

Opinion of the European Economic and Social Committee on ‘Proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States’

(COM(2018) 324 *final* — 2018/0136 (COD))

(2019/C 62/28)

Rapporteur: **Jukka AHTELA**

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Legal basis	Article 304 of the TFEU
Section responsible	Section for Employment, Social Affairs and Citizenship
Adopted in section	26.9.2018
Adopted at plenary	17.10.2018
Plenary session No	538
Outcome of vote	156/2/7
(for/against/abstentions)	

1. Conclusions and recommendations

1.1. The EESC welcomes the Commission proposal for a regulation creating a new tool that would allow for economic corrective measures with regard to Member States that commit serious and persistent violations of the values listed in Article 2 of the Treaty on European Union (TEU). The EESC notes that the Commission already has similar corrective powers to encourage compliance with rules on sound economic governance⁽¹⁾, and looks favourably on the present proposal for making corrective measures to safeguard the rule of law. In this regard, the EESC welcomes the fact that implementing acts proposed by the Commission under this regulation would be adopted by reverse qualified majority voting in the Council.

1.2. The EESC emphasises the importance of the rule of law for citizens, as well as for business initiatives, innovation and investment. However, it recommends that the proposal be amended to include a broader notion of the rule of law that encompasses the protection of fundamental rights and guarantees protecting pluralist democracy. The rule of law is only one of the values on which the EU is founded, as set out in Article 2 of the TEU. The rule of law exists in an interdependent, inseparable, triangular relationship with fundamental rights and democracy. Only by guaranteeing these three values in conjunction with each other is it possible to prevent the abuse of state power.

1.3. The EESC agrees that effective respect for the rule of law is a prerequisite for the public to have confidence that EU spending in Member States is sufficiently protected. The EESC welcomes the fact that the proposal will further strengthen protection of the financial interests of the EU. However, the EESC insists that the mechanism proposed by the Commission should be activated automatically where a generalised deficiency as regards the rule of law risks affecting the financial interests of the EU.

1.4. Furthermore, the EESC is of the opinion that the main goal of the proposal should be the protection of Article 2 values, through the protection of the EU’s finances. Consequently, the EESC recommends that the proposal be amended to allow the Commission to propose an implementing act of the regulation in cases where there is a serious, persistent and systemic threat to the rule of law, fundamental rights or standards guaranteeing pluralist democracy, as such measures, by their very nature, may pose a direct risk to the EU’s financial interests.

⁽¹⁾ OJ L 347, 20.12.2013, p. 320, Article 23.

1.5. The EESC encourages the Commission, as a preventive measure, to further develop channels for political debate on Article 2 values in the Member States. The EESC therefore urges the Commission to propose the creation of a system of regular and independent monitoring of the implementation of these values in the Member States, along the lines previously suggested by the EESC and the European Parliament.

1.6. The EESC recommends that it be included among the bodies that the Commission will keep informed of measures proposed or adopted under this legislation, and that it be specifically named among the relevant sources of information for the purposes of the Commission's determination as to the existence of a serious deficiency as regards the rule of law. This would allow the EESC to make a meaningful and effective contribution to the protection of Article 2 values and ensure that the voice of organised civil society is represented

2. Introduction and overview of the proposal

2.1. The present Commission proposal is designed to protect the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. The Commission justifies its proposal by referring to the need to protect the Union's finances by requiring Member States to maintain sufficiently robust safeguards concerning how EU funds are managed and spent. Member States are already required to demonstrate that they have adequate institutional and procedural safeguards in place to ensure that EU funds are spent effectively and legally. The correct functioning of these national verification mechanisms cannot, however, be guaranteed without oversight, in the form of an independent judiciary, public prosecutor's office and investigative bodies dealing with fraud and corruption.

2.2. The Commission's proposal would allow for the suspension or correction of payments, a prohibition on new legal commitments, a reduction of commitments or interruption of payment deadlines in response to the detection of a generalised deficiency regarding the rule of law. This will apply to all EU funds. The Commission may make a finding that a generalised deficiency in the rule of law has arisen in particular when: the independence of the judiciary is endangered; public authorities are not prevented from or corrected or sanctioned for arbitrary or unlawful behaviour; resources are withheld from public authorities which impairs their functioning; no measures are taken to avoid conflicts of interests among public authorities; the state limits the availability and effectiveness of legal remedies.

2.3. According to the proposal, the aforementioned deficiencies would give rise to corrective measures where they risk affecting sound financial management or the protection of the Union's financial interests, by impairing: national authorities implementing the EU's budget; the investigation or prosecution of fraud and corruption; effective judicial review of national authorities; prevention of fraud and corruption and imposition of effective and dissuasive penalties; recovery of unduly paid funds; cooperation with OLAF and EPPO investigations and prosecutions.

3. General comments

3.1. The EU is founded on the values common to its Member States, including the rule of law, as stated in Article 2 TEU. Respect for the rule of law also ensures legal certainty and a level playing field for business initiatives, innovation, investments and fair competition across the internal market for the benefit of consumers and citizens. This is a prerequisite for the mutual trust necessary for the smooth functioning of the EU. Disregard for the rule of law hampers balanced economic and social development in line with the Sustainable Development Goals, which is the engine that allows the EU and its governments to pursue the overarching goal of the Union 'to promote peace, its values and the well-being of its peoples', as stated in Article 3 of the TEU.

3.2. The EESC regrets that the EU treaties do not expressly stipulate that Member States must continue to satisfy the Copenhagen Criteria after accession⁽²⁾. The EESC notes that the EU institutions do not have sufficiently robust and well-tailored tools at their disposal capable of protecting against threats currently posed to the rule of law, fundamental rights and pluralist democracy in the Member States.

3.3. The rule of law is interdependent and indissoluble from guarantees protecting pluralist democracy and respect for fundamental rights. The rule of law ensures that governments respect fundamental rights standards, and pluralist democracy ensures that governments pursue policies that advance their peoples' well-being. Upholding the rule of law by

⁽²⁾ Established by the Copenhagen European Council in 1993.

itself does not guarantee that the law respects fundamental rights, nor that that law is made according to an inclusive and legitimate process based on well-informed, pluralist and balanced public debate and participation. To avoid mere 'rule by law', it is necessary to uphold fundamental rights and pluralist democratic standards alongside the rule of law.

3.4. The Commission characterises the proposed regulation as a means of protecting the EU's budget, which at the same time protects the rule of law. The EESC agrees that effective respect for the rule of law is a prerequisite for public confidence that EU spending in Member States is sufficiently protected. However, the EESC sees the proposal more as a potential tool to protect all Article 2 values through the vehicle of the EU budget.

3.5. The EESC stresses the importance of demonstrating to European citizens that EU funds are administered free of corruption and in accordance with EU law. It is equally important that the EU protect the values on which it is founded, which were created for the benefit of its citizens. The Commission should be empowered to take action under this regulation whenever Article 2 values are under a serious, systemic and persistent threat, as this threat, by its very nature, may pose a direct risk to the EU's finances.

3.6. As noted by recent resolutions of the European Parliament and statements by the European Commission and Council presidency, the rule of law, fundamental rights and pluralist democratic standards are increasingly under threat in the EU. While the situations in certain Member States pose the greatest challenges, populist authoritarianism, which stands against the EU's founding values and often against the Union itself, continues to grow in strength across the Member States.

3.7. The EESC notes the shortcomings of current tools available to the EU institutions to protect Article 2 values. Infringement procedures tend to be too narrow in their focus on technical legal questions to prevent or correct concerted attacks on the rule of law. While Article 7 of the TEU allows the Council to address, in an holistic manner, measures to undermine the rule of law, it has proven extremely difficult to marshal sufficient political will to activate the procedure.

3.8. As regards the 'framework' on the rule of law, although it is easier to activate than Article 7, it is a non-binding procedure, the effectiveness of which is questionable when faced with governments unwilling to cooperate with the Commission in good faith. Furthermore, the thresholds required to activate the rule of law framework and Article 7 are so high that, by the time these tools are used, deficiencies in the implementation of Article 2 values have become extremely serious and are, consequently, more difficult to resolve.

3.9. In light of the growing challenges and the absence of appropriate and effective tools, the EESC calls on the European Commission to pursue political debate with increased urgency on how the EU can better protect Article 2 values, and to develop additional tools for the protection of the rule of law, fundamental rights and guarantees of democratic pluralism.

3.10. EESC recalls its opinion on The European control mechanism on the rule of law and fundamental rights, which supports the creation of an EU level mechanism to monitor respect for the rule of law and fundamental rights through regular independent monitoring and dialogue between the Member States and the EU institutions ⁽³⁾.

3.11. The EESC maintains its position that the creation of such a preventive mechanism, as put forward by the European Parliament, would complement the EU's existing tools to protect Article 2 values ⁽⁴⁾. The creation of a preventive mechanism would identify shortcomings in the implementation of these values as they emerge at national level and allow for their resolution at an early stage.

3.12. As a further measure, the EESC proposes that a civil society platform or an annual forum be established at European level with the involvement of the EESC, firstly to allow EU decision-makers to receive early warning about emerging challenges to Article 2 TEU values directly from grassroots organisations and, secondly, to facilitate mutual learning and transnational collaboration between civil society organisations working primarily at national level.

⁽³⁾ OJ C 34, 2.2.2017, p. 8

⁽⁴⁾ 2015/2254(INL)

3.13. It is important that the EU consider ways of supporting civil society organisations and the media that are monitoring and reporting emerging challenges to Article 2. The EESC considers that a funding instrument to support civil society organisations promoting Article 2 values in the Member States would constitute an important complement to the present proposal by building grassroots support for these values among the public. In this regard, the EESC refers to its related opinion concerning the proposals for a new Justice, Rights and Values Fund ⁽⁵⁾ and calls on the Council and the European Parliament in the framework of the decision on the Multiannual Financial Framework post 2020 to increase substantially resources for this fund.

4. Specific comments

4.1. The EESC considers that the availability of effective judicial review by independent courts of actions and omissions by public authorities is essential not only to guarantee the effective spending of EU funds in line with EU law. It is also the only means of guaranteeing effective protection for all EU citizens of the rights that they derive from EU law, as well as the uniform interpretation of EU law across the Member States, on which the common market and the area of freedom, security and justice depend.

4.2. The EESC approves of the use of reverse qualified majority voting in the Council as a means of adopting the implementing act on the appropriate measures to be taken. This will allow measures to be taken objectively once the Commission deems a Member State to suffer from a generalised deficiency and minimise the risk of inaction or political selectivity that could result from requiring a vote in the Council.

4.3. The EESC understands the challenges of giving more detailed criteria concerning the determination of the existence of a generalised deficiency. Nevertheless, the EESC questions whether the proposal could be strengthened by the inclusion of such detailed criteria. The existence of more detailed criteria could help to ensure that the legitimacy of the Commission's decision is not undermined by allegations of bias or lack of objectivity. Such criteria could be included in the form of guidelines drawn up by the Commission subsequent to the adoption of the proposal and could draw on the Commission's own criteria under the 'framework' on the rule of law as well as the rule of law checklist of the European Commission for democracy through law (the Venice Commission).

4.4. As the EESC has underlined the rule of law, democracy and fundamental rights are interdependent, as stated in the Article 2 of the Commission proposal. In addition to more detailed criteria on the rule of law, the proposal should also include criteria allowing the Commission to determine the existence of a serious, systemic and persistent threat to respect for fundamental rights or guarantees of pluralist democracy. Where the situation in a Member State fulfils these criteria, the Commission should also be entitled to adopt corrective measures under this regulation.

4.5. The EESC notes that the Commission shall take into account all relevant information, including decisions of the Court of Justice, reports of the Court of Auditors and conclusions and recommendations of relevant international organisations. Certain supervisory bodies of the Council of Europe, such as the Venice Commission and the Group of States against Corruption (GRECO), play an important role in monitoring the rule of law in the Member States. The Venice Commission has issued several opinions concerning the state of the rule of law in a number of EU Member States and GRECO periodically issues recommendations to Member States. Similarly, the European Anti-Fraud Office (OLAF), national ombuds offices and associations of judges and judicial networks routinely report on the health of national judicial, anti-corruption and anti-fraud mechanisms.

4.6. Other international bodies periodically monitor and assess the implementation of fundamental rights standards and guarantees of pluralist democracy in the Member States, including the European Union Agency for Fundamental Rights, the Council of Europe's Commissioner for Human Rights, the European Court of Human Rights, the UN Human Rights Council and UN human rights treaty bodies. Furthermore, independent civil society organisations are also frequently a reliable source of information and analysis. Express mention of these entities in the proposal would reflect the special role they play in safeguarding the values listed in Article 2 TEU.

4.7. Furthermore, the EESC considers that, as the institution representative of civil society in the EU, its own analysis and observations are of particular relevance to the Commission when the latter is making a determination as to the existence of serious deficiencies as regards the rule of law in a given Member State both under this regulation and under other instruments. In this regard, the EESC draws the Commission's attention to the creation of an EESC working group on fundamental rights and the rule of law which will ensure special focus on the protection of Article 2 TEU values.

⁽⁵⁾ SOC/599 (See page 178 in the Official Journal) on COM(2018) 383 final and COM(2018) 384 final

4.8. Inclusion of the EESC among the bodies that the Commission will keep informed of measures proposed or adopted under this legislation and among the relevant sources of information for the purposes of the Commission's determination as to the existence of a serious deficiency as regards the rule of law would allow the EESC to make a meaningful and effective contribution to the protection of Article 2 values and ensure that the voice of organised civil society is represented.

4.9. The EESC concurs fully with the aim of the Commission that the consequences of triggering the proposed mechanism should fall on those responsible for the shortcomings and not on individual beneficiaries of EU funding, such as Erasmus students, researchers or civil society organisations ⁽⁶⁾.

4.10. The EESC notes that according to the proposal, in the event that measures are taken, the Member State shall remain responsible for distributing the funds in question. The EESC considers that while legally sound, this would do little to prevent a Member State in practice from refusing to distribute the funds in question and apportioning blame to the Commission for political gain. As the public are unlikely to appreciate the finer workings of EU legislation, Member States would be able to make a direct link between funding cuts and a Commission decision. This would create a situation where the Commission could be deterred from taking measures against a Member State because of the potential backlash in public opinion. This is a particular risk in those Member States where the government has control or influence over public and private media, which tends to be the case in Member States that suffer from serious deficiencies as regards the rule of law.

4.11. The EESC encourages the Commission to consider finding ways of mitigating the risk that individual beneficiaries may be affected negatively and that measures taken under this regulation could be subverted for political gain by governments violating Article 2 values. The Commission could consider alternative avenues through which to ensure that EU funds reach their intended beneficiaries. One possibility might be to create an executive agency to take over direct management of the relevant funds.

4.12. In bringing a generalised deficiency to an end with a view to lifting any measures taken under this regulation, the EESC stresses the importance of open dialogue between the Member State concerned and EU institutions, as suggested in the proposal. The institutions and Member States should take into account the views of civil society organisations regarding the situation in the Member State concerned, the adequacy of measures taken to bring the generalised deficiency to an end and the adequacy of measures taken to prevent their future recurrence.

Brussels, 18 October 2018.

The President
of the European Economic and Social Committee
Luca JAHIER

⁽⁶⁾ COM(2018) 98 final, p. 16.