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NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	9499/1/19
Subject:	Multiannual Financial Framework (MFF) 2021-2027 and Recovery Package - Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget

I. INTRODUCTION

1. Delegations will find in annex a new Presidency compromise regarding the Regulation on the protection of the Union budget.
2. This compromise is based on the text presented in the Romanian Presidency's progress report to COREPER¹ and takes into account the political guidance provided by the European Council on 21 July 2020.

¹ doc. ST 9499/1/19 REV1

II. PROCESS

3. On 2 May 2018, the Commission adopted a package of proposals on the Multiannual Financial Framework for the years 2021 to 2027 (MFF). The legislative package contained a proposal for a new Regulation of the European Parliament and of the Council on the protection of the Union budget in case of generalised deficiencies as regards the rule of law in Member States.
4. On 12 July 2018, the European Court of Auditors adopted an opinion on the proposal.²
5. Following requests from delegations, the Council Legal Service (CLS) presented on 25 October 2018 its opinion on the proposal.³
6. The European Parliament adopted its first reading position on 4 April 2019 and was informed of the Committee decision to enter into interinstitutional negotiations on 13 November 2019.

III. MAIN CHANGES

7. The Presidency compromise inter alia:
 - proposes amendments to the text of the Commission proposal, that was previously bracketed, to take into account the political guidance provided by the European Council;
 - includes amendments clarifying that the conditionality mechanism would be relevant in the context of Next Generation EU and when the EU budget is implemented through loans and other instruments guaranteed by the Union budget;
 - provides additional clarity on the sources of information available for the Commission's assessment and on the fact that the regulation is without prejudice to the competence of the EPPO.

² Doc. ST 11707/18 - OJ C 291, 17.8.2018, p. 1

³ Doc. ST 13593/18

IV. CONCLUSION

8. On 30 September 2020, the Permanent Representatives Committee will hold an exchange of views on this proposal with a view to giving the Presidency a mandate for negotiations with the European Parliament.
 9. Changes to the Commission proposal from 2018 are marked in **bold** and ~~striketrough~~. Changes compared to the previous text are marked as **bold underlined** or ~~striketrough~~
underlined.
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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a general regime of conditionality for the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 322(1)(a) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the Court of Auditors¹,

Acting in accordance with the ordinary legislative procedure

Whereas:

(1) The rule of law is one of the essential values upon which the Union is founded. As recalled by Article 2 of the Treaty on European Union, these values are common to the Member States.

(1b) In its conclusions of 21 July 2020, the European Council stated that the 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. It also underlined the importance of the protection of the Union's financial interests and the importance of the respect of the rule of law.

¹ [...]

- (2) The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality², legal certainty³, prohibition of arbitrariness of the executive powers⁴, separation of powers⁵, and effective judicial protection by independent courts⁶ are respected⁷.
- (3) The rule of law is a prerequisite for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.
- (4) Whenever the Member States implement the Union's budget, **including in the context of Next Generation EU and through loans and other instruments guaranteed by the Union budget**, and whatever method of implementation they use, respect for the rule of law is an essential precondition to comply with the principles of sound financial management enshrined in Article 317 of the Treaty on the Functioning of the European Union.
- (5) Sound financial management can only be ensured by the Member States if public authorities act in accordance with the law, and if breaches thereof are effectively pursued by investigative and prosecution services, and if decisions of public authorities can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.
- (6) Judicial bodies should act independently and impartially and investigation and prosecution services should be able to properly execute their function. They should be endowed with sufficient resources and procedures to act effectively and in full respect of the right to a fair trial. These conditions are required as a minimum guarantee against unlawful and arbitrary decisions by public authorities that could harm the financial interests of the Union.

² Judgment of the Court of Justice of 29 April 2004, CAS Succhi di Frutta, C-496/99 PECLI:EU:C:2004:236, paragraph 63.

³ Judgment of the Court of Justice of 12 November 1981, Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato. Joined cases 212 to 217/80, ECLI:EU:C:1981:270, paragraph 10.

⁴ Judgment of the Court of Justice of 21 September 1989, Hoechst, Joined cases 46/87 and 227/88, ECLI:EU:C:1989:337, paragraph 19.

⁵ Judgment of the Court of Justice of 10 November 2016, Kovalkovas, C-477/16, ECLI:EU:C:2016:861, paragraph 36; Judgment of the Court of Justice of 10 November 2016, PPU Poltorak, C-452/16, ECLI:EU:C:2016:858, paragraph 35; and Judgment of the Court of Justice of 22 December 2010, DEB, C-279/09, ECLI:EU:C:2010:811, paragraph 58.

⁶ Judgment of the Court of Justice of 27 February 2018, Associação Sindical dos Juizes Portugueses v Tribunal de Contas C-64/16, ECLI:EU:C:2018:117, paragraphs 31, 40-41.

⁷ Communication from the Commission "A new EU Framework to strengthen the Rule of Law", COM(2014) 158 final, Annex I.

- (7) The independence of the judiciary presupposes, in particular, that the body concerned is able to exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.
- (8) Respect for the rule of law is not only important for citizens of the Union, but also for business initiatives, innovation, investment and the proper functioning of the internal market, which will flourish most where a solid legal and institutional framework is in place.
- (9) Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, requires the Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union's budget. The very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts⁸. Maintaining the independence of the courts is essential, as confirmed by the second subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union⁹. This is true, in particular, for the judicial review of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, inter alia in the context of public procurement procedures which may also be brought before the courts.
- (10) There is hence a clear relationship between respect for the rule of law and an efficient implementation of the Union budget in accordance with the principles of sound financial management.
- (11) ~~Generalised deficiencies in the Member States as regards the rule of law~~ **Breaches of the principles of the rule of law** which affect in particular the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union.
- (12) The identification of ~~a generalised deficiency~~ **breaches of the principles of the rule of law** requires a qualitative assessment by the Commission. That assessment could ~~be based on~~ **take into account** the information from all available sources and recognized institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, **the EU Justice Scoreboard information provided by the Commission, reports of the European Anti-Fraud Office, the European Public Prosecutor's Office as relevant,** and conclusions and recommendations of relevant international organisations and networks, such as the bodies of the Council of Europe **like the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission,** and the European networks of supreme courts and councils for the judiciary.

⁸ Case C-64/16, para 32-36.

⁹ Case C-64/16, para 40-41.

- (13) The possible measures to be adopted in the event of ~~generalised deficiencies~~ **breaches of the principles of the rule of law** and the procedure to be followed to adopt them should be determined. Those measures should include the suspension of payments and of commitments, **the suspension of disbursement of instalments or the early repayment of loans**, a reduction of funding under existing commitments, and a prohibition to conclude new commitments with recipients **or to enter into new agreements on loans or other instruments guaranteed by the Union budget**.
- (14) The principle of proportionality should apply when determining the measures to be adopted, in particular taking into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, its duration and its recurrence, the intention, and the degree of cooperation of the Member State concerned in putting an end to the ~~generalised deficiency as regards the rule of law~~ **breaches of the principles of the rule of law**, and the effects of ~~that deficiency~~ **those breaches** on the respective Union funds.
- (15) In order to ensure uniform implementation of this Regulation and in view of the importance of the financial effects of measures being imposed pursuant to this Regulation, implementing powers should be conferred on the Council which should act on the basis of a Commission proposal. ~~To facilitate the adoption of decisions which are required to protect the financial interests of the Union, reversed qualified majority voting should be used.~~
- (16) Before proposing the adoption of any measure pursuant to this Regulation, the Commission should inform the Member State concerned why it considers that ~~a generalised deficiency regarding the rule of law~~ **breaches of the principles of the rule of law** might exist in that Member State. The Member State should be allowed to submit its observations. The Commission and the Council should take those observations into account.
- (17) The Council should lift measures with suspensive effect on a proposal from the Commission, if the situation leading to the imposition of those measures has been sufficiently remedied.
- (17b) The procedure for adopting and lifting the measures should respect the principles of objectivity, non discrimination and equal treatment of Member States and should be conducted on a non partisan and evidence based approach. If, exceptionally, the Member State concerned considers that there are serious breaches of the above principles it may request the President of the European Council to refer the matter to the next European Council. In such exceptional circumstances, no decision concerning the measures should be taken until the European Council has discussed the matter. This process shall, as a rule, not take longer than three months after the Commission has submitted its proposal to the Council.**
- (18) The Commission should keep the European Parliament informed of any measures proposed and adopted pursuant to this Regulation,
- (19) Nothing in this Regulation affects the competence of the European Public Prosecutor's Office or the obligations of the Member States which do not participate in the enhanced cooperation established by Council Regulation (EU) 2017/1939 of 12 October 2017.**

HAVE ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation establishes the rules necessary for the protection of the Union's budget in the case of ~~generalised deficiencies as regards~~ **breaches of the principles of** the rule of law in the Member States.

Article 2
Definitions

For the purposes of this Regulation, the following definitions apply:

(a) 'the rule of law' refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law;

~~(b) 'generalised deficiency as regards the rule of law' means a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law;~~

(c) 'government entity' means all public authorities at all levels of government, including national, regional and local authorities, as well as Member State organisations within the meaning of [point 42 of Article 2] of Regulation (EU, Euratom) No [...] (the 'Financial Regulation').

Article 3
Conditions for the adoption of measures

1. Appropriate measures shall be taken where **it is established according to Article 5 that a** ~~generalised deficiency as regards~~ **breaches of the principles of** the rule of law in a Member State affect ~~or risks affecting in a sufficiently direct way the principles of sound financial management of the EU budget or the protection of the financial interests of the Union, in particular.~~

~~2-3 For the purposes of the application of this Regulation, the following may, in particular, be indicative of considered generalised deficiencies as regards the rule of law.:~~

~~(a) endangering the independence of judiciary;~~

~~(b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;~~

~~(c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law;~~

~~(d) other conducts by the authorities of the Member State of a similar nature and gravity.~~

23. For the purposes of the application of this Regulation paragraph 1, a generalised deficiency as regards breaches of the principles of the rule of law shall concern one or more of the following:

- (a) the proper functioning of the authorities of that Member State implementing the Union budget, **including loans and other instruments guaranteed by the Union budget**, in particular in the context of public procurement or grant procedures, and when carrying out monitoring and controls;
- (b) the proper functioning of investigation and public prosecution services in relation to the **investigation and** prosecution of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget **or to the protection of the financial interests of the European Union**;
- (c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a) and (b);
- (d) the prevention and sanctioning of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget **or to the protection of the financial interests of the European Union**, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;
- (e) the **diligent** recovery of funds unduly paid;
- (f) the effective and timely cooperation with the European Anti-fraud Office and with the European Public Prosecutor's Office in their investigations or prosecutions pursuant to their respective legal acts and to the principle of loyal cooperation.
- (g) other situations or conducts of the authorities of the Member States relevant for the sound financial management of the Union budget or the protection of the financial interests of the European Union.**

Article 4 *Content of measures*

1. Provided that the conditions foreseen in Article 3 are fulfilled and following the procedure foreseen in Article 5, one or more of the following appropriate measures may be adopted:

(a) where the Commission implements the Union's budget in direct or indirect management pursuant to points (a) and (c) of Article 62 of the Financial Regulation, and where a government entity is the recipient:

- (1) a suspension of payments or of the implementation of the legal commitment or a termination of the legal commitment pursuant to Article 131(3) of the Financial Regulation;
- (2) a prohibition to enter into new legal commitments;

(3) a suspension of disbursement of instalments in full or in part or a early repayment of loans guaranteed by the Union budget;

(4) a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget;

(5) a prohibition to enter into new agreements on loans or other instruments guaranteed by the Union budget.

(b) where the Commission implements the Union's budget in shared management pursuant to point (b) of Article 62 of the Financial Regulation:

(1) a suspension of the approval of one or more programmes or an amendment thereof;

(2) a suspension of commitments;

(3) a reduction of commitments, including through financial corrections or transfers to other spending programmes;

(4) a reduction of pre-financing;

(5) an interruption of payment deadlines;

(6) a suspension of payments.

2. Unless the decision adopting the measures provides otherwise, the imposition of appropriate measures shall not affect the obligations of government entities referred to in point (a) of paragraph 1 or of Member States referred to in point (b) of paragraph 1 to implement the programme or fund affected by the measure, and in particular the obligations **they have towards final recipients or beneficiaries, including the obligation** to make payments to final recipients or beneficiaries.

3. The measures taken shall be proportionate to the **actual or potential impact of the generalised deficiency breaches of the principles of the rule of law on the sound financial management of the EU budget or the financial interests of the Union, and take into account the nature, gravity and scope of the generalised deficiency as regards breaches of the principles of** the rule of law. They shall, insofar as possible, target the Union actions affected ~~or potentially affected by that deficiency the breaches.~~

Article 5 Procedure

1. Where the Commission finds that it has reasonable grounds to ~~believe~~ **consider** that the conditions of Article 3 are fulfilled, it shall send a written notification to that Member State, setting out the **factual elements and specific** grounds on which it based its finding.

2. The Commission 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 **and other recognized institutions**.

3. The Commission may request any additional information required for its assessment, both before and after having **sent the written notification** ~~made a finding~~ pursuant to paragraph 1.

4. The Member State concerned shall provide all required information and may make observations **on the findings set out in the notification referred to in paragraph 1** within a time limit specified by the Commission, which shall not be less than ~~1~~ **2** months from the date of notification of the finding. In its observations, the Member State may propose the adoption of remedial measures **to address the finding in the Commission's notification**.

5. The Commission shall take into account the information received and any observations made by the Member State concerned, as well as the adequacy of any proposed remedial measures, when deciding whether or not to submit a proposal for a decision on the appropriate measures.

5bis. In the event the Commission envisages to make a proposal pursuant to paragraph 6, it shall beforehand give the Member State the opportunity to submit its observations on the findings and the proportionality of the envisaged measures, within a time limit specified by the Commission and which shall not be less than one month.

6. Where the Commission considers that the **conditions of Article 3 are fulfilled and that remedial measures proposed by the Member State under paragraph 4, if any, do not adequately address the finding in the Commission's notification** ~~generalised deficiency as regards the rule of law is established~~, it shall submit a proposal for an implementing act on the appropriate measures to the Council **within one month of receiving the Member State's observations or, in case no observations are made, within one month of the time limit specified by the Commission according to paragraph 5 bis. The proposal shall set out the specific grounds and evidence on which the Commission based its finding. In duly justified circumstances, the Commission may extend the time-limit provided in this paragraph by one month. In such case, it shall inform the Member State about the extension before the end of the one-month period.**

7. The decision shall be ~~deemed to have been~~ adopted by the Council, ~~unless it decides, by qualified majority, to reject the Commission proposal~~ within one month of ~~its adoption by the Commission~~ **receiving the Commission's proposal. If exceptional circumstances arise, the period for adoption of the decision may be extended up to three months.**

8. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text as a Council decision.

Article 6
Lifting of measures

1. The Member State concerned may, at any time, **propose new remedial measures and** submit to the Commission evidence to show that **the conditions of Article 3 are no longer fulfilled** ~~the generalised deficiency as regards the rule of law has been remedied or has ceased to exist.~~ **After a maximum period of one year after the adoption of measures by the Council the Commission shall reassess the situation in the Member State concerned.**
2. The Commission shall reassess the situation in the Member State concerned **taking into account the evidence submitted by the Member State concerned, as well as the adequacy of new remedial measures. Where the Commission considers that the conditions of Article 3 are no longer fulfilled, it shall submit to the Council a proposal for a decision lifting the adopted measures. Where the Commission considers that the situation leading to the adoption of measures has been remedied in part, it shall submit to the Council a proposal for a decision adapting the adopted measures. Where the Commission considers that the situation leading to the adoption of measures has not been remedied, it shall** ~~submit to the Council a reasoned report~~ **address to the Member State concerned a reasoned decision and inform the Council thereof. The Commission shall submit its proposal or its reasoned report adopt its decision within one month of receiving the evidence from the Member State. Once the generalised deficiencies as regards the rule of law which on the grounds of which the appropriate measures were adopted cease to exist in full or in part, the Commission shall submit to the Council a proposal for a decision lifting those measures in full or in part. The procedure set out in paragraphs 2, 3, 4, 5, 6, 7 and 78 of Article 5 shall apply as appropriate.**
3. Where measures concerning the suspension of the approval of one or more programmes or amendments thereof referred to in point (~~i1~~) of Article 4(~~21~~)(b) or the suspension of commitments referred to in point (~~ii2~~) of Article 4(~~21~~)(b) are lifted, amounts corresponding to the suspended commitments shall be entered in the budget subject to Article ~~75~~ of Council Regulation (EU, Euratom) No XXXX (MFF Regulation). Suspended commitments of year n may not be entered in the budget beyond year n+2.

Article 7
~~Information of~~ Informing the European Parliament

The Commission shall immediately inform the European Parliament of any measures proposed, ~~or~~ adopted **or lifted** pursuant to Articles 4, ~~and 5 and 6.~~

Article 8
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. It shall apply from 1 January 2021.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
