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# RULE OF LAW CONDITIONALITY

## WHAT COULD AN ACCEPTABLE COMPROMISE LOOK LIKE?



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The rule of law conditionality is without a doubt one of the thorniest issues in the negotiations of the EU's €1.8 trillion budget and coronavirus recovery package. When the EU leaders accepted at the end of July the principle of tying the EU funds to the respect of the rule of law, the compromise was written in deliberately ambiguous terms to have all 27 governments on board. Now it is time for the Council of the EU and the European Parliament to negotiate the details and procedures of this new mechanism. This proves to be difficult, and any delay in this specific negotiation risks endangering the adoption of the whole MFF-Recovery package.

If we look at the side of the Council, the [difficulties encountered by the German presidency](#) to come up with an agreed negotiating position on this topic reveal the level of division that exists among Member States. Seven countries did not support the German proposal on the grounds that it was too weak (basically the Nordics, Benelux and Austria) whereas Hungary and Poland continue to

insist that they want to secure a veto right over the mechanism. From a strictly legal perspective, the lack of consensus is not a problem, given that the regulation has to be adopted by a qualified majority in the Council. However, Hungary and Poland's rejection is worrying as both countries have [threatened to block the adoption of the Own Resources Decision](#), a necessary step to set up the EU's budget and coronavirus recovery package, if the compromise reached on rule of law conditionality is not to their liking.

The Parliament, for its part, – [demands](#) – a robust rule of law mechanism able to react to any systemic threat to the values enshrined in Article 2 of the TEU and based on reverse qualified majority voting. In a [letter sent to the German presidency at the end of August](#), the four main European parties (the EPP, the S&D, Renew Europe and the Greens) made clear that they will not give their consent to the next multi-annual EU budget (2021-2027) until the adoption of such a robust rule-of-law conditionality regime.

How to get out of this conundrum? Many people fear that MEPs will end up giving up their principles and accepting a watered-down, 'toothless' version of the mechanism for the sake of preserving the overall budget/recovery package. They argue that the Parliament's margin of manoeuvre is very limited in this affair. However, things are less black-and-white. Contrary to a dominant vision, this dispute is not a zero-sum negotiation over a single dimension, **the voting rule to adopt sanctions** (whether it is unanimity, qualified majority or reverse qualified majority). The robustness of this mechanism will also depend on other factors such as the **scope of rule of law** violations covered by the instrument, the clarity of conditions to trigger its use and the existence of effective provisions to protect the final beneficiaries of the EU funding. These elements are equally or more important to ensure the credibility, effectiveness and perceived legitimacy of the rule of law conditionality mechanism. **The Council and the Parliament may forge an acceptable compromise if the Parliament lowers its ambitions on the decision-making rule, the Council accedes to broaden the scope of application** and both parties agree to reduce the level of political discretion in the activation of the procedure and to set up realistic mechanisms to protect end beneficiaries.

## 1 ■ Let the Council decide through qualified majority but request full transparency in the vote

As said above, the most contentious issue – and the one attracting most attention – is that of the voting rule for the adoption of Council decisions on sanctions. In the draft regulation of 2018, the Commission proposed to apply the "reverse qualified majority" voting rule (that is, to deem any Commission proposals of financial sanctions for rule of law infringements accepted unless rejected or modified by a qualified majority of the Council). The Parliament has fully endorsed this proposal but the Council proposes instead to adopt sanctions through classic qualified majority voting (QMV – at least 55% of the Member States representing at least 65% of the EU population).

On this point the Parliament should be open to modifying its position, following two observations. The first is that the German presidency has little margin of manoeuvre with respect to this issue. Contrary to a widespread belief, the opposition to the reverse majority voting rule is not limited to Hungary and Poland. Many other governments with rule of law problems were initially opposed to the idea of introducing a rule of law conditionality mechanism (Kelemen 2020)<sup>1</sup>. They may have reluctantly accepted the principle over time but will surely oppose the idea of giving so much discretionary powers to the Commission, fearing that it can one day be used against them. And one should not forget that both Hungary and Poland are still asking for unanimity. In these circumstances, it is hardly possible for the German presidency to make the Council endorse a vote under reverse qualified majority voting.

The second observation is that reverse majority voting is not essential to render the mechanism effective. This also seems to be a widespread belief in the media and public debates. A [Politico article](#) published right after the EU's summit argued that a shift from reverse qualified majority to qualified majority voting to impose sanctions "would be an improvement over existing rules, but it would still be a mostly symbolic, hardly workable mechanism that will cause few headaches in Budapest and Warsaw". Likewise, according to the [EUobserver](#), in May 2020 Commissioner Reynders had said to MEPs in the civil liberties committee that "reverse qualified majority proposed for the Council [...] has to be maintained, that is the only way to make sure the mechanism will be effective".

The truth is that Hungary and Poland do not have the capacity to block a vote under QMV. Even if we add other countries presenting important deficiencies in the rule of law according to the recent first Commission's [Rule of Law Report](#) (Bulgaria, Croatia, Malta, Romania, Slovakia), the remaining Member States are still able to adopt a decision under QMV. Thus, a system under QMV is perfectly effective as long as there is a clear political commitment from a solid majority of Member States to act when confronted with major rule of law violations.

Can we expect this level of political commitment? As pointed out by many experts (Kelemen and Scheppele 2018, Pech and Kochenov 2019)<sup>2</sup>,

1. Kelemen, D. (2020), The European Union's Authoritarian Equilibrium, *Journal of European Public Policy*, 27:3, 481-499

2. PECH, L and KOCHENOV D (2019), Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid, Policy Brief, RECONNECT H2020 project; Kelemen D and Scheppele K.L 'How to Stop Funding Autocracy in the EU', *Verfassungsblog*, 10/9/2018 (<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-Eu>)

the Council has not been very active in the past, even in front of blatant rule of law violations from Hungary and Poland, either for partisan reasons or due to the natural unwillingness to interfere in other countries' domestic affairs. Moreover, the fact that the Council has refused to make public the positions of national delegations on the rule of law conditionality mechanism<sup>3</sup> could indicate that there are inconsistencies between governments' public discourses and actual voting behaviour on this matter. To make governments fully accountable of their voting, **the Parliament should impose on the Council transparency for decisions concerning the adoption of sanctions under the rule of law conditionality regime.** This should be a condition when accepting the adoption by QMV.

## 2 ■ Broaden the scope of the instrument but maintain a loose link with the management of the EU budget

No matter the voting rule applied, the usefulness of the mechanism will depend very much on its scope. The [original 2018 Commission proposal](#) envisages a rule of law mechanism able to deal with all types of generalised deficiencies as regards the rule of law upon condition that the latter "affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union" (art 3.1.). It does not cover all sorts of violations of art 2 TEU's values but offers the Commission **the capacity to tackle some systemic threats** to the [basic principles](#) underpinning the rule of law, that is, the principles of legality, judicial independence, legal certainty, prohibition of arbitrariness of the executive powers, right to effective judicial review and equality before the law. The underlying assumption is that a lack of respect of these principles significantly impairs Member States' capacity to manage and control the use of EU funds. Yet, there is no need for the Commission to prove the existence of a malfunctioning in use or control of the EU funds.

3. Between 1 April and 7 June 2019, the Romanian Presidency conducted an extensive examination of the rule of law proposal with a view to moving the file forward. The results of these discussions were included in a [special progress report on this issue](#). This report, however, was only made partially accessible to the public. The most important details on the rule of law discussion, in particular the five different possible compromises proposed by the presidency and the level of support among the member states, were deleted.

4. In particular, the Structural Funds' draft regulation for 2021-2027 includes a provision allowing the Commission to suspend all or part of payments in case of a reasoned opinion of the Commission issued in the context of infringement proceedings pursuant to Article 258 TFEU, putting at risk the legality and regularity of EU expenditure (art. 91 (1)(d), Common Provision Regulation proposal).

The [proposal put forward by the German presidency](#) envisages a mechanism that would be more narrowly focused and difficult to trigger. The document talks about "breaches of the principles of rule of law" rather than "generalised deficiencies" and requires the Commission to prove that these breaches "affect in a sufficiently direct way" (art 3.1) the management of the EU budget in the Member State's territory. In other terms, **the mechanism could be only used to sanction a proved malfunctioning of the Member States' public authorities in the management of EU funds, in the prevention and sanctioning of fraud, corruption or other breaches of Union law related to the implementation of the Union budget** or in the provision of appropriate judicial responses to these acts or omissions by public authorities.

Such a narrow approach would render this new mechanism useless. In most countries, the biggest amount of EU funding comes from the EU cohesion policy and there are already legal provisions allowing the Commission to suspend the flow of EU cohesion money in case of irregularities in the management of the programs<sup>4</sup>. Besides, asking the Commission to prove the misuse of EU funds puts the bar for the activation very high. As pointed out by a recent report of the [European Court of Auditors](#), **there are important weaknesses in the Commission's fraud reporting system** which make it very difficult for the Commission to gather comprehensive evidence of the misuse of EU funds. This is a major failure of the Commission's anti-fraud strategy which needs to be corrected but a new legal mechanism to suspend EU funds is not the solution.

**The Parliament should force the Council to broaden the scope of the instrument.** It should ensure that it addresses systemic threats to the rule of law rather than specific irregularities related to the management of the EU budget. At the same time, **MEPs should accept that the mechanism cannot be used against all threats to art 2 TEU's values**, even not against all sorts of rule of law violations. The instrument is based on art. 322 TFEU, which stipulates the procedure to adopt the EU's financial management rules.

Thus, the suspension of EU payments shall be justified by the existence of a potential threat to the Member State's capacity to properly manage and control the use of EU funds. This may look disappointing, as it will leave out aspects such as, e.g., attacks to media pluralism or to the freedom of expression. However, the instrument will still be very useful to address problems of judicial independence as well as to dismantle generalised practices of clientelism based on the use of EU funds that support some illiberal populist regimes. To put it bluntly, it will not be a "magic bullet" to address the Orbán problem once and for all but would at least allow the EU to stop funding the Orbán regime.

The Parliament does not formally contest this link to the EU budget. In [its proposal](#), however, it expands the concept of risk to the Union's financial interests to a much too broad definition on legal grounds. It includes elements such as endangering the 'proper functioning of the market economy', not implementing the obligations of membership, 'including adherence to the aim of political, economic and monetary union' or failing to prevent and sanction tax evasion and tax competition (article 3.1). Such a broad scope can be challenged by courts. Politically, it may alienate some of the countries in favour of a tough rule of law conditionality mechanism which are virtuous in the respect of rule of law and democratic principles but less virtuous as regards, for example, the respect of EU's competition rules or in tax matters.

### 3 ■ Reduce the degree of political discretion in the use of the mechanism

One of the criticisms that the original 2018 proposal received is that it gives much discretionary power to the Commission. The Commission is allowed to start the procedure if it has 'reasonable grounds' (art 5.1) to believe that a generalised deficiency as regards the rule of law affects or risks affecting the sound management of the EU budget. In doing so, it may take into account "all relevant information, including decisions of the

Court of Justice of the European Union, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations" (art 5.2). As pointed out by the [Court of Auditors](#) and other experts<sup>5</sup>, **the Commission should provide more clarity on the assessment criteria used to evaluate the existence of generalised rule of law deficiencies** in view of ensuring equal treatment among Member States. The decision to publish annual [rule of law reports](#) covering all Member States is a good step in this direction. To reinforce the perception of objectivity, the Council could accept the Parliament's demand to set up **a panel of independent experts to advise and assist the Commission** in identifying generalised deficiencies.

### 4 ■ Include effective provisions to ensure that final beneficiaries are not penalised

A crucial element to render the mechanism effective is to ensure that the EU budget's final recipients are not penalised for the faults committed by their governments. This is a key demand from the European Parliament, and it is not a minor point<sup>6</sup>. No matter the type of voting procedure used, if the sanction is likely to entail major unintended economic and political costs, the Commission and the Council will refrain from making use of it. In this respect, it is fair to remember that, despite the introduction of reverse qualified majority voting in 2011, sanctions for excessive deficits have never been used so far<sup>7</sup>.

The 2018 Commission proposal includes an obligation for sanctioned governments to step in and make the payments to final recipients with their own budget. However, there are no specific provisions to enforce it. Sanctioned governments may refuse to continue payments, arguing that they do not have the money to replace EU funding. They could also stop some payments for political reasons, to penalise disloyal constituencies and shift the blame to the EU level. To prevent this from happening, the Parliament has introduced some important modifications in the proposal.

5. See for instance Blauburger Michael and van Hüllen, Vera (2020): Conditionality of EU funds: an instrument to enforce EU fundamental values?, *Journal of European Integration*, DOI: 10.1080/07036337.2019.1708337

6. Michelot, Martin (2018), *How can Europe repair breaches of the rule of law?*, Policy paper 221, Jacques Delors Institute

7. In 2016 the Commission refrained from proposing sanctions against Spain and Portugal despite the fact that both countries had not taken effective action to correct their deficits. The decision was justified "in light of the challenging economic environment" in both countries.

It obliges the Commission to set up a website or internet portal to allow end recipients to inform the Commission about any breach of the legal obligation of governments to continue making payments. In addition, it imposes a concrete duty upon the Commission to ensure that any amount due by government entities is effectively paid to final recipients. To this effect, the Commission can recover payments made to intermediary public bodies (e.g. the Ministry of social affairs, the national Erasmus agency), transfer them back to the EU budget and re-programme them “for the benefit, to the possible extent, of the final recipients or beneficiaries” (art 3b Parliament’s draft regulation).

The Council should accept these changes to the proposal. Allowing the Commission to take back control over the EU funds and redistribute them to the final recipients would **convert a purely negative conditionality into a “smart conditionality” as proposed by a [Renew Europe position paper](#)**. This would not only reduce the risk of a political backlash but would render the threat of the sanctions more credible.

## 5 ■ Final remarks

The rule of law conditionality mechanism will not be the only tool to tackle the problems of democratic backsliding in Member States such as Hungary and Poland. If well designed, however, it may become a powerful instrument to address serious rule of law violations, particularly as regards the independence of the judiciary, the arbitrariness of the executive power, equality before the law and the existence of appropriate administrative and judicial review procedures to investigate and sanction rule of law breaches.

At present, the Council and Parliament’s positions on this issue seem irreconcilable. However, as argued in this paper, **it is possible to find an acceptable compromise if the two parts make concessions**. The Parliament should let the Council vote under a qualified majority system upon the condition of full transparency. The Council should accept to broaden the scope of the instrument so as to cover systemic threats to the rule of law rather than specific irregularities related to the management of the EU budget. It should also support the Parliament’s demands to reduce the level of political discretion in the

activation of the instrument by the Commission and include effective provisions to protect end recipients.

Last but not least, one should not forget that there are many other ways through which the Council, the Commission and the Parliament can fight corruption and fraud in the use of the EU budget as well as use the EU budget as a leverage to force respect to art. 2 TEU’s values. A first necessary step is to ensure a sufficient budget for OLAF and the new European Public Prosecutor’s Office (EPPO) for 2021-2027. Another promising avenue of action is to condition the adoption of National Recovery and Resilience Plans to achieving ‘substantial progress’ or ‘full implementation’ of Country Specific Recommendations (CSRs) linked to the respect of the rule of law<sup>8</sup>. Finally, principles such as gender equality or non-discrimination are more prominent in the new cohesion policy regulation proposed for the post-2020 period. The respect of these principles is compulsory when it comes to project selection (art 67 of the draft Commons Provisions Regulation) and there is a new ‘enabling conditionality’ requiring the effective application and implementation of the EU Charter of Fundamental Rights as a condition to disburse EU cohesion policy funds (Annex III of draft Common Provisions Regulations).

How and to which extent these various new instruments and provisions will be used remains an open question. As experts on rule-of-law frequently remind us, the Union’s inability to tackle the rule of law problem is less related to the lack of tools than to the lack of political will. Ultimately, where there is a political will, there is a way.

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8. As proposed by the Commission in its [working document providing guidance for the elaboration of National Recovery and Resilience Plans](#) (SWD, 2020 205 final, 17.9.2020, p.7). Notice that the 2019 country-specific recommendations for Hungary included: “reinforce the anticorruption framework ... and strengthen judicial independence” and in 2020 Poland was recommended to “enhance the investment climate, in particular by safeguarding judicial independence”.