Member States on notice that an implicit power that the Commission already has will be explicitly used for this purpose.

One has to look no farther than the recent headlines in the tiny sliver of the Hungarian press that remains outside of government control to see a clear example. The Hungarian police just dropped the investigation into the government contracts that awarded EU funds to the prime minister's son-in-law, even though the EU's anti-fraud agency OLAF provided overwhelming evidence that the contracts had been awarded in an improper manner. Orbán's police exonerated the prime minister's son-in-law even when they had been handed overwhelming evidence to the contrary by OLAF!

The rule of law is the backbone of any system of even-handed and neutral state administration. Once every administrator, investigator, judge and auditor is a political loyalist whose job is contingent on ensuring that his or her political masters get whatever they

want, effective financial management simply cannot occur.

Finally, the CLS objected that the Commission had not explained precisely what would count as a violation of the rule of law so that Member States could adjust accordingly. While it is not unusual to see the argument that the rule of law would be a broad and vague concept, it is a rather precisely defined term as it is used by EU institutions. As the Commission explained when it announced its rule of law framework, the rule of law has a principled minimum core:

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.

The Venice Commission even has a helpful checklist that explains in more detail what each of these concepts means more precisely. While there may be some imprecision around the edges of these concepts, the core ideas are crystal clear.

In Hungary and Poland, for instance, legal "reforms" have repeatedly breached the most basic understanding of the most basic components of the rule of law. In Hungary, judges can be disciplined by a political official who operates under virtually no standards. In Poland, any judicial decision from the last 25 years can be reopened and re-decided by new judges newly appointed to a new kangaroo council of the judiciary. In both Hungary and Poland, sitting judges have been fired under the guise of political renovation, and new judges have been appointed from among the ranks of party loyalists or new converts to the cause looking for a rapid elevation to senior ranks, judges who understand that their job is to insulate government officials from any negative consequences for their actions. Not surprisingly, public procurement, including procurement with EU funds, is riddled with special favors to government supporters in both Hungary and Poland – and the impunity with which government officials act is in no small measure due to the fact that, with captured courts and audit offices, they will never have to pay a price. If the CLS truly believes that there is no connection between the rule of law and the ability to spend EU funds properly, it does not know what the rule of law means.

The Council – and the CLS in particular – never misses an opportunity to miss an opportunity to defend the fundamental values that form the very *raison d'être* of the European Union. Instead, the Council seems determined to defer to Member State governments, even if they engage in actions so autocratic – from judicial capture, to election rigging, to attacks on independent civil society – that they make a mockery of the EU as a union of values. It would be bad enough if the Council were merely guilty of inaction. However, with this opinion, the CLS is advising the Council to do something even worse: to actually prevent other institutions of the EU from doing their job to uphold and defend the set of common values on which the EU is based. The progressive destruction of law by arbitrariness – rule of law rot – will eventually undermine the entire European project if it is not caught and treated. If the Council is unwilling to lead, it should at least not block other EU institutions when they defend the Union from the autocrats that threaten it.

ABOUT THE AUTHORS

Kim Lane Scheppele
Kim Lane Scheppele is the Laurance S. Rockefeller Professor of Sociology and International Affairs in the Princeton School of Public and International Affairs and the University Center for Human Values at Princeton University.
Laurent Pech
Laurent Pech is Full Professor of Law, Dean of Law and Head of the Sutherland School of Law at University College Dublin. He is also a Senior Research Fellow at the CEU Democracy Institute in Budapest.
R. Daniel Kelemen
R. Daniel Kelemen is a Professor of Political Science and Jean Monnet Chair in EU Politics at Rutgers University in New Jersey.



SUGGESTED CITATION

Scheppele, Kim Lane; Pech, Laurent; Kelemen, R. Daniel: Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism, Verfassungsblog, 12.11.2018, doi: 10.17176/20181115-215538-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20181115-215538-0.