

Compromise on Making EU Budget Conditional to Rule of Law Respect

Thomas Wahl

News

On 5 November 2020, the [German Council Presidency](#) and the European Parliament's negotiators [agreed on a compromise](#) to link the protection of the EU's financial interests with rule-of-law breaches in the Member States in the future. This so-called "conditionality mechanism" was initially proposed by the Commission in May 2018 ([--> eucri](#)m 1/2018, 12-13). The deal does away with the Commission's approach that "generalised deficiencies" in the rule of law in a given Member State may trigger preventive measures. Instead, appropriate measures can now be taken if it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU "in a sufficiently direct way."

Measures can be adopted if breaches of the principle of the rule of law (e.g., threatened independence of the judiciary, failure to correct arbitrary/unlawful decisions, limits in legal remedies) concern one or more of the following:

- The proper functioning of the authorities of a Member State implementing the Union budget;
- The proper functioning of the authorities carrying out financial controls, monitoring, and audits;
- The proper functioning of effective and transparent financial management and accountability systems;
- The proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption, and other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;
- The effective judicial review by independent courts of actions or omissions by the authorities referred to;
- The prevention and sanctioning of fraud;
- The recovery of funds unduly paid;
- The effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with the EPPO;
- Other situations or conduct on the part of the authorities of the Member States relevant to the sound financial management of the Union budget or the protection of the EU's financial interests.

Possible measures to be implemented in the event of breaches of the rule-of-law principles and the procedure to be followed to sanction them can include:

- Suspension of payments and of commitments;
- Suspension of disbursement of instalments or the early repayment of loans;

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– 176

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- Reduction in funding under existing commitments;
- Prohibition from concluding new commitments with recipients or from entering into new agreements on loans or other instruments guaranteed by the Union budget.

Functioning of the mechanisms: The Commission, after establishing the existence of a breach, will propose triggering the conditionality mechanism against a Member State government. The Council will then have one month (or three months in cases of exception) to adopt the proposed measures by a qualified majority. The Commission will use its rights (e.g., under Art. 237 TFEU or the Council Rules of Procedure) to convene the Council to make sure the deadline is respected.

The EP and the Council Presidency also agreed on the protection of final recipients and beneficiaries – such as students, researchers, farmers, and NGOs – who should not be punished for the failure of their governments to respect the rule of law. Next to reporting obligations for the Member States and guidance provided by the Commission, the EP included a provision by means of which final recipients/beneficiaries can file a complaint to the Commission via a web platform, which will assist them in ensuring they receive the amounts due.

The conditionality mechanism must be endorsed by the Council and EP's plenary. The situation is complex: while the conditionality mechanism can be adopted without the agreement of the opposing Member States, such as Poland and Hungary, the decision on own resources (which is quintessential for the adoption of the huge future EU budget package) must be adopted unanimously. However, Poland and Hungary have threatened to veto the own-resources decision if the rule-of-law mechanism is adopted. This, in turn, is the central condition for the European Parliament's approval of the own-resources decision.

The idea of making the transfer of EU money subject to the rule of law has also been met with criticism by legal experts (à L. Bachmaier, [eucrim 2019, 120](#)). In a statement of 15 October 2020, the Brussels-based think-tank [CEPS found](#) the approach problematic on several accounts:

- In most cases, the causal link between erosion of the rule of law and a breach of the EU's financial interests will be tenuous and therefore difficult to uphold in court;
- In light of international practice, it is unusual to link budget transfers to a transgression of value-based rules;
- The conditionality mechanism comes at the expense of citizens (especially the most disadvantaged among them) in the Member State whose government infringes the rule of law.

The CEPS proposed strengthening the EPPO or making EU funding dependent on joining the new body for those Member States that are not yet participating in the EPPO.

According to a [survey commissioned by the European Parliament](#) and conducted in late September/early October 2020, 77% of EU citizens agree that EU funds should be made conditional upon the national government's implementation of the rule of law and of democratic values. 7 in 10 respondents agreed with this statement in 26 EU Member States. In addition, a majority of Europeans supports a larger EU budget to help overcome the COVID-19 pandemic. Public health is the stated priority, followed by economic recovery, and climate change. (TW)

UPDATE: After Hungary and Poland torpedoed the compromise proposal on the new multi-annual EU budget (2021-2027) and recovery fund for weeks because they disagreed with linking EU monetary support to rule-of-law conditionality, the 27 heads of state and government were able to reach an agreement on the first day of their December summit in Brussels (10/11 December 2020). It provides for a compromise on the new rule-of-law mechanism, which the German Council Presidency had brokered. Hungary and Poland accepted an "interpretative declaration" laid down in the [European Council summit conclusion](#), which outlines the para-

meters of the mechanism and the possibilities both countries have to oppose the new mechanism. Among other things, it was agreed that no measures be taken on the basis of the Regulation until the Commission has finalised guidelines on the way it will be applied. Furthermore, the Member States can first ask the CJEU to clarify whether the regulation is in line with EU law, and the Commission is obliged to incorporate any elements stemming from a potential CJEU judgment. It was also clarified that “the triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature. The Regulation does not relate to generalised deficiencies.” And: “Any formal opening of the procedure will be preceded by a thorough dialogue with the Member State concerned so as to give it the possibility to remedy the situation.”

Following the political agreement at the EU summit, the [ECOFIN Council formally and finally adopted the Regulation](#), laying down the next multiannual EU financial framework for 2021-2027 (MFF) on 17 December 2020. The plenary of the [European Parliament \(EP\) had already approved](#) it on 16 December 2020.

However, in a [resolution on the MFF package and the rule-of-law regulation](#) published on 17 December 2020, MEPs questioned the EU summit declaration to suspend the rule-of-law mechanism pending CJEU approval. Instead, rule-of-law conditionality should apply in full from 1 January 2021. According to the EU Treaties, the European Council cannot exercise legislative functions. MEPs therefore believe that a political declaration by the European Council cannot be considered an interpretation of legislation, and the “interpretative declaration” must be considered “superfluous.”

The EP also deeply regrets that, due to the requirement of unanimity in the Council, the entire procedure for adopting the budgetary and recovery package, including the new EU programmes for the 2021-2027 period, has been unduly protracted. Overcoming the hurdles resulting from this requirement should be one of the issues discussed at the upcoming conference on the future of Europe.

The European Council conclusions also [caused confusion](#) among legal experts. Initial [reactions on the platform “Verfassungsblog”](#) revealed that – although the summit conclusions are formally not binding – “they are clearly intended to cast a long shadow over the Conditionality Regulation to make it practically unusable.”

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