Editorial note

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RECOVERY PLAN AND RULE OF LAW CONDITIONALITY: A NEW ERA BECKONS?

By any standards, 2020 has been a painful year. A health crisis of historic proportions is still unravelling and, in addition to its human cost, it has far reaching adverse socio-economic repercussions the full extent of which is difficult to predict. The year also sees the curtains closing on the United Kingdom membership, a defining event in the evolution of the Union. For the UK, withdrawal marks the greatest constitutional reversal since the restoration of the monarchy in 1660. For the EU, it shatters the irreversibility of the ever closer union narrative. 2020 also marks the end of a tumultuous decade where the EU has been beset by many emergencies, including the eurozone and migration crises. On a more positive note, the twilight of the year saw the adoption of a series of measures bringing into effect a comprehensive recovery package to counter the economic effects of COVID-19, including the accompanying rule of law conditionality Regulation.[1] These make for seminal developments in EU law and deserve attention.

Recovery package and the new EU budget

In May 2020, following the invitation of the European Council, the Commission presented an ambitious recovery plan to counter the economic impact of the COVID-19 epidemic.[2] The plan, hailed somewhat over-ambitiously as Europe's 'Hamilton moment', proposed 'Next Generation EU', a recovery instrument embedded in the new Multiannual Financial Framework (MFF) for 2021–2027. The objective was to provide a 'comprehensive, bold and sustained' response to the crisis and plan long

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[1] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/I/1.

[2] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe's moment: Repair and Prepare for the Next Generation' COM(2020) 456 final.

term for the well-being of the Union.[3] In its meeting of July 2020, after marathon negotiations, the European Council reached a comprehensive agreement on the EU budget and a recovery package[4] along the lines proposed by the Commission. The package runs to €1,824.3 billion and combines the MFF (€1,074.3 billion) and the Next Generation EU (NGEU) instrument of €750 billion, the latter being equivalent to approximately 5¼ of EU annual GDP. The goal is to generate the funds necessary for sustainable and resilient recovery whilst supporting the EU's green and digital priorities.[5]

Although the package was politically agreed in July, it was not transposed into law as there was an outstanding item: rule of law conditionality. This emerged in the light of the Commission's original proposal dating back to 2018,[6] which had sought to link observance of rule of law standards with sound financial management, and in the shadow of the rule of law regression in Poland and Hungary which continues to exercise Europe. In its July conclusions, the European Council proclaimed that the Union's financial interests would be protected in accordance with the values of Article 2 TEU and stated that a regime of conditionality to protect the budget and the NGEU would be introduced.[7] There followed an agreement at Council level on the contents of the conditionality regime[8] and a juxtaposition with Poland and Hungary who, in a joint declaration, objected to the link between the rule of law and the EU budget.[9]

In its 10–11 December 2020 meeting, the European Council reached a compromise which opened the road for the adoption of the recovery package.[10] The package is based on four pillars. A Council Regulation

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[3] Commission, 'Amended proposal for a Council Decision on the system of Own Resources of the European Union' COM(2020) 445 final Brussels, 1.

[4] See Conclusions of the Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) EUCO 10/20, CO EUR 8, CONCL 4, Brussels, 21 July 2020 ('July Conclusions').

[5] See July Conclusions (n 4) para A2.

[6] Commission, 'Proposal for a Regulation of the European Parliament and 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.

[7] See July Conclusions (n 4) para A24 and annex to the conclusions, paras 22–23.

[8] See the text of the mandate granted by COREPER on 30 September 2020 for the negotiations with Parliament: 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, Interinstitutional File: 2018/0136(COD), 11322/20, Brussels, 30 September 2020.

[9] See joint declaration by the Prime Ministers of Hungary and Poland, 26 November 2020 <https://visegradpost.com/en/2020/11/26/eu-rule-of-law-joint-declaration-of-the-prime-minister-of-poland-and-the-prime-minister-of-hungary/> accessed 31 December 2020.

[10] European Council meeting (10 and 11 December 2020) Conclusions, EUCO 22/20, CO EUR 17 CONCL 8, Brussels, 11 December 2020 ('December Conclusions').

laying down the multiannual financial framework for the years 2021 to 2027 (Regulation No 2020/2093);[11] a Council Decision on the system of own resources of the European Union (Decision 2020/2053);[12] a European Parliament and Council Regulation on a general regime of conditionality for the protection of the Union budget (Regulation 2020/2092);[13] and a Proposal for a Regulation establishing a Recovery and Resilience Facility, on which, at the time of writing, provisional agreement has been reached between the European Parliament and the Council.

Under the agreed package, to fund the NGEU, the Commission will be able to borrow up to €750 billion in 2018 prices on the financial markets to be used for loans up to €360 billion and grants up to €390 billion.[14] The capital raised is to be repaid by 2058.[15] Authority to the Commission to borrow is granted by the new Own Resources Decision adopted pursuant to Article 311 TFEU, under the terms of which the decision may not come into force before it is approved by the Member States in accordance with their respective constitutional requirements.[16] The powers granted to the Commission to borrow are limited in size, duration and scope.[17] The amounts available under the NGEU will be allocated to seven programmes but the lion's share (€672.5 billion) goes to the Recovery and Resilience Facility (RRF).[18] The intention is to channel funds to the countries and sectors most affected by the crisis. 70% under the grants of the RRF will be committed in 2021 and 2022 and 30% will be committed in 2023. Allocations from the RRF in 2021–2022 will be established according to the Commission's allocation criteria taking into account the respective living standards, size and unemployment levels of the Member States.[19]

In line with the principles of good governance, Member States are to prepare national recovery and resilience plans for 2021–2023. The plans will be assessed by the Commission and must be consistent with

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[11] Council Regulation No 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L433 I/11.

[12] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU [2020] OJ L424/1.

[13] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/I/1.

[14] See July Conclusions (n 4) para A6 and Council Decision, 2020/2053 (n 12) Article 5(1).

[15] Council Decision 2020/2053 (n 12) Article 5(2).

[16] ibid, Article 5.

[17] July Conclusions (n 4) para A4; and see Council Decision, 2020/2053 (n 12) Article 5.

[18] See July Conclusions (n 4) para A14. The programmes are: Recovery and Resilience Facility: €672.5 billion (loans: €360 billion, grants: €312.5 billion); ReactEU: €47.5 billion; Horizon Europe: €5 billion; InvestEU: €5.6 billion; Rural Development: €7.5 billion; Just Transition Fund (JTF): €10 billion; RescEU: €1.9 billion.

[19] See Special European Council, 17–21 July 2020 <www.consilium.europa.eu/en/meetings/european-council/2020/07/17-21/> accessed 31 December 2020.

the country specific recommendations made in the context of the European Semester. They must also contribute to growth and job creation and advance green and digital transitions. The plans will be adapted as necessary in 2022. Their assessment is to be approved by the Council by a qualified majority on a proposal by the Commission. The disbursement of grants will take place only if agreed milestones and targets set out in the plans are fulfilled. Where one or more Member States consider that there are serious deviations from the milestones and targets, they may request that the President of the European Council refer the matter to the next European Council.[20]

Provision is also made for a new own resource of the EU to finance the NGEU, namely a levy on non-recyclable plastic packaging that will be introduced in 2021.[21] In addition, it is envisaged that the Commission will put forward a proposal for a carbon adjustment measure and a digital levy, both of which are to be introduced at the latest by 1 January 2023.[22] Notably, 30% of the total expenditure from the MFF and NGEU will target climate-related projects. Expenses under the MFF and NGEU will comply with the EU's objective of climate neutrality by 2050, the EU's 2030 climate targets and the Paris Agreement.[23]

Distinct features and assessment

The EU's response to the COVID-19 crisis was rapid, ambitious and decisive. The new package has good prospects to succeed although the self-imposed triptych against which it is to be judged, 'convergence, resilience and transformation', is a tall order.[24] The EU's response to the crisis was both joint and innovative.[25] It provides for the first time for collective debt at European Union level. It is a form of financial risk mutualisation that has eluded the response to the Eurozone crisis and enhances solidarity and the idea of togetherness. This is particularly important as the

[20] July Conclusions (n 4) para A19.

[21] Decision 2020/2053 (n 12) Article 2.

[22] See July Conclusions (n 4) para A29. The Commission is also to put forward a proposal on a revised emissions trading scheme (ETS), possibly extending it to the aviation and maritime sectors. The possibility of introducing a Financial Transaction Tax will be looked at in the course of the next MFF.

[23] See Special European Council (n 19).

[24] In presenting his proposals to the European Council, its President, Mr Charles Michel, stated as follows: 'The goals of our recovery can be summarised in three words: first convergence, second resilience and third transformation. Concretely, this means: repairing the damage caused by COVID-19, reforming our economies and remodelling our societies'. Press release, 10 July 2020 <www.consilium.europa.eu/en/meetings/european-council/2020/07/17-21/> accessed 31 December 2020.

[25] See Special European Council (n 19).

impact and costs of the pandemic appear to be unevenly spread in terms of sectors, Member States, and specific regions. A second distinct feature is that the financial package is based on the disciplines of EU law proper. This makes a break with the emphasis on intergovernmentalism that characterised the response to the Eurozone crisis and which has been endorsed, and even encouraged, by the Court of Justice.[26] Thirdly, the universal and comprehensive character of the measures advances an integrated conception of the EU interest. By linking disbursement of funds with progress in strategic areas, the package interlaces the response to the pandemic with policy priorities and is forward looking. It is not simply a response to a crisis but a blueprint for development. Furthermore, this is the first EU budget which is linked to climate objectives, even though perhaps more timidly than one would have hoped. The measures also enhance the presence of the EU in matters of economic policy, strengthening the subtle but steady shift of emphasis from the internal market to EMU governance as the prevalent model of integration. The package, built in response to a genuine crisis, sends a positive message to citizens. At the same time, there is no denying that it gives more power to the EU and thereby, by way of collateral effect, facilitates empire building. Although the funds that will be made available to the Member States are not subject to conditionality in the way it applied to ESM financial assistance, the package does place budgetary and macro-economic surveillance at the heart of the scheme and advances conditionality as a constitutional virtue.

Rule of law conditionality: high politics and low protection?

It is telling of the regression in the rule of law standards that has beset the EU in recent years that the most controversial issue faced by the European Council was the rule of law conditionality mechanism to accompany the recovery plan. Prior to the December European Council meeting, two opposite camps emerged. Hungary and Poland, both of which are widely viewed as backsliding on rule of law standards, appeared prepared to veto the EU budget and the recovery package unless the ties between spending and the rule of law became looser. In the event, the final text agreed is, in terms of substance, close to the September Council draft[27] although some concessions were obtained in the European Council Conclusions.

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[26] See, eg in relation to the migration crisis, Case T-257/16 *NM v European Council* ECLI:EU:T:2017:130, and, in relation to the EuroGroup, Joined Cases C-105/15 P to C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702, and, especially, the recent judgment in Joined Cases C597/18 P, C598/18 P, C603/18 P and C604/18 P *Council v Chrysostomides* ECLI:EU:C:2020:1028.

[27] See (n 8).

Regulation 2020/2092 on the rule of law conditionality[28] is a key part of the package. Its origins lie in a Commission proposal submitted in 2018 which linked prudent financial management with respect for the rule of law and sought to protect the Union's budget in the case of generalised rule of law deficiencies in a Member State.[29] It was intended to apply from 2021 with the start of the MFF 2021–2027 and came back to the fore following the recovery plan submitted by the Commission in May 2020. The Regulation was adopted by qualified majority following the European Council meeting of December 2020. Hungary and Poland voted against it[30] and it is expected that its validity will be challenged before the CJEU. In comparison to the Commission's original proposal, the agreed text provides for additional process and substantive safeguards to protect the interests of Member States and reduce the discretion of the Commission although in some limited respects it goes further than the Commission's proposal.

The Regulation is based on Article 322(1)(a) TFEU and requires appropriate measures to be taken where rule of law breaches affect or seriously risk affecting the principles of sound financial management or the protection of the financial interests of the Union. The underlying rationale is that respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 TFEU. Such management can only be ensured if national authorities act in accordance with the law, effectively pursue cases of fraud, corruption, and conflict of interest, and unlawful decisions are subject to review by an independent judiciary.[31] The Regulation provides for the conditions under which measures may be taken, their contents, the procedure for their adoption, and their lifting. It is to apply from 1 January 2021[32] and its provisions may eventually be included in the Financial Regulation[33] when it is next revised.[34] The present piece

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[28] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433 I/1.

[29] See (n 6).

[30] Hungary and Poland voted against the regulation. See voting result, Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, Interinstitutional File: 2018/0136 (COD), Brussels, 14 December 2020 (OR en) 14020/20.

[31] Preamble, recitals 7 and 8.

[32] Article 10. It is not intended to have retroactive effect. Under the December 2020 European Council conclusions, the measures will apply only in relation to budgetary commitments starting under the new Multiannual Financial Framework, including Next Generation EU. See European Council meeting (10 and 11 December 2020), Conclusions, EUCO 22/20 CO EUR 17 CONCL 8, Brussels, 11 December 2020, Conclusions, para 2(k).

[33] Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018.

[34] See Joint statement by the Parliament, the Council and the Commission annexed to the European Parliament legislative resolution of 16 December 2020 on the Council position

provides an overview of the Regulation and focuses on the conditions that must be fulfilled for measures to be taken and the decision-making process.

Conditions

For measures to be taken against a Member State, two conditions must be fulfilled. There must, first, be breaches of the principles of the rule of law and, secondly, those breaches must affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.[35] Those conditions have undergone some changes since the Commission's original proposal and it is worth examining them in detail.

Breaches of the principles of the rule of law

The first condition is that there must be breaches of the principles of the rule of law. The Regulation contains a comprehensive definition of the rule of law and makes it clear that the concept must be understood in conjunction with the other values enshrined in Article 2 TEU.[36]

Under the Commission's original proposal, a prerequisite for the imposition of measures was that there must be a generalised deficiency as regards the rule of law.[37] 'Generalised deficiency' was defined as a widespread or recurrent practice or omission, or measure which affects the rule of law.[38] The above terms have been replaced by the condition that there must be 'breaches of the principles of the rule of law'.[39] This is a stricter condition. The term breach implies a violation whilst the term deficiency is open-ended, indicating lack of appropriate standards which may not necessarily cross the threshold of illegality.[40] The term 'breach-

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at first reading with a view to the adoption of a regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget (09980/1/2020 – C9-0407/2020 – 2018/0136(COD)), <www.europarl.europa.eu/doceo/document/TA-9-2020-0356_EN.html#title1> accessed 31 December 2020.

35 Article 4(1).

36 Under Article 2(a), the concept includes the principles of legality, implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.

37 See Commission Proposal (n 6) Article 3(1).

38 ibid, Article 2(b).

39 Article 4(1).

40 The December 2020 European Council Conclusions expressly state that the Regulation does not relate to generalised deficiencies. See December Conclusions (n 10) para 2(f).

es' in the plural, which is consistent throughout the Regulation,[41] may suggest that a single breach does not suffice. The Regulation, however, does not appear to exclude individual breaches. Unlike the Commission's original proposal, the final text does not require that the violation must be widespread or recurrent. The objectives of the Regulation countenance that interpretation. A single but serious breach falls well within the mischief that the Regulation seeks to counter. Whilst perhaps an isolated breach resulting from administrative practice may not suffice, the term breaches is best understood as having a qualitative rather than a quantitative character. This is further supported by the preamble which states that rule of law breaches can seriously harm the financial interests of the Union and that that 'is the case for *individual breaches* […] and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities'.[42] Legislation or administrative rules which run counter to the rule of law may amount to 'breaches' since they are of general application. Breaches may result from any branch of government or any authority exercising public power. In terms of frequency, there is a fine line as to when occasional violations by the administration or the judiciary cease to be viewed as insignificant and become actionable. Seriousness, frequency, and responses by the authorities in correcting errors are important factors. There is however no need to establish a pattern of breaches.

Under Article 3, the following may be indicative of breaches of the principles of the rule of law:

(a) endangering the independence of the judiciary;

(b) failing to prevent, correct or 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 interest;

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

The violations listed are widely phrased and can be the result of either law or practice.

The Regulation provides for a closed list of areas that the rule of law breaches must concern. In summary, under Article 4(2), these are the following:

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[41] See Article 1, Article 3, and Article 4(1).

[42] See preamble, recital 15 (emphasis added).

(a) the proper functioning of the authorities 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;

(b) the proper functioning of the authorities carrying out financial control, monitoring and audit;

(c) the proper functioning of investigation and prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the budget or to the protection of the EU financial interests;

(d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c);

(e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the budget or to the protection of the EU financial interests, and the imposition of effective and dissuasive penalties;

(f) the recovery of funds unduly paid;

(g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO;

(h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

In contrast to the Commission's proposal which contained an indicative list, the above list is a closed one.[43] Nonetheless, its exhaustive character is somewhat compromised by its final catch-all clause in Article 4(2)(h).

Link between the rule of law violations and EU finances

Under Article 4(1), the second prerequisite for the imposition of measures is that the breaches of the principles of the rule of law must affect or 'seriously' risk affecting the sound financial management of the EU budget or the protection of the EU financial interests 'in a sufficiently direct way'. The glosses in quotation marks were absent in the Commission's initial proposal.[44] The final text succeeds in establishing a clearer

[43] Article 4(2) of the Regulation. Cf Article 3(1) of the Commission's Proposal (n 6).

[44] See Commission Proposal (n 6) Article 3(1). In some respects the language of the Regulation has been tightened (see eg Article 4(1) of the Regulation vis-à-vis Article 3, opening paragraph of the Commission's proposal) but in others extended (see Article 4(2), points (c)

connection between rule of law violations and the financial interests of the Union, but it is still wide. The term 'protection of the financial interests of the Union' is wider than the sound financial management of the Union budget and may lend itself to an open-ended interpretation.

The key consideration here is the degree of proximity required. When can a rule of law breach that concerns one of the areas listed in Article 4(2) be said to risk seriously affecting the sound management of the budget or the EU financial interests in 'a sufficiently direct way'? The statements included in the European Council Conclusions are of limited help. It is stated there that the measures must be proportionate to the impact of the breaches on the sound financial management of the budget or the Union's financial interests, and the causal link between such breaches and such negative consequences must be sufficiently direct and duly established. The mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism.[45] It is further stated that the triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature.[46] These statements however are in themselves ambiguous and their legal significance is unclear as the European Council does not have authority to interpret authentically EU law.

The expression 'sufficiently directly' should be understood in the light of the objectives of the Regulation. The underlying idea is that there is a strong link between, on one hand, respect for the rule of law and, on the other hand, mutual trust and financial solidarity among Member States and among the EU and the Member States. The condition is therefore fulfilled where a violation of the rule of law is liable to affect directly that mutual trust. The fact that a breach may affect more other areas not concerned with EU finances does not mean that it does not affect directly the financial interests of the Union. Also, it is not necessary that the breach must be intended to target one or more of the areas listed in Article 4(2) or to affect the EU budget or the EU financial interests. The impact on the EU interests must be direct but not actual; potential effect suffices.[47] Political interference with the prosecution of crime other than financial crime may not meet the test of directness but context is everything. If such interference is likely to create a climate of fear or occurs at a senior level of the prosecution authority it may pass the threshold. The more fundamental or systemic the breach is, the easier it is to satisfy the requirement of directness. Would a statute that prejudices judi-

(e)(h) of the Regulation vis-à-vis Article 3(1) of the Commission Proposal).

[45] July Conclusions (n 4) para 2(e).

[46] ibid, para 2(f).

[47] See Article 5(3) of the Regulation.

cial independence such as that found to be incompatible with EU law in *Commission v Poland*[48] meet those conditions? A constitutional court or a supreme court exercises overarching jurisdiction and, given its position at the apex of the judicial hierarchy, has a special role as the guardian of justice. Where the appointment of its members is found to breach the principle of judicial independence, such a breach reverberates throughout the legal system and is liable to affect the administration of justice in all areas, including those listed in Article 4(2). It certainly poses a serious risk of affecting the protection of EU financial interests, but does it do so in a sufficiently direct way? The link can be made where there is pending relevant litigation.

The conundrum of guidelines

Notably, the July European Council Conclusions add a proviso to the application of the conditionality mechanism. They state that, with a view to ensuring that it is applied objectively, fairly, and with due regard to the equal treatment of Member States, the Commission intends to adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment. Such guidelines are to be developed in close consultation with the Member States and, until they are finalised, the Commission will not propose measures under the Regulation.[49]

This is an arrangement introduced to accommodate the concerns of Poland and Hungary. In strict law, the adoption of guidelines does not appear necessary as a condition for the application of the Regulation. It is correct that guidelines may be helpful in the interests of equal treatment, where the EU is empowered to impose sanctions. Thus, in the context of Article 260 TFEU, the CJEU has held that, in the absence of provisions in the Treaties, the Commission may adopt guidelines for determining how the lump sums or penalty payments which it intends to propose to the Court are calculated.[50] Such guidelines help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty, and are designed to achieve proportionality in the amounts of the penalty payments.[51] However, the adoption of guidelines for the application of the Regulation is not a *sine qua non*. The Regulation does not provide for the imposition of fines but the suspension of payments due. Also, the terms of the Regulation do not have an inordinate degree of vagueness or ambiguity such that would make nec-

[48] Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

[49] July Conclusions (n 4) para 2(c).

[50] See Case C-387/97 *Commission v Greece* ECLI:EU:C:2000:356, para 84.

[51] ibid, para 87.

essary the issue of guidelines before it can be applied. The minutes of the Council meeting where the Regulation was adopted include a statement by the Commission where the latter confirms the declarations included in the European Council's meeting.[52] The legal effect of the statement is debatable. In *Antonissen*,[53] the CJEU held that a declaration recorded in the Council minutes at the time of the adoption of a measure cannot be used for the purpose of interpreting it where no reference is made to the content of the declaration in the wording of the provision in question. Whether the Commission's statement would be capable of giving rise to a legitimate expectation on the part of Member States that the Regulation will not be applied is an open question. Nonetheless, as a matter of good governance, one should expect the Commission to issue such guidelines.

Measures that may be taken

Article 5(1) outlines the measures that may be taken where the conditions of Article 4 are fulfilled. They are wide-ranging and include, inter alia, suspension of payments, disbursements, or commitments, suspension of the approval of programmes, prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget, and a reduction of pre-financing. The measures must satisfy the principle of proportionality.[54] Care is taken to ensure the interests of the intended beneficiaries of the funds frozen.[55] This is however not an easy task as, ultimately, the duty to effect payment rests with the default Member State. The failure of a Member State to fulfil its obligation to make payment may in itself be actionable under *Francovich*[56] and can lead to enforcement proceedings by the Commission.

The July European Council Conclusions state that application of the mechanism will respect its subsidiary character. Measures should be considered only where other procedures set out in Union law, including under the Common Provisions Regulation, the Financial Regulation or infringement procedures under the Treaty, would not allow to protect the Union budget more effectively.[57] The subsidiary character of the Reg-

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[52] See Interinstitutional File: 2018/0136 (COD) (n 30).

[53] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* ECLI:EU:C:1991:80, para 17. However, in other cases the Court has attributed some importance to statements by the Council annexed to the minutes of its meetings. See Case C-24/83 *Gewiese* ECLI:EU:C:1984:62.

[54] Article 5(3). Compliance with proportionality is also stressed in the preamble, recital 18, and the July Council Conclusions (n 4) para 2(e).

[55] Article 5(2).

[56] Joined Cases C-6 and C-9/90 *Francovich and others* ECLI:EU:C:1991:428.

[57] July Conclusions (n 4) para 2(d).

ulation, however, is not reflected in the main text. The preamble states that measures under it are necessary 'in particular' in cases where other procedures set out in Union legislation would not allow the budget to be protected more effectively.[58] In many cases, it would make sense to have recourse to alternative means of enforcement but, if the conditions specified in the Regulation are fulfilled, the taking of measures under it is not excluded on the ground that the same conduct can also be remedied by other means.

Decision-making

The procedure for the adoption of measures gives a central role to the Commission but entrusts the Council with the final decision. The Regulation strengthens the process rights of the Member State concerned and replaces the negative resolution procedure envisaged in the Commission's proposal with ordinary QMV. Essentially, where the Commission has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it initiates a process which has three phases covering respectively fact finding, bargaining, and decision-making.[59] The Member State must provide the Commission with the information requested and may propose remedial measures to address the Commission's concerns.[60] Under the final text of the Regulation, the Member State has two chances to present its views. First, when it answers questions raised by the Commission and also, subsequently, if the Commission intends to make a proposal to the Council. At that stage, it must give the Member State the opportunity to submit its observations, in particular on the proportionality of the envisaged measures, within one month.[61] The Regulation stresses the importance of ensuring that the Commission's assessment is fair, objective, and transparent.[62]

The replacement of reverse QMV with positive Council action loosens the technocratic grip to the benefit of politicisation. Under the Commission's proposal, if the Commission considered that there was a violation, it would submit a proposal to the Council.[63] The proposed measures were deemed to have been adopted unless the Council decided, by qualified majority, to reject them within one month.[64] Under the Regulation, where

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[58] See recital 17.

[59] See Article 6.

[60] Article 6(5).

[61] Article 6(7).

[62] See preamble, recital 16, and Article 6(3).

[63] Commission Proposal (n 6) Article 5(6).

[64] ibid, Article 5(7).

the Commission considers that the conditions of Article 4 are fulfilled and that any remedial measures proposed by the Member State are not adequate, the Commission must submit a proposal to the Council within one month of receiving the Member State's observations.[65] The proposal must set out the specific grounds and evidence on which the Commission based its findings. The Council must adopt an implementing decision within one month of receiving the Commission's proposal.[66]

Thus, under the Regulation, unless the Council decides to act within the time limits prescribed, no measures are imposed. In adopting the Commission's proposal, the Council acts by the default procedure, ie qualified majority.[67] The Council may also amend the Commission's proposal by qualified majority.[68] This replaces the general rule under which the Council may change the Commission's proposal only by unanimity.[69]

The Regulation includes elaborate provisions on the lifting of the measures to ensure that they are not in force any longer than necessary. There is both an obligation of regular review on the part of the Commission and a right of the Member State to seek their lifting.[70] Where, after regular review or the request of the Member State, the Commission considers that the conditions of Article 4 are no longer fulfilled, it must submit a proposal to the Council for lifting the adopted measures. Where it considers that the situation has been remedied in part, it must submit a proposal for adapting the adopted measures. The final decision rests with the Council which decides by QMV. However, where the Commission considers that the situation has not been remedied, it must adopt a reasoned decision and inform the Council accordingly.[71] It appears that in such a case the Council cannot lift the measures although the Member State may challenge the Commission's decision before the CJEU.

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[65] Article 6(9). In the event that the Member State makes no observations, the Commission must submit its proposal without undue delay and in any case within one month after the deadline for the submission of the Member State's observations.

[66] Article 6(10). If exceptional circumstances arise, the period may be extended by a maximum of two months.

[67] See Article 16(3) TEU.

[68] Article 6(11).

[69] See Article 293(1) TFEU. Note however that, under the exceptions stated in Article 293(1), the general default rules do not apply to financial matters, ie Articles 310, 312, 314 and 315(2).

[70] Article 7.

[71] Article 7(2). See also the safeguards stated in recital 26.

Conclusion

The recovery package adopted in December 2020 should be assessed positively. It links crisis management with long-term policy priorities, it introduces collectivisation of debt at Union level, and it is predominated by EU rather than inter-governmental disciplines. Although the conditionality mechanism, as provided in the Regulation, lacks the long tentacles of the Commission's initial proposal, the efforts to make it blunter and more obtuse have only partly succeeded. In terms of substance, it provides some comfort for the Member States in that it requires a more direct link between the breaches of the rule of law and the protection of the financial interests of the Union. In terms of process, it increases the procedural rights of the Member States and, by replacing reverse QMV with positive Council action, it increases politicisation at the expense of technocracy.

The Regulation is a step forward in protecting the rule of law, albeit more timid than might have been hoped. It is by no means a panacea for the rule of law crisis that has beset the Union in recent years. Nor is it a panacea for the protection of EU finances when threatened by lower level non rule of law related deficiencies. The Regulation falls into a more general model of the EU's response to the rule of law crisis, namely strengthening the institutional and regulatory framework to limit deviations by imposing procedural safeguards, recognising new roles for the institutions, shaping the institutional design, and providing for substantive rules to contain breaches. Whether it will prove efficacious remains to be seen. It will depend on the willingness of the Member States to uphold their commitments, the resolve of the other Member States, the personalities of key actors, and also institutional resilience. Sight should also not be lost of the fact that, as the EU concentrates more power, the need to safeguard rule of law principles exists not only in relation to the Member States but also to the EU institutions.

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