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S&D Note

Rule of Law Conditionality mechanism

Outcome of the negotiations

On 5 November 2020, during the fifth trilogue a deal on the Rule of Law (RoL) conditionality mechanism could be reached with the Council, which reflects S&D priorities.

From S&D, a robust rule of law mechanism able to react to any systemic threat to the EU's core values enshrined in Article 2 TEU, which is **effective and applicable** was the biggest challenge and overarching goal of the negotiations. S&D, EPP, Renew and Greens made clear that EP will not give its consent to the 2021-2027 MFF until the adoption of such a strong and robust RoL conditionality mechanism was agreed.

After intense and constructive negotiations a successful agreement could be found. From S&D side the negotiations have been led by Eider Gardiazabal, who is co-rapporteur on RoL.

We almost obtained all S&D points, with the exception of the voting method and a stronger EP role.

S&D key achievements

- **Final beneficiaries of EU programs are protected:**

A full set of provisions for the protection of final beneficiaries was introduced in the text, which has been a S&D key demand from the very beginning. Along the lines of S&D position the COM has to set up a website/internet portal to allow end recipients to inform the COM about any breach of the legal obligation of governments to continue making the payments; furthermore, the COM is obliged to do its utmost to assure that any amount due by government entities or Member States is effectively paid to final beneficiaries as an agreement was reached.

- **A stronger definition and reference to fundamental rights was introduced:**

An improved definition was agreed. RoL "shall be understood having regard" to all values in Art 2 TEU, accompanied by several references to values and **fundamental rights** and not only to the

value of RoL as such; furthermore it was added, that there is no hierarchy among Union values.

- **The preventive aspect of the RoL mechanism was secured:**

It was agreed to widen the scope and to safeguard the **preventive aspect** of the mechanism and its **concept of a serious risk**. Therefore, the mechanism, can be triggered already when there is a serious risk that issues with the rule of law and which can affect the budget.

- **A list of examples for possible breaches has been re-introduced:**

A stand-alone article (2a) in the regulation, specifying the scope via a list of examples of possible breaches, which includes endangering the independence of the judiciary, failing to correct arbitrary/unlawful decisions, and limiting legal remedies has been introduced.

- **Individual but also widespread/recurrent issues are covered:**

A clarification was introduced, that individual and widespread/recurrent issues are covered by the RoL mechanism.

- **Copenhagen criteria, COM annual RoL report, Venice commission, tax evasion and tax fraud introduced:**

Other aspects of the scope included in the EP mandate, such as the Copenhagen criteria (reference that laws and practices of Member States continue to comply with common values and to mutual trust between Member States), a reference to the Commission's annual rule of law report, the Venice commission (including a RoL checklist), tax evasion and tax fraud have been introduced in the text.

- **More efficiency through a shortened timeline:**

The mechanism became more efficient, by the introduction of a shortened timeline. The Council initially proposed a timeline for the adoption of the measures under the mechanism of up to 13 months, which has been cut to a maximum of 7 month, or 9 months if the "emergency brake" used (CSL can delay the adoption of the measures by two months, while the **European Council** discusses the matter, has been cut.

- **Reporting and review clause added:**

After three years, the COM must consider the overall effectiveness of the mechanism and issue a report. In case needed it will be accompanied or followed by a legislative proposal for the improvement of the mechanism.

Concessions

On the **adoption/lifting of the measures** of the RoL mechanism the CSL insisted that the triggering of the mechanism will be decided by the Council only and by **qualified majority** (and no reversed qualified majority, as proposed by COM and supported by EP). The EP delegation expressed concerns about what happens if Council does not respect its legal obligation to act within the deadline it was achieved to introduce an **"inactivity clause"**, which assures that the CSL adopts the decision and does not refrain from acting within the period of one month (or 3 months if the "emergency break" is used, recital 17 b RoL regulation). Therefore a declaration was introduced with a view to ensuring that the CSL takes a decision within the time limits by stating that the COM will forward a proposal to the CSL to adopt appropriate measures by means of an implementing decision (art. 5(7), recital 16a new RoL regulation).

On the **Parliament's role** in the process, we did not obtain that the EP has same role of Council on decision to adopt/lift of measures. But we managed that the EP will be informed about measures and may invite the Commission for a structured dialogue on its findings.

The **expert panel** has been replaced by the introduction of a reference to the Commission's annual rule of law report and the Venice commission (including a RoL checklist) the Commission has to take into consideration, when doing its assessment of the breaches of RoL principles.

Next steps

The Rule of Law conditionality mechanism shall be adopted in BUDG most probably next week and go to **Plenary as soon as possible** after the CSL adopted its position (second reading co-decision procedure).

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Background

- *On **3 May 2018** the **Commission** put forward the proposal for a Regulation on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, based on Article 322 TFEU.*
- *The **EP first reading position** was adopted in Plenary on **17 December 2018** (P8_TA(2019)0038 Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States).*
- *The file is negotiated under **the co-decision procedure**; responsible committees are BUDG/CONT (58 RoP); co-rapporteurs are Eider Gardiazabal Rubial (S&D) and Petri Sarvamaa (EPP); associated committee LIBE, (57 RoP).*
- *The file is closely **linked to the 21-27 MFF negotiations** and for the Council an integral part of the MFF negotiating box and the Council conclusions of end of July 2020. From the very beginning, the Parliament insisted in the context of MFF on its **prerogatives under the co-decision** procedure.*
- *Only on **30 September 2020** the **Council** adopted its position. The position was adopted by qualified majority. **Seven MS voted against** for opposite reasons. For some MS the proposal is not ambitious enough (SV, FI, DK, NL, BE) whereas others against the mechanism as such (HU, PL). Lux abstained for the first reason.*
- *When the EU leaders accepted at the end of July the principle of tying the EU funds to the respect of rule of law, the CSL's compromise was written in deliberately ambiguous terms to have all 27 MS on board. Also there was a pressure that any delay of an agreement risks endangering the adoption of the whole MFF Recovery Package (Hungary and Poland threatened not to give their consent to the own resources decision and to block the ratification process, which is the basis for the COVID recovery instrument, until an agreement with the Parliament on RoL was found.*
- *The RoL conditionality mechanism is based on **article 322 TFEU**, which stipulates the procedure to adopt the EU's financial management rules. **Therefore the suspension of EU payments shall be***

justified by the existence of a (potential) threat to the MS's capacity to properly manage and control the use of EU funds. This causal link between the deficiency/breach of RoL and the capacity for sound financial management or the protection of the financial interests of the Union is absolutely necessary, otherwise the measure to suspend EU funds will be challenged by the European Court of Justice and not applicable.

ANNEX

<i>EP initial mandate</i>	<i>Council initial mandate</i>	<i>Outcome of the negotiations</i>
Protection of final beneficiaries <i>Article 4(2), 4(3a), 4 (3b)</i>		
<ul style="list-style-type: none"> – Obligations of government entities to final beneficiaries to remain, including as regards making payments – COM to provide information portal and tools for beneficiaries to inform COM if obligations not respected – COM to act on information received to make sure beneficiaries are paid (using e.g. provisions of CPR) – Use of Union reserve in certain cases 	<ul style="list-style-type: none"> – Obligations of government entities to final beneficiaries to remain, including as regards making payments 	<ul style="list-style-type: none"> – Obligations of government entities to final beneficiaries to remain, including as regards making payments – MS affected by measures to report regularly to COM on compliance – COM to provide information portal and tools for beneficiaries to inform COM if obligations not respected – COM to act on information received to make sure beneficiaries are paid (using e.g. provisions of CPR)
Scope: breaches vs deficiencies <i>Articles 1, 2, title</i>		
<ul style="list-style-type: none"> – Mechanism triggered by “generalised deficiencies as regards the rule of law” – Definition of generalised deficiency as widespread/recurrent practice/omission/measure 	<ul style="list-style-type: none"> – Mechanism triggered by “breaches of the principles of the rule of law” (“breaches” used in EUCO conclusions) – No definition of breaches – “Rule of law” does not appear in title of act 	<ul style="list-style-type: none"> – Mechanism triggered by “breaches of the principles of the rule of law” – Recital to clarify that individual breaches and widespread/recurrent practices/omissions/measures are covered – “Rule of law” does not appear in title of act
Scope: preventive/risk aspect <i>Article 3(1)</i>		
<ul style="list-style-type: none"> – Mechanism triggered when a generalised deficiency “affects or risks affecting” the budget 	<ul style="list-style-type: none"> – Mechanism triggered when breaches “affect in a sufficiently direct way” the budget 	<ul style="list-style-type: none"> – Mechanism triggered when breaches “affect or seriously risk affecting” the budget “in a sufficiently direct way”
Scope: clarification of scope via list of examples <i>Article 2a</i>		
<ul style="list-style-type: none"> – Stand-alone Article 2a with examples of what constitutes generalised deficiencies, including endangering the independence of judiciary, failing to correct arbitrary/unlawful decisions, and limiting legal remedies 	<ul style="list-style-type: none"> – List of examples deleted 	<ul style="list-style-type: none"> – Stand-alone Article 2a with examples of what constitutes breaches, including endangering the independence of judiciary, failing to correct arbitrary/unlawful decisions, and limiting legal remedies
Scope: Union values, fundamental rights, Copenhagen criteria <i>Article 2 + Recitals</i>		

<i>EP initial mandate</i>	<i>Council initial mandate</i>	<i>Outcome of the negotiations</i>
<ul style="list-style-type: none"> – Rule of law “shall be understood having regard” to values in Art 2 TEU – Generalised deficiency can follow from “systemic threat” to Union values – Systemic violations of fundamental rights listed among possible aspects affected by deficiencies – All Union values listed in Recital 1; mention that there is no hierarchy among Union values – Reference to Charter and to Venice Commission, including rule of law checklist 	<ul style="list-style-type: none"> – No reference to other Union values besides what is included in original COM proposal 	<ul style="list-style-type: none"> – Rule of law “shall be understood having regard” to values in Art 2 TEU – All Union values listed in Recital 1; mention that there is no hierarchy among Union values – Reference to Charter and to Venice Commission, including rule of law checklist
Scope: Copenhagen criteria and sincere cooperation		
<i>Recitals</i>		
<ul style="list-style-type: none"> – Reference to Copenhagen criteria, to the fact that laws and practices of MS that continue to comply with common values, and to sincere cooperation between MS 	<ul style="list-style-type: none"> – Not included 	<ul style="list-style-type: none"> – Reference to Copenhagen criteria, to the fact that laws and practices of MS that continue to comply with common values, and to mutual trust between MS
Scope: tax matters		
<i>Article 3(1) + Recitals</i>		
<ul style="list-style-type: none"> – Tax fraud, tax evasion and administrative cooperation in tax matters listed among possible aspects affected by deficiencies 	<ul style="list-style-type: none"> – Not included 	<ul style="list-style-type: none"> – Tax fraud listed among possible aspects affected by deficiencies – Tax fraud and evasion mentioned in Recital
Panel of independent experts		
<i>Article 3a + Recitals</i>		
<ul style="list-style-type: none"> – Panel of independent experts to assist the Commission in identifying generalised deficiencies – COM must take Panel annual reports into account 	<ul style="list-style-type: none"> – No panel 	<ul style="list-style-type: none"> – No panel – References to European Rule of Law mechanisms and annual rule of law report in Recitals
Role of European Parliament		
<i>Article 7</i>		
<ul style="list-style-type: none"> – EP has same role of Council on decision to adopt/lift of measures 	<ul style="list-style-type: none"> – EP to be informed when measures are proposed, adopted or lifted 	<ul style="list-style-type: none"> – EP to be informed when measures are proposed, adopted or lifted – EP may invite COM to structured dialogue
Reporting and review		
<i>Article 7a, recital 18a new</i>		
<ul style="list-style-type: none"> – COM reports on regulation after five years – COM to accompany report by proposals where necessary – Act to be included in Financial Regulation as of its next revision 	<ul style="list-style-type: none"> – No reporting 	<ul style="list-style-type: none"> – COM reports on regulation after three years – COM to consider the overall effectiveness in a report – COM declaration that they will consider accompanying report with proposals

<i>EP initial mandate</i>	<i>Council initial mandate</i>	<i>Outcome of the negotiations</i>
		– Joint declaration that Institutions will consider inclusion in Financial Regulation as of its next revision
Timeline for adoption of measures <i>Article 5</i>		
<ul style="list-style-type: none"> – Minimum timeline of 4 months; (indicative) maximum of 6 months – MS to react on findings once – COM to have due regard to relevant information from available sources and Panel when proposing measures and assessing proportionality 	<ul style="list-style-type: none"> – Minimum timeline of 6 months; (indicative) maximum of 12-13 months if “emergency brake” used – MS to react on findings first, then on findings and on measures and their proportionality – COM to have due regard to relevant information from recognised institutions when proposing measures 	<ul style="list-style-type: none"> – Minimum timeline of 5 months; (indicative) maximum of 9 months if “emergency brake” used – MS to react on findings first, then on measures and their proportionality – COM to have due regard to relevant information from available sources when proposing measures and assessing proportionality
Timeline: “emergency brake” <i>Article 5(7) + Recital 17b</i>		
– No emergency brake	– In exceptional circumstances, period to adopt decision can be extended up to three months (while matter may be referred to European Council)	– In exceptional circumstances, period to adopt decision can be extended up to three months (while matter may be referred to European Council)
Voting system to adopt measures <i>Article 5(7), recital 16a new</i>		
– Measures deemed adopted unless, within 4 weeks, Council (by reverse QMV) and EP (by simple majority) oppose accompanying budgetary transfer	<ul style="list-style-type: none"> – Council adoption by qualified majority (QMV) (EU CO conclusions) – Council must adopt measures within 1 month of COM proposal (or 3 months if “emergency brake” used) 	<ul style="list-style-type: none"> – Council must adopt measures by QMV within 1 month (or 3 months if “emergency brake” used) – Inactivity clause: introduction of a COM declaration that it will use its prerogative to ask for a vote in the Council (agenda) if not taking place within the deadline (a simple majority of MS need to agree).