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OPINION OF THE LEGAL SERVICE¹

Subject: Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States

- Compatibility with the EU Treaties

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (10.12.2018)

I. INTRODUCTION

1. During the meeting of the Ad Hoc Working Party on the Multiannual Financial Framework (MFF) of 4 September 2018, delegations raised various issues of compatibility with the Treaties of the Commission proposal for the establishment of a mechanism on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States ("the proposal").² **DELETED**

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² Proposal of 2 May 2018 for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, doc. 8356/18.

compatibility of the proposed mechanism with Article 7 of the TEU, the choice of Article 322(1)(a) TFEU as an appropriate legal basis and the legality of the procedure for the adoption of measures under the mechanism. This opinion responds to that request.

II. LEGAL AND FACTUAL BACKGROUND

2. The Commission proposal is based on the premise that respect of the rule of law is an essential precondition to comply with the principles of sound financial management, in accordance with which the budget shall be implemented as provided for in Article 310(5) TFEU,³ as well as to guarantee the effective protection of the financial interests of the Union (recitals 4 and 11). Thus generalised deficiencies as regards of the rule of law in the Member States entail the risk of financial losses which justify the adoption of measures for the protection of the Union's budget (Article 1).

3. Article 3 of the proposal establishes in broad terms the triggering conditions for the adoption of the measures:

"Appropriate measures shall be taken where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union".

4. The provision further provides a list of possible situations in which the malfunctioning of public authorities in a Member State affects the sound and efficient implementation of the Union budget (Article 3(1) of the proposal). Additionally, Article 3(2) of the proposal provides a list of possible examples of generalised deficiencies as regards the rule of law.

³ Cf. also Article 2(59) of the Financial Regulation: "'sound financial management' means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness" and Article 6; Several other provisions of the Financial Regulation further detail and refer to this principle.

5. Measures to be adopted are defined in Article 4. They vary depending on the method of implementation of the budget in a specific case. In case of direct or indirect management, measures can be adopted only where a government entity is the recipient of the funding and can consist either in a suspension of payments or in the suspension or termination of a legal commitment or in the prohibition to enter into new legal commitments. In case of shared management a wider number of options are envisaged, including the suspension of the approvals of programmes, a reduction of commitments, the transfer of funding to other programmes and a reduction of pre-financing.
6. Article 4(2) of the proposal aims at protecting the position of the individuals who are the final recipients or beneficiaries of the funds and to that effect clarifies that the imposition of appropriate measures shall not exonerate Member States from their obligation to make the relative payments.
7. The conditions for the determination of the specific measures to be adopted in a given case are defined in Article 4(3) of the proposal, according to which:

" the measures taken shall be proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law. They shall, insofar as possible, target the Union actions affected or potentially affected by that deficiency".

8. Finally, Article 5 of the proposal sets out the procedural framework for the adoption of the measures by means of an implementing act of the Council on the basis of a Commission proposal. The Commission shall submit its proposal after having given the concerned Member State the possibility to express its observations on the reasons why the Commission considers that a generalised deficiency as regards the rule of law might exist, and after having taken them into account. The decision is deemed to be adopted unless the Council decides, by qualified majority, to reject the Commission's proposal within one month ("reversed qualified majority"). The Council can also amend the Commission's proposal by qualified majority (Article 5(8)). The same procedure applies for the lifting of measures in case the generalised deficiency as regards the rule of law has been remedied or has ceased to exist (Article 6).

III. LEGAL ANALYSIS

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