

#BerlinPerspectives

Analysing German European Policy

Protecting the Rule of Law in the EU:

Germany's Council Presidency must secure both the EU's budget and its credibility

by Natasha Wunsch

- *Protecting the rule of law among member states is one of the EU's main challenges today.*
- *The adoption of the Multiannual Financial Framework offers a unique opportunity for the EU to develop an effective response to rule of law violations in member states.*
- *Divergent interpretations of the recent European Council summit's compromise jeopardize the introduction of a new rule of law mechanism.*
- *The German Council Presidency must work towards concretizing and depoliticizing the agreed conditionality regime for EU funds.*

The European Council summit in July 2020 offered a stark illustration of the EU's traditional dilemma: to reach consensus among 27 member states on sensitive issues generally implies agreeing upon the lowest common denominator. This time, the heads of state and government arguably achieved even less. On the crucial conditionality regime to be introduced to protect the EU's budget and to sanction member states violating the rule of law, the summit's conclusions are so vague that all sides have been able to claim victory on the issue. This results in ongoing uncertainty that risks jeopardizing the successful adoption of the latest Multiannual Financial Framework (MFF).

Tying the disbursement of EU funds to member states to their respect for the rule of law and the EU's common values is a promising approach to circumvent the extended and so far futile Article 7 procedure engaged against Hungary and Poland. The challenge the German Council Presidency faces is to oversee the adoption of the MFF and the Next Generation EU recovery fund while simultaneously pushing towards the concretization of a conditionality regime that will demonstrate the EU's ability and resolve to tackle rule of law violations. To perform this delicate balancing act will require combining pragmatism with firmness and swift action

to ensure the introduction of an effective rule of law mechanism.

Tackling the rule of law challenge

Developing an adequate response to rule of law violations by member states has become more pressing for the EU in recent years. The Article 7 procedure, initially designed for this purpose, has proven in practice unable to deter the Fidesz and the Law and Justice Party (PiS) governments in Hungary and Poland from undermining judicial independence and media freedom in these countries. Launched in December 2017 against Poland and in September 2018 against Hungary, the procedure has so far failed to produce any tangible results. This is not least due to the institutional hurdles that require member states to secure first a qualified majority and then unanimity to impose sanctions up to the suspension of voting rights upon the targeted country.

In response to a request by the European Parliament, the European Commission in 2018 proposed an alternative mechanism that holds more direct consequences for the countries concerned. Its basic idea is to tie the disbursement of EU funds to respect for the rule of law. The original proposal foresees that the Commission would propose appropriate measures to the Council in cases where a generalized deficiency of the rule of law has been established, with the decision reversed only where the Council can muster a qualified majority within a month. Unlike the lengthy and highly politicized Article 7 procedure, the new instrument seeks to address rule of law violations more swiftly, simply, and effectively.

The July European Council summit appeared to endorse a watered-down version of the Commission's mechanism. While it embraces the need for a conditionality regime for EU funds, the conclusions posit that "the Commission will propose measures in case of breaches for adoption by the Council by qualified majority" and that "the European Council will revert rapidly to the matter."

The limits of constructive ambiguity

The wording of the European Council conclusions allows for at least three alternative interpretations that differ widely in their implications.

The first entails a higher threshold for the imposition of sanctions, with a formal approval by the Council replacing the initial reverse qualified majority contained in the Commission proposal. This would offer an improvement over the current lack of any conditionality mechanism for EU funding, but would raise the bar for its effective implementation. Most importantly, the need for an official endorsement by member states would contribute to the kind of politicization of the instrument that has proven detrimental in the case of the Article 7 procedure, whose weaknesses the new mechanism is supposed to compensate.

Following the European Council, Hungarian Prime Minister Viktor Orbán and Polish Prime Minister Mateusz Morawiecki touted an alternative interpretation. They suggested that the explicit reference to the European Council reverting to the matter implies that any decision related to the introduction of a conditionality regime would inevitably be taken under unanimity rule during a future summit. This understanding would grant each member state a veto over any such initiative, resulting in a stalemate akin to the current deadlock on Article 7.

Whether the European Parliament would really reject the EU's budget and the Next Generation EU recovery fund over an insufficient rule of law mechanism is an open question.

Finally, a third view considers that the European Council's language opens the door for an adoption of the Commission's proposal via ordinary legislative procedure. This would require only a qualified majority in the Council and thus sideline reluctant member states to potentially open the way to sweeping changes to the way in which the EU disburses its funds.

The ambiguous language ultimately allowed heads of state and government to reach a written agreement on the introduction of a conditionality regime for EU funding. Besides diverging interpretations among member states, however, there is an additional stumbling block. The European Parliament, which has traditionally been very vocal in supporting a decisive EU response to rule of law violations, is dissatisfied even with the most ambitious reading of the European Council conclusions and has requested a renegotiation. In a joint letter sent to German Chancellor Angela Merkel and Commission President Ursula von der Leyen at the end of August, the conservatives, social democrats, liberals and greens in the European Parliament demanded a return to the reverse qualified majority and the incorporation of annual monitoring reports on EU values into the legal instrument to be adopted. Failing this, they are threatening to block the adoption of the MFF. Whether the European Parliament would really reject the EU's budget and the Next Generation EU recovery fund over an insufficient rule of law mechanism is an open question. Still, the current confrontation shows how tense the situation is in which Germany's Council Presidency must seek to foster agreement.

Germany's balancing act

A lot will depend on Germany's ability to use its Council Presidency to simultaneously ensure the adoption of the MFF and the Next Generation EU recovery fund while also paving the way to the introduction of an effective conditionality regime. Intricate timing issues complicate coherent action. The recovery fund, which will allow the EU to issue debt for the first time, needs to be ratified by all national parliaments. Until this has happened, wary member states can use ratification as leverage to prevent the adoption of any rule of law conditionality on EU funding. At the same time, with Poland and Hungary among its main beneficiaries, swift adoption of the MFF is in their interest.

For now, Chancellor Merkel has decided to take a pragmatic approach. She claimed ahead of the European Council summit that "to link funds to the rule of law (...) you first need funds." Still, Germany has also signalled that it intends to use its Council Presidency

to push ahead on adopting the Commission's 2018 proposal. Given its political standing as well as its role as a net contributor to the EU's budget, Germany is uniquely situated to drive both dossiers forward before the end of the year. During the July summit, Merkel personally handled negotiations with Orbán. Herein may in fact lie the key to a solution: according to some media sources, she reassured him that she would seek to conclude the ongoing Article 7 procedure against Hungary by the end of the year. In exchange, Orbán may be willing to compromise on the exact shape of the rule of law mechanism.

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Towards an effective rule of law mechanism

The July European Council summit succeeded in reaching agreement on the need for a conditionality regime for EU funds. It is crucial that the EU now translate this political consensus into a legal regulation that can remedy the failure of the Article 7 procedure to act as an effective deterrent to member states violating the rule of law. Two elements will be essential: to concretize the rule of law mechanism while at the same time depoliticizing it.

Using the Commission's 2018 proposal for a regulation as a starting point appears the most straightforward way, and one that is apparently also favoured by the German government. It contains the necessary legal rationale as well as a clear articulation of the cases in which the mechanism may be triggered, which map rather neatly onto the accusations levied against Hungary and Poland. In light of the European Council conclusions, it seems difficult to retain the reverse qualified majority

demanded by the European Parliament. To avoid any drawn-out political debates each time the Commission proposes to withhold EU funds from a member state, the mechanism will need to be all the more specific about the kinds of violations that may result in sanctions and their assessment.

Regarding the scope of the mechanism, it seems preferable to stick to a narrower catalogue of criteria that can be more objectively assessed. This would still allow for those countries implicitly concerned by the mechanism to be targeted – Poland and Hungary have been convicted of infringements of EU law by the Court of Justice of the EU – without raising undue concerns over political interference in domestic affairs.

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With regard to depoliticization, the Commission proposal foresees a qualitative assessment drawing on a wide range of sources, including not only EU institutions but also external bodies such as the Council of Europe and in particular its Venice Commission, which has considerable expertise on rule of law issues. In light of the political obstacles impeding the effective use of the Article 7 procedures, it seems preferable to introduce a procedure that is independent of political majorities and instead based upon a simple judicial assessment. Different proposals have been floated. For example, relying on the EU's Fundamental Rights Agency would shift the task of establishing whether a given country is breaching the rule of law from its fellow member states to a non-political body. Another approach would tie any sanctions relating to EU funds to the non-implementation of judgments by the Court of Justice of the EU relating to Article 19. This would establish an objective trigger and produce a mechanism that is limited in scope, but focused on those violations

that pose the most serious threat to the EU's integrity and the interests of other member states.

The creation of an effective conditionality regime is a matter of re-establishing the EU's credibility when it comes to addressing rule of law violations in its midst. The coming months will show whether the German Council Presidency is able to live up to this task. Without such a solution, the EU will not only once again fall short of protecting its financial interests, but also risk further undermining its own values as well as its credibility when promoting democracy in third countries.

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