

Rule of law as “integral part” of the next MFF: to what extent and why?

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As generally recognized, systematic problems related to Rule of law may have an impact in the area of union finances. Based on the link between rule of law and sound management of EU funds, the new Multiannual Financial Framework (MFF) adopts, on the one hand, a “protective” approach, safeguarding the EU budget from breaches of rule of law, and, on the other hand, a “strategic” one, reinforcing the leverage of the EU Funds to promote European common values.

The rule of law conditionality to protect the EU budget

A “protective approach” explicitly inspires the new “rule of law conditionality”, introduced by the proposal COM (2018)324. It sets up a mechanism whereby a generalized deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union, measures related to EU Funds can be adopted. They include the suspension and reduction of payments and commitment, and the prohibition to enter into new legal commitments.

The proposal breaks into the controversial debate on the legal feasibility and political opportunity to introduce the “rule of law conditionality”.

From a legal point of view, the main legal objection to the mechanism is related to the fact that the current Treaties do not contain any explicit legal basis for connecting financial consequences to the breach of the Art. 2 values, but set up a specific mechanism for the protection of the Rule of Law (Art. 7 TUE). However, the argument can be countered on the basis of the proposal’s target to protect EU financial interests¹. In the proposal, not every “generalized deficiency as regards the rule of law” but only the deficiencies “which affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union” could lead to appropriate measures (Art. 3). Although weak (Viță , 2018: 56), the explicit link between the rule of law breach and the EU spending can support the legal basis identified by the Commission (Art. 322 TFUE, financial rules determining the procedure to be adopted for establishing and implementing the budget).

Moreover, the EU law already knows “exogenous conditionalities” that link the assignment or the suspension of EU Funds to obligations and targets not directly related to the spending programmes, but connected to different EU policies (Andor, 2018: 23-24). One example is the macroeconomic conditionality set out in MFF 2014-2021, which establishes a direct relation between the suspension of payments related to the

¹ See explanatory memorandum.

structural Funds and failures in respecting economic governance prescriptions (Heinemann, 2018: 298). However, differently from the macroeconomic conditionality, connected to formal economic governance procedures, the proposal does not establish any link between the new conditionality and the mechanism set up in the Art. 7. The new procedure bypasses the article 7 and potentially overlaps with it (Rangel de Mesquita, 2018: 287). This risk is even more obvious if one agrees on the opinion that the suspension of certain of the rights deriving from the application of the Treaties envisaged in the article 7, par. 3, could include the right to be beneficiaries of EU funds (Besselink, 2016: 9).

Furthermore, the lack of coordination between the two mechanisms could reflect on the institutional balance, affecting asymmetrically the powers of EU institutions in protecting the rule of law. As pointed out by the Court of auditors and the Committee of the Regions in their opinions on the MFF², the new mechanism gives the European Commission a discretionary power in initiating the procedure and assessing the general deficiencies (Georgiev, 2018: 19). The absence of certain, clear and specific criteria defining what would constitute a ‘generalised deficiency’ or how measures would be implemented even produces a risk of abuses (Expert Group of the Friedrich-Ebert-Stiftung, 2018: 15). Conversely, the role of the main actors involved in Art. 7 procedures is either not mentioned (European Council) or substantially weakened (European Parliament and Council). In particular, the provision of the “reverse qualified majority” in the Council diverges from the normal voting rules (Rangel de Mesquita, 2018: 287) and is criticized by several institutional actors (among them, the Italian Government³ and the Czech Senate⁴).

Moving from an institutional to a more practical approach, no impact assessment accompanies the proposal, making hard to evaluate its implications on the sound management of EU Funds and its economic effects on the beneficiaries and the regional and territorial areas of the Member States. On the one hand, the proposal only recalls the principle of proportionality without identifying clear criteria for the choice and extent of measures. On the other hand, the safeguards envisaged by the Commission for the implementation of the programmes and for the payments to beneficiaries are not considered as an efficient shield from an adverse impact on final recipients of EU programmes (Court of auditors; German Bundesrat⁵).

The EP, in its first reading position⁶, tried to address these shortcomings, introducing a detailed definition of general deficiencies and a panel of independent experts assisting the Commission, and measures to protect the final beneficiaries.

In the Council the debate is still open, and the most controversial points of the proposal will be addressed only at a later stage. They include the voting modality in the Council and even the subject matter of the proposal. The latter would risk being completely distorted, if, as proposed, the proposal was applicable in case of “generalised malfunctioning of Member States authorities as regards budget-related aspects”, instead of “generalised deficiencies as regards the rule of law”.

² Court of auditors’ opinion 1/2018 concerning the proposal COM(2018)324, 23 August 2018; Committee of the Regions’ opinion on the Multiannual Financial Framework package for the years 2021-2027, 9 October 2018.

³ Italian Government, Report on the proposal COM(2018)324 sent to the Parliament on 17 December 2018.

⁴ Czech Senate’s Resolution on the proposal COM(2018)324, 17 October 2018.

⁵ German Bundesrat’s opinion on the proposal COM(2018)324, 6 July 2018.

⁶ European Parliament legislative resolution of 4 April 2019.

The rule of law as a strategic driver in the EU Funds programming decisions

If the rule of law conditionality seems mainly directed to promote a sound management of EU Funds and protect the EU budget, conversely, the EU funds can potentially play a role in fostering the rule of law dimension.

In this respect, the reinforced link between the cohesion policy and the European Semester set out by the Common Provision regulation⁷ (CPR) can be seen from a rule of law angle.

The European Semester is the cycle of economic and fiscal policy coordination among Member States established in the aftermath of the Eurozone crisis. It starts in Autumn with the Commission's Annual Growth Survey (AGS), setting out the EU economic and social priorities for the following year, and has its key-moment in May-July, when each Member States receives the Country-specific recommendations (CSRs) providing policy guidance on how to boost economic investments, jobs and growth. The progress made in addressing the issues identified in the previous year's recommendations are assessed in the Winter package by the Country reports, which, starting from this year, include a new investment Annex identifying the priorities for 2021-2027 cohesion policy.

With the aim of a closer alignment between the share managed Funds and the European Semester, in the new programming period 2021-2027, the CSRs are taken into consideration at the beginning of the programming (when Member States prepare and submit the documents setting out the national plans on how to use EU funding) and during the mid-term review.

The described reinforced link between European Semester and Cohesion policy can be particularly relevant from a rule of law perspective, if we take into consideration the increasing focus of the European Semester on the rule of law dimension. Well-performing public institutions, along with “the rule of law, effective justice systems and robust anti-corruption frameworks” are key priorities in the next cycle” (AGS 2019). As for Hungary, the issue of judicial independence and the fight against corruption is addressed in the CSR n. 4. Moreover, the Investment guidance, annexed to the Country report considers “improved measures to prevent and address conflict of interest, fraud and corruption” as a factor for the effective delivery of the cohesion policy. As for Romania, prevention and fighting against conflict of interest, fraud and corruption are mentioned in the Investment Annex and, although not directly covered in the CSR, considered “relevant for developing a positive socio-economic environment in the country”. Concerning Poland, rule of law issues are recalled in the Poland country report and in the CSR, but not directly considered in a specific recommendation.

In light of the considerations above, in the next MFF the promotion of rule of law could be potentially seen as one possible driver of the dialogue in the EU Funds programming decisions for the period 2021-2027. In this perspective, the strategic use of EU funds in strengthening the rule of law would be supported by the recommendations for structural reforms within the European Semester, and, as such, could prove to be more effective (COM(2019)163).

In conclusion, through an approach both protective and strategic, the new MFF connects the EU Funds to the rule of law, with the aim of both safeguarding the EU budget and promoting the rule of law. As shown by the negotiations in the Council on the MFF package, the “avenue” undertaken by the European Commission is filled with

⁷ (COM(2018)375)

political obstacles. The next months are decisive to evaluate to what extent the efforts of the Finnish Presidency and the strong political commitment of the President-elect Ursula von der Leyen will be effective to “to make the rule of law an integral part of the next Multiannual Financial Framework” (Political guidelines, 2019).

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