

New Instruments Protecting the 2021-2027 Cohesion Budget against Rule-of-Law Breaches

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ABSTRACT

This article introduces the main legal instruments at the EU level to protect the EU's financial interests with a special focus on the budget for cohesion measures. It features the Regulation on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) against breaches of the principles of the rule of law, and the cohesion policy common provisions Regulation which provides horizontal enabling conditions applicable to all its financing objectives (CPR).

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I. Introduction

The rule of law is one of the founding values of the European Union. It is enshrined in Art. 2 of the Treaty on European Union (TEU), alongside human dignity, freedom, democracy, equality, and respect for human rights. According to Art. 2 TEU, these values are common to all EU Member States. While the Treaty itself does not provide a single, exhaustive definition or a list of standards constituting the rule of law, the relevant principles may be derived, *inter alia*, from the case law of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR) as well as from the documents prepared by the Council of Europe. These principles include legality; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; and equality before the law.

The respect for these principles is also of paramount importance for the sound management of the Union's budget and for the legal and regular implementation of Union funding, as they can only be ensured if public authorities act in accordance with the law. This link between the rule of law and the protection of the Union's budget was accentuated in the Commission's communication of 14 February 2018 entitled "A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020,"¹ published a few months ahead of the Commission's presentation of its proposals for the Multiannual Financial Framework 2021-2027 (in May 2018). In the Communication, it reads as follows:

[A]s part of the public debate, it has been suggested that the disbursement of EU budget funds could be linked to the respect for the values set out in Article 2 of the EU Treaty and in particular to the state of the rule of law in Member States. Some have gone further, arguing that serious breaches of EU law should have consequences and should lead to the suspension of disbursements from the EU budget.

In further text, the Communication stresses the following:

[T]he Union is a community of law and its values constitute the very basis of its existence. They permeate its entire legal and institutional structure and all its policies and programmes. Respect for these values must therefore be ensured throughout all Union policies. This includes the EU budget, where respect for fundamental values is an essential precondition for sound financial management and effective EU funding.

II. Recent Legal Instruments for Protection of the Union Budget for Cohesion

On 14 March 2018, in the context of its position on the next Multiannual Financial Framework, the European Parliament called on the Commission "to propose a mechanism whereby Member States that do not respect the values enshrined in Article 2 TEU can be subject to financial consequences."² At the same time, the European Parliament insisted that such a mechanism should not ultimately punish the final beneficiaries of the Union budget, as they "can in no way be affected by breaches of rules for which they are not responsible" and that "any possible financial consequence should be borne by the Member State independently of budget implementation."

At that point in time, certain mechanisms already existed that allowed the Commission to identify and follow up on potential infringements of EU law, including an infringement procedure against a Member State based

on Art. 258 TFEU and the mechanism in Art. 7 TEU (the latter allowing for suspension of certain EU membership rights provided that a unanimous European Council decision is taken determining the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2 TEU – a requirement very difficult to meet). In parallel, the Member States were obliged to take all the necessary measures (legislative, regulatory, and administrative measures) to protect the Union's financial interests by virtue of Art. 59 of the Financial Regulation.³ However, there was no specific mechanism in place at that time to protect the Union's budget against generalised deficiencies related to the rule of law in a Member State.

1. The general regime of conditionality

With the entry into force of the general regime of conditionality for the protection of the EU budget ("the Conditionality Regulation") in January 2021,⁴ an additional instrument was created to protect the Union's budget in cases in which breaches of the rule-of-law principles might affect its sound financial management or protection of the financial interests of the Union in a sufficiently direct way. In Art. 2 lit. a), the Conditionality Regulation defines the "rule of law" as follows:

[It] refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

The Regulation also lists a number of situations/circumstances indicative of breaches of the principles of the rule of law.⁵

This new instrument is complementary to other tools and procedures to protect the EU budget, so it can only be used in cases in which the other procedures set out in Union legislation would not protect the Union budget more effectively. According to the Conditionality Regulation, possible measures for the budget managed in shared management mode (such as, for example, cohesion policy funds)⁶ include suspension of payments, suspension of commitments, and reduction of pre-financing to a Member State. At the same time, the beneficiaries of Union funds should continue to receive their payments, made directly by the Member States concerned. Lastly, any measures proposed vis-à-vis a Member State must be proportionate. To assess whether this is the case, the Commission must take into account the nature, duration, gravity, and scope of the breaches of the rule-of-law principles. The measures should target the Union actions affected by the breaches.⁷

On 11 March 2021, Poland and Hungary brought actions for annulment of the Regulation before the CJEU, alleging, *inter alia*, that the Regulation lacks a valid legal basis and that it constitutes an infringement of Art. 7 TEU, namely of the principles of equal treatment of Member States, of legal certainty, and of proportionality. The Court dismissed the two actions on 16 February 2022,⁸ thus confirming the validity of the Conditionality Regulation.

In its guidelines on the application of the Conditionality Regulation published on 2 March 2022, the Commission also tackles the relationship between the Conditionality Regulation and other EU budget protection instruments,⁹ underlining that, before starting the procedure under the Conditionality Regulation, it will "consider whether appropriate measures are necessary, i.e. whether other procedures set out in Union legislation for the protection of the Union budget would not allow it to protect the Union budget more effectively, as established by Article 6(1) of the Conditionality Regulation."

2. Enabling conditions applicable to funding under the Common Provisions Regulation

Cohesion policy is the Union's main investment policy to reduce disparities among regions and Member States; it is also a key component of the Union's budget. It is implemented in shared management mode, in line with the provisions of the Common Provisions Regulation (CPR).¹⁰ The CPR comprises another tool that can be used to protect the Union budget against breaches of the principles of the rule of law, specific to the funds it governs. It has to be underlined, however, that, contrary to the Conditionality Regulation, the CPR was not created with the specific intention of addressing breaches of the rule of law. It nevertheless contains a number of prerequisites (known as "horizontal enabling conditions") that a Member State has to fulfil before it receives EU funding.¹¹ One of these can be applied in the present context.

One specific enabling condition requires each Member State to establish effective mechanisms such that the implementation of its programmes complies with the Charter of Fundamental Rights of the European Union. These rights include the right to an effective remedy and to a fair trial by an independent and impartial court (Art. 47 of the Charter), which constitute key aspects of the rule of law. Member States are required to ensure that that enabling conditions remain fulfilled and respected throughout the entire programme period 2021-2027,¹² which is indispensable to receiving reimbursements of expenditure (except for expenditure related to operations contributing to the fulfilment of the relevant enabling condition).

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1. Communication from the Commission to the European Parliament, the European Council, and the Council, "A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020", COM(2018) 98 final.↵
 2. European Parliament resolution of 14 March 2018 on the next Multiannual Financial Framework (MFF): Preparing the Parliament's position on the MFF post-2020, P8_TA(2018)0075.↵
 3. Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2000, OJ L 298, 26 October 2012, 1.↵
 4. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1. For a summary, see T. Wahl, "Compromise on Making EU Budget Conditional to Rule of Law Respect", (2020) *eucrim*, 174-176.↵
 5. *Idem*, Art. 3.↵
 6. *Idem*, Art. 5(1)(b).↵
 7. *Idem*, Art. 5(3).↵
 8. CJEU, Case C-156/21, *Hungary v European Parliament and Council of the European Union* and Case C-157/21, *Republic of Poland v European Parliament, Council of the European Union*. See also T. Wahl, "CJEU Dismisses Actions against Rule-of-Law Conditionality to Safeguard the EU Budget", (2022) *eucrim*, 21-22.↵
 9. Communication from the Commission, "Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget", C(2022) 1382 final, OJ C 123, 18.3.2022, 12.↵
 10. Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, 159.↵
 11. *Idem*, Art. 13 and Annex III.↵
 12. This is in contrast to the predecessor of the enabling conditions, namely the ex-ante conditionalities introduced in the 2014-2020 programme by Regulation 1303/2013, which did not foresee such an obligation.↵
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Author statement

The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission.

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