

## **Respect for the rule of law as embedded in Article 2 TEU and protection of the Union's financial interests**

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### *Abstract*

The defence of common values, and of the rule of law in particular, has become an issue of major concern for EU institutions. The emergency caused by the COVID-19 pandemic brought the EU to adopt a wide-ranging package of financial aids. Within this package, the hypothesis of linking the disbursement of EU funds to the respect for the rule of law in the Member States re-emerged. Rule of law deficiencies, indeed, are believed to disrupt the very functioning of the Union's legal order, based as it is on mutual legal interdependence and mutual trust among its Members.

*Keywords:* Rule of Law – Conditionality – Next Generation EU – Article 7 TUE.

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It is widely held among scholars that the defence of the ‘common values’, and of the rule of law in particular, as embedded in Article 2 TEU, is not adequately pursued by the EU institutions *vis-à-vis* what has been called «the purposeful destruction of the rule of law inside EU Member States»<sup>1</sup>, starting from Hungary and Poland.

Measures laid down in Article 7 TEU give national governments, as represented in the Council (‘alert procedure’) or in the European Council (‘nuclear option’), the task of protecting ‘common values’ from violations perpetrated by a Member State within its own jurisdiction. For some scholars, it is precisely for this reason that Article 7 has not served the purpose for which it was conceived, since it leaves the defence of values which should not be subject to negotiation up for political bargain.

It is true that the Article 7 mechanism is deemed to be complementary to the classic infringement procedure provided for by Article 258 TFEU for the purpose of defending those values, and that some steps have recently been taken in that direction. Overall, the reluctance of European political rulers to confront the challenge of the breach of common values results however clearly, and it is likely to endanger the endurance of EU constitutionalism. Some commentators even believe that, as the EU left Hungarian Prime Minister to develop into an autocrat during the last decade, it is now too late for a radical turnaround – which an intergovernmental solution would provide.

Against such background, attention should be driven to the recent EU attempts at circumventing the current stalemate affecting the enforcement of Article 7 TEU, by linking the disbursement of EU budget funds, or of cohesion funds, to the respect for the rule of law in the Member States. A 2017 Commission document concerning the reform of EU budget already held that:

«Upholding EU core values when developing and implementing EU policies is key. There have been new suggestions in the public debate to link the disbursement of EU budget funds to the state of the rule of law in Member States. Respect for the rule of law is important for European citizens, but also for business initiatives, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget»<sup>2</sup>.

On the other hand, the ‘new suggestions’ that the Commission seemed then to endorse would launch a conditionality mechanism in an unexplored field, that of the rule of law crisis. Conditionality would then exert a different function from that of its macroeconomic version, which was deemed crucial in order to contrast the Eurozone financial crisis in the last decade.

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<sup>1</sup> J.-W. Müller, *Reflections on Europe’s ‘Rule of Law Crises’*, in P.F. Kjaer, N. Olson (eds.), *Critical Theories of Crisis in Europe. From Weimar to the Euro*, Rowman & Littlefield, London, 2016, p. 162.

<sup>2</sup> European Commission, *Reflection paper on the future of EU finance*, 28 June 2017, p. 22, <https://op.europa.eu/en/publication-detail/-/publication/5f9c0e27-6519-11e7-b2f2-01aa75ed71a1>.

Furthermore, in its 2018 proposal to protect the Union's budget in the case of generalised deficiencies regarding the rule of law in the Member States, the European Commission refers to deficiencies in the administration of justice that «affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union» (Art 3.1).

Two years later, the emergency caused by the COVID-19 pandemic brought the EU to adopt a wide-ranging package, which combines the future Multiannual Financial Framework (MFF) and a specific Recovery effort under Next Generation EU (NGEU). Within this package, the hypothesis of linking the disbursement of EU budget funds to the respect for the rule of law in the Member States re-emerged.

In the European Council's Conclusions of 21 July 2020, it was stated in this respect (A24) that:

«The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU. The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law».

The wording was meant to put the Union's financial interests on an equal footing to the rule of law, in spite of Article 2 TEU.

However, such approach appeared too cautious to the European Parliament. On 23 July 2020, the EP Resolution affirmed:

«The EP [...] strongly regrets the fact that the European Council significantly weakened the efforts of the Commission and Parliament to uphold the rule of law, fundamental rights and democracy in the framework of the MFF and the Next Generation EU (NGEU) instrument; reconfirms its demand to complete the co-legislator's work on the Commission's proposed mechanism to protect the EU budget where there is a systemic threat to the values enshrined in Article 2 of the TEU, and where the financial interests of the Union are at stake; stresses that, to be effective, this mechanism should be activated by a reverse qualified majority; underlines that this mechanism must not affect the obligation of government entities or of Member States to make payments to final beneficiaries or recipients; underlines that the Rule of Law Regulation will be adopted by co-decision».

This statement forced the Council to change its plans, and to negotiate an agreement with the EP. Meanwhile, on 30th September 2020, the European Commission published the first annual rule of law report, which monitors both positive and negative developments relating to the rule of law in all Member States. «Serious concern» was there raised for how judicial independence was ensured both in Hungary and in Poland, adding that, for the former, judicial independence was one of the issues raised in the Article 7 procedure initiated by the EP, and that Poland's justice reforms of 2015 led the Commission to launch the same procedure, which is still being considered by the Council.

In a plenary debate on 5th October 2020, MEPs welcomed the annual rule of law report, although calling for more action on enforcement, being convinced that

monitoring alone would not bring back judicial independence in Poland or in Hungary.

On 5th November 2020, Parliament negotiators reached a provisional agreement with the Council Presidency on a legislation establishing a mechanism that would allow the suspension of budget payments to a Member State who violated the rule of law, ensuring that it would not only apply to cases of corruption and fraud, but that it would also cover breaches of fundamental values such as freedom, democracy, equality and respect for human rights, including the rights of minorities.

The decision on the suspension will have to be made by the Council on the proposal of the European Commission. Nonetheless, this procedure cannot be referred to the rules of the EU budget, like those of the NGEU, since they need to be approved unanimously. Hence the Hungarian and Polish governments' threat of vetoing the NGEU's approval, despite the fact that these two countries would be among the main beneficiaries of the NGEU funding.

For the moment, we do not know whether such blackmail will once again succeed. What we might examine is the feasibility of the new mechanism<sup>3</sup>.

According to some commentators, linking the budget to the rule of law conditionality would create a paradox, whereby a national government's infringement of the rule of law would come at the expense of its most disadvantaged citizens<sup>4</sup>. But the agreement reached between the EP and the Council takes into account such an objection, by relying on an EP resolution of April 2019, which required that Member States execute MFF projects even if they have not received the corresponding transfers from the EU budget due to a rule of law breach.

It is further argued that, rather than linking the budget to the respect for the rule of law, it might be useful to reinforce existing instruments such as the European Public Prosecutor Office (EPPO), which can investigate, prosecute, and bring to judgment such crimes against the EU budget as fraud, corruption or serious cross-border VAT fraud<sup>5</sup>.

This approach neglects the crucial point of the issue. The damages which some Member States might provide to the EU's financial interest are relevant for the issue only to the extent that they have been committed by violating the values mentioned in Article 2 TEU, namely, those that the Treaty of the Union presumes to be «common to the Member States», and on which, as it solemnly states, «the Union is founded». Therefore, a Member State contravening such values would endanger the legitimacy of EU decision-making as a whole, and possibly question the lawfulness of subsequent EU decisions. Rule of law deficiencies are believed to disrupt the very functioning of the Union legal order, based as it is on mutual legal interdependence and mutual trust among its members<sup>6</sup>.

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<sup>3</sup> The essay has been submitted to this Journal in December 2020.

<sup>4</sup> D. Gros, S. Blockmans, F. Corti, *Rule of Law and the Next Generation EU Recovery*, in *CEPS*, 15 October 2020, <https://www.ceps.eu/rule-of-law-and-the-next-generation-eu-recovery/>.

<sup>5</sup> *Ibidem*.

<sup>6</sup> See C. Hillion, *Overseeing the Rule of Law in the European Union. Legal Mandate and Means*, in *European Policy Analysis*, Vol. 1, 2016, p. 2.

It is also objected that judiciary independence, whose violation lies at the core of the alleged charges to the Hungarian and Polish governments, is far from exhausting the sense of the rule of law. The objection is *per se* correct, but it neglects that ideologies seeking to destroy EU basic values

«[...] are now quite entrenched, making ‘autocratic legalism’ a strategy for dealing with EU law itself. No longer are rule of law issues temporary and isolated deviations from a norm of compliance, which had been presumed. Instead, non-compliance with European values has become a principled *ideological choice* of several governments»<sup>7</sup>.

Recent circumstances have confirmed this perspective. The deep controversy raised by the agreement that aimed at introducing the rule of law conditionality reveals that the EU is confronted with a constitutional challenge that goes far beyond a single government’s expediency.

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<sup>7</sup> K.L. Scheppele, D.V. Kochenov, B.Grawoska-Moroz, *EU Values are Law after All. Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, Vol. 39, 2020, pp. 3-121.