AT A GLANCE

Requested by the BUDG Committee

Study in Focus

The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context

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The rule of law Conditionality Mechanism is a new instrument that entered into force in January 2021. It allows the European Union (EU) to take measures in cases when breaches of the rule of law principles affect or seriously risk affecting the EU budget or the EU's financial interests. As this new mechanism has so far only been applied once, some questions are left open on its application and the possibilities offered by it. The full study discusses the potential scope of application of this new tool. In particular, it analyses how it can be used either as an alternative to, or in combination with, other tools and mechanisms aimed at protecting the EU's financial interests.

Background

The Conditionality Mechanism is a continuous exercise through which all 27 Member States are constantly monitored and assessed by the European Commission services. The Commission's Directorate-General for Budget is at the centre of the process, coordinating input from other Directorates-General and institutions and requesting further information where necessary. It performs a case-by-case appraisal as country and case-specific dimensions shall be taken into account.

The Commission can only trigger the rule of law Conditionality Mechanism if it considers that other procedures set out in EU legislation would not allow it to protect the Union budget more effectively. Some of them (the Early Detection and Exclusion System (EDES)) protect the EU budget from the risk of insolvency, negligence, fraud or irregularity committed by private actors (potential beneficiaries of EU funds). From the point of view of this study, however, the most relevant ones are 'second-level' layers applicable to those EU funds managed by national authorities (Cohesion, 'Home Funds' and CAP funds, Recovery and Resilience Facility), as their scope of application partly overlaps with that of the Conditionality Mechanism.

In addition to proving that the Conditionality Regulation would be more effective than other layers of protection, the Commission must prove the existence of a breach of rule of law principles affecting or seriously risking to affect the EU budget in a sufficiently direct way. The study creates a typology of hypothetical situations that may fulfil these two conditions. As there is no clear definition of 'sufficiently direct link', it discusses the implications of adopting different interpretations of this 'link" in different hypothetical situations.

Key findings

- **Some existing layers of protection can be very effective to protect the EU budget against certain breaches of the principles of the rule of law**. In particular, the Commission can suspend the adoption of Cohesion and 'Home Funds' programmes or suspend the reimbursement of costs related to operations co-financed by Cohesion or 'Home Funds' if it finds evidence proving that the Member State does not respect the Charter of Fundamental Rights in the implementation of these funds. These provisions have proved to be very powerful in the past and will remain important in the future.
- **The rule of law Conditionality Mechanism offers various advantages vis-à-vis other layers of protection.** It is particularly appropriate to protect the budget from systemic breaches of rule of law principles arising from the adoption of general laws as well as from the malfunctioning -by action or omission- of public authorities not directly involved in the management or control of EU funds.

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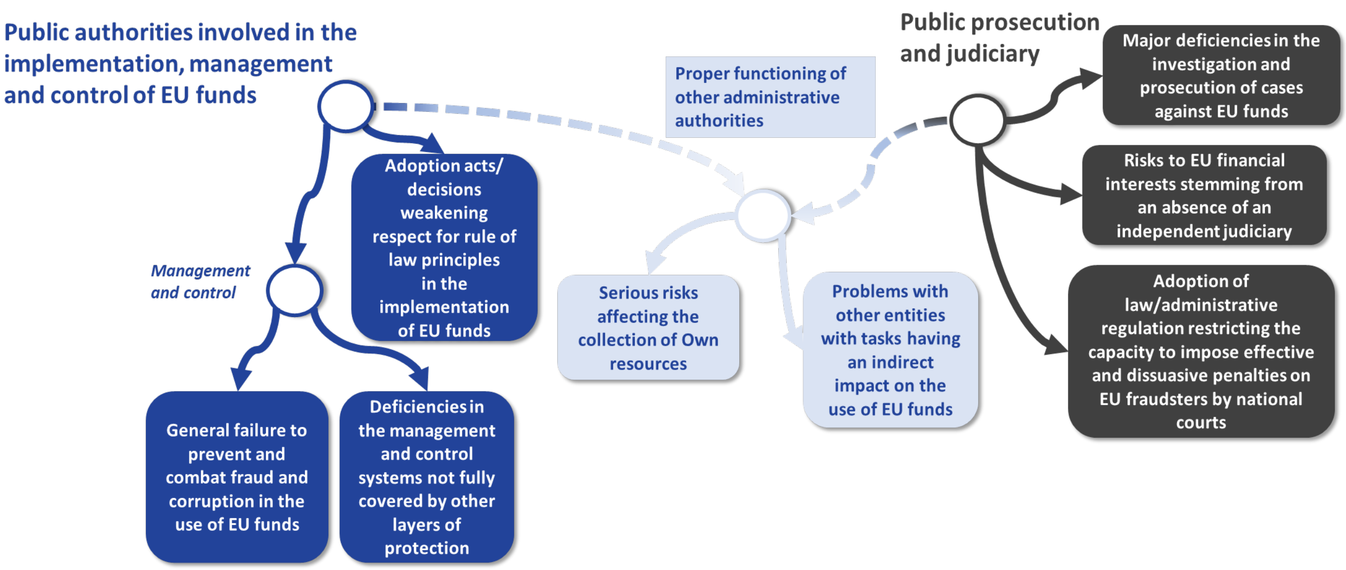
- Under certain circumstances, it can be more effective than existing tools to deal with risks arising from **individual or occasional breaches of rule of law principles**.
- It offers a lot of **flexibility** regarding the measures to be adopted, even if there is a duty of **proportionality**.
- **The Conditionality Mechanism might not always be the most effective solution**, either because there is a need for a quick response, or because there are no clear remedial and monitorable actions that can be imposed on the Member State concerned.
- **How the 'sufficiently direct link' is interpreted may have important repercussions on the application of the mechanism in the future.** A too restrictive interpretation might limit the number of potential cases. A too broad interpretation would allow the Commission to make more extensive use of this instrument but increase the risk of invalidation by the Court.
- The Conditionality mechanism can be triggered in the absence of **clear and explicit intention by central authorities to breach the rule of law.** Infringement of rule of law principles may come from a systemic failure by the central level to prevent or sanction arbitrary or unlawful decisions made by lower-level administrative bodies.
- Once triggered the mechanism should not necessarily reach the stage of Council measures. Some problems can be solved with a **quick fix at the notification stage**.

Main conclusions

The study aims to deconstruct the image of the Conditionality Regulation as a 'means of last resort', as it is often portrayed in academic literature and the press. Treating it as such and triggering it only in cases of major and systemic breaches of the rule of law risks converting it into a toxic instrument, with a very high threshold of application and considerable political costs attached. In fine, the mechanism is an instrument to protect the EU's financial interests, working alongside other ones, in all 27 Member States.

Typology of situations that may fall within the scope of the Conditionality Mechanism



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