Upholding the Rule of Law in the EU

Conditionality for EU Funds to Combat Rule of Law Violations?

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<td>Commission</td>
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1 Introduction

1.1 Problem Description

The rule of law is regarded as a fundamental part of the constitutional legacy of Europe, as well as a fundamental value of the EU according to Article 2 TEU. Generally, the rule of law is seen as a good thing. However, certain Member States are currently being criticised for what has been described as the dismantling of the rule of law. There is a mechanism set out in the Treaties for the situation where the Parliament, the Commission or a certain number of Member States fear that the rule of law is violated in another Member State. The mechanism is called the Article 7 procedure but in reality, there are two procedures set out in Article 7 TEU. The first, less severe one, can only result in the establishment of a clear risk of a breach of the rule of law. The second part of Article 7 is sometimes called the nuclear option and if used to its full length it could result in the suspension of voting rights in the Council for the Member State concerned.

It can be argued that Article 7 is too blunt an instrument to be effectively used to combat alleged rule of law violations in Member States. However, there are other mechanisms for addressing these issues. Some are already existing within the EU legal landscape, for example infringement procedures that the Commission may bring to the ECJ. Others can be said to spring from the cumbersomeness of applying Article 7 TEU, such as the Commission’s Rule of Law Framework adopted in 2014. Further suggestions have been made, one of those is to connect the compliance with the principle of the rule of law to the disbursement of EU funds. The setting up of conditions in this way is called conditionality. There is currently conditionality for all EU funds but none based on compliance with the rule of law. The aim of this thesis is thus to assess the legal preconditions for introducing rule of law conditionality for EU funds.

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1 The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), preamble.
4 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/1, art 7.
5 ibid art 7.1.
6 ibid arts 7.2-7.3.
1.2 State of Play

The principle of rule of law is currently highly relevant in the EU. Poland and Hungary are the main recipients of the claims that the rule of law is being dismantled. The shift towards illiberal democracy in some Member States, led by among others the prime minister of Hungary, Victor Orbán, has been pointed out as a threat to the rule of law.

There was criticism from the former Justice Commissioner Viviane Reding on the lack of compliance with the rule of law in Hungary as early as in 2013. However no formal action according to Article 7 TEU was brought following that criticism. As already mentioned, the Commission introduced a new Rule of Law Framework in 2014. In short, it can be described as a mechanism that precedes a formal activation of Article 7 by the Commission. The Rule of Law Framework was activated for the first time in 2016, in relation to Poland. The Commission has since issued several recommendations on the rule of law concerning Poland. Dissatisfied with the result, the Commission decided to issue a reasoned proposal to the Council where it recommended the Council to adopt a decision saying that there is a clear risk of a serious breach of the rule of law in Poland, according to Article 7.1 TEU. Any decision has to this date not been adopted by the Council.

Furthermore, the rule of law has recently been the subject of several ECJ judgments. In a request for a preliminary ruling from Portugal the ECJ elaborated on the relationship between independent judiciary and the rule of law. Moreover, an Irish court has referred a case to the ECJ regarding the conditions for not executing a European arrest warrant against a Polish man, given the rule of law violations the Irish court established in Poland. The Commission has furthermore launched infringement procedures against

8 Scheppele, KL & Pech, L (n 3).
9 Pech, L, 'Rättsstatsprincipen i EU - betydelse, funktioner och utmaningar’ in Mellbourn, A (ed.) Hoten mot rättsstaten i Europa (Premiss 2017) 92.
16 Giblin, R, ‘High Court judge seeks EU ruling on effect of Polish law changes’ The Irish Times (12 March 2018).
Poland regarding different retirement ages for male and female judges. Furthermore, voices in the Parliament has been raised recently on the activation of Article 7.1 TEU concerning Hungary as well.

Simultaneously there is debate and talks regarding the next multiannual financial framework (MFF). The MFF is a long-term framework for the maximum spending by the EU over a number of years. The MFF must cover at least five years and the last periods have been seven years. The next period will most likely follow the seven-year pattern. It can be noted that the MFF technically is not a budget, rather a framework under which the annual budgets are to be adopted. However, since it all forms an integral system regarding the financials of the EU, references to the MFF as a budgetary instrument may be made in this thesis. The MFF is decided according to Article 312 TFEU and is unanimously adopted by the Council in the form of a resolution. Before the Council acts, the consent of the Parliament shall be obtained.

The current MFF period runs from 2014-2020 and it is subsequently no surprise debate and talks have begun. It is high time to start the negotiation for the next MFF for the post-2020 period. It can be expected to be a tough negotiation given the loss of UK as a great net contributor after Brexit and the constant difference of agendas and ideas on the size and content of the EU budget given the diverse economic conditions in the Member States. On top of that there is a suggestion to introduce rule of law conditionality. The Commission presented its proposal for the next MFF in early May 2018, including a conditionality mechanism for the rule of law. The Commission’s proposal is not the final product, it only provides a starting point for the negotiations. It can thus be expected that the final MFF will differ from the proposal, both in terms of the levels of spending

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and the existence of a rule of law based conditionality. The proposed conditionality regulation has already received criticism.²¹

Although now is the first time the Commission formally proposes rule of law conditionality, calls for it have been around for a while. The potential of this mechanism to combat violations of the rule of law was acknowledged by the foreign ministers of Denmark, Finland, Germany and the Netherlands in 2013.²² Furthermore, Justice Commissioner Věra Jourová has expressed support for a mechanism that connects the rule of law to EU funds in the post-2020 MFF.²³

As can be drawn from the above, this is a politically sensitive issue. However, in this thesis focus will be on the legal aspects. It is noteworthy though that law may function as a hindrance to political will but it may also simplify political procedures. This is especially true for the different voting mechanisms applicable in the Council and the European Council. These voting rules will be addressed below and it might be worth having the political aspect in mind when reading this thesis even though the main focus is on the legal possibilities of the suggested rule of law conditionality.

1.3 Thesis Objective and Research Question

As mentioned in the problem description above and with the background presented in that section, the objective of this thesis is to assess the legal preconditions for introducing rule of law conditionality for EU funds. The research question to be answered in this thesis is:

*Can the EU combat systematic rule of law violations by establishing rule of law conditionality for EU funds?*

The question may require further definition and explanation. The term systematic is used to differentiate single measures that might limit the impact of the rule of law from the systematic dismantling of a rule of law based system. According to the general systematic of EU law the Commission is the guardian of the Treaties and the CJEU the main

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²¹ Khan, M, ‘Poland rebukes Brussels’ plans to link budget funds to rule of law’ *Financial Times* (Brussels 14 May 2018).
²² Letter from the Ministers of Foreign Affairs of Denmark, Finland, Germany and the Netherlands to the President of the European Commission (6 March 2013).
²³ Šelih, J, Bond, I & Dolan, C, ‘Can EU funds promote the rule of law in Europe?’ (Centre for European Reform, 2017) 7.
interpreter of EU law. For single breaches of Treaty provisions, the infringement procedure is the go to mechanism. However, when violations of the fundamental values of the EU are systematic, the use of the infringement procedure is inadequate since it can only be used against specific issues. Article 7 TEU can be seen as an expression of the limits of the infringement procedure. It is expressed in Article 7.2 TEU that the breach must be serious and persistent.

Conditionality for EU funds may also require further explanation. Conditionality is used in many fields of EU law. Even the accession to the Union is conditional. However, this thesis will only focus on conditionality where compliance with the conditions by a Member State leads to disbursement of EU funds to that Member State. This includes a system where non-compliance leads to suspension of EU funds. Such funds are sometimes paid to Member States directly or to other actors within that Member State via the Member State. For the purpose of the research question, no distinction is made between those two situations.

1.4 Limitations

Certain limitations follow directly from the research question and the short explanation of it in the previous section. For the purpose of clarity, they will be summarised briefly in this paragraph. The thesis is limited to systematic breaches of the rule of law. How the EU might or should combat single rule of law violations is subsequently left outside. Furthermore, the thesis is limited to financial conditionality. Specifically, conditionality which when met leads to the spending of EU funds to the Member States, hereinafter referred to as spending conditionality. Spending conditionality may be used externally towards third states as well, however this thesis is limited to the internal aspect. Lastly, the definition of the rule of law is limited to the definition within the EU. Any other definitions in national jurisdictions and elsewhere, e.g. historical documents and non-national jurisdictions, are used only to better understand the EU’s version of the principle.

Moreover, this thesis will not address the question whether the rule of law has been or is breached in any of EU’s Member States. Instead, the aim of this thesis is to examine the

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possibilities of introducing conditionality based on compliance with the rule of law. The approach is therefore more abstract than concrete in relation to actual and real allegations of rule of law breaches.

As will be noted elsewhere in this thesis, the principle of the rule of law is not static. Its substance and applicability may change over time. This thesis is thus limited to the current understanding of the rule of law within EU. However, since the principle is based on long legal traditions it is unlikely the understanding of the principle will change drastically in the immediate future. Events such as the UK leaving the EU may in the long run result in a steer towards a traditionally more continental understanding of the rule of law. Although, UK is still a Member State of the EU and this thesis’ aim is to determine lex lata, not to speculate in the future of the principle of the rule of law.

1.5 Method and Thesis Structure

The structure of the thesis is closely linked to the method applied. Hence, to best explain both the structure and method of this thesis the two will be addressed together in this section. In order to fully answer the research question, the thesis must first address the definition of the rule of law. The origin of the principle of the rule of law and its current understanding within the EU is a prerequisite for the further assessment of the possibilities to connect said principle to the disbursement of EU funds. The thesis will subsequently be divided, roughly, into two parts. The first part will address the concept of rule of law in an attempt to define the concept as understood in EU law. The second part will be more focused on answering the research question by assessing what legal conditions there are to conditionality for EU funds based on the compliance with the rule of law.

The main problem methodically in pursuit of a definition of the principle of the rule of law is the fact that no recognised and uniform definition of the principle exists. However, there are references in EU law to concepts that form the substance of the rule of law. The method for defining the rule of law must subsequently be approached the other way around compared to assessments of other legal principles. The method that will be applied in this thesis can roughly be explained as first defining a frame of the principle

based on the general understanding historically, linguistically and throughout other jurisdictions than the EU’s. The frame will then be filled with the concepts that have been noted in sources of EU law to form part of the rule of law.

When using this method there may be a risk of missing out on concepts that form part of the rule of law. This is a risk to be aware of and it will be managed by examining a wide range of sources when in search for these concepts. This might result in the finding of a concept that is mentioned in one contexts as forming part of the rule of law but that may not be associated to the value of the rule of law enshrined in Article 2 TEU. By doing this the risk of assessing one concept that in the end turns out to not form part of the rule of law will be higher than the risk of missing out on concepts. Moreover, the research question cannot fully be answered if it is not clarified what substance the principle of the rule of law has. There is consequently reason for conducting this definition exercise.

The framing of the principle will be less related to the jurisdiction of the EU. Rather it will have its starting point in legal history and jurisprudence. The main focus will be on the history of the principle within the jurisdictions of the EU’s Member States. However, outlooks to other jurisdictions may be called upon to specify differences in order to better understand the European pedigree of the principle. The general dividing lines between the different understandings of the principle in the EU Member States will be noted to clarify the dynamic nature of the principle. This will be done in section 2.1.

The filling out exercise will, as noted above, be primarily based on the recognised sources of EU law and will be conducted in section 2.2. However, it is not efficient to go through every source of EU law in pursuit of substance to the rule of law. Since the rule of law is relevant all through the legal spectra such an approach would be highly inefficient. The starting point of this thesis will instead be existing attempts to define the principle of the rule of law. In the current EU context, the main source for that purpose is the Commission’s Rule of Law Framework. There is an annex to the Rule of Law Framework in which a list of concepts is presented. The concepts are accompanied by references to case-law of the CJEU. In the same annex, there is furthermore a reference to a similar list of concepts conducted by the Council of Europe’s Venice Commission. The filling out exercise will start off in these two lists.
When it has been concluded what concepts form part of the rule of law according to the two lists mentioned above, those concepts will be elaborated on one by one in section 2.3. It will be assessed what connection can be established between the concepts that are found to form part of the rule of law on one hand, and the principle of the rule of law, as enshrined in Article 2 TEU, on the other. Furthermore, it will be assessed what each concept entails and how or if they relate to each other. When assessing the concepts that form part of the rule of law, sources from within the EU legal system will primarily be used. It will first be assessed if the Treaties, including TEU, TFEU and the Charter, travaux préparatoires, secondary legalisation and case-law of the CJEU provide sufficient explanation of the concept in question. Where this is not the case, other relevant sources within the EU, which are not legislative acts but are issued by the EU institutions, may be assessed.

The use of travaux préparatoires to interpret provisions in the Treaties has increased, following the preparatory works being made available to the public to a greater extent. The ECJ has relied on travaux préparatoires for example in Pringle, where it was used to determine the aim pursued by the no bail-out clause in Article 125 TFEU. However, the method of interpreting EU law is primarily, and when possible, based on the literal interpretation of the provisions in question. The quest for the underlying aim, which could be found in the travaux préparatoires is thus primarily of importance where the wording does not provide a satisfactory basis for the interpretation. The use of travaux préparatoires can be criticised. It may for example be difficult to know whose underlying objective one is in pursuit of given the number of actors involved in the construction of the provisions. Furthermore, the use of travaux préparatoires is a fairly new phenomenon in the method of interpreting EU law. Many of the documents in question were thus not written with awareness of the future use of them as means of interpretation.

Furthermore, legal doctrine will be used when relevant to fill out the legal sources mentioned above or to complement them with other perspectives or criticism. It is important to be aware of the differences in the legal hierarchy of the sources available. The most prominent source as to whether a concept that is said to form part of the rule of

30 Lenaerts, K & Gutiérrez-Fons, JA (n 28) 4.
law actually does, in relation to the rule of law enshrined in Article 2 TEU, is the case-law of the CJEU. However, where the CJEU does not provide guidance, other sources may be used but there must always be an awareness of the differences to these sources. The same goes for the elaboration of the substance of each concept that forms part of the rule of law but since that outcome is less binary than whether or not a concept can be connected to Article 2 TEU, a wider margin of appreciation can be applied.

The second major part of this thesis, regarding the MFF regulation and the legal possibilities of including the rule of law, partly or in its entirety, among the conditionalities for EU funds. It will consist of roughly three sub parts. Firstly, the current conditionality regulation will be presented and discussed in section 3.2. Secondly, the technical parts of the future MFF regulation, such as what regulations address which issue and the regulations internal relations, will be examined. There will also be a presentation and discussion of the general legal hurdles and limits to the use of the rule of law for conditionality. This will be done in section 3.3. Thirdly, a discussion and assessment will be conducted in section 3.4 of the potential content and scope of a rule of law conditionality for EU funds.

All through the thesis there will be an awareness of the other mechanisms for addressing alleged violations of the rule of law in Member States, and where there is a relationship between this mechanism, the conditionality for EU funds, and another mechanism that relationship will be mentioned and discussed. In the end of the thesis critical remarks regarding this mechanism will be given.

The aim of the method is to interpret the lex lata, it may however seem that the part of this thesis that focuses on the possibilities of including new conditionality is more of a lex ferenda issue. However, the main focus in that section is to determine the legal preconditions for such introduction of new conditionality, it is thus also mainly a question of lex lata interpretation. The method of interpreting EU law is characterised by the aim of uniform application of EU law throughout the Union. The nature of EU law is complex given the fact that EU law is implemented both on supranational level within the EU institutions and the CJEU, and in the Member States. The interpretation is also characterised by the relationship between EU and Member State competence. All legislative acts of the EU must be based on the competences given to the EU in the Treaties. The Treaties subsequently form the natural top of the hierarchy of the EU law
sources. The fact that the rule of law is stated as a fundamental value of the EU in the Treaties form the basis for much of the assessment of the substance of the principle since the concepts that form part of the rule of law preferably should be connected to Article 2 TEU, where the rule of law is enshrined. As will be made clear below, that connection is usually made in case-law of the CJEU.

Analysis and discussion will be built-in throughout the thesis to create a better flow of the text since the different aspects of this thesis differ in character. The first part of the thesis, regarding the rule of law definition, will be more abstract and draw towards philosophical and general jurisprudence questions while the second part, on the conditions for rule of law conditionality, will be more practical and consist mainly of application of EU law and principles.

2 The Definition of the Rule of Law

2.1 The Rule of Law, l’État de droit and der Rechtsstaat

In this section, the exercise described in the method section as the framing of the rule of law will be conducted. As has been noted above, the rule of law stems from different legal traditions but is in all regarded as a fundamental principle. The main legal traditions that has formed and influenced much of the current legal landscape in Europe are the English, French and German.\textsuperscript{31} In the following a short introduction will be made to the understanding of the rule of law, l’État de droit and der Rechtsstaat, respectively.

The linguistic aspect is of importance to note, since the phrases are not direct translations of each other. The French and German phrases adhere to a similar structure though. Both include the word for the state, l’état and der staat, and the word for right or law, droit and recht. A translation to English of these phrases would go along the lines of state of right or state of law. It can be argued that the French and German phrases better describe the principle and that the term rule of law in itself is contradictory since ruling requires actions and laws are unable to act.\textsuperscript{32} However, since this thesis is written in English the rule of law will be used. Moreover, in EU there are currently 28 official languages and

\textsuperscript{31} Loughlin, M (n 27) 313.

\textsuperscript{32} ibid.
any reference to either of the phrases above shall mean the same thing,\(^{33}\) according to the uniform application of EU law.

Regarding the English principle of the rule of law a good starting point for understanding the essence of the principle is the Magna Charta.\(^{34}\) Drawn up in 1215 it was a contract between the king of England and rebellious barons and in content it was mainly a limitation to the king’s powers.\(^{35}\) One of the central provisions of the Magna Charta regards the concept of non-arbitrariness and contemporary legal scholars have traced the current principle of rule of law to Magna Charta.\(^{36}\) In Magna Charta individuals are protected against the arbitrary power of the king.\(^{37}\) In this context, the core of rule of law, as the absence of rule of individual will, is clear. However, the concept has evolved since the 13\(^{th}\) century. In the late 19\(^{th}\) century Albert Venn Dicey formed a now classic definition of the rule of law.\(^{38}\) The definition includes three key concepts. First, “that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land”,\(^{39}\) in other words the concept of legality.\(^{40}\) Secondly, “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”,\(^{41}\) otherwise known as the concept of equality before the law.\(^{42}\) Finally, Dicey argues that the rule of law is the product of constitutional principles being the result of “judicial decisions determining the rights of private persons in particular cases brought before the Courts.”\(^{43}\) Laurent Pech argues that the third concept must be seen in the context of Dicey’s dislike of the continental tradition, specifically the French.\(^{44}\) Dicey argues for the superiority of the common law system for

\(^{33}\) See for example the different translations of COM(2014) 158 final.

\(^{34}\) See for a similar view Bingham, T, The Rule of Law (Penguin Law 2011), 10.


\(^{36}\) ibid 464-466.

\(^{37}\) ibid 466.

\(^{38}\) Pech, L, ’Rättsstatsprincipen i EU - betydelse, funktioner och utmaningar’ (n 9) 94.


\(^{41}\) Dicey, AV (n 39) 189.


\(^{43}\) Dicey, AV (n 39) 191.

the protection of human rights. Dicey’s definition is not spared competition but it remains the general starting point for the definition of the rule of law in the English legal tradition. An attempt to define the current British understanding of the rule of law is made by Tom Bingham. He writes that the core of the rule of law is “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.47

Dicey’s dislike for France and its legal system provides a good transition to the continent’s legal traditions and specifically the French understanding of l’État de droit. The principle in its French form started to develop in the late 19th century. By that time the principle of national sovereignty was guiding French public law and it was perceived that the legislative power was the exercise of the general will. At this point French jurists started questioning if not the legislative power should also be made subject to the law. Raymond Carré de Malberg was a central figure in this movement. He made a distinction between l’État légal and l’État de droit where the former primarily meant that the administration of the state acted according to the laws. The concept of l’État de droit followed from the conviction that the law exists to protect individual rights. L’État légal did not, according to de Malberg, satisfy that conviction.

The German principle of der Rechtsstaat was developed from tensions between traditional authoritarian values and modern liberal values. The German understanding of der Rechtsstaat can be seen as the opposite to der Polizeistaat. The tensions culminated at the Paulskirche national assembly following the revolution of 1848. The ambitious Paulskirchenverfassung, that never came into effect but still has had a large

46 ibid.
47 Bingham, T (n 34) 37.
48 Loughlin, M (n 27) 322.
49 ibid.
50 ibid.
51 ibid.
52 ibid.
53 ibid.
54 ibid.
55 ibid 319.
56 Pech, L, ’Rättssatsprincipen i EU - betydelse, funktioner och utmaningar’ (n 9) 95.
57 Loughlin, M (n 27) 319.
influence on German constitutional thinking and tradition, treated *der Rechtsstaat* as a fundamental principle of liberal constitutionalism.\(^{58}\) In practice however, *der Rechtsstaat* was regarded as a principle in administrative law until it was elevated to a guiding principle in all areas of law in the 1949 constitution.\(^{59}\) The traditional approach to rights, and subsequently the understanding of *der Rechtsstaat*, changed after 1945 and the idea that rights could not be fundamental or have natural existence was challenged.\(^{60}\)

According to the traditional German approach rights were only created through legislative action.\(^{61}\) However, the constitutional discussions post-1945 led to the *Bundesverfassungsgericht*, the federal constitutional court, being established. The court was made the guardian of the constitution and it held that the constitution embodied a regime of basic values.\(^{62}\) In contrast to the English understanding of the rule of law that has evolved gradually and without drastic changes, the German equivalent has changed and evolved as historic events has occurred and reached its current understanding as late as in the 1940s and 50s.

It can be concluded that there are similarities in the three national principles. They were all established or developed in the mid-late 19\(^{th}\) century, they are all considered to be fundamental elements of the respective constitutional traditions and it was liberal jurists that took the lead during the development in the mid-late 19\(^{th}\) century.\(^{63}\) However, there are also clear differences. The English concept was developed as a limitation of the king’s powers, the French concept was based on the protection of individual rights and the German concept was the liberal antitype to the authoritarian *Polizeistaat*. To combine these constitutional traditions with 25 others into one common European legal tradition in the EU is not done without bumps in the road. The following sections will set out to fill in this frame set up by the general “European” understanding of the rule of law with positive concepts that form part of the rule of law in its EU understanding.

### 2.2 Existing EU Rule of Law Definitions

As can be drawn from what is written above, there is not one definition of rule of law that is generally applicable within all jurisdictions. The content of the principle of rule of law,

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58 Loughlin, M (n 27) 319.
59 Pech, L, ’Rättsstatsprincipen i EU - betydelse, funktioner och utmaningar’ (n 9) 95.
60 Loughlin, M (n 27) 321.
61 ibid 320.
62 ibid 321.
63 ibid 323-324.
as will be described hereinafter, is limited to what it is understood to be contained in the jurisdiction of EU. The central rule of law provision in EU law is the enshrinement in Article 2 TEU of the rule of law as a fundamental value on which the EU is based.

The starting point for the assessment regarding what concepts make up the principle of rule of law is not obvious though. Article 2 TEU provides no instruction as to where one is to look for the content of the principle. On the contrary, concepts lay scattered throughout the vast landscape of EU law. For example, some concepts are found in other articles of the Treaties, others are established in case-law of the ECJ as will be explained below. However, as was noted above in the section on the method, going through every act of legal significance in search for the concepts that form part of the rule of law is highly inefficient. The starting point will instead be existing lists of such concepts.

The Commission introduced the Rule of Law Framework in 2014 in the form of a communication.\(^{64}\) In essence it sets out a procedure for the Commission to follow when there is fear of rule of law breaches in Member States. The procedure can be said to precede an Article 7 procedure and is supposed to be less formal and aim towards dialogue between the Commission and the Member State concerned. The part of the Rule of Law Framework of interest for this study is the list of concepts presented in the annex of the communication. This list does, slightly surprising given the title of the communication, \textit{A new EU Framework to strengthen the Rule of Law}, not claim to be a list of rule of law concepts per se, rather it is a list of noteworthy general principles of EU law. A probable reason for this is the fact that every mention of a general principle is based on case-law of the CJEU. Few cases, historically, have mentioned rule of law in connection with the concepts listed in the annex. Whether that means that they are not part of the principle of rule of law will be discussed below when the concepts are being assessed one by one.

The Council’s legal service gave, also in 2014, an opinion on the Rule of Law Framework where it criticised its legal basis and argued that it is incompatible with the principle of conferral.\(^{65}\) It was noted that Article 5 TEU sets out the principle of conferral according to which any competence not conferred upon the EU remains the competence of the

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\(^{64}\) COM(2014) 158 final.  
\(^{65}\) Council of the European Union, Opinion of the Legal Service on the 27 May 2014 ‘Commission’s Communication on a new EU Framework to strengthen the Rule of Law’ (Council’s Legal Service) 10296/14, para 28.
Member States. Furthermore, the Council’s legal service noted that Article 2 TEU does not confer any material competence to the EU. It was thus concluded that the EU’s institutions do not have the competence, according to the Treaties, to act with the aim of respect for the rule of law, with the exception of Article 7 TEU. Moreover, there is no room in Article 7 TEU to adopt any further measures. The Council’s legal service therefore concludes that there is no legal basis in the Treaties for the adoption of a framework like this. It should be noted that the Council’s legal service’s opinions are not binding and that the Rule of Law Framework has been used after this opinion was given.66

No criticism was directed towards the legitimacy of the list of concepts in the annex, why it is still relevant to consider the Rule of Law Framework, at least in that regard.

Additionally, in the annex of the Rule of Law Framework there is a reference to a similar list drawn up by the Council of Europe’s Venice Commission. Although the Council of Europe is disconnected from the EU, all Member States of the EU are also members to the Council of Europe. Moreover, the EU is not bound by the judgments of the ECtHR but there are references made to judgments of the Strasbourg court as well as the ECHR and reports from the Venice Commission in the judgments of the CJEU and opinions of the Advocate Generals.67 The list in question was drawn up by the Venice Commission in 2011 and is noted to not be exhaustive.68 This can be compared to the disclaimer in the Commission’s list that it is made up of noteworthy principles. If nothing else, this ambiguity illustrates the difficulty of defining the content of the rule of law.

In this paragraph, a comparison of the two lists will be conducted. First, it can be noted that the lists carry similarities. The following concepts are present in both lists: legality, legal certainty, equality before the law and respect for fundamental rights.69 The Venice Commission uses human rights instead of fundamental rights, in the following the two terms will be used interchangeably. Both lists also include the prohibition of arbitrariness,

although in the Commission’s version the words of the executive powers are added.\textsuperscript{70} The
Venice Commission has included non-discrimination as an individual concept. However, it will be made clear below that non-discrimination is closely linked with equality before the law. Non-discrimination will therefore be addressed in the section on equality before the law. Furthermore, the Venice Commission uses the term access to justice before an independent and impartial court while the Commission uses independent and effective judicial review.\textsuperscript{71} What importance these differences have will be addressed in each section below. An assessment of the potential differences between the concepts of access to justice before an independent and impartial court and independent and effective judicial review will be addressed first.

2.3 The Concepts that Form Part of the Rule of Law

2.3.1 Access to Justice vs. Judicial Review

The two concepts of access to justice before an independent and impartial court and independent and effective judicial review are closely linked. Both of them pursue an independent justice system where cases brought to it can be solved. However, it must be determined if the two expressions are synonymous or if there is a difference given the different wordings. The first element of each concept is the access to justice and judicial review respectively. In case-law of the ECJ it has been stated that judicial review follows from Article 47 of the Charter.\textsuperscript{72} Furthermore, it has been established that Article 47.2 of the Charter corresponds to Article 6.1 ECHR, where access to justice is enshrined.\textsuperscript{73} The ECJ has stated that Article 47 of the Charter secures the rights set out in Article 6.1 ECHR in EU law.\textsuperscript{74} According to the ECJ there is therefore no need to make references to Article 6.1 ECHR, given that the rights are protected in EU law by Article 47 of the Charter.\textsuperscript{75} This follows the general relationship between the Charter and the ECHR, stated in Article 52.3 of the Charter, according to which corresponding rights in both systems should have at least the meaning and scope in the Charter as in the ECHR.

\textsuperscript{70} COM(2014) 158 final, Annex 1.
\textsuperscript{71} ibid.
\textsuperscript{72} Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013] EU:C:2013:625 para 97.
\textsuperscript{73} Case C-279/09 DEB [2010] ECR I-13849, para 32.
\textsuperscript{74} Case C-199/11 Otis and Others [2012] EU:C:2012:684 para 47.
\textsuperscript{75} ibid.
Judicial review does not cover all situations where a case must be able to be brought to court if access to justice is to be fulfilled. Judicial review may have different scopes of application depending on jurisdiction but in essence it is the review, by the judiciary, of the powers exercised by legislations, decisions etcetera. Its purpose is to assure the compliance of the decisions taken by the authorities or the laws adopted by the parliament of a state, with that state’s constitutional order. It may regard the division of competence, procedural issues or compliance with higher constitutional norms. Judicial review is complemented by for example judicial appeal which in essence provides for the facts of a case or the interpretation of a legal provision to be reconsidered when there is a claim of misinterpretation in a decision by a public authority or a lower court instance. Access to justice is required to fulfil both judicial review and judicial appeal but it can be questioned whether both fall inside the principle of the rule of law according to the EU’s understanding. As will be addressed here below, there is an inherent difference between the legal systems in the Council of Europe and the EU that points in favour of judicial review being sufficient for the EU’s understanding of the rule of law.

The ECHR focuses on the protection of individual’s rights and the Council of Europe and the ECtHR is primarily concerned with establishing an order that guarantees those rights. The EU on the other hand is a complete legal system that lays down laws and have a “constitutional” system consisting of its Treaties. It can thus be deemed natural that the Council of Europe’s main concern is the access to justice since it is essential for individual’s rights to be guaranteed. The conflict of norms or constitutional compatibility are not relevant considerations for the Council of Europe or the ECtHR. Conversely it is natural that the EU’s main concern is the judicial review given the fact that the EU enacts laws that must comply with the Treaties and be in conformity with its constitutional norms. The EU’s legal system is based on EU law being applied uniformly in all Member States. The uniform application is ensured through the possibility for individuals in any Member State to turn to their national judicial system with an issue regarding EU law. The right to judicial appeal is vital to ensure individuals’ rights but judicial review can assure the uniform application of EU law.

It must subsequently be concluded that the terms spring from separate aims and interests but that access to justice and judicial review, as enshrined in Articles 6 of the ECHR and Article 47 of the Charter, overlap. Moreover, it can be concluded that judicial review only partly covers the spectra of cases that may have reason to require access to justice.
However, for the EU’s understanding of the rule of law, judicial review is of essence rather than judicial appeal, or any other type of action brought against a court. It can subsequently be concluded that references to Article 6 ECHR may be relevant for the understanding of Article 47 of the Charter, but it should be kept in mind that the content of the two articles are not identical.

The independence and/or impartiality is connected to the aforementioned principles of access to justice and judicial review. In legal doctrine, regarding access to justice according to the ECHR, it has been noted that being independent and impartial are expressions of two different concepts.\textsuperscript{76} Independence of the judiciary is related to the independence from the public administration.\textsuperscript{77} Impartiality, on the other hand, has to do with the relationship between the judge and the parties of the case.\textsuperscript{78} However, in case-law of the ECJ a distinction has been made between the external and internal aspects of independence. The external aspect entails that the members of the court, the judges, should be protected from external intervention.\textsuperscript{79} This is guaranteed by protecting the integrity of the judges, for example by making them protected against removal from office. The internal aspect is related to impartiality and entails that the judges should remain at a constant distance from the interests of the parties in the case they are to judge over.\textsuperscript{80} It can subsequently be concluded that what in the jurisdiction of the Council of Europe is regarded as two concepts, independence and impartiality, is regarded as two aspects of the same concept in EU’s jurisdiction.

2.3.2 Judicial Review
Although the concept of judicial review and independent judiciary are strongly connected they will be dealt with separately here since there are different aspects and approaches to the concepts in the case-law of the ECJ. As noted above the concept of judicial review can be drawn from Article 47 of the Charter. The ECJ has found that judicial review is of

\textsuperscript{77} Settem, OJ (n 76) 60.
\textsuperscript{78} ibid.
\textsuperscript{79} Case C-506/04 Wilson [2006] ECR I-08613, para 51.
\textsuperscript{80} ibid para 52.
the essence for the rule of law. Moreover, EU acts are subject to judicial review, in particular in relation to the Treaties, the general principles of law and fundamental rights.

Additionally, there is a vast selection of case-law from the ECJ regarding the understanding judicial review according to Article 47 of the Charter. In essence, judicial review means that the court or tribunal in question must have power to consider all the questions of fact and law that are relevant to the case before it. The concept is twofolded consisting of, on one hand, the access to a fair trial, and on the other, the access to an effective remedy. It should be noted that the concept as drawn from the Charter, is only applicable to acts of EU law. However, the ECJ has concluded that EU law, given its nature and characteristic, forms part of the national legal systems in each Member State.

As just mentioned, access to justice is a two-folded concept. The two parts will be analysed in the following. First, the access to a fair trial will be addressed. For fair trial to prevail there is a need for access to court. Access to court can be said to have two aspects, one formal and one less formal. The formal aspect, the right to bring action before a court, has been acknowledged by the ECJ. The less formal aspect is the access to inter alia legal aid to provide similar conditions for all parties in a trial. There may be a difference regarding resources, legal expertise, experience etcetera between the parties of a trial. This may be compensated by providing a structure of legal aid or other equal measures. That legal aid shall be available to those who lack sufficient resources is stated in the third paragraph of Article 47 in the Charter. The obligation to provide legal aid is limited to when it is necessary to ensure effective access to justice.

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82 Case C-583/11 P, para 91.
83 See Case C-199/11, para 49.
In 2016, a directive on strengthening of the presumption of innocence and of the right to be present at the trial in criminal proceedings was adopted.\(^8^8\) It is stated in the preamble that presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter.\(^8^9\) According to Article 3 of the directive Member States shall assure that suspects and accused persons are presumed innocent until proved guilty according to law. Furthermore, the right to not incriminate oneself, the right to be silent and the right to be present at the trial are laid down.\(^9^0\)

Further aspects emerge from the Venice Commission and case-law of the ECtHR. Notably, the effectiveness of judicial decisions.\(^9^1\) That is that the effects of a judgment should be executed effectively and promptly. The ECtHR has stated that it follows from Article 6 of the ECHR that a final, binding judicial decision should not remain without execution.\(^9^2\)

The second part of the concept, right to an effective remedy, will hereby be addressed. The system for judicial review within EU, primarily expressed though the possibility to reference a case for a preliminary ruling has been emphasised by the ECJ as a central component for the protection of an effective remedy.\(^9^3\) The system provides the conditions for a uniform application of EU law throughout the Union. The autonomy of EU law, and the necessity of preliminary rulings to achieve the autonomy was addressed in *Achmea*.\(^9^4\) The case concerned a bilateral investment treaty (BIT) between the Netherlands and Slovakia which included an arbitration clause that provided for an arbitral tribunal. The arbitral tribunal could apply national Dutch or Slovakian law as well as other agreements between these states. The ECJ concluded that under such circumstances, and given the character of EU law as an integral part of national law in each Member State, EU law may be applied and interpreted by the arbitral tribunal. Furthermore, the decisions of the arbitral tribunal were definitive and the tribunal did not


\(^{89}\) ibid preamble (1).

\(^{90}\) ibid arts 7-8.

\(^{91}\) Venice Commission Report, 27.

\(^{92}\) *Hirschhorn v Romania* App no 29294/02 (ECtHR, 26 July 2007).

\(^{93}\) Case C-583/11 P, para 92.

\(^{94}\) Case C-284/16.
have the right to refer a case to the ECJ for preliminary ruling. This in total meant that EU law could be applied and interpreted but there was no way the application and interpretation could be subject to review by the ECJ. This led the ECJ to the conclusion that the autonomy of EU law was not upheld.

A preliminary ruling can only be asked for by a “court or tribunal” according to Article 267 TFEU. A fundamental characteristic of a court or tribunal according to Article 267 TFEU is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU. It should be recalled that the aim of this provision in the Treaties is to ensure that EU law has the same effect in all Member States. It can thus be concluded that there is a need for a national court or tribunal to have the possibility to ask the ECJ for a preliminary ruling in order to provide for an effective remedy.

2.3.3 Independent Judiciary

In a recent judgment from the ECJ, it is established that independent courts and judges are necessary for the upholding of the rule of law. The case was the result of a request for a preliminary ruling from a Portuguese court and the background was the reducing of wages for civil servants in Portugal as a measure to combat the large deficits in Portugal at the time. The reduced wages policy also hit judges and an association for judges argued that the reducing of wages would limit the independence of the judges.

In the judgment, the relationship between Article 2 and 19.1 TEU as well as Article 47 of the Charter is clarified. It is primarily noted that Article 19.1 TEU gives substance to the value of rule of law as set out in Article 2 TEU. The substance in question is the need for an effective judicial review. To understand what is meant by effective judicial review, the ECJ notes that the independence of courts and judges, as set out in Article 47 of the Charter, is necessary. It can subsequently be concluded that independent courts and judges is an aspect of rule of law. The ECJ mentions two characteristics of independence.

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95 Case C-284/16, para 56.
96 ibid para 59.
97 ibid para 43.
99 Case C-64/16.
100 ibid para 32.
101 ibid para 41.
of the judiciary. Firstly, that judges are protected against removal from their office and secondly, that judges should be paid in accordance with the importance of the functions they carry. The first of those two aspects of independence has been settled case-law of the ECJ since 1998. The second can be said to follow from a report from the Venice Commission.

As noted above a distinction has been made by the ECJ between the internal and external aspect of independence. The external aspect entails that the members of the court, the judges, should be protected from external intervention. That is guaranteed by protecting the integrity of the judges, for example by making them protected against removal from office. The internal aspect is related to impartiality and entails that the judges should remain at a constant distance from the interests of the parties in the case they are to judge over. Conclusively, objectivity is necessary and the only interest of judges should be the strict application of rule of law.

The question of whom or what the judiciary should be independent from is answered partly through these two aspects presented by the ECJ. The external aspect leads to the assumption that all external intervention that might jeopardise an independent ruling constitute a threat to the independence of the judiciary. In the case on the salaries of Portuguese judges, it is stated that the concept of independence assumes that the judicial functions are exercised autonomously “without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever”. Any external intervention may thus be a threat to the independence of the judiciary. Furthermore, the internal aspect states that other interests than the interest of strict application of rule of law may threaten the independence of the judiciary.

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102 Case C-64/16 para 45.
104 Case C-64/16, Opinion of AG Saugmandsgaard Øe, para 78.
105 Case C-506/04.
106 ibid para 51.
107 ibid para 52.
108 Case C-64/16, para 44.
One way to assure independence, specifically the external aspect of it, is the principle of separation of powers. The ECJ has stated that the separation of powers is a characteristic of rule of law.\(^{109}\) However, the ECJ has not elaborated on its understanding of separation of powers. Much has been written on the separation of powers between the EU institutions.\(^{110}\) Less has been written on the requirements EU impose on its Member States regarding the separation of powers. Many EU Member States have constitutions that set out that the state should be based on the separation of powers.\(^{111}\) However, not all do. In Sweden, the state is based on the principle of popular sovereignty, even though some elements of separation of powers has been added in recent years.\(^{112}\) It must be asked whether separation of powers is an aim in itself or merely a way to reach the genuine aim, the independence of the judiciary. Other paths may be available to reach independence and it can be questioned whether it matters for this definition if another choice of path is made, given that the aim of an independent judiciary is reached.

According to the case-law presented above, any removal of judges from their office constitutes a breach of the concept of independent judiciary. However, there may be instances where removal is called upon. Since the independence of the judiciary is regulated in the Charter, specifically in Article 47, there is a structure for when and how a limitation of a right or freedom can be made. The structure is set out in Article 52 of the Charter. Limitations can only be made by law and as long as they respect the essence or the right or freedom. Furthermore, limitations should be subject to proportionality and may only be made when they are necessary. Finally, the limitation should genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. The ECJ has stated, in relation to Article 47 of the Charter, that the absence of a specific legal basis is contrary to the fundamental principle of the rule of law.\(^{113}\)

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\(^{109}\) Case C-279/09, para 58.


2.3.4 Equality before the Law

The ECJ has stated that equal treatment follows from Articles 20 and 21 of the Charter and is a general principle of EU law.\textsuperscript{114} According to that principle, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.\textsuperscript{115} Equality before the law is related to the principle of non-discrimination. Article 20 of the Charter states simply that “[e]everyone is equal before the law” and Article 21 refers to non-discrimination. It is important to make a distinction between the two articles and subsequently the rights they entail. The main difference being that non-discrimination is limited to the grounds of discrimination, listed in Article 21 of the Charter. It follows from the wording of Article 20 of the Charter that the scope of application seems to be larger. It seems to include that any inequality, regardless if based on any of the grounds of discrimination or not, is a violation of Article 20.

The statement in Article 20 follows a theme in the Charter.\textsuperscript{116} Article 20 is the first article under the title Equality and the following articles, 21-26, are all specialisations of the general principle set out in Article 20.\textsuperscript{117} There has been some criticism on the grounds that Articles 21-26 limit the application of Article 20.\textsuperscript{118} The critics’ main concern is the fact that equality before the law seems to have been made synonymous with non-discrimination.\textsuperscript{119}

Regardless the scope of application of the concept, there is a need to establish a link between it and the rule of law. References to equality before the law as a general principle are common,\textsuperscript{120} but references to the concept as a part of rule of law is harder to find. According to the Cotonou Agreement, rule of law entails inter alia equality before the law.\textsuperscript{121} The Cotonou Agreement is a treaty between the EU and the so-called ACP-

\begin{itemize}
\item \textsuperscript{114} Case C-550/07 \textit{Akzo Nobel Chemicals and Akcros Chemicals v Commission} [2010] ECR I-08301, para 54.
\item \textsuperscript{115} ibid para 55.
\item \textsuperscript{117} ibid 15.
\item \textsuperscript{118} ibid 29.
\item \textsuperscript{119} ibid.
\item \textsuperscript{120} See for example Case C-550/07 P, para 54.
\item \textsuperscript{121} The Cotonou Agreement (Signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005, revised in Ouagadougou on 22 June 2010), art 9.2.
\end{itemize}
countries. However, the relevance of this can be questioned since the treaty is not part of EU law and is only applicable between the parties.

Equality before the law is mentioned in the Rule of Law Framework in both the Commission’s and the Venice Commission’s lists. In the Rule of Law Framework, there is a reference to the case-law establishing equality before the law as a general principle. However, the connection between equality before the law as a general principle and as a right following from the Charter on one hand, and the rule of law according to Article 2 TEU on the other, remains unclear.

2.3.5 Respect for Fundamental Rights
Many of the concepts that are listed here as forming part of the principle of rule of law are based on or linked to fundamental rights stemming from inter alia the Charter. However, the respect for fundamental rights can also be said to forms its own concept within the understanding of rule of law. The Venice Commission concluded that there is consensus regarding respect for human rights being a core element of rule of law. It is worth noting that the Council of Europe consists of three pillars, rule of law, human rights and democracy. In that context, rule of law and fundamental rights seem to be in a horizontal relationship but as mentioned above, respect for fundamental rights is related to rule of law in a vertical manner as well. The concepts seem to be intertwined and their relationship to each other may at times be hard to make out from the outside. Respect for human rights is furthermore stated as a fundamental value of the EU, alongside the rule of law in Article 2 TEU.

As mentioned above, individual fundamental rights form their own concepts of the rule of law, such as judicial review, independent judiciary and equality before the law. Other human rights of relevance for rule of law include, according to the Venice Commission, the right to expression. The right to openly criticise the government, and the judiciary, is argued to be a necessary component in a state governed by rule of law. The Venice

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122 79 countries from Africa, the Caribbean and the Pacific.
124 Statute of the Council of Europe signed in London 1949 (ETS No. 001), art 3 and preamble.
Commission also mentions the prohibition of torture as related to the right to a fair trial.\textsuperscript{126} As expressed above in the section on independent judiciary, limitations to fundamental rights in the Charter must be provided for by law.\textsuperscript{127} That in itself is an expression of the concept of legality.

It may be worth recalling the French origin of the principle of \textit{l’État de droit} as a means of reaching respect for fundamental rights. With that understanding another relationship between the rule of law and fundamental rights emerges where the rule of law, contrary to the conclusion reached by the Venice Commission, is seen as a stepping stone towards human rights. According to that understanding the rule of law would be regarded as subordinated to the respect for human rights.

It can be concluded that there is a relationship between the respect for fundamental rights and the rule of law but it cannot be certain that the general respect for fundamental rights forms part of the rule of law according to Article 2 TEU. However, the individual rights that also constitute their own autonomous concepts of the rule of law unequivocally form part of the rule of law principle.

2.3.6 Legality

Measures adopted by the Union shall be subject to a complete system of legal remedies to review the legality.\textsuperscript{128} This is provided for by the role of the CJEU and its function to ensure the uniform application of EU law. According to ECJ in \textit{Les Verts}, legality concerns the question whether the measures adopted by EU institutions are in conformity with the basic constitutional charter of the EU.\textsuperscript{129} In \textit{Les Verts}, the ECJ states that the EU is based on the rule of law and that denying a review of the constitutional conformity is a breach of the fundamental value.\textsuperscript{130} It may be noted that, as has been mentioned above, this thesis focuses on the national conformity of rule of law and not the horizontal issues within the EU. However, as was concluded in the aforementioned \textit{Achmea},\textsuperscript{131} EU law should be regarded as an integral part of every Member State’s national law. It can thus

\textsuperscript{126} Venice Commission Report, 13.
\textsuperscript{127} There are other requirements as well, e.g. proportionality and that a limitation should respect the essence of the right or freedom.
\textsuperscript{129} ibid.
\textsuperscript{130} ibid.
\textsuperscript{131} Case C-284/16.
be said that not providing for legal remedies to review the legality of relevant acts and measures, regardless if it is limited to EU law or national law in general, constitutes a breach of the concept.

The concept of legality is enshrined in Article 49.1 of the Charter and was discussed in an opinion by Advocate General Bobek. In the opinion, he states that the core of legality, which is the strongest expression of the concept of legal certainty, is the prohibition of retroactivity. This statement clearly shows the link between legality and legal certainty, that will be addressed below. Moreover, the prohibition of *ex post facto* law, i.e. retroactive changes to the legal consequences of acts already committed, has been set out in case-law. It requires that it is possible to determine, for a concerned person, exactly when any measure with legal effect stemming from the EU institutions starts having legal effect.

### 2.3.7 Legal Certainty

The relationship between legal certainty and rule of law is established in settled case-law of the ECJ since it has been concluded that the system of preliminary rulings ensures the compliance throughout the EU of the fundamental requirement for legal certainty. Furthermore, the system of preliminary rulings is necessary to provide effective judicial review. Effective judicial review is in turn of the essence for the rule of law.

In the joined cases C-643/15 and C-647/15 the ECJ elaborated on the concept of legal certainty. The background to the cases was a decision by the Council regarding the flow of asylum seekers that primarily concerned Greece and Italy and the decision’s objective was to relocate asylum seekers to other Member States. Both Slovakia and Hungary contested the act and Hungary argued that the act lacked legal certainty. The ECJ concluded that by explaining the interaction between the provisions of that act and the

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132 Case C-574/15 *Scialdone* [2018] EU:C:2017:553, Opinion of AG Bobek, para 146.
134 Case T-115/94, para 124.
135 Case C-72/15, para 80.
136 ibid para 75.
137 ibid para 73.
provisions of legislative acts adopted within the framework of the EU’s common asylum policy, the Council had observed the concept of legal certainty.\(^{138}\)

In *Rosneft* it is stated that legal certainty requires, in particular, that rules should be clear and precise.\(^{139}\) With legal certainty, individuals may be able to clearly determine what rights and obligations they have, and act accordingly.\(^{140}\) In *Rosneft* the ECJ further concludes that the principle of *nulla poena sine lege certa* constitutes a specific expression of legal certainty.\(^{141}\) According to case-law of the ECtHR, it is enough that the provision in question proves to be sufficiently clear in the large majority of cases.\(^{142}\)

As noted above, it has been established that clarity and precision are prerequisites for legal certainty. To increase predictability of the law for individuals and to decrease asymmetric information relations between law maker and the subject of the law, clarity in legal language is significant.\(^{143}\) The ECJ has imposed high requirements of clarity and preciseness in legal language.\(^{144}\) It can be noted that the general aim of these requirements is the predictability of the law.\(^{145}\)

The way in which the legal provisions are interpreted by the courts, both the CJEU and the national courts, is of importance for legal certainty. When the law is clear and precise, a literal interpretation can best accommodate legal certainty.\(^{146}\) This is true since it provides for a high level of predictability. In cases where the predictability is of paramount importance, the need to follow the wording of clear and precise provisions is required.\(^{147}\) This is particularly true in the field of criminal law where the principle of *nulla poena sine lege certa* is essential.\(^{148}\) There may be cases where the wording of a


\(^{139}\) Case C-72/15, para 161.

\(^{140}\) ibid.

\(^{141}\) ibid para 162.

\(^{142}\) ibid para 164.

\(^{143}\) See for example Case C-63/93 Duff and Others [1996] ECR I-00569, para 20 and Portuese, A, Gough, O & Tanega, J (n 143) 132.

\(^{144}\) Lenaerts, K & Gutiérrez-Fons, JA (n 28) 6.

\(^{145}\) ibid 7.

\(^{146}\) ibid.
legal provision is ambiguous in relation to the clear meaning of said provision.\textsuperscript{149} In those cases a divergence from the literal interpretation may be in line with the concept of legal certainty.\textsuperscript{150}

One aspect of EU law that may pose a hurdle to the clarity and preciseness is the fact that there are, at the moment, 28 official languages of the Union. It has been established by the ECJ that the wording in one language version of a EU act cannot be the sole basis for the interpretation of that act.\textsuperscript{151} Subsequently, in the event of discrepancy between different language versions, one cannot rely on a single language version when assessing the content of EU law. Incorrect translation or use of language may pose a threat to the legal certainty.\textsuperscript{152} While it may seem impractical that assessment of multiple language versions is required when applying a legal provision, any other solution would threaten the uniform application of EU law.\textsuperscript{153}

2.3.8 Non-Arbitrariness (of the Executive Powers)

Prohibition of arbitrariness is listed both by the Commission and the Venice Commission. Furthermore, it can be said that non-arbitrariness is the essence of the rule of law, following the German understanding of the rule of law as the opposite to the arbitrary \textit{Polizeistaat} and the English understanding of the rule of law as the absence of the arbitrary exercise of power by the king. According to these legal traditions, non-arbitrariness can be said to both form a natural part of the rule of law but it can also be said to be synonymous to the term rule of law. It is therefore no surprise or controversy surrounding the inclusion of the concept of non-arbitrariness as a part of the rule of law in the EU.

However, as was noted previously, the Commission has added the words: \textit{of the executive powers}. In the following it will be discussed what, if any, importance this difference has. The addition seems to limit the scope of application in comparison to non-arbitrariness in general that would include non-arbitrariness of other actors than just the executive powers. However, the question is if there are any other relevant actors that fall outside

\textsuperscript{149} Case C-582/08 \textit{Commission v United Kingdom} [2010] ECR I-07195, Opinion of AG Jääskinen, para 27.

\textsuperscript{150} Lenaerts, K & Gutiérrez-Fons, JA (n 28) 7.

\textsuperscript{151} Case C-16/16 \textit{Belgium v Commission} [2018] EU:C:2018:79, para 50.

\textsuperscript{152} Miščenič, E, ‘Legal Translation vs. Legal Certainty in EU Law’ in Miščenič, E & Raccah, A (eds.) \textit{Legal Risks in EU Law} (Springer 2016) 87.

\textsuperscript{153} Lenaerts, K & Gutiérrez-Fons, JA (n 28) 12.
the scope of the Commission’s term. The concept entails the absence of arbitrary exercise of power. Naturally only actors that exercise power may threaten the non-arbitrariness. If the separation of powers is applied and specifically the *trias politica* principle, the executive power is one of the three actors, the legislative and judicial being the remaining two. It can be noted that the concept of non-arbitrariness in the ECtHR includes the judicial authorities.\(^{154}\) It has furthermore been concluded by the ECtHR that lack of legal certainty, specifically in relation to *nulla poena sine lege certa*, may lead to arbitrary prosecution, conviction and punishment.\(^{155}\) If the EU’s definition of the concept includes these aspects as well or if it, as seems to follow from the wording, is limited to the executive powers is not sufficiently clear. It can be noted though that the ECJ has stated that a system in which public authorities intervene in the private sphere must have legal basis to provide the protection against arbitrary intervention.\(^{156}\)

Citizen participation can be said to be another way to overcome arbitrariness.\(^{157}\) When providing citizens with the tools to participate, freedom of press can play a vital role as an auditor. The freedom of press is dependent on the freedom of expression. Besides reviewing the executive, legislative and judicial powers the free press may function as the voice of the people. However, that makes it a power of its own and the question is if there needs to be non-arbitrariness of the free press’ powers as well. Other concepts already mentioned may function as a way to overcome arbitrariness. Predictability is related to legal certainty, fairness to equality before the law and accountability is related to access to justice. This strengthens the notion of non-arbitrariness as a concept closely linked with the overall principle of the rule of law.

2.3.9 Summary and General Reflections

In summary, all concepts addressed above can be argued to form part of the EU’s understanding of the rule of law, some more clearly than others. That is concluded either by explicit statements by the ECJ or by the level of dependence between the concepts and between some of the concepts and the fundamental understanding of the rule of law, the latter is best exemplified with the concept of non-arbitrariness. Furthermore, it can be

\(^{154}\) *Stašaitis v. Lithuania* App no 47679/99 (ECtHR, 21 March 2002) para 67.

\(^{155}\) *S.W. v. The United Kingdom* App no 20166/92 (ECtHR, 22 November 1995) para 34.


noted that many of the concepts are interrelated. Access to justice, for example, is pointless if the courts are not independent and the courts cannot be deemed independent if there is arbitrary exercise of power.

However, a general reflection is that much of the focus in the concepts above are directed towards the judicial system, the courts and tribunals. The respect for fundamental rights is an exception but those rights exemplified above illustrate that the importance of fundamental rights may to some degree be limited to the rights that are necessary for the judicial system or the exercise of power to function in an independent and non-arbitrary manner.

Another general reflection, that could be drawn even before setting out to conduct this compilation of concepts, is the ambiguity and lack of uniformity that characterize the principle of the rule of law. This criticism has also been raised in relation to the EU’s use of the rule of law as a value to promote in its external relations. It has been argued that there are multiple parallel concepts of the rule of law in EU’s external relations.158 Furthermore, it has been argued that EU’s policymakers have different understandings of the rule of law and the pre-Lisbon Treaty structure with three pillars has been blamed for the lack of uniformity.159 Hopefully, the attention the principle now enjoys will intensify the discussion on how the rule of law is to be defined, which may lead to a more uniform understanding of the principle in the future.

Finally, the concepts that form part of the rule of law can be seen as the legal prerequisites for the rule of law. It can then be asked whether the prerequisites are cumulative or alternative. Generally speaking, it can be drawn from the way the concepts are seen as necessary for the upholding of the rule of law that the prerequisites are cumulative. This is expressed for example by the ECJ.160 However, some exceptions may exist as was discussed above regarding the standing of the separation of powers that may be seen as an autonomous concept or as a means of reaching independence. Moreover, it can be asked whether it is possible to demand full compliance with a perfect rule of law principle or if any national divergence is accepted. Furthermore, it can be questioned if the requirements imposed on the Member States are the lowest acceptable level of rule of law

159 Ibid.
160 Case C-64/16, para 36.
compliance or if the same application of the rule of law in every Member State is expected.

2.4 Conclusions

It can be concluded that compliance with the rule of law is a central aspect of the legal traditions of Europe, specifically the English, French and German legal traditions. Furthermore, it is unequivocally a central principle in the jurisdiction of the EU. However, no clear and uniform understanding of the content of the principle exists even though the different approaches in different jurisdictions are similar and overlap. The underlying concepts that have been identified as forming part of the rule of law in the EU are: judicial review, independent judiciary, equality before the law, respect for fundamental rights, legality, legal certainty and non-arbitrariness of the executive powers. These concepts can be concluded to be related to and dependent on each other.

3 Conditionality for EU Funds

3.1 General

Conditionality in general is the presence of conditions set up by one party, that when met by the second party leads to the granting of something desirable by the first party to the latter. Conditionality is widely used in the EU. Even joining the Union is conditional to the Copenhagen criteria, which include the rule of law. Conditionality for joining the EU means that when there is compliance, membership can be granted. This thesis focuses on EU spending conditionality, i.e. when compliance leads to disbursement of funds and non-compliance leads to suspension of funds. Spending conditionality is used by the EU both externally and internally. This thesis concerns the internal aspect, when the conditionality is directed towards the Member States by the EU institutions.

EU spending conditionality is, as mentioned above, linked to the disbursement of EU funds. The EU budget’s income is largely made up of contributions from the Member States, mainly gross national income (GNI) based contributions, custom tariffs and VAT

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161 Vîță, V (n 26) 116.
162 ibid 117.
163 ibid.
based contributions. The GNI based contributions make up the main part of the EU’s revenues. Naturally, Member States with higher GNI contribute more to the EU budget. The EU budget spending consists largely of disbursement of funds in order to fulfi the EU’s policies. For example, to support agricultural or fishery industries. These funds are disbursed based on need and compliance with the requirements, including conditionalities. This means that some Member States receive funding from the EU that is larger than their contribution and vice versa. In that regard, Member States are divided into net contributors, that give in more than they get back, and net receivers, that get more money from the EU than they contribute.

To briefly recap what is explained in the beginning of this thesis, the multiannual financial framework (MFF) is a seven-year framework including the maximum levels of spending per year and category. It is not formally a budget, instead it is the framework under which the annual budgets are adopted. The MFF is adopted according to Article 312 TFEU by unanimity in the Council in the form of a resolution. Parliamentary consent is a prerequisite.

The EU funds relevant to this thesis are primarily the five European structural and investment (ESI) funds: The Cohesion fund (CF), European regional development fund (ERDF), European social fund (ESF), European agricultural fund for rural development (EAFRD) and European maritime and fisheries fund (EMFF). There is currently conditionality for all the ESI funds. The EU is not alone in applying conditionality for spending. Financial aid by the International Monetary Fund (IMF) and World Bank is connected to conditionality. The general idea is the same as in the EU but some differences exist. In the IMF, soft conditionality is used to some extent. That is, conditions that do not have to be met but are steps the IMF would like to see. Furthermore, the IMF conditionality is only

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165 ibid.
168 ibid 80.
focused on economic factors such as public debt, public pending, taxation etcetera. The World Bank conditionality includes macroeconomic and institutional reforms. The EU’s use of spending conditionality can be categorised into three types of conditionality. Namely, ex ante, ex post and macroeconomic conditionality. The current conditionality regime will be assessed in the following section, with the three categories forming the basis for that assessment.

3.2 Current Conditionality Regime

As noted above, spending conditionality is not new as a phenomenon. The purpose of this thesis is to examine the possibilities to add compliance with the rule of law to the existing list of conditionality for EU funds. A primary distinction is made between ex ante conditionality and ex post conditionality. Ex ante conditionality are conditions that must be in place before funds are disbursed. Ex post conditionality on the other hand means conditions that should be met after funds are paid out.

3.2.1 Ex Ante Conditionality

Ex ante conditionality was introduced in the 2014-2010 MFF and it provides an incentive for Member States to implement structural reforms. In the 2014-2020 MFF there are 48 ex ante conditionalities. Seven of those are generally applicable to all ESI funds, as set out in the Common Provisions Regulation. Furthermore there are 29 sector-specific ex ante conditionalities related to the cohesion policy. The cohesion policy includes the CF, ERDF and ESF. Eight ex ante conditionalities are fund-specific to the EAFRD

172 ibid 3.
173 ibid 4.
175 COM SWD(2017) 127 final, 5.
177 COM SWD(2017) 127 final, 5.
178 Common Provisions Regulation, art 19 and preamble (2).
and four are fund-specific to the EMFF. A majority of the ex ante conditionalities aim at creating an investment friendly environment to strengthen the single market, for example by requiring a structure to comply with public procurement and state aid.

The areas of the seven generally applicable ex ante conditionalities are anti-discrimination, gender, disability, public procurement, state aid, environmental legislation and finally, statistical systems and result indicators. The ex ante conditionalities are all based on the existence of administrative capacity or other arrangements for the implementation of certain legal acts or policies of the EU in the field of ESI funds. In the area of anti-discrimination for example, the ex ante conditionality is the existence of administrative capacity for the implementation and application of EU anti-discrimination law and policy in the field of ESI funds. For every ex ante conditionality, there are two or more criteria, some more specific than others. Some criteria refer to specific EU laws, other to fields of EU law. One refers to international UN conventions, although that reference is made via a Council decision on the matter. Furthermore, some criteria do not seem to be related to any previous legal documents, for example the criteria regarding the collection of data and result indicators. However, the ability to monitor the implementation and effect of the funds may be necessary for the full effect of the funds to be realised.

The ex ante conditionalities for the three funds included in the cohesion policy are also set out in the Common Provisions Regulation. They are, as noted above, 29 in number and therefore too many to be listed here. They are however sorted into eleven thematic targets: the research, technological development and innovation (R&D) target, broadband target, SME target, low carbon economy target, climate change target, environmental protection and resource efficiency target, transport and infrastructure target, employment

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180 ibid 6.
181 Common Provisions Regulation, annex XI, pt II.
182 See Common Provisions Regulation, annex XI, pt II, The area of environmental legislation, the first indent under criteria.
183 See Common Provisions Regulation, annex XI, pt II, The area of anti discrimination, the second indent under criteria.
184 See Common Provisions Regulation, annex XI, pt II, The area of disability, the third indent under criteria.
185 See Common Provisions Regulation, annex XI, pt II, The area of statistical systems and result indicators, the third indent under criteria.
target, poverty target, education target and lastly, efficient public administration target. The ex ante conditionalities for the cohesion policy are differentiated but they all follow from the general aim of the cohesion policy, to create cohesion in the EU.

The last group of ex ante conditionalities are the fund specific ones for the EAFRD and EMFF. They are 12 in total, eight for EAFRD and four for EMFF. They differ from the previous mentioned ex ante conditionalities primarily as they do not follow from the Common Provisions Regulation but from the fund specific regulations of the two funds. The eight EAFRD ex ante conditionalities follow from the EAFRD regulation. The five of the ex ante conditionalities, related to rural development, are shared with the cohesion policy. The three remaining are good agricultural and environmental conditions (GAEC), minimum requirements for fertilisers and plant protection products and relevant national standards for the preservation and protection of the environment and promotion of resource efficiency. Regarding the EMFF, the EMFF regulation sets out four ex ante conditionalities. The four ex ante conditionalities are: report on fishing capacity, establishment of a plan on aquaculture and two ex ante conditionalities on administrative capacity. All ex ante conditionalities for the EAFRD and EMFF are subsequently related to the main purposes of the funds, rural development and agriculture and fishery respectively.

It can primarily be concluded that no current ex ante conditionality is explicitly linked to the judiciary or the rule of law. However, it has been argued that the eleventh conditionality objective for the cohesion policy, enhancing institutional capacity of public authorities and stakeholders and efficient public administration, could entail the rule of law. It is an interesting argument and the logic of it is that the respect of rule of law could be regarded as a precondition for efficient public administration. Absence of

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189 ibid.
190 Šelih, J, Bond, I & Dolan, C (n 23) 11.
191 ibid.
rule of law would, according to this view, be a sign that the objective is not met.¹⁹² This argument, interesting as it may be, can however be criticised. Firstly, it can be criticised on the grounds that the structure of the institution of conditionality does not allow for the objectives to be applied directly, rather more specified criteria should be the grounds of assessment.¹⁹³ Secondly, it can be questioned whether there is any connection between the respect for rule of law and efficient public administration. In any case, it does not seem to follow naturally that rule of law must be respected to comply with this conditionality objective. It could therefore be paradoxical to squeeze the rule of law into a conditionality objective on efficient public administration since that could be questionable from a legal certainty point of view, and therefore in itself be a breach of the rule of law.

Furthermore, it can be concluded that the ex ante conditionalities may be related to a wide range of areas and targets. However, they are all related to the aim of the fund or general rules on the effective implementation of the funds. The conditionalities are thus there to assure the full effect of the fund.

3.2.2 Ex Post Conditionality

In the 2014-2020 MFF ex post conditionality is used in the cohesion budget where 5 % was set aside pending the mid-term review.¹⁹⁴ That means that part of the funding was earmarked until after it had been proven the conditionalities were met. However, the funds are generally disbursed gradually and the funds may be suspended if it is found that the conditionalities are not met. It can subsequently be concluded that just because the fund is conditional on an ex ante basis that does not open up for states to comply with the conditionalities on day one, get the funds and then diverge the regulation while keeping the funds inevitably. The difference between ex ante and ex post conditionality can be said to be mostly technical. Furthermore, since most of the funds in the 2014-2020 MFF are disbursed via ex ante conditionalities it may be politically difficult to change that regime given that it could mean a time lag in the reception of EU funds.

¹⁹² Šelih, I, Bond, I & Dolan, C (n 23) 11.
¹⁹⁴ Kölling, M (n 171) 4.
3.2.3 Macroeconomic Conditionality
The final type of conditionality that will be presented here, macroeconomic conditionality, is linked to macroeconomic performances. In the 2014-2020 MFF the macroeconomic conditionalities are divided into two dimensions. The first dimension entails that the Commission may, under certain circumstances and when justified by economic and employment challenges in a Member State, request that the concerned Member State undertakes appropriate measures. If appropriate measures are not taken ESI funds can be suspended. The second dimension is related to economic governance procedures and non-compliance leads to suspending funds.

It can be argued that macroeconomic conditionality regarding the rule of law may be used if the rule of law is seen as a prerequisite for the financial regulation regarding the economic governance of the budget. This is argued by the Commission, in its proposal for the 2021-2027 MFF. The proposal presupposes that sound financial management requires compliance with the rule of law. The Commission’s proposal and argumentation will be addressed further below. However, it can be noted that this approach to rule of law violations is, at least in theory, limited to violations of the rule of law that affects the sound financial management. The dismantlement of the rule of law in a manner that only affects legal aspects separated from financial regulation and budget issues would not be grounds for suspending funds. It could be argued that such distinctions between areas of law are not of relevance in practice. However, if the rule of law violation is limited to e.g. a special court instance that only have jurisdiction over certain issues that cannot be connected to the sound financial management of EU funds, that would certainly fall outside the scope of this type of conditionality regulation. It is worth noting though, that such violations of the rule of law are not left without applicable measures since Article 7 TEU covers all rule of law violations regardless the field of law.

195 Kölling, M (n 171) 3.
196 ibid.
197 ibid.
198 ibid.
3.2.4 Previous Suspensions

The only time so far funds have been suspended was against Hungary in March 2012.\textsuperscript{200} The suspension was lifted just three months later, before they took effect, after the Council found Hungary had adopted necessary measures.\textsuperscript{201} The suspension was based on the lack of measures to correct Hungary’s excessive government deficit.\textsuperscript{202} Hence, although the possibility to suspend funds is available it has barely been used. Whether this is because there is limited need to use the suspension mechanism, i.e. the conditionalities are met, or if there are other reasons is unclear. However, it is of interest to discuss the possible effectiveness of conditionality if it is to be used as an instrument to combat violations of the rule of law. In comparison to the nuclear option in Article 7.2 TEU, a conditionality procedure seems in theory to be easier to implement. Depending on the governance and decision process, that will be discussed further below, it will be more or less cumbersome to reach a decision to suspend funding. However, every procedure that does not require unanimity has to be presumed to be more easily applied that Article 7.2 TEU.

Moreover, besides the legal aspects of whether a conditionality is complied with and whether there are grounds for suspending the funds, there are political considerations to be taken into account. Political aspects may include the size and importance of the Member State concerned, the number of other states afraid they might be next in line, the general opinion of EU in the concerned Member State etcetera. For example, EU may be more inclined to suspend funding to a state with a generally positive opinion on the EU rather than a Member State on the verge of leaving the EU.

In conclusion, lack of effectiveness of this mechanism may be its biggest obstacle. Perhaps even larger than the legal hurdles that will be addressed below. However, for the purpose of this thesis the legal preconditions are central and the political aspects fall to a great extent outside that purpose. Furthermore, the effectiveness of a measure can be discussed and investigated ahead of implementation but it cannot be fully determined until afterwards.

\textsuperscript{201} 2012/323/EU: Council Implementing Decision of 22 June 2012 lifting the suspension of commitments from the Cohesion Fund for Hungary [2012] OJ L165/46.
3.2.5 Summary
This section has given an overview of the current conditionality regime in the 2014-2020 MFF. It can be summarised as complicated and a bit cluttered. Moreover, it is not used to suspend funds to a great extent. However, it cannot be ruled out that the mere existence of possible suspension is enough for compliance to be met by Member States. Furthermore, there are different types of conditionality found in different legal sources. There is however little point in doing further technical legal analysis of the current legislation since the interest of this thesis lies in the possibility of new conditionality in the future MFF for the post-2020 period. The legal structure may change. In the following the primary focus will be on the limits set up by the Treaties and the more fundamental hurdles that must be assessed on the route to rule of law conditionality.

3.3 Legal Hurdles and Conditions
3.3.1 Legal Basis
As noted above, the legal basis for the MFF is Article 312 TFEU. However, as has also been noted, the conditionalities are regulated in other legislative acts. The Common Provisions Regulation and the fund specific regulations do not use Article 312 TFEU as the legal basis. The legal basis for the Common Provisions Regulation is Article 177 TFEU. Article 177 TFEU sets out that the general rules of the functioning of the cohesion policy should be decided by the ordinary legislative procedure. Article 312 TFEU requires unanimity in the Council to decide on the MFF.

The legal basis for the legislative acts of the EU is crucial. Every legislative act of the EU must be enacted based on the competences of the EU as set out in the Treaties. The scope of possible provisions of EU law is thus limited by the competences of the Union. Subsequently, the content of the MFF regulation as well as the fund specific regulations must be legally based in the Treaties. The criteria for the correct use of legal basis has been elaborated by the ECJ. According to the ECJ, it is settled case-law that the choice of the legal basis for EU measures must rest on objective factors such as the aim and content of the measure. Furthermore, the choice is subject to judicial review.

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205 ibid.
The array of provisions in the Treaties that may be used as a legal basis is limited. For example, Article 2 TEU, that sets out that the rule of law is one of the values on which the EU is founded, does not give the EU institutions any mandate to further regulate the implementation of the rule of law. Article 2 TEU merely states what values the EU is founded on, it does not in itself give any powers to act in order to uphold or strengthen the values. Consequently, Article 2 TEU cannot be used as the legal basis for a regulation.

If no other legal basis can be found in the Treaties but an act is proven necessary to attain an objective set out in the Treaties, Article 352 TFEU may be used. The article can only be invoked within the framework of policies set out in the Treaties.\textsuperscript{206} It is at this stage of importance to remember the earlier mentioned opinion of the Council’s legal service, where it is stated that the EU’s institutions lack legal basis in the Treaties for pursuing the aim of respect for the rule of law outside the Article 7 procedure.\textsuperscript{207}

Moreover, the vote requirements are set higher in Article 352 TFEU than the ordinary legislative procedure, including unanimity in the Council. Furthermore, the use of this Article is only justified when no other provision of the Treaties provides the necessary power to adopt the measure in question.\textsuperscript{208} Furthermore, the article may not be used in a way that would effectively widen the scope of EU competence and amend the Treaties.\textsuperscript{209} In contrast with the opinion of the legal service it could be argued that Article 3 TEU states that the promotion of EU’s values is an aim of the EU.\textsuperscript{210} According to such reasoning that requirement in Article 352 TFEU is fulfilled.

As noted above it must be proved that no other provision in the Treaties provide the necessary legal basis before turning to Article 352 TFEU. In the following it will be assessed whether rule of law conditionality may fit within the legal basis of any other provision of the Treaties, for example Article 177 TFEU regarding the cohesion policy.\textsuperscript{211}

To include conditionality on the rule of law, either in its entirety or partly, within the legal basis of the cohesion policy the aim of the conditionalities must be the implementation of

\textsuperscript{206} Council’s Legal Service, para 23.
\textsuperscript{207} ibid para 28.
\textsuperscript{211} TFEU, art 177.
the cohesion policy. Article 177 TFEU states that the Parliament and the Council shall define inter alia the general rules on the effectiveness and the coordination of the funds. It can be argued that the rule of law is needed to ensure the effectiveness of the cohesion policy funds. Without legal certainty and access to justice there may be difficulty in the effective implementation of the policies. However, the question at this stage is whether the rule of law on the fundamental value level as set out in Article 2 TEU is necessary to obtain the goals of the cohesion policy or if only certain concepts, as legal certainty and access to justice, within the rule of law fit under the legal basis of Article 177 TFEU.

It is subsequently clear that there is a difference in using the rule of law as the fundamental value according to Article 2 TEU and using the concepts of the rule of law that are necessary to obtain the general objective of e.g. the cohesion policy. The scope of the rule of law conditionality is wider if the more general value is used but it may be more in line with the legal bases available in the Treaties to limit the conditionality to certain concepts.

As noted in the part of this thesis on the rule of law, many of the concepts of the rule of law may be found in the Charter. The articles of the Charter may be used as a legal basis for EU legislative acts according to Article 52.5 of the Charter. However, not all concepts that form part of the rule of law can be found in the Charter and the ones that are cannot all be found in one single article. As was seen for example in the judgment on Portuguese judges the ECJ used both Article 19 TEU and Article 47 of the Charter to construct a concept that forms part of the rule of law according to Article 2 TEU. A patchwork of articles could perhaps fill out bits of, but not the entire, rule of law principle.

Finally, it should be pointed out that the most specific legal basis must be used. This prevents the patchwork kind of solution mentioned above. However, there are instances where two or more legal bases can be used. The preconditions for that will hereby be assessed.

3.3.2 Two or More Legal Bases
Dual or plural legal basis for EU acts is possible if three conditions are met. First, that the act pursues two or more objectives without one being predominant to the others.

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Secondly, the objectives have to be inseparably linked.\textsuperscript{214} Thirdly, the legal bases have to provide for compatible procedures.\textsuperscript{215}

The first can be assessed with the example of the current Common Provisions Regulation. That regulation is the main instrument regulating the ESI funds, if rule of law conditionality with another legal basis would be added, that would most likely be deemed a subordinate objective. Furthermore, regarding the second criteria, that the objectives must be inseparably linked it can be said to practically mean that two or more legislative acts, one for each specific legal basis cannot together fulfil the general objective. The inclusion of different conditionalities in separate legal acts has not been an obstacle before, as can be concluded from the assessment above of the current conditionality regulation. Regarding the third criteria the ECJ has stated that two legal bases where one requires adoption with unanimity and the other qualified majority is incompatible with each other.\textsuperscript{216} As noted above, acts with Article 177 TFEU as the legal basis are adopted according to the ordinary legislative procedure which means qualified majority in the Council. However, acts are adopted with the legal basis of Article 352 TFEU by unanimity. These legal bases are consequently incompatible.

Neither of the three criteria are met according to this application of the settled case-law. The application can be criticised for being rudimentary. Nevertheless, it indicates the problems of adding more than the fragments of the principle of rule of law that are necessary for the effective implementation of the funds. If the entire principle is to be included, there needs to be a new take on the regulation of this area of EU law. Whether the conditionality that do fit within the legal basis of the Common Provisions Regulation (or whatever its successor will be named) will still be there while conditionality that do not fit will be included in another act of EU law or whether all conditionality will be put in one single regulation is difficult to say. What is clear though is that there are legal hurdles on the way to the inclusion of the full concept of the rule of law as a conditionality, especially if it is to be included in the Common Provisions Regulation.

\textsuperscript{214} Case C-338/01, para 56.
\textsuperscript{216} Case C-338/01, para 58.
3.3.3 Relationship Between the MFF and the Conditionality Regulation

As has been made clear from the above, the framework of rules regarding the MFF, the conditionalities and financial regulation etcetera are found in a number of separate legislative acts. The limits and conditions for adopting acts concerning the use of legal basis is an explanation for the division of the conditionality regime into separate acts. There may be need to further assess the relationship between primarily the MFF regulation and the regulations containing conditionality.217

As has also been noted above, the MFF regulation requires unanimity to be adopted while the regulation for conditionality can be adopted with a lower voting requirements, depending on legal basis. It is vital that any regulation decided with qualified majority does not alter the content of what is or will be decided by unanimity in another regulation. That would be contrary to the provisions of the Treaties. It is subsequently necessary to determine the scope of Article 312 TFEU, the legal basis for the MFF. The MFF regulation shall set out the amounts of the annual ceilings.218 The annual budgets shall comply with these ceilings.219 Furthermore, the MFF regulation shall lay down any other provisions required for the smooth running of the annual budget procedure.220

What the last sentence involves is not entirely clear. Specifically, the terms *lay down* and *the smooth running* may require further assessment and discussion. It can be questioned whether the term lay down requires the provisions to be written directly in the MFF regulation or if a reference to another regulation is sufficient. Furthermore, whether the regulations containing conditionality can be said to be the kind of provisions required for the smooth running of the annual budget procedure is of the essence to determine. In the current MFF regulation, Article 3 states that the special instruments provided for in Articles 9 to 15 allow the budget procedure to run smoothly. There is no reference in Articles 9 to 15 of the funds relevant for this thesis or the conditionality regime. Instead, the articles include inter alia provisions on aid and financial support in event of e.g. natural disasters. Furthermore, in the preamble of the proposed MFF regulation for the

217 It is not certain that future conditionalities will follow from a regulation named Common Provisions Regulation.
219 ibid art 312.1.
220 ibid art 312.3.
period 2021-2027 it is noted that provisions for the smooth running of the annual budgets are necessary to accommodate for unforeseen circumstances.\footnote{COM(2018) 322 final, preamble (7).} It thus seems that the reference to smooth running should be understood as providing for flexibility of the budget to accommodate for unforeseen events. The conditionality regime is thus not included. This provision in Article 312 TFEU does therefore not seem to be a limitation of the possibilities to regulate conditionality in separate legislative acts.

3.3.4 Institutional and Governance Issues

Putting the technical issues addressed above aside, the following will focus on the more fundamental institutional and governance issues that arise when assessing the possibilities of rule of law based conditionality.

The question of whom shall be the guardian of the conditionality is central. In other words, which of EU’s institutions will decide when funding shall and shall not be allowed based on the conditionalities. In the Common Provisions Regulation, the Commission performs that function.\footnote{Common Provisions Regulation, art 19.} Furthermore, the EMFF regulation makes a reference to the general provisions in the Common Provisions Regulation in such way that the Commission has the same role regarding the EMFF.\footnote{Regulation 508/2014, art 18.1(d).} However, no such reference can be found in the EAFRD regulation. It is clear though, that the Commission is the guardian of conditionality regarding that fund as well.\footnote{Regulation 1305/2013, art 10.} Nevertheless, there has previously been a different order used, involving the Council.\footnote{Raulus, H, ‘The Growing Role of the Union in Protection of Rule of Law’ in Goudappel, F & Hirsch Ballin, E (eds.), Democracy and Rule of Law in the European Union (Asser Press 2016) 33.} It is subsequently possible, if the Member States do not wish to give up their say in the rule of law issue to the Commission, to provide the right to make the decision to the Council.

Besides the question of whom, there is the question of when. Under what circumstances funds are suspended is necessary to determine. A difference can be made between compulsory and optional conditionality.\footnote{Vîță, V (n 26) 123.} The difference follows from the use of \textit{shall} or \textit{may}.\footnote{ibid.} Accordingly, it follows from the Common Provisions Regulation that the
Commission *shall* assess the fulfilment of the conditionalities. However, the same article sets out that the Commission *may* suspend payments. Although, suspensions *shall* be lifted when the conditionality is once again fulfilled. It should be noted that these regulations will be renegotiated for the post-2020 period and changes cannot be ruled out.

Institutionally, it is of interest to clarify to what extent, if any, the CJEU should have the possibility to review the conditionality decisions. It should first be noted that the structure of the conditionality as set out in a regulation can be subject to judicial review, as regards inter alia its legal basis and compliance with the principle of conferral. Both Articles 263 and 267 TFEU provides for that since the conditionality will be included in a regulation. However, the main issue is the ability to get the suspension tried by a court. First it must be addressed who has the interest of having the suspension tried. The Member State concerned naturally has that interest, since it is against Member States claims of non-compliance would be directed. However, since individuals may be negatively affected by the decision to suspend EU funding, it could be questioned whether they should have the right to appeal the decision to suspend as well. Given that the suspension will follow from a decision, either by the Commission or the Council, Article 263 TFEU provides the basis for a review of the legality of an act adopted by inter alia the Commission and the Council.

Member states have the right to bring action according to the procedure in Article 263 TFEU but individuals may only do so to the extent it concerns them directly and individually or, in event of a regulatory act, if it concerns the person in question directly and does not require implementing measures. Regulatory acts are stated by the ECJ to not include legislative acts. A decision by the Commission or the Council would not be a legislative act. The next step is to determine whether the decision would require implementing measures. It has been noted by the ECJ that it its irrelevant whether the implementing measures are required on EU or Member State level. Depending on how the funds and conditionality regimes are structured, it may or may not require

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228 Common Provisions Regulation, art 19.3.
229 ibid art 19.5.
230 ibid art 19.7.
231 Case C-583/11 P, para 112.
implementing decisions. It is thus at this stage not possible to determine under what conditions individuals may bring action. If the requirements for a regulatory act are not fulfilled the conditions for the right to bring action are that the person in question is directly and individually concerned. The approach to these conditions have been criticised for being too restrictive.²³³ Paradoxically, it may be argued that the lack of judicial review by the ECJ for these issues could in itself constitute a breach of the rule of law. Because, the rule of law is not only a requirement on Member State level, the EU’s institutions are also required to comply.

Furthermore, the constitutional balance between the supranational elements of the EU in relation to the sovereignty of the Member States may be of interest to address briefly. It can be argued that the Commission as the main actor in opposition against a Member State allegedly violating the rule of law is problematic. Because, if rule of law is perceived as a fundament for the European cooperation, it can be questioned if not the other Member States should be more concerned with the development and subsequently be more interested in taking action. Such action would preferably be taken in the Council or the European Council. However, it can of course be said that it is in the Commission’s interest to deal with behaviour within the Union that risks harming it. But, if this is a fundamentally important condition for the functioning cooperation within the 28 European states in the EU, it is not obvious that the 27 other states are prepared to give the mandate for solving the problem to the supranational Commission.

3.3.5 Conflicting Interests
The suspending of EU funding on the basis of breaches made by the Member States may affect the rights of its citizens. In comparison with the Article 7 procedure it is stated in Article 7.3 TEU that natural and legal persons’ rights should be considered when Member States’ rights are suspended according to the article. Suspension of funds according to a conditionality regime is by nature not the rights referred to in Article 7.3 TEU. However, negative effects for natural and legal persons may follow from the suspending of funds and it can be argued that this safeguard cannot be circumvented by introducing a new mechanism for combating rule of law violations.

Another conflicting interest is the EU’s own obligation to comply with the rule of law. To construct a mechanism that can be effectively applied in relation to a Member State’s alleged violations of one the Union’s fundamental values may require a certain degree of elasticity and flexibility. This is the case since the violations are difficult to quantify. Suppose that the mechanism includes a list of what is considered violations of the rule of law. To include everything that might potentially limit the rule of law, if even possible, such list would have to be incredibly lengthy. A limited list could result in measures that in reality dismantles the rule of law falling outside the scope of application of the regulation. That might allow Member States to consciously dismantle the rule of law to a certain degree, without being subject to the regulation. On the other hand, making the list non-exhaustive or the items open ended might lead to legal uncertainty and be in itself a violation of the principle of the rule of law. This is a conundrum that potential future rule of law conditionality will have to address.

3.3.6 Proportionality

Proportionality is a constitutional principle incorporated in many jurisdictions, among them the EU’s. In EU law, the principle of proportionality serves as a framework to determine whether decisions and governmental intervention that limit conflicting rights can be motivated by public interests. Acts of the EU’s institutions are subject to the principle of proportionality. The proportionality test is thus relevant to apply in this context since acts of EU’s institutions are in question and, as has been determined above, conflicting interests are at risk.

According to the ECJ a measure meets the proportionality test when it is “appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”. There are subsequently four conditions to be applied. The measure should be appropriate, in pursuit of a legitimate objective, constitute the least restrictive

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235 ibid 440.
236 ibid.
measure and in balance between the disadvantages on one hand and the pursued aim on the other. Not all four steps are addressed at all times though and step three and four are often applied alternatively.²³⁸

Given the many forms and substances rule of law conditionality may take, the proportionality test cannot be directly applied on an EU act at this time. However, in the following a general discussion based on the conflicting interests and the four steps presented above will be conducted. First it should be assessed whether the measure, restricting of funds, in pursuit of compliance with the fundamental values of the EU is appropriate. The receiving of funds is one of the upsides to membership in the Union and compliance with the values is a prerequisite for membership. To require compliance with the values can thus be argued to be appropriate in relation to disbursement of funds. Furthermore, the aim is compliance with the fundamental values that can be said to form the basis for the functioning of the Union. It can therefore be said to be legitimate. The question is thus whether this constitutes the least restrictive measure. That assessment is dependent on the form the conditionality will take. Particularly, what degree of suspension that may be available if the conditionality is not met. To suspend all funds may constitute a measure that is not in compliance with the least restrictive measure criterion. The last aspect of proportionality is also difficult to address without a concrete conditionality mechanism available. However, the balance must observe inter alia the effect on the true recipients of the funds, the natural and legal persons in each Member State and the importance of funding from the EU to areas of the EU that require more support.

3.4 The Content of a Rule of Law Conditionality

The overall and general aim of linking rule of law compliance to EU funds through the conditionality regime says little of the details as to what exactly the conditions are. The main dividing line is between the use of the rule of law as its complete and intact principle as enshrined in Article 2 TEU and the use of the underlying concepts by themselves, independent judiciary, equality before the law etcetera. In the following these two main paths will be addressed. Furthermore, during the spring and summer of 2018 the MFF negotiations are commenced. The first step in that negotiation was the proposal by the Commission presented on 2 May 2018. The proposal includes a regulation on rule of law

²³⁸ Sauter, W (n 234) 448.
conditionality. Since the Commission’s proposal raises many of the issues discussed in this thesis, but in a more concrete way, it will be addressed and discussed. It should however be made clear that it is just a proposal and it has already received criticism.²³⁹

3.4.1 The Complete and Intact Principle of the Rule of Law

As has been noted in the section on the legal basis, the rule of law can only be used as a conditionality if and to the extent it can be said to constitute a necessity for the implementation of the fund in some way. It can be argued to be a necessity for the sound financial management according to Article 322 TFEU. Furthermore, it can be argued to be a necessity to ensure the effectiveness of the fund according to Article 177 TFEU. More examples can probably be found but they all suffer the same limitation. The violations of the rule of law may only lead to the suspension of funds if said violation risks jeopardizing the general aim of the legal basis in question, for Article 322 TFEU that is the sound financial management and for Article 177 TFEU it is the effectiveness of the fund.

The only legal basis that, theoretically, could include the principle of the rule of law autonomously is Article 352 TFEU. The article was mentioned above and its main use is to fulfil an objective of the EU where no other legal basis provides the necessary legal basis. It was argued above that the statement in Article 3 TEU, that the EU’s aim is to promote its values, is enough for that prerequisite in Article 352, that it be an objective of the Treaties, is fulfilled. However, it should be remembered that a measure could not be adopted that widens the scope of the Treaties. If Article 352 TFEU is to be used it must subsequently be related to the value of the rule of law as set out in Article 2 TEU. However, it is to be seen as the last resort, as is made clear from the requirements of unanimity when the Council is to vote on the proposal.

It may furthermore be argued that the fact that the content of the rule of law is rather unclear prevents it from being used as a condition if legal certainty is to be upheld. However, that obstacle may be overcome by including a definition of the rule of law in the regulation in question. Although, that might be seen as a way to preempt the rule of law provision in the Treaties. For there is, as was noted above, no clear definition following the rule of law enshrinement in Article 2 TEU. Perhaps the Treaties leaves that

²³⁹ Khan, M (n 21).
open for a reason, maybe it was too difficult to agree on a definition when the Treaties were drawn up or it is intentionally left open for the changes of the principle of the rule of law that may occur during the life span of the Treaties. However, it may also be that it was seen as a certainty that rule of law would be complied with and that the enshrinement was just a clarification, not an article that would be used in real situations. Under these circumstances, it may be argued that to define the rule of law in a separate act of the EU is to change the content of a provision in the Treaties. A disclaimer such as for the purposes of this regulation may overcome that but it is still an aspect to be aware of.

3.4.2 The Underlying Concepts of the Rule of Law

On a more general, and perhaps theoretical level, it can be questioned to what extent, if any, the rule of law may be divided into its underlying concepts. As was noted in the discussion in part two of this thesis on the definition of the rule of law, the underlying concepts are interdependent to a great extent. It can therefore be questioned whether it is possible in practice to divide the underlying concepts and only include some of them in the conditionality regime. To include a concept that is dependent on another concept may lead to the inclusion of the latter as well in practice. This is especially true for judicial review and independent judiciary. There is no point in having judicial review if the judiciary is not independent. Reversely, it can be said that there is no point in having an independent judiciary if there is no judicial review.

Nevertheless, if certain concepts of the rule of law is to be included it must be determined which concepts. The content of the rule of law according to Article 2 TEU was concluded above to spring from a range of sources within EU law. The concepts that can be drawn directly and independently from other articles within the Treaties may be more obvious to include. For example, the concepts of independent judiciary and access to judicial review follow from Articles 19 TEU and 47 of the Charter.

If the legal basis is said to limit the scope of the rule of law that may be included in a potential conditionality, it is of interest to determine what parts of the principle are in question. Previously in this thesis, Articles 177 and 322 TFEU have been mentioned as potential legal bases. They both include the aim of ensuring the full effect of the funds. The full effect requires the funds to end up at its designated recipient. If that is not the case the party that claims access to the fund must have access to a court system to which that party may turn. A judiciary that complies with the concepts of independence and
judicial review to ensure compliance between the national systems and the EU law is therefore of vital importance to provide the prerequisites for the full effect of the funds. It can thus be concluded that the parts of the rule of law that is most closely linked with the aim of ensuring the EU funds have full effect are the concepts that are most closely linked to the judiciary, independence and judicial review. However, it should not be excluded that other concepts that form part of the rule of law may be argued to fit within any of the legal bases of the Treaties.

Furthermore, it may be asked if there is a primus inter pares among the concepts. This question can partly be answered differently depending on what legal tradition one relies on. Based on the English legal tradition judicial review can be said to form the core, according to the French legal tradition fundamental rights are central and in German legal tradition non-arbitrariness can be said to have been the core of der Rechtsstaat since the 19th century but judicial review has been put in a more prominent position since the 1949 constitution took effect. In the EU, the legal tradition is related to the role of the CJEU as the interpreter and the safeguard to the uniform application of EU law. To uphold that role and subsequently the uniform application, the need for independent judiciary and access to judicial review is vital. It can therefore be argued that if there is a primus inter pares among the concepts that form part of the rule of law in EU, it is access to judicial review before independent courts. Without the possibility to bring a case concerning EU law to a national court which may then refer the case to the ECJ for a preliminary ruling the uniform application of EU law cannot be upheld and the entire EU system is based on EU law being applied uniformly in all Member States.

3.4.3 The Proposal by the Commission
As mentioned above, the Commission has presented a proposal for a regulation on the protection of the EU’s budget in case of “generalised deficiencies” of the rule of law. In the light of the considerations regarding this issue presented in this thesis, the proposal will be presented and discussed briefly. The purpose of this exercise is to bring a concrete aspect to the more general approach of the considerations above.

The proposed regulation contains eight articles. Articles 1 and 2 present the subject matter of the proposal and the definitions of the rule of law, generalised deficiency as regards

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the rule of law and government entity. Articles 3 and 4 include the central provisions of the regulation. Article 3 states that appropriate measures shall be taken when a generalised deficiency as regards the rule of law affects or risks affecting the sound financial management or the protection of the EU’s financial interests. Furthermore, the article includes a non-exhaustive list of what is considered general deficiencies as regards the rule of law. Article 4 includes the appropriate measures that may be adopted. Article 5 sets out the procedure which in essence is proposed to be initiated by the Commission and adopted as an implementing act by the Council according to a reversed qualified majority vote. Article 6 includes provisions on the lifting of measures. The last two articles are of less importance to this thesis, including information to the Parliament and the entry into force. In the following some relevant aspects of the proposed regulation will be addressed and discussed.

First, the definitions of the rule of law and generalised deficiency as regards the rule of law will be addressed. The definition of the rule of law contains a list of the concepts the rule of law includes. This list shows similarities with the inventory of noteworthy general principles of EU law according to the Rule of Law Framework from 2014. However, the proposed regulation is clearer in the connection between these concepts and the rule of law as a fundamental value according to Article 2 TEU.241 Moreover, separation of powers is given a more prominent role in the proposed regulation. In the Rule of Law Framework separation of powers is noted only in relation to the concept of fair trial.242 This may just be a stylistic difference but separation of powers is given a seemingly autonomous status in the inventory of the proposed regulation.

Furthermore, independent and effective judicial review in the Rule of Law Framework is exchanged for effective judicial protection by independent courts. This change may be the result of the judgment from the ECJ, referenced above, on the independence of the judiciary in relation to the salary of Portuguese judges.243 In that case, the ECJ put emphasis on the independence of the judges and the court, as follows from Article 47 of the Charter, as a prerequisite for the right to effective judicial protection according to Article 19.1 TEU. In this case, the ECJ also concluded that independent courts and effective judicial protection according to Article 47 of the Charter and Article 19.1 TEU

241 COM(2018) 324 final, preamble (1)-(2).
243 Case C-64/16.
respectively, form part of the rule of law enshrined in Article 2 TEU. Whether this entail more than a linguistic shift is not clear. However, the discussion in the beginning of this thesis on judicial review being complemented by inter alia judicial appeal should be brought to mind. It could be asked whether judicial protection includes both judicial review and judicial appeal, in which case the concept in the proposal is wider than its counterpart in the Rule of Law Framework.

It is stated that the generalised deficiency as regards the rule of law means the widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law. The use of the words widespread and recurrent can be compared to the phrase systemic in the research question of this thesis and the words serious and persistent used in Article 7.2 TEU. The differentiation regarding the choice of words in relation to Article 7 TEU can be presumed to be made to not create any links to the Article 7 procedure. As noted above, the Commission has previously received criticism from the Council’s legal service for its Rule of Law Framework on the basis that it intruded in the scope of Article 7 TEU. Furthermore, there may be reasons for holding the door open for other mechanisms to deal with rule of law violations if the Article 7 procedure turns out to be too difficult to use in practice.

Secondly, Article 3 will be addressed. For the purpose of this thesis, the most interesting part is the list of acts that may be considered general deficiencies of the rule of law. The non-exhaustive list includes three entries. The first is the endangering of the independence of the judiciary. The second is the failure to deal with arbitrary or unlawful decisions by public authorities including preventing and sanctioning. The third refers to the limiting of the availability and effectiveness of legal remedies. The main focus is subsequently on the effective judicial protection by independent courts. It may be that it is the concept that is the biggest safeguard for sound financial management but it may also be that it is the concept that has been most directly connected to the rule of law in case-law of the ECJ, following the judgment on Portuguese judges’ salary. Furthermore, as was concluded above, it could be said to constitute the most prominent aspect and the core of the rule of law within the EU’s jurisdiction.

244 Council’s Legal Service, 28.
Thirdly, the appropriate measures that may be adopted according to Article 4 will be discussed. It may be of interest to note, in relation to the discussion above on proportionality, that the measures available according to Article 4.1(a) of the proposed regulation are limited to implementations of the budget where a government entity is the recipient. Furthermore, the principle of proportionality is mentioned in Article 4.3. It is stated that the measure should be proportionate to the nature, gravity and scope of the rule of law deficiency. Furthermore, the measures should target the EU actions affected or potentially affected by the deficiency, to the degree possible.

Fourthly, the procedural issues will be assessed. The suspension should be precluded by an information exchange between the commission and the Member State concerned. When the Commission considers a rule of law deficiency to be established it shall submit a proposal for an implementing act with the appropriate measures to the Council. The Council decision shall be adopted by a reverse qualified majority vote. That means a qualified majority must vote against the proposal to not be adopted. Compared to the sanctions in Article 7.2 TEU which are decided by unanimity, this voting requirement is set lower. Finally, measures are lifted by request of the Member State concerned and decided in the same way as measures are imposed.

The suggested legal basis for the proposal is Article 322.1(a) TFEU. Said article allows for financial rules to be adopted according to the ordinary legislative procedure. The financial rules should “determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts”. In the proposed regulation, the Commission connects the compliance with the rule of law to the sound financial management. This may provide an opening for including the entire principle of the rule of law in the conditionality regime. However, it comes with a major limitation since only rule of law violations that affects or risks affecting the sound financial management or the protection of the EU’s financial interests can lead to the suspension of funds.
4 Conclusions and Reflections

4.1 Summary and Central Conclusions

4.1.1 Executive Summary

This thesis set out to examine the legal prerequisites for conditionality based on compliance with the rule of law, a fundamental value of the EU according to the Treaties. The task was approached in two steps, by defining the rule of law according to the EU’s understanding and by examining the legal conditions for conditionality in general and rule of law conditionality in particular. As was noted in the section above on the method, discussion, analysis and conclusions have been made throughout the thesis. Here below, a brief executive summary will be given. After that, a more extensive presentation of the central conclusions drawn in the thesis will follow.

In this thesis, it was concluded that the rule of law is not easily defined in its EU understanding, even though concepts that form part of the principle can be identified. Furthermore, it was concluded that the choice of legal basis is the main factor that sets out the limits for any rule of law based conditionality. There is no legal basis that explicitly gives the EU competence to legislate regarding compliance with the rule of law. However, it can be argued that rule of law is a prerequisite for an aim set out in another provision in the Treaties providing a possible legal basis, for example regarding the sound financial management. However, the rule of law would then be indirectly included in the conditionality regime in the sense that rule of law violations may only constitute grounds for suspension if they affect e.g. the sound financial management. Finally, it was concluded that there are two potential structures for a rule of law conditionality. One that includes the principle in its entirety and one that includes one or more of the underlying concepts by themselves. Both structures carry concerns but it was concluded that both may be implemented as long as the limitations set out in the Treaties, e.g. on the principle of conferral, and the EU’s own obligation to comply with the rule of law, specifically legal certainty, are observed.

4.1.2 The Dynamic Nature of the Rule of Law

Regarding the legal tradition and history of the term rule of law and its continental counterparts it was concluded that there are similarities between the English, French and German developments of the respective concepts in the sense that they all were established or developed in the late 19th century and are considered fundamental elements
of each jurisdiction. However, there are differences in the content of each rule of law understanding. Furthermore, it was concluded that the EU and the Council of Europe both regard the rule of law as fundamental values and there are references to the rule of law according to the ECHR, ECtHR and reports from the Venice Commission in acts from the EU’s institutions and the ECJ. It was also concluded that there is an inherent difference in the systematic of the EU and the Council of Europe which leads to a schism regarding the understanding of the rule of law. This is made clear in the distinction between access to justice and judicial review.

Moreover, it was concluded that judicial review, independent judiciary, equality before the law, respect for fundamental rights, legality, legal certainty and non-arbitrariness of the executive powers can be said to form part of the rule of law, although based on different legal sources of EU law. Not all concepts could be found to be referenced to by the ECJ as forming part of the rule of law. It was also concluded that the concepts are interdependent which makes it hard to divide them. However, it was also concluded that there may be a hierarchy among the concepts with the judicial review before independent courts, or alternatively phrased effective judicial protection by independent courts to be in conformity with the Commission’s proposal mentioned above, as the most prominent among the concepts. In summary, it was concluded that the rule of law is generally regarded as a fundamental principle but there is diversity regarding the content of the principle. Conclusively, the rule of law is a dynamic principle.

4.1.3 Legal Prerequisites and Hurdles for Rule of Law Conditionality

Regarding the legal prerequisites for introducing a new conditionality for the rule of law, it was concluded that there is an established conditionality regime and that conditionality is widely used within the EU. Both for the spending of funds and for other aspects of the EU membership. However, spending conditionality may be criticised for lacking effectiveness given its lack of usage.

Furthermore, it was concluded that there are legal hurdles on the way to rule of law conditionality. One hurdle is the limiting effect of the legal basis chosen. There needs to be a legal basis for whatever regulation, or other legislative act, that may contain the conditionality for rule of law. There is no clear legal basis available that explicitly gives the EU the competence to impose a mechanism for the compliance with the rule of law. The legal basis must then pursue another main purpose, such as the sound financial
management of the funds. The rule of law violations that may be the grounds for suspension of funds according to a conditionality of the proposed sort is thus limited to the effects it may have on the sound financial management of the funds, or the correlative aim of any other legal basis chosen.

Other aspects concluded to constitute legal hurdles include the institutional balance between the EU’s institutions and the role of the CJEU to review the lawfulness of any suspensions under the assumed rule of law conditionality. This institutional balance can be compared to the procedure in Article 7 TEU where the required steps and voting rules before a decision can be reached are set high. Furthermore, there are conflicting interests such as the effect sanctions may have on individuals and the EU’s own obligation to comply with the rule of law. The balance between flexibility to provide for a mechanism that can be effectively applied in relation to breaches of the rule of law and the legal certainty for the Member States of the Union may be difficult to reach. If flexibility gets the upper hand it may lead to a lack of legal certainty and thus create a paradox in the way that the rule of law is violated in order to combat rule of law violations.

Furthermore, it was concluded that the principle of proportionality must be complied with when establishing a rule of law conditionality. Though, it was also concluded that the principle of proportionality does not seem constitute a major hurdle as long as the possible suspensions are not disproportionate to the rule of law breach in question.

4.1.4 Conditionality for the Entire or Parts of the Rule of Law

It was finally concluded that there are two paths towards rule of law conditionality. One path includes the entire rule of law principle with its underlying concepts as a condition for disbursement of funds. The other path leads to conditionality regarding one or some of the underlying concepts but not all. It was concluded that to include a definition of the entire rule of law principle may effectively alter the Treaties in a way that is not allowed since the rule of law according to Article 2 TEU is not explicitly defined. Regarding the second path, it was concluded that the concepts that follow individually and independently from the Treaties, such as the concepts of independent judiciary and judicial review, may be more obvious to include by themselves than concepts that follow straight from Article 2 TEU.
4.2 Criticism

There are a few points of criticism that may be raised at this stage. First of all, rule of law conditionality can be criticised because it may only be used fully and with great effect on net receivers. The fear of rule of law deficiencies are currently directed towards states that are net receivers, Poland and Hungary being two examples previously mentioned in this thesis.\textsuperscript{245} Suspensions would have a substantial effect on the economies of both Member States. Perhaps that circumstance in itself is the reason behind the strong stance from inter alia the Commission. Perhaps some find it more provoking to disregard the fundamental values of EU while benefiting from the economic pros of being a Member State than it would be if a state that does not benefit economically from the membership in EU ignored the fundamental values. There is obviously no ground for such a view since the fundamental values applies equally to all Member States of the EU. However, this mechanism to combat rule of law violations comes with a huge loop hole through which all net contributors may escape.

Furthermore, to include the rule of law in the conditionality regime may be criticised for being morally illogical. A conditionality regime including EU’s fundamental values can be perceived as the EU using fundamental values as bargaining chip in relation to funds. That perception suggests that the EU accepts Member States violating the fundamental values as long as the Member State in question is content with receiving less funding. This might be stretching it too far but it is worth noting since it cannot hardly be what the EU wishes to communicate.

Moreover, as has already been mentioned, the fact that natural or legal persons will be the real losers if funds are suspended may be a ground for criticism. However, that is the risk with economic sanctions in general and it could be argued that in the long run, cutting of funds because the ruling party fails to comply with fundamental values of the EU may lead to a change of government and a change of public policy regarding values such as the rule of law. Nevertheless, there is a need to be aware of the effects on the true recipients of the EU funds before deciding to suspend those funds for a breach they are not responsible for.

\textsuperscript{245} Keep, M (n 164) 21.
A final point of criticism is the excluding focus in the legal history doctrine on the western European constitutional traditions of the rule of law. The EU is said to be based on a constitutional heritage common to all Member States but when regarding the heritage and source of the constitutional principle of rule of law the English, German and French legal traditions are primarily turned to. It should be remembered that the rule of law is closely linked to democracy. The three aforementioned states have a longer democratic tradition than certain other European states, which may explain why there is reason to focus on them. Furthermore, they have been Member States of the EU longer than any of the eastern European states where the rule of law is currently said to be threatened. However, it cannot be denied that there is a lack of legal history doctrine from the eastern bloc of the EU and if it is perceived that western Europe is forcing its values and its definition of those values upon the eastern states, that may be the seedbed for Eurosceptic movements and cracks in the Union. If not all constitutional traditions of the EU’s Member States are expressed in the EU, it cannot be said to rely on a common constitutional tradition.

A general reflection closely linked with the discussion above is whether it can be said that the common constitutional traditions, and subsequently the understanding of the EU’s fundamental values, change as Member States join and leave the Union. Perhaps short term effects are difficult to detect. However, the question is whether e.g. Brexit will lead to a shift over time from a rule of law definition characterised by both British and continental views to an understanding that is based solely on continental constitutional traditions. Only the future holds the answer to that question. In a wider perspective, it will be interesting to see what implications Brexit will lead to given that Ireland and to some degree Cyprus will soon be the only custodians of the common law tradition in the EU.

4.3 The Way Forward
As has been concluded, there may be a way to include the compliance with the rule of law within the conditionality regime for EU funds. However, there are limitations as to what the content and characteristics of such a conditionality may be. Furthermore, there are risks of violating the Treaties by changing their content if the rule of law is defined in legislative acts adopted on the basis of the Treaties. EU’s legislators must therefore tread lightly if they are to adopt rule of law conditionality. These limitations and risks all follow from the Treaties in its current form. To provide good conditions for the introduction of rule of law conditionality, there needs to be a change in the Treaties that gives the EU
explicit competence to adopt acts and measures to combat rule of law violations. With a legal basis in the Treaties, providing competence to adopt measures to strengthen the rule of law, the EU’s institutions could operate more effectively and with more clarity in pursuit of compliance with one of the fundamental values of the Union.

The ambiguity of the rule of law principle as enshrined in Article 2 TEU could be overcome with a clearer definition of what concepts form part of the rule of law according to the Treaties. However, there may be reasons for keeping that open since changes in the definition and the differences in legal traditions throughout the Union could prohibit the Member States to unite in a definition of the rule of law to be included in the Treaties. Furthermore, in the current political climate of the Union it is difficult to see how there could be consensus on any issue regarding the rule of law. It may even be that if consensus could be met, it would be met over a definition of the rule of law that is restricted or limited compared to the definition indirectly following from the Treaties, as presented in this thesis. That would not benefit the fight against rule of law violations within the EU.

It must be concluded that a Treaty change in this regard is unlikely, at least in the near future. However, more clarity might be brought to the principle of the rule of law through judgments of the CJEU. As the final interpreter of the Treaties and given the uncertainty of the provisions in question, it is likely further judgments from Luxembourg, rather than changes to the Treaties, will clarify and concretise the principle of the rule of law according to Article 2 TEU. As was mentioned in the beginning of this thesis there are currently cases pending before the ECJ on rule of law related issues and the future will probably bring more judgments regarding aspects of the rule of law and the principle will subsequently be made clearer.

Finally, there are too many aspects and perspectives to this issue to be able to easily solve it on a theoretical level, that was not the purpose of this thesis either. In essence this is a question of democracy and the preferred solution must be that nationals vote against a regime that contributes to the dismantling of the rule of law. However, the entire EU project is dependent on the possibility for EU law to be applied nationally and national courts and their right or obligation to refer a case for a preliminary ruling is central in reaching the uniform application of EU law. There is thus a legitimate aim from the EU’s side to uphold the rule of law in all Member States but it must be made in a way that is compatible with the Treaties and that honours the democracy of each Member State.
Legal Sources and Bibliography

Literature
Bergström, CF, ‘Defending Restricted Standing for Individuals to Bring Direct Actions against ‘Legislative’ Measures’ (2014) 10 European Constitutional Law Review 481
Bingham, T, The Rule of Law (Penguin Law 2011)
Dicey, AV, An Introduction to the Study of the Law of the Constitution (7th edn, MacMillan 1908)
Laug Loughlin, M Foundations of Public Law (Oxford University Press 2010)
Mišćenić, E, ‘Legal Translation vs. Legal Certainty in EU Law’ in Mišćenić, E & Raccah, A (eds.) Legal Risks in EU Law (Springer 2016)
Nergelius, J, ‘Constitutional Reform in Sweden Some Important Remarks’ (2013) 4 Tijdschrift voor Constitutioneel Recht 372
Pech, L, ‘Rättsstatsprincipen i EU - betydelse, funktioner och utmaningar’ in Mellbourn, A (ed.) Hoten mot rättsstaten i Europa (Premiss 2017)
Sacchi, S, ‘Conditionality by other means: EU involvement in Italy’s structural reforms in the sovereign debt crisis’ (2015) 13 Comparative European Politics 77
Šelih, J, Bond, I & Dolan, C, ‘Can EU funds promote the rule of law in Europe?’ (Centre for European Reform, 2017)
Settem, OJ, Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings (Springer 2016)
Judgments of the Court of Justice of the European Union

Judgments from the Court of Justice

Case 45/86 Commission v Council [1987] ECR 1493
Case C-331/88 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others [1990] ECR I-04023
Case C-63/93 Duff and Others [1996] ECR I-00569
Case C-36/98 Spain v Council [2001] ECR I-00779
Case C-506/04 Wilson [2006] ECR I-08613
Case C-279/09 DEB [2010] ECR I-13849
Case C-199/11 Otis and Others [2012] EU:C:2012:684
Case C-370/12 Pringle [2012] EU:C:2012:756
Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013] EU:C:2013:625
Case C-510/13 E.ON Földgáz Trade [2015] EU:C:2015:189
Case C-456/13 P T & L Sugars Ltd [2015] EU:C:2015:284
Case C-147/13 Spain v Council [2015] EU:C:2015:299
Case C-72/15 Rosneft [2017] EU:C:2017:236
Case C-16/16 Belgium v Commission [2018] EU:C:2018:79
Case C-64/16 Associação Sindical dos Juízes Portugueses [2018] EU:C:2018:117
Case C-284/16 Achmea [2018] EU:C:2018:158

Judgment from the General Court

Opinions of the Court of Justice
Avis 2/94 Adhésion de la Communauté à la CEDH [1996] ECR I-01759

Opinions of Advocate Generals
Case C-582/08 Commission v United Kingdom [2010] ECR I-07195, Opinion of AG Jääskinen
Case C-64/16 Associação Sindical dos Juízes Portugueses [2017] EU:C:2017:395, Opinion of AG Saugmandsgaard Øe
Case C-574/15 Scialdone [2018] EU:C:2018:553, Opinion of AG Bobek

Legislative Acts of the EU
Treaties
Consolidated version of the Treaty on European Union [2012] OJ C326/1
Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/1

Secondary Legislation
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


EU Institution Documents

Commission


Commission, Commission Staff Working Document: The Value Added of Ex ante Conditionalities in the European Structural and Investment Funds’ COM SWD(2017) 127 final


Council


2012/323/EU: Council Implementing Decision of 22 June 2012 lifting the suspension of commitments from the Cohesion Fund for Hungary [2012] OJ L165/46


Council of the European Union, Opinion of the Legal Service on the 27 May 2014 ‘Commission’s Communication on a new EU Framework to strengthen the Rule of Law’ 10296/14

Parliament and FRA


International Agreement to which EU is a party

Council of Europe Documents
Statute of the Council of Europe signed in London 1949 (ETS No. 001)
The Convention for the Protection of Human Rights and Fundamental Freedoms
25-26 March 2011 CDL-AD(2011)003rev
Council of Europe, Venice Commission Rule of Law Checklist adopted in Venice 11-12
March 2016 CDL-AD(2016)007

Judgments from the ECtHR
S.W. v. The United Kingdom App no 20166/92 (ECtHR, 22 November 1995)
Stašaitis v. Lithuania App no 47679/99 (ECtHR, 21 March 2002)
Hirschhorn v Romania App no 29294/02 (ECtHR, 26 July 2007)

Other Sources
Letter from the Ministers of Foreign Affairs of Denmark, Finland, Germany and the
Netherlands to the President of the European Commission (6 March 2013)
Reding, V, ‘The EU and the Rule of Law – What next?’ (Brussels 4 September 2013)
2018
Scheppele, KL & Pech, L, 'Why Poland and not Hungary?’ Verfassungsblog (8 March
May 2018
Giblin, R, ‘High Court judge seeks EU ruling on effect of Polish law changes’ The Irish
law/courts/high-court/high-court-judge-seeks-eu-ruling-on-effect-of-polish-law-
changes-1.3424530> accessed 21 May 2018
Khan, M, ‘Poland rebukes Brussels’ plans to link budget funds to rule of law’ Financial
Times (Brussels 14 May 2018) <https://www.ft.com/content/f0db175e-5754-
11e8-bdb7-f6677d2e1ce8> accessed 20 May 2018