

A new instrument to uphold the Rule of Law in EU Member States: the ‘Regulation on a general regime of conditionality for the protection of the Union budget’ and its contested implementation

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This piece has been cross-posted with permission from the [RECONNECT blog](#), where it was first published on 19 January 2021.

A [survey commissioned by the European Parliament](#) conducted in the 27 Member States shows that 77% of European Union (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. On 16 December 2020, the EU adopted the "[Regulation on a general regime of conditionality for the protection of the Union budget](#)" (Rule of Law Regulation) (applying from 1 January 2021). The new policy instrument aims to protect, broadly speaking, the EU's financial interests when rule of law breaches in a Member State risk affecting the sound financial management of the EU budget.

The idea of strengthening the mechanisms for the enforcement of the rule of law in Member States through 'tightening the purse strings' had been long voiced and discussed among scholars (for instance, [here](#), [here](#), [here](#), and [here](#)), and the concerns of those contributing to the EU budget about sending funds to authoritarian and corrupt governments in Europe had been reflected in initiatives of the European Commission and the European Parliament (see [here](#) and [here](#)). After a long negotiation process - with a final twist whereby Hungary and Poland, the EU Members most likely to be affected by the new rules, vetoed the approval of the EU's seven-year budget (the Multiannual Financial Framework or MFF) and the COVID-19 recovery fund (Next Generation EU or NGEU) - an agreement was reached by the European Parliament and the Council on a general regime of conditionality for the protection of the Union budget. On paper, the conditionality is supposed to apply as of 1 January 2021. However, the adoption of the Regulation involved an unusual '[interpretative declaration](#)' by the European Council (EU CO), included in its December 2020 meeting conclusions. This approach has been strongly criticised (e.g. [here](#) and [here](#)) and in practice may [delay](#) the implementation of the mechanism.

This blogpost explains the core content and scope of the new Regulation and discusses the imminent challenges to its implementation.

Content and scope of the Regulation

The Rule of Law Regulation sets out rules and introduces a mechanism aimed at protecting the Union budget in the case of "breaches of the principles of the rule of law in the Member States" (Article 1). Respect for the rule of law is considered an essential precondition for compliance with the principles of sound financial management when implementing the EU budget and resources (Recital 7 of the Regulation). Notably, the scope of the Regulation has been defined more precisely compared to the original [2018 proposal](#) of the Commission, which referred to "generalised deficiencies" of the rule of law.

The Regulation defines in detail the relevant rule of law principles for the purposes of the new mechanism and gives examples of breaches of the rule of law. The constituent principles of the rule of law, as developed in the case law of the Court of Justice of the EU (CJEU) include legality, legal certainty, prohibition of arbitrariness, effective judicial protection, separation of powers, and non-discrimination and equality before the law (Article 2) (for a more detailed assessment see RECONNECT paper [here](#)). Indicative examples of breaches of the principles of the rule of law include endangering the independence of the judiciary, failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, and limiting the availability and effectiveness of legal remedies (Article 3).

Where it is determined that the rule of law breaches "affect or seriously risk affecting" the sound financial management of the Union budget or the protection of the financial interests of the Union, the EU may impose a number of measures to protect the EU budget. There must be a direct link (Article 4: "in a sufficiently direct way") between the rule of law breaches and the negative impact on the EU's financial interests. Measures imposed under the Regulation may result in the suspension or termination of payments, reduction of economic advantages under EU financial instruments, a prohibition to enter into new agreements, etc., in compliance with the principle of proportionality, while taking into account aspects such as the nature, duration, gravity and scope of the rule of law breaches (Article 5).

The procedure is initiated by the Commission when it has reasonable grounds to consider that there is a breach of the rule of law affecting the EU's financial interests and sound management of the budget, or that there is a serious risk of that happening (Article 6). The mechanism foreseen in the Regulation is conceived as complementary to other instruments set out in EU law and the Commission would apply it unless it considers that other procedures would protect the Union budget more effectively.

The procedure starts with the Commission sending a written notification to the Member State concerned, setting out the factual elements and the specific grounds justifying its findings, and specifying a time limit (between one and three months) for comments or observations by the concerned State. At the same time, the Commission would also inform the European Parliament and the Council. The Commission should carry out its assessment within one month from the receipt of any information or observations from the Member State concerned, including proposals for the adoption of remedial measures to address the findings set out in the Commission's notification, and decide whether to submit a proposal to the Council for an implementing decision on the appropriate measures. At this stage, the Member State concerned would have a second possibility to comment, this time on the proportionality of the measures proposed by the Commission. The Council should take such decision within one month (exceptionally to be extended by two months) and may amend the Commission's proposal and adopt the amended text acting by a qualified majority.

Another important feature of the procedure is the so-called 'emergency brake' in Recital 26 of the Regulation, which exceptionally gives a Member State the possibility to ask the President of the EUCO to refer its case to the next meeting of the EUCO before the Council votes on the measures proposed by the Commission. This process should not take longer than three months after the Commission has proposed the measures in question to the Council. While the EUCO can only delay (by three months) but not stop the adoption of measures by the Council, it has been [commented](#) that this is "mainly a symbolic win for those Member States most likely to be the first ones being targeted by measures" undertaken in the framework of the Regulation.

The interpretative declaration of the European Council

Strong concerns against the rule of law mechanism and allegations of violation of the Treaties were voiced by Hungary and Poland (the Member States likely to be most closely affected by the mechanism), resulting in the veto to the approval of the EU's

seven-year budget (MFF) and the COVID-19 recovery fund (NGEU). The stalemate was eventually unblocked thanks to the insertion in the conclusions of the December EUCO meeting of a number of statements related to the regime of conditionality for the protection of the Union budget. Despite the political and non-binding nature of the interpretative declaration, [it has been argued](#) that the text clearly intends to create legal effects, and will in practice, at a minimum, delay the implementation of the Regulation. Here are the salient points.

The EUCO conclusions restate that the objective of the Regulation is to protect the Union budget and the EU's financial interests, and they emphasise the subsidiary nature of the mechanism. The underlying message is a reassurance that the new mechanism is not aimed at upholding/enforcing the rule of law in the Member States through the use of financial tools, but rather at protecting the Union's financial interests from the effects of rule of law breaches. While inviting the European Parliament and the Council to immediately take the necessary steps to formally adopt the Regulation, the EUCO included in its conclusions a number of points that are not reflected in the text of the adopted Regulation.

First, the conclusions refer to "guidelines" and to an "assessment methodology" that the Commission intends to develop in relation to the implementation of the Regulation, but there is no mention of these additional instruments in the Regulation itself (which is the legally binding instrument). It has been noted (e.g. [here](#) and [here](#)) that the Regulation is specific enough and does not necessarily need such additional instruments for its effective implementation in practice. Secondly, and quite importantly, the EUCO conclusions state that, should an action for annulment of the Regulation be introduced, the guidelines will be finalised after the judgment of the CJEU so as to incorporate any relevant elements stemming from the judgment. Moreover, the EUCO notes that the Commission will not propose measures under the Regulation until the guidelines are finalised.

Conclusion

The EU is now equipped, for the first time, with a mechanism to protect the budget against breaches of the principle of the rule of law. While scholars have strongly criticised the EUCO for violating institutional balance and overstepping its competencies (see in particular the compelling arguments put forward by [Alemanno and Chamon](#), [Dimitrovs](#), and [Scheppelle, Pech and Platon](#)) the reactions of the EU institutions seem to scale back the 'audacious' EUCO statements in the December conclusions.

The statements of EU Commission President, Ursula von der Leyen, on the day of the adoption of the Regulation sound encouraging and more balanced as compared to the EUCO conclusions (it should be considered that the Commission President is a member of the EUCO and, apparently, has subscribed to the elements mentioned in the conclusions). [She pledged that](#) the EUCO "conclusions ultimately do not change anything about the conditionality mechanism, neither in the law nor in its application. (...) In essence, as I understand it, there is a fear that the application of the Regulation will be delayed, and that justice delayed might be justice denied. This will not happen. The Regulation will apply from 1 January 2021. And any breach that occurs from that day onwards will be covered". She also added that the Commission will adopt guidelines on the Regulation, as planned, and that if there were a court case, the Commission would naturally take the ECJEU judgment into account in finalising the guidelines. In such a case she would rely on the support of the Parliament in defending the Regulation and ask for an expedited court procedure.

[The European Parliament resolution](#), also related to the Regulation, is even bolder in this regard. It confirms that the content of the EUCO conclusions is "superfluous" and that "the applicability, purpose and scope of the Rule of Law Regulation is clearly defined in the legal text of the said Regulation". The resolution also stresses that "in accordance with Article 15(1) TEU, the European Council shall not exercise legislative functions; (...) any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice". Further to the

statement by President von der Leyen, the Parliament reminds us that the applicability of the Regulation "cannot be subject to adoption of any guidelines, as the text agreed is sufficiently clear, and no implementing instruments are foreseen". In case of a procedure for the annulment of the Regulation, the Parliament would defend its validity and would ask that the Court proceed in an expedited manner.

While an action for annulment seems highly likely, the positions of the EU Commission and Parliament seems clear in that they will make use of all available legal means to minimise delays.

URL: <https://binghamcentre.biicl.org/comments/109/a-new-instrument-to-uphold-the-rule-of-law-in-eu-member-states-the-regulation-on-a-general-regime-of-conditionality-for-the-protection-of-the-union-budget-and-its-contested-implementation>