Protecting the EU budget against generalised rule of law deficiencies

OVERVIEW

When preparing the 2021-2027 multiannual financial framework, the European Commission proposed to strengthen the link between EU funding and respect for the rule of law. To this end, on 3 May 2018, the Commission presented a proposal for a regulation that would introduce a general rule of law conditionality into the EU’s financial rules. Any Member State where a generalised rule of law deficiency is found could be subject to the suspension of payments and commitments, reduced funding and a prohibition on concluding new commitments. On 13 November 2019, the decision of the European Parliament’s Budget and Budgetary Control Committees to enter interinstitutional negotiations on the proposal was announced in plenary. Negotiations will be based on Parliament’s first-reading position adopted in plenary in April 2019. Parliament’s main amendments are concerned with the definition of generalised deficiencies, procedural issues (the panel of independent experts and the need to put Parliament on an equal footing with Council), and with the protection of end beneficiaries of EU funding. The rule of law conditionality has become an important element of the negotiations on the legislative package for the 2021-2027 MFF and the Recovery Instrument for the aftermath of the coronavirus pandemic.

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

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<td>Rapporteurs:</td>
<td>Petri Sarvamaa (EPP, Finland) and Eider Gardiazabal Rubial (S&amp;D, Spain)</td>
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<td>Shadow rapporteurs:</td>
<td>Lefteris Christoforou (EPP), Claudiu Manda (S&amp;D), Katalin Cseh (RE), Joachim Kuhs (ID), Alexandra Geese (Verts/ALE), Ryszard Czarnecki (ECR), Younous Omarjee (GUE/NGL)</td>
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COM(2018) 324 2.5.2018
2018/0136(COD)

Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly ‘co-decision’)

Next steps expected:

Trilogue negotiations
Introduction

The rule of law is one of the fundamental values of the Union, enshrined in Article 2 of the Treaty on European Union (TEU). That article explicitly states that the EU ‘is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ and adds that ‘These values are common to the Member States’. A special Eurobarometer on the rule of law (April 2019) showed overwhelming popular support for the rule of law among EU citizens.

In its communication of April 2019 on further strengthening the rule of law within the Union, the Commission proposes the following definition of the concept of the rule of law:

Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.

Although EU spending is protected by various conditionality mechanisms, rule of law deficiencies are not addressed explicitly. In the light of recent debates on deficiencies with respect to the rule of law in the Member States and on improved implementation of the EU budget, linking the two areas has become a crucial element in the reform of EU finances proposed in the legislative package for the 2021-2027 multiannual financial framework. The Commission has maintained the conditionality in its amended proposals for the MFF and the Recovery Instrument for the aftermath of the coronavirus pandemic (Next Generation EU).

Context

On 20 December 2017, the Commission triggered the procedure provided for in Article 7(1) TEU for the first time, submitting a reasoned proposal for a decision of the Council on the determination of a clear risk of a serious breach of the rule of law by Poland (2017/0360 (NLE)), and simultaneously issuing detailed recommendations. The triggering of the procedure was preceded by three detailed recommendations adopted by the Commission under its Rule of Law Framework (2016/1374, 2016/146 and 2017/1520). The European Parliament backed the Commission’s move in a resolution of 1 March 2018, having already expressed criticism of the situation in Poland in its resolutions of November 2017, September 2016 and April 2016. Council discussed the situation in Poland in April 2018, and held a hearing on the issue in June 2018. On 12 September 2018, Parliament adopted a resolution calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (procedure 2017/2131(INL)). This resolution was preceded by numerous others adopted between March 2011 and May 2017. Annexed to the resolution is a proposal for a Council decision containing a detailed account of the situation in Hungary. The topic of the state of the rule of law in various Member States has also attracted the attention of academics and think-tanks.

Existing situation

Mechanisms to protect the rule of law in the Member States

Under the current Treaty framework, the rule of law can be protected by a variety of mechanisms, ranging from more political to more legal, and from ‘softer’ to ‘harder’. The most ‘political’ of all is the preventive mechanism, provided for in Article 7(1) TEU, under which the Council may, by a qualified majority of four fifths of its members – not including the Member State concerned – adopt a decision stating that there is a clear risk of a serious breach of the rule of law (or any other EU value, enshrined in Article 2 TEU), by a given Member State. No specific sanctions are attached. Article 7(2)
to (4) provides for a political mechanism with concrete legal effects, and is known as the sanctions mechanism. It can be triggered independently of Article 7(1). The decision-maker is the European Council, which must decide by unanimity (without the incriminated Member State). The procedure may lead to the suspension of that Member State’s voting rights in Council. However, as academics point out, the ‘threat of actual sanctioning ... remains hardly credible’. This is, of course, due to the requirement of unanimity which may prove difficult to achieve. Aside from that, the rule of law can be protected by resorting to the infringement procedure and action for failure to fulfil Union obligations (upon the initiative of the Commission or a Member State – Articles 258-260 of the Treaty on the Functioning of the European Union (TFEU)), as well as through the preliminary reference procedure (upon the initiative of a court in the Member State concerned – Article 267 TFEU).

However, the limitation of Article 267 TFEU as a mechanism for the protection of the rule of law is that it ‘depends on an independent judiciary at the domestic level, which is often questionable in cases of rule of law violations’. Finally, mention should be made here of the cooperation and verification mechanism, which is a special mechanism for Romania and Bulgaria, introduced at the time of their accession to the EU. It includes the rule of law in its material scope.

In addition to the four mechanisms explicitly provided by the Treaties (Article 7(1) TEU; Article 7(2) to (4) TEU; Articles 258-260 TFEU; and Article 267 TFEU), the European Commission has established two more, which do not, however, produce any legal effects and do not involve other institutions than the Commission itself. The first of these is the rule of law framework, under which the Commission investigates the situation in the Member State concerned, engages in a dialogue with its authorities, and, if need may be, issues recommendations that are not legally binding. This framework was triggered for the first time in 2015 in relation to Poland, and led to the issuance of four recommendations (2016/1374, 2016/146, 2017/1520, 2018/103) which, however, were not implemented. A new mechanism, the rule of law cycle, was announced in the Commission communication of July 2019, and is expected to become operational by the end of 2020. The idea of the cycle is to subject each and every single Member State to an annual rule-of-law check-up and to publish its results in an annual rule of law report. The mechanism, not provided for explicitly in the Treaties, will not lead to any direct legal effects. Finally, it should be added that in 2016 Parliament proposed the creation of an EU pact on democracy, the rule of law and fundamental rights in the form of an inter-institutional agreement. Commission Vice-President Didier Reynders recently indicated that the first annual rule of law report will be published in September 2020.

Budgetary conditionalities in EU financial rules

Existing regulations concerning the EU budget include rules known as ‘spending conditionalities’. The rules originated in the 1980s and were first used in the EU’s external policies, before being applied to cohesion policy. They are generally defined as a ‘condition attached to EU financial benefits with the aim of advancing broader EU policy objectives at the Member State level’. The conditions are enshrined in fund-specific regulations and can concern the Member States or final beneficiaries. Some of the conditionalities must be fulfilled before funds are disbursed (ex ante conditionalities), others apply in the later stages of the implementation process or are focused on outputs and, if not fulfilled, may lead to a halt in payments (interim and ex post conditionalities). So far, rule of law deficiencies have not been addressed explicitly in the framework of spending conditionalities, hence the need for the proposed legislation.

The 2014-2020 programming period saw a clear shift towards governance by conditionality, linked to a new results-based approach to EU finances. Currently, conditionality rules are most present in EU spending on cohesion (European Regional Development Fund, European Social Fund and Cohesion Fund), agriculture and fisheries (European Agricultural Fund for Rural Development and European Maritime and Fisheries Fund) and home affairs (Asylum, Migration and Integration Fund and Internal Security Fund (ISF)). However, the use of available provisions and tools has so far been conservative, their design has been criticised and their impact is considered uncertain.
Parliament's starting position

In March 2018, in its resolution ahead of the Commission's proposal, Parliament underlined that the next multiannual financial framework (MFF) should build on EU values and priorities, including promotion of the rule of law. The Parliament called on the Commission 'to propose a mechanism whereby Member States that do not respect the values enshrined in Article 2 of the Treaty on European Union (TEU) can be subject to financial consequences'. However, 'final beneficiaries of the Union budget', Parliament also warned, 'can in no way be affected by breaches of rules for which they are not responsible'.

Preparation of the proposal

The idea of introducing an EU value of conditionality for EU funds was first raised by the then Justice Commissioner, Věra Jourová, in a speech in February 2017, given in Vienna. The Commissioner said:

"...we ... need to ensure that EU funds bring a positive impact and contribute more generally to promote the EU's fundamental rights and values. That is why I intend to explore the possibility to strengthen the 'fundamental rights and values conditionality' of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds."

The proposal was submitted as part of the legislative package for the 2021-2027 MFF.

The changes the proposal would bring

On 3 May 2018, the Commission put forward a proposal for a regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States. The proposal is based on Article 322(1)(a) of the Treaty on the Functioning of the European Union and Article 106a of the Treaty establishing the European Atomic Energy Community. This rule merely provides that: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations: (a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts […]. It does not mention explicitly the possibility of introducing sanctions for non-compliance with the value of the rule of law, mentioned in Article 2 TEU. This has given rise to doubts as to the legal basis, as outlined in the Council Legal Service opinion (see below).

Definition of the rule of law and generalised deficiencies

In its article 2(a) the proposal defines the rule of law as 'the Union value enshrined in Article 2 [TEU] which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive power; effective judicial protection by independent courts, including fundamental rights; separation of powers and equality before the law'. A general deficiency of the rule of law occurs, according to article 2(b) when there is a 'widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law'. Therefore, the mechanism put forward by the Commission does not deal with individual breaches of the rule of law, but can only be applied in case of systemic deficiencies, which therefore have to be proven. Article 3(2) lists, in a non-exhaustive manner, three examples of situations where a generalised deficiency may be found: (a) endangering the independence of judiciary; (b) failing to prevent, correct and sanction arbitrary or unlawful decisions of law enforcement authorities; and (c) limiting the availability of legal remedies, failing to implement judgments, and limiting the effective investigation, prosecution and sanctioning of breaches of law.

For the sanctions mechanism to be triggered, the generalised deficiency must 'affect or risk affecting the principles of sound financial management or the protection of the financial interests of the
Union’ (article 3(1)). These principles include: the proper functioning of the Member State’s authorities implementing the Union budget in the context of public procurement, grants, monitoring and controls; the proper functioning of investigation and prosecution services with regard to fraud, corruption and other breaches of EU law relating to the implementation of the budget; effective judicial review with regard to the above actions or omissions by the national authorities; the prevention and sanctioning of fraud, corruption or other budget-related breaches of EU law; the recovery of funds unduly paid; and effective and timely cooperation with the European Anti-Fraud Office (OLAF) and the European Public Prosecutor’s Office (EPPO). The sanctions provided for in article 4 are of a financial nature and include the following non-exhaustive possibilities: suspension of payments or of implementation of the legal commitment, or termination of the legal commitment; a prohibition on entering into new legal commitments; suspension of the approval of one or more programmes or amendment of such programmes; suspension of commitments; reduction of commitments, including through financial corrections or transfers to other spending programmes; reduction of pre-financing; interruption of payment deadlines; and suspension of payments.

Procedural matters: Only Commission and Council involved

The Commission’s proposal provides for the involvement of only two institutions in the procedure: the Commission itself and Council, with no role envisaged for the European Parliament, and no panel of experts to be consulted. The procedure would be triggered by the Commission, which would send a written notification to the Member State concerned (article 5(1)). The Commission would take into account decisions of the European Court of Justice, reports of the European Court of Auditors, and conclusions and recommendation of ‘relevant international organisations’ (article 5(2)), presumably the Council of Europe and its Venice Commission, but that is not spelled out explicitly. There is no duty to take into account resolutions of the European Parliament, or opinions prepared by professional legal networks, such as the European Judicial Network. The Commission could also request additional information from the Member State concerned (article 5(3)), which the latter would be obliged to provide (article 5(4)). The Member State would be able to submit observations, which the Commission would have to take into consideration (article 5(5)).

Following these preliminary stages of the procedure, the Commission would submit a proposal for an implementing act, providing for sanctions, to the Council (article 5(6)). The Council could reject the Commission proposal by qualified majority (the procedure known as the reverse qualified majority) within a month of its adoption by the Commission (article 5(7)). If not rejected within that deadline, the decision would be deemed to have been adopted. Furthermore, the Council could, by qualified majority, amend the Commission’s proposal and adopt the amended text as the decision (article 5(8)). This departs from the usual rules in qualified majority voting. No role, not even merely consultative, is envisaged for Parliament or any other EU institution at this stage.

The proposal also provides for a procedure for lifting the sanctions (article 6). The sanctioned Member State would be able to submit evidence to the Commission, demonstrating that the general deficiency had been remedied or ceased to exist (article 6(1)). The Commission would then assess the situation and if indeed it found that the deficiencies had been remedied partially or in full, it could submit to the Council a decision lifting the sanctions, partially or in full. No role is envisaged for the European Parliament in this procedure, apart from being informed by the Commission of the imposition and lifting of sanctions (article 7).

Limited protection of end beneficiaries

According to article 4(2), unless the decision imposing sanctions provides otherwise, the final recipients or beneficiaries of programmes or funds should not be affected. The government entities or Member State in question must make the payments to them, despite the imposition of sanctions. In effect, therefore, the duty to make payments would be transferred from the EU budget to the national budget. However, the proposal does not provide for any mechanisms to actually guarantee
the payments to the end beneficiaries should the Member State fail to make them. Furthermore, the expression 'Unless the decision adopting the measures provides otherwise' at the beginning of article 4(2) means that the sanctioning decision may envisage end beneficiaries not being protected at all and losing the funding, becoming effectively penalised for the breaches of the rule of law committed by the Member State. The protection of end beneficiaries is, therefore, conditional (upon the Council decision) and limited (no enforcement mechanism envisaged).

Advisory committees

European Economic and Social Committee

On 18 September 2018, the European Economic and Social Committee (EESC) adopted its opinion on the MFF package for the years 2021 to 2027 (rapporteur: Javier Doz Orrit, Workers – Group II, Spain), supporting the proposal and suggesting that the conditionality mechanism also be extended to other principles linked to the rule of law contained in the EU Treaties. Furthermore, on 17 October 2018, the EESC adopted a specific opinion on the proposed regulation. The Committee confirmed its support for the Commission’s proposal, in particular, for the fact that decisions on sanctions would require reverse qualified majority voting in the Council. The EESC is of the opinion that ‘the mechanism proposed by the Commission should be activated automatically where a generalised deficiency as regards the rule of law risks affecting the financial interests of the EU’ (point 1.3), and should include, in addition to the protection of the rule of law, the protection of fundamental rights and guarantees protecting pluralist democracy (point 1.4).

Committee of the Regions

On 9 October 2018, the Committee of the Regions (CoR) adopted its opinion on the MFF package for the years 2021 to 2027 (rapporteur: Nikola Dobroslavić, EPP, Croatia), taking the view that respect for the rule of law is a necessary condition for sound financial management and efficient use of the EU budget. The CoR considers that the mechanism proposed could be implemented more quickly than the Article 7 TEU procedure. However, it believes that the proposal would allow too much discrentional power to the Commission in relation to the initiation of procedures, and calls on the Commission to set out clear criteria to determine what constitutes a generalised deficiency. In addition, on 12 February 2020, the CoR adopted its opinion on the Commission’s communication on strengthening the rule of law within the Union (COM(2019) 343 final).

National parliaments

The proposal was transmitted to national parliaments on 7 May 2018, and the deadline for submitting reasoned opinions (Article 6 of the Protocol on the principles of subsidiarity and proportionality) expired on 2 July 2018 (after eight weeks). No national parliament submitted a reasoned opinion questioning the conformity of the proposal with the principle of subsidiarity. Following scrutiny procedures, detailed contributions were submitted by the German Bundesrat, the Portuguese parliament and the Czech Senate. The German Bundesrat takes the view that the Commission is correct in asserting that the rule of law is an indispensable prerequisite for sound financial management and effective EU funding. However, concerning the proposal itself the Bundesrat points out that ‘the TEU and the TFEU lay down clear procedures for ascertaining breaches of EU law and for sanctioning them – including cutting EU resources’. Furthermore, the German upper house considers that ‘the criteria for the proposed sanctions are not fixed in part and that the list of them is not exhaustive’. The Czech Senate criticised the procedural aspects of the proposal, especially the rule that the sanctions decision would be deemed adopted if the Council does not reject it by qualified majority within one month.
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Stakeholders

Maria José Rangel de Mesquita takes the view that the proposal is inspired by existing conditionalities in the current 2014 to 2020 MFF, especially those linking the effectiveness of the European structural and investment (ESI) funds to sound economic governance, as provided in Regulation 1303/2013. However, she considers that 'the newly proposed mechanism by-passes the Article 7 [TEU] procedure' and expresses doubts as to its conformity with primary law. Iain Begg considers that 'the attempt to link EU expenditure with adherence to the rule of law, while reflecting a moral position, is fraught with dangers. Defining the circumstances in which EU money will be withheld – in other words, financial sanctions – will be tricky enough, but implementation will be harder still'.

The Spinelli Group, in its manifesto on the future of Europe unveiled in September 2018, expressed the view that the European Parliament 'must acquire full powers of co-decision with the Council over all financial decisions ...'. Although the manifesto does not address the proposal directly, it can be inferred that the group would like see stronger involvement of Parliament in the sanctions procedure.

In 2018, the Friedrich Ebert Stiftung published a position paper by Dr László Andor (Corvinus University, Budapest), who warns that 'if the current budget debate leads to a significant reduction of transfers by downgrading the cohesion funding instruments, the single market may also disintegrate. The EU should not resolve one problem by creating or aggravating others ...'. Dr Andor believes that it 'seems like eternity to establish that this or that country is actually violating the values and democratic standards of the EU'. He also remarks that 'the past decade has shown that while the EU has successfully enforced the Maastricht criteria, it has failed to do so with regard to the Copenhagen criteria; apparently the EU considers the first more important than the second'.

Vit Havelka, a commentator from Czech think-tank Europeum, points out that the proposal would give the Commission the power to 'assess, for instance, whether prosecution, audit offices or the judiciary are independent enough to conduct unbiased investigation of potential frauds'. In contrast, in his view, the proposal 'is not constructed to punish Member States for promoting policies that diverge from "the European mainstream" ... but rather countries whose political system cannot guarantee solid systems of checks and balances, and fundamental rule of law'. He is critical of the procedural side, arguing that the Commission proposal 'results in reduced clarity – is the Commission as an expert institution responsible for the decision, or the Council as purely political body? In this respect, the upcoming MFF negotiations should resolve the ambiguity and opt for only one source of legitimacy'.

Professor F. Heinemann (ZEW Mannheim) in his analysis considers popular arguments against the regulation, such as that the financial sanctions would increase European polarisation, that it would impact poor countries and unintended target groups disproportionately, and that the suspension of cohesion payments could damage economic convergence.

Michael Blauberger and Vera van Hüllen evaluate the Commission's proposal in terms of its chances of successfully deterring or redressing infringements of the rule of law at the level of Member States. Drawing on both the literature on EU enlargement and on international sanctions, they identify a list of scope conditions for conditionality in order to systematically evaluate the institutional design and analyse the context of application of the proposed rule of law conditionality on EU funds with regard to its expected effectiveness. They find that the current proposal would indeed improve the speed and likelihood of sanctions compared with existing mechanisms, but that it lacks in the determinacy of conditions and procedures, thus undermining its perceived legitimacy and chances of success. Ulrich Sedelmeyer, writing in 2017 on 'Political safeguards against democratic backsliding in the EU', warned that the actual capacity of material sanctions to 'to redress democratic backsliding is severely limited. Even credible threats of material sanctions are no panacea against illiberal practices in member states. The effectiveness of material sanctions decreases the more
serious such cases are. (…) Studies of EU conditionality towards candidate countries suggest that (…) material incentives are insufficient when used towards illiberal governments (…)’.7

Legislative process

European Court of Auditors

On 17 August 2018, the European Court of Auditors (ECA) delivered its opinion on the proposal, noting that the regulation would give the Commission a very broad margin of discretion in the procedure. The ECA also pointed to the lack of rules on specific stakeholder consultation and the absence of an impact assessment. The ECA recommended that clear and specific criteria for defining what constitutes a generalised deficiency as regards the rule of law should be set out in the regulation and pointed to the need to protect the legitimate interests of the EU fund beneficiaries who would be affected.

European Parliament

Draft reports

On 3 October 2018, the co-rapporteurs from the Committees on Budgets (BUDG) and on Budgetary Control (CONT) presented their draft report on the proposal. The main amendments include referring to the Copenhagen criteria in defining the rule of law, the Commission's duty to take into account all relevant information, including information coming from Parliament and from bodies such as the Venice Commission of the Council of Europe, and the need to pay attention to the protection of final beneficiaries. Concerning procedural aspects, the draft report insists on putting Parliament on an equal footing with Council as far as the imposition and lifting of sanctions are concerned. According to the proposed amendments, the Commission would adopt a decision on the appropriate measures by its own implementing act, and simultaneously submit to Parliament and Council a proposal to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted. On 17 December 2018 the BUDG and CONT committees submitted their joint report on the proposal. On 17 January 2019, in plenary, the Parliament adopted a number of amendments to the proposal and referred the matter back to the committees.

Parliament's first-reading position (April 2019)


Definition of rule of law deficiencies

Parliament has amended article 2(a), where the rule of law is defined, by including reference not only to Article 2 TEU but also to Article 49 TEU which lays down the criteria of membership. The list of key elements of the rule of law is also expanded to include the principle of non-discrimination, access to justice and impartiality of courts; and reference to the EU Charter of Fundamental Rights and international human rights treaties is added. The notion of a 'generalised deficiency' is defined both in article 2(b) and in the newly added article 2a. The definition in article 2(b) is expanded by adding explicit reference to the 'principles of sound financial management or the protection of the financial interests of the Union'. A new, detailed definition of 'Generalised deficiencies' is placed in the newly added article 2a. Drawing on article 3(2)(a)-(c) of the Commission's proposal, it refers to five elements:

- endangering the independence of judiciary, including setting any limitations on the ability to exercise judicial functions autonomously by externally intervening in guarantees of independence, by constraining judgment under external order, by arbitrarily revising rules on the appointment or terms of service of judicial personnel, by
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- Influencing judicial staff in any way that jeopardises their impartiality or by interfering with the independence of attorneyship;
- Failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;
- Limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules or lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law;
- Endangering the administrative capacity of a Member State to respect the obligations of Union membership, including the capacity to implement effectively the rules, standards and policies that make up the body of Union law;
- Measures that weaken the protection of the confidential communication between lawyer and client.

The concept of risks to the financial interests of the Union (article 3) is expanded. New elements are added to the definition and, in particular, ‘the proper functioning of the market economy’, including ‘respecting competition and market forces’ (article 3(1)(aa)), as well as ‘the proper functioning of the authorities carrying out financial control’ (article 3(1)(ab). Tax fraud is added to article 3(1)(b) and (d), and a separate point addresses ‘the prevention and sanctioning of tax evasion and tax competition’ (article 3(1)(ea)).

Panel of independent experts

A major innovation in Parliament’s amendments is the creation of a panel of independent experts, envisaged in a newly added article 3a. The experts would be drawn from specialists in constitutional law, financial matters and budgetary matters (article 3a(1)). The panel would number a total of 32 members, with 27 members appointed, one each, by national parliaments, with an additional five experts appointed by the European Parliament. The Commission, Council or other EU institutions would not appoint any experts. The Panel could also invite observers from ‘relevant organisations and networks’, including: the European Federation of Academies of Sciences and Humanities, the European Network of National Human Rights Institutions, the bodies of the Council of Europe – including the European Commission for the Efficiency of Justice, the Council of Bars and Law Societies of Europe, the Tax Justice Network, the United Nations, the Organization for Security and Co-operation in Europe and the Organisation for Economic Co-operation and Development (article 3(a)(1) second subparagraph). The panel would have an advisory role and would ‘assist the Commission in identifying generalised deficiencies’ as defined in the regulation (article 3(a)(2) first sub-paragraph). The panel would work on an annual basis, and would rely on both quantitative and qualitative data (article 3(a)(2) second sub-paragraph). The panel would have the power to issue an opinion on the state of the rule of law in a given Member State (article 3(a)(4)). The panel’s opinion would not be binding, but the Commission would nonetheless be obliged to take it into account (article 3a(5)).

The Commission would have to take into account any opinions of the panel, and to inform Parliament and Council of any notification sent to a Member State. When assessing whether the conditions for triggering the sanctions were met, the Commission would be under a duty to take into account the panel’s opinions, Parliament resolutions and other elements (in the original proposal the Commission was not obliged to take them into account). Furthermore, the Commission would also have to take into account the criteria used in accession negotiations, in particular the chapters on the judiciary, fundamental rights, freedom of security, financial control and taxation, and also guidelines used in the context of the cooperation and verification mechanism.
Budgetary reserve

A new rule (article 5(6a)) provides that, at the same time, when the Commission adopts a decision it will have to simultaneously submit to Parliament and Council a proposal to transfer to a budgetary reserve the amount equivalent to the proposed sanctions. This proposal will be considered approved within four weeks of its submission unless Parliament, acting by a majority of votes cast, or Council, acting by qualified majority, decide to amend or reject it (article 5(6b)). The decision imposing sanctions will enter into force if neither Parliament nor Council reject the transfer proposal within the four-week period (article 5(6c)). These new procedural arrangements are a significant modification of the Commission's original proposal. First of all, Parliament is treated on an equal footing with Council and can veto the decision on sanctions acting by majority of votes cast. Second, the decision on sanctions is now closely linked, in procedural terms, with the proposal to transfer the value of the sanctions to a budgetary reserve (one of flexibility mechanisms proposed in the 2021-2027 MFF regulation). This means that the money is set aside, and not mixed up with the other budgetary funds.

Parliament’s amendment to article 6(1) requires that the sanctioned Member State’s request to lift the sanctions must be a ‘formal notification’. Upon a request of the sanctioned Member State or on its own initiative, the Commission may reassess the situation in that Member State (Article 6(2)); the Parliament’s amendments make it clear that the Member State’s request must trigger that procedure; the Commission must take into account any opinions of the panel, and should, within the indicative deadline of one month, come up with a reassessment. If the Commission’s finding are favourable to the Member State in question, it would adopt a decision lifting the sanctions, and at the same time submit to Parliament and Council a proposal to release the budgetary reserve (in full or in part). The same procedure as in article 5 would apply, meaning that both Parliament and Council could block the Commission's decision by a majority of votes cast (Parliament) or qualified majority (Council).

Protection of end beneficiaries

The protection of end beneficiaries or final recipients would be stepped up and made more realistic through the imposition of concrete duties upon the Commission in their respect, including duties to provide information and offer guidance. Under article 4(3b), the Commission would have a legal duty to ‘ensure that any amount due from government entities or Member States ... is effectively paid to final recipients or beneficiaries’. This is backed by effective additional sanctions against the non-compliant Member State, including the recovery of payments made to governmental bodies that have not made payments to the end beneficiaries or the transfer of an amount equivalent to that which was not paid to the end beneficiaries to the Union reserve; this money could then ‘be mobilised ... for the benefit, to the possible extent, of the final recipients or beneficiaries’.

A newly inserted article 7a requires the Commission to report to Parliament and Council on the application and effectiveness of the regulation, at the latest five years after its entry into force. A newly inserted article 8a requires that the content of the proposed regulation be ‘inserted into the Financial Regulation upon its next revision’.

Council

Confidential legal opinion of the Council Legal Service

On 25 October 2018, the Council Legal Service prepared a legal opinion on the proposal. On 10 December 2019, the legal opinion was made partially available, but the essential Section III ‘Legal analysis' had been deleted in its entirety. On 30 October 2019, Professor Laurent Pech made a request to Council to obtain the document, but Council refused explaining that ‘the legal issues dealt with by the requested document are controversial and the different actors involved in this legislative procedure have expressed divergent positions. As a consequence, the ongoing discussions are very sensitive’. The content of the legal opinion was, however, reported on
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29 October 2018 by Politico and on 31 October 2018 by Agence Europe. According to the information they made available, it seems that the Council Legal Service's main issue was with the legal basis. As Politico reports, they wrote that while Article 322 TFEU 'is the correct legal basis for the establishment of a genuine conditionality regime of a general character', nonetheless 'the conditionality regime envisaged in the proposal as it currently stands, cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU, as the respective aims and consequences of both procedures are not properly distinguished and risk overlapping with each other'.

Concerning references to the rule of law in article 3 of the proposal, the Council Legal Service wrote, according to Politico, that 'The reference to the rule of law in Article 3 of the proposal as a condition for triggering the proposed mechanism is neither necessary nor sufficient to establish a link with the sound implementation of the EU budget, which is required for a genuine spending conditionality', adding that 'a genuine conditionality mechanism cannot be based on the presumption that a risk for the EU budget necessarily exists once certain deficiencies are qualified as generalised. Rather, it requires that the existence of such a risk is established on the basis of ... explicit standards and criteria'. The Council Legal Service was also critical of the reversed qualified majority mechanism which, as Politico reports, they found to be 'lacking in proper justification'.

Progress made in Council

On 6 February 2020, a progress report on the file, prepared on 24 June 2019 by the Romanian Presidency, was made partially public. The most important details, in particular those concerning the positions of the delegations and the content of the Council Legal Service opinion, were deleted. Based on what was disclosed, it is known that the proceedings opened with a presentation of the Council Legal Service opinion of 25 October 2018. Following that, preliminary discussions took place under the Austrian Presidency. A draft 'negotiating box', which included possible elements relating to the proposal, was discussed in the General Affairs Council meeting of 11 December 2018. A number of elements were 'identified ... as requiring guidance from the Leaders', namely the link between a generalised deficiency in the rule of law and the protection of the Union's budget and use of the reverse qualified majority voting rule for the adoption of Council decisions on measures. On 1 March 2019, the proposal was discussed at the ad hoc working party on the MFF. The delegations were presented with a paper from the Commission in which the added value of the proposal, in comparison with existing conditionality mechanisms, was explained.

Between 1 April and 7 June 2019, the Romanian Presidency conducted an extensive examination of the proposal with a view to moving the file forward and improving its technical elements, where possible. To that end, the Presidency tabled five different compromises, which were discussed in the ad hoc working party on the MFF. As the next six pages of the document (pp 3-9) have been deleted, it is impossible to say anything more about the positions of the delegations and the actual state of play in Council. As of December 2019, based on the decision of the European Council, the negotiations of the 2021-2027 MFF package were taken over by the incoming European Council President, Charles Michel. On 20 February 2020 Michel called a special European Council to discuss the EU's next long-term budget. According to the draft European Council conclusions, in the event of rule of law deficiencies, the decision on measures would be approved by Council by a qualified majority vote. However, the two-day negotiations finished without reaching agreement and without determining a calendar for the next steps or meetings. The outbreak of the coronavirus pandemic has further complicated the negotiations. On 27 May 2020, two years after the initial proposal for the next long-term budget, the Commission put forward amended MFF proposals linked to the Recovery Instrument (the Next Generation EU). EU leaders had a first discussion on the revised MFF package, including the proposal for linking the budget to the rule of law, during their video-conference meeting on 19 June 2020. However, a decisive meeting is expected to take place on 17-18 July.
Forthcoming trilogues

On 12 November 2019, the BUDG and CONT committees decided to open interinstitutional negotiations based on the first reading in Parliament, and on 13 November 2019 that decision was announced in plenary (Rule 72). However, it is not clear when Council will be ready to start trilogue negotiations. The lack of agreement on the 2021-2027 MFF at the level of the European Council has put the process on hold. In December 2019, the European Parliament’s political group leaders decided to freeze negotiations on legislation relating to the new MFF, including the regulation on linking the EU budget and the rule of law, until Council agrees on the full negotiating mandate.

EP SUPPORTING ANALYSIS

Maňko R., Protecting the rule of law in the EU: Existing mechanisms and possible improvements, EPRS, European Parliament, 2019.


OTHER SOURCES

Protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States, Legislative Observatory (OEIL), European Parliament.

ENDNOTES


2 M. Blauberger and V. van Hullen, ‘Conditionality of EU funds: an instrument to enforce EU fundamental values’, Journal of European Integration, 8 January 2020, p. 2.

3 Blauberger and Van Hullen, p. 3.


5 See for instance, Article 19 of Regulation 1303/2013.

6 Speech by Commissioner Jourová, 10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law, Europa Nu (28 February 2017).


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