

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

## Abstract

The rule of law Conditionality Mechanism is a new instrument that entered into force in January 2021. It allows the EU to take measures in cases of breaches of the rule of law principles that affect or seriously risk affecting the sound financial management of the EU budget or the EU's financial interests in a sufficiently direct way. [This study](#) discusses the potential scope of application of this new mechanism. 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.

The rule of law Conditionality Mechanism – also known as ‘Conditionality Regulation’ – is a new instrument that entered into force in January 2021. The mechanism allows the EU to take measures in cases of breaches of the rule of law principles that affect or seriously risk affecting the sound financial management of the EU budget or the EU's financial interests in a sufficiently direct way.

As the Conditionality Regulation was only adopted recently, some questions are left open on its potential scope of application. The European Commission has published guidelines, but without sufficient jurisprudence to go on they leave some room for interpretation. The fact that the Regulation has so far only been applied once makes it difficult to draw definitive conclusions on how it will be applied in the future.

This study discusses the potential scope of application of this new mechanism, in particular by analysing 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. To this end, the study:

- Provides an overview of the institutional setup and processes linked to the application of the mechanism.
- Describes and analyses the European Court of Justice (Court) rulings and the Commission's Guidelines, focusing on the aspects most linked to scope and application of the Regulation;
- Maps the various tools that already exist to protect the Union's financial interests ('layers of protection') and describes their scope of application and effectiveness through the presentation of anonymised real case studies of their use.
- Constructs a typology of hypothetical situations of breaches of the rule of law affecting the Union's financial interests that could fall within the scope of the Conditionality Regulation.

## Procedure and institutional setup

Rather than being a one-off procedure, the Conditionality Mechanism is a continuous exercise through which all 27 Member States are constantly monitored and assessed by the 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. The European Anti-Fraud Office (OLAF) and European Public Prosecutors' Office (EPPO) also play an important role, as both can bring any irregularities or other relevant issues to the attention of the Commission during the procedure. The Conditionality procedure runs in parallel to the data collection and analysis carried out for the purpose of the annual Rule of Law Reports, led by the Directorate-General for Justice<sup>1</sup>. The two processes inform each other, even if the scope differs considerably: Rule of Law Reports provide general assessments and include chapters on media pluralism and freedom, or the system of checks and balances, whereas the rule of law Conditionality Mechanism is focused on breaches of the principles of rule of law that affect the sound financial management of the EU budget.

Another important feature of the mechanism is that it requires a case-by-case appraisal. The need to tailor the approach stems from both country and case-specific dimensions that make a one-size-fits-all process impossible.

## Other 'layers of protection' of the EU budget

The Conditionality Regulation stipulates that 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. These other procedures, referred to as 'other layers of protection', cover different types of risks. Some of them (the Early Detection and Exclusion System) protect the EU budget from risks of insolvency, negligence, fraud or irregularity committed by private actors (potential beneficiaries of EU funds). From the point of view of the study, however, the most relevant layers of protection are those applied to EU funds managed by national authorities (cohesion funds, 'Home Funds' and Common Agricultural Policy funds, Recovery and Resilience Facility (RRF)) and protecting the EU budget from actions or omissions by public authorities as they can partly overlap with the Conditionality Mechanism.

Most of these procedures are designed to deal with deficiencies affecting national authorities in charge of managing and controlling specific EU programmes, and thus are ill-equipped to deal with systemic deficiencies. They are also ineffective in protecting the EU's financial interests from the malfunctioning of public authorities not directly involved in the management or control of EU funds. In many cases, the Commission first needs to prove that a risk to the EU budget has materialised before some of these procedures can be applied, when the harm has already been done.

Some procedures, however, are applied in a more forward-looking way and can be used in response to general changes in national laws or nationwide administrative decisions indicative of breaches of the rule of law principles. This is the case for the horizontal enabling condition, which ensures respect of the EU Charter of Fundamental Rights in the implementation of cohesion and 'Home Funds'. This enabling condition is very powerful and partially overlaps with the Conditionality Regulation, even if it has a narrower scope of application and only allows to suspend payments or the approval of programmes, while the Conditionality Regulation offers a greater number of measures.

Finally, through the establishment of RRF milestones related to rule of law issues, the EU can encourage national governments to adopt reforms in the area of judicial independence, the fight against corruption or anti-money laundering. The real effectiveness of this instrument has not yet been tested at the moment of writing this study.

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<sup>1</sup> See details [here](#)

### **The ‘complementarity test’ – when would the Conditionality Mechanism be more effective?**

The Conditionality Mechanism can be used as an alternative to the other layers of protection when there is a risk to the EU budget not (or insufficiently) covered by existing provisions. It can also be deployed alongside or after the adoption of other provisions, if the Commission concludes that cumulative application will protect the EU budget more effectively.

The assessment of its relative effectiveness will depend on the specific circumstances but, in general terms, the new mechanism offers several advantages compared with other instruments in protecting the EU budget. It is the only procedure protecting the EU’s financial interests from the malfunctioning of public prosecution and judicial authorities. It can also be used preventively, to respond to risks to the EU budget without having to prove that the risks have materialised. As long as it complies with the principle of proportionality, it allows for a considerable level of flexibility on the measures to be adopted. It has more comprehensive coverage of risks stemming from changes in national laws or nationwide administrative decisions that breach the rule of law principles.

Nonetheless, the Conditionality Mechanism might not always be the most effective solution. In some cases, the Commission may conclude that the Regulation would not provide an appropriate response, 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 to address the situation.

### **The thorny issue of the ‘sufficiently direct link’**

To trigger a procedure under the Conditionality Regulation, a breach of the rule of law must affect or seriously risk affecting the EU budget in a sufficiently direct way. While the Court has repeatedly reiterated in its judgments that this condition requires a ‘genuine’ link to be established between the breach of rule of law and the EU budget, it does not go into further detail on *when* such a link is genuine. Without any jurisprudence to go on, there are different interpretations of what would constitute a link that would allow this mechanism to be triggered.

In many cases, the link can be presumed in a relatively straightforward manner: for instance, when the breach results from the actions of public authorities in charge of managing and controlling the use of EU funds. In cases where the breach stems from the actions of public authorities not directly involved in the management or control of EU funds, the method of establishing this link is subject to debate. A ‘restrictive’ interpretation would require this direct link to be demonstrated by hard evidence, such as proof that certain judges were barred from working on cases directly related to the use of EU funds. A broader reading would contend that such hard facts are not always necessary. For example, it could be argued that where there is strong evidence of total absence of independence in the judiciary, there is a serious risk that cases of fraud and corruption in the use of EU funds will not be properly investigated and condemned. This debate has important practical repercussions on the application of the mechanism and makes the concept central to the uncertainties still surrounding the Regulation.

### **A typology of hypothetical situations falling within the scope of the Regulation**

The analysis of the Conditionality Regulation, the Court rulings and the Commission’s guidelines, as well as the assessment of the various other layers of protection, allow various hypothetical situations that may fall within the scope of the Regulation to be identified.

These are situations in which actions or omissions by public authorities are indicative of breaches of rule of law having relevance to the EU budget or the EU’s financial interests, and in which the Regulation would likely be more effective than existing layers of protection in addressing the situation. Whether or not these

situations result in the mechanism being triggered will depend very much on the Commission's capacity to prove the existence of a 'sufficiently direct link' and of a 'serious risk' to the EU budget.

The analysis and discussion of these various hypothetical situations prove that the use of the mechanism should not necessarily be limited to cases of systemic and recurrent breaches of rule of law principles. The Regulation can be used in response to individual and/or occasional breaches insofar as it proves to be more effective than existing layers of protection in dealing with these situations.

Another aspect to consider is that the use of the mechanism does not necessarily require proof of public authorities' clear and explicit intention to breach the rule of law principles. Neither the Conditionality Regulation nor the Court rulings require this. Our case studies show situations in which the breach does not come from a single, intentional decision taken at the central level – such as the adoption of a new law endangering the independence of the judiciary – but rather from a systemic failure by the central level to prevent or sanction arbitrary or unlawful decisions made by lower-level administrative bodies.

### **Conclusions: a new addition to the toolbox to protect the EU's financial interests**

To conclude, our study intends to dispel the image of the Conditionality Regulation as a sort of new 'nuclear option', as it is often portrayed in academic literature and the press. Treating it as a means of last resort and only in cases of major and systemic threats to the rule of law risks converting it into a toxic instrument, with a very high threshold of application and considerable political costs attached. This study aims to deconstruct this image, presenting it instead as another instrument to protect the EU's financial interests. The mechanism works alongside other ones and may be used to support the Commission's continuous monitoring of the rule of law situation in all 27 Member States.

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