

HOW FIRM ARE THE BONDS THAT TIE THE EU TOGETHER? EU RULE OF LAW CONDITIONALITY MECHANISM AND THE NEXT GENERATION EU RECOVERY FUND*

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ABSTRACT

The Covid-19 pandemic has generated a one-in-a-generation challenge upon the EU, consisting of immediate danger for life and health, savings and jobs of its citizens, as well as for the stability and proper functioning of political and legal systems of its Member States. The manner in which the EU as a whole reacted to such sudden and grave challenge is by no means indicative of its political and legal-constitutional substance, and, consequently, of its capacity to subsist in its present form or to develop further.

The centrepiece of the Next Generation EU (NGEU) is the Recovery and Resilience Facility, which should help Member States address the economic and social impact of the COVID-19 pandemic. The establishment of the pandemic recovery fund may be regarded not only as an ad hoc measure, but also as a crucial milestone in the path to overcoming the disbalance between Union solidarity and national interests. However, the whole EU budget deal depended on the acceptance of the Rule of Law Mechanism by all Member States.

In the first part, this paper will analyse the COVID-19 recovery fund compromise solution as it has been finally agreed. Firstly, we will try to determine the effectiveness of the conditionality mechanism, in the light of European Council Conclusions on the “interpretative declaration on the new Rule of Law Mechanism” and its legal effects. Secondly, we will tackle the issue of the enforcement of the Rule of Law protection mechanism, having in mind the causal link

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that should be detected, between the protection of the financial interests of the EU, with the non-respect of the EU values enshrined in the Article 2 TEU, by particular Member State(s). Consequently, we will try to envisage the impact of the implementation of this conditionality mechanism, taking into consideration which Member States, and EU citizens, would be “hit” hardest by it.

In the second part of the paper an attempt shall be made to perceive the conditionality mechanism, tied to the recovery fund, from the perspective of the principle of solidarity.

Ultimately, this paper will try to answer the following question: in view of the necessary shift of priorities and the need for urgent reaction to the COVID-19 crisis, is the common European answer, in view of the core values of the EU and the principle of solidarity, optimal, and above all, will it be effective?

Keywords: Next Generation EU, Solidarity, Rule of Law, Conditionality Mechanism, COVID-19 pandemic

1. INTRODUCTION

Jean-Claude Juncker, in capacity of the President of the European Commission, coined the term *polycrisis* for the purpose of denoting the multitude of challenges that the EU was faced with as the second decade of the 21st century progressed, in the wake of the 2008 global financial crisis: the sovereign debt crisis, also referred to as the Eurocrisis, external and internal security threats, the refugee crisis, the rise of populism which coincided with the Brexit and the rule of law backsliding in certain Member States.¹ These crises were mutually positively interrelated, i.e. fed each other. The EU articulated and applied various mechanisms and policies to address these challenges. As shall be seen, the plan to introduce the rule of law conditionality to the EU long-term budget (Multiannual Financial Framework – MFF) for the period 2021-2027 had predated the Covid-19 pandemic.

The *polycrisis* that exposed multiple vulnerabilities of the EU in the past decade has come to a completely different light during 2020. The Covid-19 pandemic struck, generating the worst crisis of the 21st century, at least so far, which has threatened to bring the economies of the EU and its Member States, along with the rest of the world, to their knees.

However, there are indications that in the midst of the social and economic crisis of such historic proportions, a transformation of constitutional, economic and political structures of the EU of commensurately historic significance has been taking place. Faced with the pandemic, the EU could not have confined itself to tackling

¹ *Speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV) (2016) [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_2293], Accessed on 21 March 2021.*

the consequences of Covid-19, the rule of law backsliding, Brexit or any other crisis independently of one another, as they transpired. The EU seems to have been forced to provide a common answer to these crises, one that should be based on core EU law principles of mutual trust and solidarity, in order to enable itself to move forward. In other words, the EU was suddenly hard-pressed to overcome its structural deficiencies.² In July 2020 a political agreement was reached by the European Council over a package comprising the 7-year EU budget and a recovery fund, totalling 1.8 billion Euro.³ Differences between the stakeholders over the agreed-upon rule of law conditionality halted enactment of actual legislation implementing the package until December 2020, when a compromise on that issue was agreed upon by the European Council.⁴ For the first time in the history of the EU, EU funding was conditioned upon respect of one of core values of the EU – the rule of law.

At first glance, the idea of linking, in relation to all Member States, the benefits of receiving proceeds from the EU budget and recovery funds with the respect of rule of law seems reasonable. It should, however, be analysed from several important perspectives. Is such conditionality necessary and may it be effective, in view of all the other tools on the disposal of EU bodies? Does it give excessive discretionary powers to the institution that is responsible for its implementation? Finally, does it create asymmetries that can negatively impact the relations between Member States, even though it is theoretically applicable to all Member States?

In this article we shall attempt to conceptualize the aforementioned issues from the perspective of EU constitutional law, to the extent possible in view of the chronological proximity and the open-endedness of subject events. We shall also try to understand whether such solution is sustainable in an environment of shifting policy and existential priorities, as well as whether it stands in accordance with, or is opposed to the core basis of the EU legal system, formed by certain values and principles, in particular by the principle of solidarity.

The application of the principle of solidarity to the Covid-19 recovery package has vastly remained in the shadow of the rule of law conditionality tied to that package, as well as by the overall gravity of consequences of the Covid-19 pandemic. We shall attempt to delineate the significance of the adopted mechanism for financing of the Covid-19 recovery fund for the overall constitutional structure of the EU, including the European Monetary Union (the EMU).

² For a comprehensive presentation of EU law, see Čapeta, Tamara; Rodin, Siniša, *Osnove prava Evropske unije*, Narodne novine, Zagreb, 2018.

³ Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20.

⁴ European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl. 8.

Both aforementioned aspects of the Covid-19 recovery package – the solidarity-based mechanism of financing assistance and the conditionality attached to said assistance – shall be compared to the instruments applied by the EU in response to the 2008 global financial crisis and the ensuing sovereign debt crisis that hit the EMU.

Finally, we shall explore the conflict between the principle of solidarity and the rule of law conditionality mechanism that became apparent in December 2020, when the two countries that were the likely targets of such conditionality threatened to block the entire recovery package. Was this antithesis coincidental, resulting from the idiosyncratic circumstances of the pandemic, political circumstances in certain Member States etc., or was it a symptom of a structural deficiency of the EU constitutional set-up?

Since true strength of a political community may only be assessed under stress, we shall attempt to assess whether a conclusion on the nature and quality of legal and political bonds tying the EU together may be formed on the basis of the analysis of two prominent features of the Covid-19 recovery package – solidarity-based debt-sharing and the rule of law conditionality.

2. RECOVERY FUND CONDITIONALITY: RULE OF LAW REPLACES FISCAL DISCIPLINE

2.1. Brief background on conditionality as tool of EU policies

According to Baraggia, conditionality can be defined as a tool for “building consent via the control of resources”,⁵ and is predicated upon asymmetry of the subjects involved.⁶ It is undisputed that conditionality is not a new tool in EU policies. It has been implemented within the Enlargement and Neighbourhood policy,⁷ as the defining element of the EU enlargement process,⁸ in conjunction with the Copenhagen Criteria imposed upon candidate countries. In the EU external policy, conditionality is the most prominent feature of the pre-accession process. It is utilized for

⁵ Baraggia, A., *The New Regulation on the Rule of Law Conditionality: a Controversial Tool with Some Potential*, 2020, [<https://blog-iacl-aicd.org/2020-posts/2020/12/22/the-new-regulation-on-the-rule-of-law-conditionality-a-controversial-tool-with-some-potential>], Accessed on 20 February 2021.

⁶ “Conditionality implies a relational but not equal position: the subject who poses the conditions exercises power over the recipient.” Baraggia, *op. cit.*, note 5.

⁷ Kochenov, D., *Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*, European Integration Online Papers (EIoP), Vol. 8, No. 10, 2004, [<http://eiop.or.at/eiop/texte/2004-010a.htm>], Accessed on 1 April 2021.

⁸ Heinemann, F., *Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework*, *Intereconomics*, Vol. 53, No. 6, 2018, pp. 297 - 301, [<https://www.intereconomics.eu/contents/year/2018/number/6/article/going-for-the-wallet-rule-of-law-conditionality-in-the-next-eu-multiannual-financial-framework.html>], Accessed on 1 April 2021.

bringing about positive judicial, administrative and economic developments in the accession candidate country.⁹ As much as it generates political encouragement and enables financial support, it is also perceived as sometimes being both excessively vague and formal, permitting certain candidate countries to mask the actual state of affairs by “window dressing,” i.e. by a purely technical fulfilment of the required conditions.¹⁰ Conditionality has also been used for internal policy purposes, in cases involving a common EU interest.¹¹ In the area of agriculture, a Member State should grant additional financial incentives to farmers complying with the practices beneficial for the climate and the environment.¹² The Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania involved post-accession conditionality for the purpose of promoting judicial reform and anti-corruption measures.¹³ The CVM was supposed to establish a bridge between the respect of rule of law during the pre-accession phase with post-accession fulfilment of certain benchmarks. From a broader perspective, however, it should be noted that room for carrying forward conditionality from the pre-accession to the post-accession period is limited by the principle of mutual solidarity, which governs relations between Member States.

Major EU spending programmes have been conditioned in a way to ensure sound administrative and financial management by the beneficiary of such funding.¹⁴ All mechanisms of financial assistance which were implemented within the EU following the financial crisis of 2008 and the ensuing sovereign debt crisis involved conditionality.¹⁵ It was in that period that conditionality became “the new topos of EU economic governance,” according to Ioannidis, who pointed out that all

⁹ See more in Szarek-Mason, P., *Conditionality in the EU accession process*, in: Szarek-Mason, P. (ed.), *The European Union's Fight Against Corruption, The Evolving Policy Towards Member States and Candidate Countries*, 2010, pp. 135-156.

¹⁰ See more in De Ridder, E.; Kochenov, D., *Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing*, *European Foreign Affairs Review*, Vol. 16, No. 5, 2011, pp. 589-605.

¹¹ For example, in case of the Cohesion Fund and its Conditionality Policy.

¹² Regulation (EU) No 1307/2013 of the European Parliament and the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 [2013] OJ L 347/608.

¹³ Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, notified under document number C (2006) 6570 final [2006] OJ L 354/56.

¹⁴ Heinemann, *op. cit.*, note 8, p. 298.

¹⁵ On the constitutional significance of EU responses to the Eurocrisis see more in: Lukić, M., *Transformation Through Rescue - A Legal Perspective on the Response of the European Monetary Union to the Sovereign Debt Crisis*, *Annals of the Faculty of Law in Belgrade - Belgrade Law Review*, No. 3, 2013, pp. 187-198; Lukić, M., *Evro kao trojanski konj evropskog ujedinjenja - nadvladavanje suvereniteta država članica u ime štednje i solidarnosti* [The Euro as Trojan Horse of European Unification - Subduing Member State Sovereignty in the name of austerity], *Pravo i privreda*, Nos. 4-5, 2013, pp. 555-572.

financial assistance schemes to Member States included conditionality tied to fulfilling macroeconomic and budgetary conditions, assessing that “never before had European institutions been engaged in so close surveillance and micromanagement of such a wide spectrum of policies.”¹⁶

In the interest of its wide-spread application to instruments for combatting the Eurocrisis, negative conditionality made its way into the Treaties. A new paragraph 3 was added to Article 136 of the Treaty on the Functioning of the European Union (TFEU) whereby Eurozone members were permitted to establish a stability mechanism “to be activated if indispensable to safeguard the stability of the euro area as a whole”, under the condition that “the granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”¹⁷ The amendment was challenged before the Court of Justice of the European Union (the CJEU) in the *Pringle* case. In its seminal judgment, the CJEU affirmed compatibility of the amendment with the EU law, stressing the importance of the strict conditionality requirement for the compliance of the subject mechanism with EU law.¹⁸ According to a more recent analysis by Jacoby and Hopkin, however, the conditionality approach to imposing macroeconomic discipline in the Eurozone ultimately failed, so that monetary measures took center stage, for which conditionality had minor significance.¹⁹

The EU has been thus gradually introducing more and more conditionality mechanisms for the purpose of enhancing better governance in certain Member States, predominantly, but not exclusively, in relation to economic matters.

2.2. New mechanism for continuous rule of law monitoring and protection

Prior to undertaking the analysis of the Rule of Law Conditionality Mechanism attached to the MFF 2021-2027 and the NGEU, as the newest, and for now, the most discussed addition to the EU rule of law “toolbox”, it is important to note

¹⁶ Ioannidis, M., *EU Financial Assistance Conditionality after “Two Pack”*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, Vol. 74, 2014, pp. 62-63, 103.

¹⁷ European Council Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ 2011 L 91/1.

¹⁸ Case 370/12 *Thomas Pringle v Government of Ireland and Others* [2012] EU:C:2012:756, paras. 72, 111, 136, 143; for an in-depth analysis of the judgment see Lukić, M., *Presuda u slučaju Pringl (2012): pravno sredstvo nadmoći političke nad ekonomskom prirodom Unije*, in Vasić, R.; Čučković, B. (eds.) *Identitetski preobražaj Srbije*, Prilozi projektu 2017, Beograd 2018, pp. 63-78.

¹⁹ Jacoby, W.; Hopkin, J., *From lever to club? Conditionality in the European Union during the financial crisis*, *Journal of European Public Policy*, Vol. 27, 2020, pp. 1157-1177.

that in the same year in which that conditionality mechanism was enacted, the first Rule of Law Report was also published, setting forth the European Rule of Law Mechanism as a “as a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening.”²⁰ The report was issued in accordance with the Commission’s Blueprint for action for the purpose of strengthening the rule of law, which had been published in 2019,²¹ and in line with a number of resolutions of the European Parliament.²² Both in the 2019 Blueprint for action and in the 2020 Rule of law report, the Commission provided rather detailed descriptions of the scope and elements of the rule of law principle. The structure of the 2019 Blueprint for action involved a differentiation of perspectives on rule of law that seems instructive on how the approach of the EU to tackling rule of law issues shall evolve in the future: treating rule of law, on one hand, as a “shared value for Europeans,” and, on the other, as a “shared responsibility for all Member States and EU institutions.”²³ The European Rule of Law Mechanism was envisaged as an *ex-ante* tool that should be based on inter-institutional dialogue through political and technical cooperation. The 2020 Rule of law report encompassed 27 country chapters, comprising assessments of the state of affairs with respect to rule of law in the Member States. Aside from being the first annual report issued under the new mechanism, it was also the first rule of law assessment done in the EU during the Covid-19 pandemic. The authors of the report deemed the pandemic a “stress-test for the rule of law resilience”.²⁴ Four aspects, envisaged as the “pillars” of rule of law, were analysed: the level of trust in the checks and balances in the Member States, the functioning of the media and the civil society, as well as the resilience of the justice system during the pandemic.²⁵ The impact that the Covid-19 pandemic had on every aspect of governance seems to confirm the need for continuous monitoring of rule of law in the EU and the Member States.

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30.9.2020, COM/2020/580 final.

²¹ 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: Strengthening the rule of law within the Union, a blueprint for action, COM/2019/343 final.

²² European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254(INL); European Parliament Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 2018/2886(RSP).

²³ Strengthening the rule of law within the Union, a blueprint for action, *op. cit.*, note 21, pp. 2-3.

²⁴ 2020 Rule of Law Report, *op. cit.*, note 21, p. 6.

²⁵ *Ibid.*, pp. 6-7.

From a static perspective, which does not take into account the growing role of EU citizens in the constitutional system of the EU, one could raise several objections to the potential effectiveness of this mechanism. First, aside from shedding light on pertinent issues and challenges and encouraging and enabling inter-institutional dialogue, it does not provide an answer on how to enable dialogue with States which intentionally choose not to respect rule of law. Second, having in mind that this kind of reporting is very similar to pre-accession reporting, it does not offer a new element to the already existing system that would enable linking “financial strings at the Union’ disposal” with the respect of rule of law and other values in Member States.²⁶ This leads us to the analysis of the centrepiece of the heated compromise that was reached over the Covid-19 recovery instrument, which is supposed to protect rule of law by imposing conditionality of receiving financial assistance.

2.3. Linking rule of law with financial benefits

Precise understanding of the rule of law principle, as a meta-value, is a complex undertaking.²⁷ In addition, the attitudes towards various mechanisms for dealing with the rule of law crisis differed between EU institutions and Member States.²⁸ In this part of our contribution will attempt to provide more clarity on the newly introduced mechanism by understanding the *rationale* and the context in which that mechanism was enacted.

Prior to the regulation which is the subject of this article, instruments for addressing deficiencies of rule of law in Member States that were available to the Commission comprised the procedure under Article 7 of the Treaty on the European Union (TEU), which is supposed to address “a clear risk of a serious breach by a Member State” of values stipulated in Article 2 TEU and is primarily conducted before the Council, and the infringement procedure under Articles 258-260 TFEU, which is applicable “if a Member State fails to fulfil an obligation under the Treaties” and entails reference to the CJEU.²⁹ Blauburger and van Hüllen have

²⁶ Kochenov, D., *Elephants in the Room: The European Commission’s 2019 Communication on the Rule of Law*, Hague Journal on the Rule of Law, Vol. 11, 2019, p. 425.

²⁷ See: Vlajković, M., *Rule of Law -EU’s Common Constitutional Denominator and a Crucial Membership Condition*, ECLIC, EU 2020 – lessons from the past and solutions for the future, Vol. 4, 2020, pp. 235-257.

²⁸ See: Peirone, F., *The Rule of Law in the EU: Between Union and Unity*, Croatian Yearbook of European Law and Policy, Vol. 15, No. 1, 2019, pp. 57-98; Kochenov, D.; Pech, L., *Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation*, Journal of Common Market Studies, Vol. 54, Nstr.Nonih pitanja koje je proiziof Law, marijastr.Nonih pitanja koje je proiziof Law, marijano. 5, 2016, pp. 1063-1074.

²⁹ About the infringement procedure see: Petrašević, T.; Dadić, M., *Infringement procedures before the Court of Justice of the EU*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta

summarised the shortcomings of both mechanisms: while the application of Article 7, in terms of suspension of membership rights, is not always credible due to the requirement of unanimity in the Council, and is surely ineffective when more than one Member State is infringing upon Article 2 TEU values, infringement proceedings “typically target specific violations of EU law and cannot grasp the systemic nature of many small reforms adding up to significant democratic backsliding.”³⁰ Other authors, however, point out to the fact that the CJEU has settled that “the attempted purge of Poland’s Supreme Court was a violation of the rule of law under Article 2 TEU, concretized by Article 19 TEU,” i.e. that “Article 2 TEU... can clearly be the subject of an infringement action.”³¹ In the same vein of thought lies the claim that, based on the experience gained until 2020, judicial mechanisms are more effective than political ones in relation to addressing rule of law violations, so that the infringement procedures from Articles 258 and 259 TEU should be applied in the form of “systemic infringement actions”, based on the assumption that “the sum of numerous violations... is thus more important and qualitatively different than the individual violations that are more customarily alleged in infringements.”³²

So, where does the connection between the rule of law protection and the Covid-19 recovery response come to light? Firstly, the Covid-19 pandemic raised numerous important rule of law issues that are challenging not only for the Member States, but for the EU as a whole. This was underlined in the first Rule of Law Report, published in September 2020, in which it was highlighted that the “first reflection is on the rule of law culture and on the level of trust in the checks and balances in Member States.”³³ Secondly, and perhaps more importantly, the rule of law conditionality that had been proposed in 2018 by the EU Commission³⁴ was

Sveučilišta JJ Strossmayera u Osijeku, Vol. 29, Issue No. 1, 2013, pp. 77-98.

³⁰ Blauberger, M.; van Hüllen, V., *Conditionality of EU funds: an instrument to enforce EU fundamental values?*, Journal of European Integration, Vol. 43, No. 1, 2021, p. 3.

³¹ Scheppele, K. L.; Pech, L.; Platon, S., *Compromising the Rule of Law while Compromising on the Rule of Law*, 2020, [<https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>], Accessed on 21 March 2021, referring to Case 619/18, *European Commission v. Republic of Poland*, 2019, EU:C:2019:531.

³² A systemic infringement action would involve, according to this view, “making the pattern of Member State conduct the subject of a single infringement action and demonstrating to the ECJ that the pattern constitutes a systemic violation of EU values.” Scheppele, K. L.; Kochenov, D. V.; Grabowska-Moroz, B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Vol. 39, No. 1, 2020, p. 11, 119-120.

³³ 2020 Rule of Law Report, *op.cit.*, note 21, pp. 6-7.

³⁴ 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,

eventually implemented in 2020, as the mechanism to which implementation of the NGEU was supposed to be subordinated.

2.3.1. *Regulation proposal of 2018*

Approximately from the middle of the second decade of the 21st century, EU bodies have been faced with a pronounced backsliding of rule of law in certain Member States, namely Hungary and Poland. According to European officials, the issue was not only whether rule of law should have been protected in the EU legal and political system, but rather what was the most efficient way to do that. It seemed that in the cases of Hungary and Poland the institutions of the EU failed to do protect rule of law, or that they seemed to lack appropriate mechanisms. It was undisputed that EU values had to be preserved at all costs. According to Commissioner Reding, the rule of law is “in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties.”³⁵ The imperative of preserving rule of law was the rationale of every “tool” that had been envisaged and/or implemented, starting from the activation of article 7 para. 1 TEU against Poland, the infringement procedures led before the Court of Justice of the EU (CJEU) against Hungary and Poland and numerous Commissions’ communications.³⁶

In 2018, the European Commission presented its Proposal for a Regulation on the protection of the Union’s budget in cases of generalised deficiencies as regards the rule of law in the Member States (the 2018 Regulation proposal),³⁷ with the intention to thus provide a strong and efficient instrument for responding to the rule of law backsliding in certain EU Member States. The 2018 Regulation proposal purported to allow the Commission to suspend or cut funding under existing financial commitments, as well as prohibit the Commission to conclude new such commitments, in case of a finding of generalized deficiencies as regards rule of law in a Member State.³⁸

COM/2018/324 final - 2018/0136 (COD).

³⁵ Reding, V., European Commission, Speech, 4 September 2013, *The EU and the Rule of Law—What Next?*, 2013, [http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm], Accessed on 18 April 2021.

³⁶ Some of the key documents issued by the Commission in this respect are the Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM/2014/0158, and the Strengthening the rule of law within the Union, a blueprint for action, *op. cit.*, note 22.

³⁷ 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).

³⁸ For a detailed analysis of the strengths and weaknesses of the rule of law conditionality contained in the 2018 Regulation proposal, see Goldner Lang, I., *The Rule of Law, the Force of Law and the Power of*

The proposed procedure entailed the power of the Commission to submit an implementing act of appropriate measures to the Council, whereby such an act would have been adopted unless the Council rejected it with qualified majority.³⁹ The threshold for the Council to reject the implementing act was thus raised significantly by the proposal of so-called *reverse majority* voting. This mechanism was apparently taken over from the EMU regulation enacted in response to the Eurocrisis (the so-called *Six-pack*, *Two-pack*, as well as the *Common Provisions Regulation* of 2013⁴⁰ etc), which also featured, as has been already noted, prominent conditionality tied to macroeconomic and budgetary discipline. The fact stressed by Fiscaro, however, should be noted: “neither EMU sanctions nor macro-economic conditionality have ever been effectively applied.”⁴¹

The 2018 Regulation Proposal left ample room for political manoeuvring by the EU Commission. First, the Commission had considerable leeway in determining what should be considered as a general deficiency, whether, in each particular case, there was one and to what extent it affected sound implementation of the EU budget or the financial interests of the Union. Second, the Commission was granted significant discretion in relation to establishing the measures which should be “proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law.”⁴² Described provisions seemed to give rather wide discretionary powers to the EU Commission, which could have been perceived as a challenge to rule of law on the EU level, and in particular, as noted by Fiscaro, to the principles of legal certainty, transparency and non-arbitrariness.⁴³ Additionally, it seems that the existence and the substance of the rule of law deficiencies should not be determined merely on the basis of collecting “relevant information,”⁴⁴ with-

Money in the EU, Croatian Yearbook of European Law and Policy, Vol. 15, 2019, pp. 1-26.

³⁹ *Ibid.*, Art. 5, paras. 7 and 8.

⁴⁰ Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/ 320.

⁴¹ Fiscaro, M., *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, European Papers, Vol. 4, No. 3, 2019, p. 709.

⁴² 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), Art. 4, par. 3.

⁴³ Fiscaro, *op. cit.*, note 41, p. 714.

⁴⁴ 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), Art. 5, par. 2.

out specifying more precisely from which sources and in which manner the said information should be collected. *Argumentum a contrario* for this critical narrative may be the fact that this Proposal was brought up in 2018, before other mechanisms, such as the Rule of Law Report, which are also relevant for assessing the “deficiencies” and possibly a lack of respect of rule of law, were adopted.

The 2018 Regulation proposal faced significant criticism by the Legal Service of the Council. In its opinion,⁴⁵ the said service raised several important issues, emphasizing primarily the exact legal basis for enacting such a regulation: protecting sound implementation of the EU budget. The Council Legal Service concluded that the reference to rule of law in the Proposal was “neither necessary nor sufficient to establish a link with the sound implementation of the EU budget, which is required for a genuine spending conditionality,” as well as that “a genuine conditionality mechanism cannot be based on the presumption that a risk for the EU budget necessarily exists once certain deficiencies are qualified as generalised.”⁴⁶ On the basis of these general findings, the Council Legal Service proceeded to conclude that “the conditionality regime envisaged in the proposal as it currently stands, cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU, as the respective aims and consequences of both procedures are not properly distinguished and risk overlapping with each other.”⁴⁷ The Council Legal Service allowed the possibility that generalized malfunctioning of State authorities could justify activating a regime of conditionality aimed at protecting sound implementation of the EU budget, but spelled out specific conditions for such activation, insisting on the establishment of a concrete and direct link between malfunctioning of State authorities and the risk for sound financial management in the implementation of EU funds or the protection of the financial interests of the Union.⁴⁸ Finally, the Council Legal Service found that the reverse majority voting in the Council was not adequately justified in the proposal.⁴⁹

⁴⁵ Opinion of Legal Service, 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, Compatibility with the EU Treaties, Brussels, Interinstitutional File: 2018/0136(COD).

⁴⁶ *Ibid.*, par. 51.

⁴⁷ *Ibid.*

⁴⁸ “(i) the cases of malfunctioning are identified with a clear and sufficiently precise definition; (ii) the malfunctioning affects or risks affecting *in concreto* the duty of sound financial management in the implementation of EU funds or the protection of the financial interests of the Union; (iii) the existence of a sufficient direct link between the malfunctioning and the use of the budget is established through verifiable evidence and (iv) the measures adopted are proportionate in volume to the negative effects of the malfunctioning on the use of the Union budget;” *Ibid.*

⁴⁹ *Ibid.*

2.3.2. Political agreement of July 2020

The political agreement on the EU long-term funding and the Covid-19 recovery package was reached by the European Council on 21 July 2020. The negotiations lasted four days and nights, making that the second longest lasting European summit in history, only few minutes shorter than the Nice Summit in 2000.⁵⁰ It was agreed that the package would include, in addition to the 7-year EU budget amounting to approximately 1.1 trillion Euro, a recovery instrument, named “Next Generation EU” (NGEU), worth 750 billion Euro in 2018 prices.⁵¹ The package that was agreed in July 2020 conformed mostly to the Commission’s proposal, issued in May 2020.⁵² The most contentious aspect of the entire package, due to which intense negotiations lasted for several days, was the overall size of grants under the NGEU, as well as the source of funding thereof.⁵³ It was finally agreed that the Commission would be authorized to borrow on the capital markets the entire amount of 750 billion Euro “on behalf of the Union.”⁵⁴ The borrowing would need to stop by the end of 2026, and the repayments would need to be completed by the end of 2058.⁵⁵ The empowerment to borrow would take the form of the Own Resources Decision, which would include specific powers of the Commission to temporarily increase contributions by certain Member States in order that liquidity necessary for orderly repayment of borrowed funds be preserved.⁵⁶ Out of the total 750 billion Euro, 360 billion Euro could be loaned to Member States in need, whereas 390 billion Euro could be provided in the form of grants.⁵⁷ Most of the NGEU funds would be committed to the Recovery and Resilience Facility (RRF), encompassing the entire amount destined for loans (360

⁵⁰ *Four days, four nights: A look back on the special meeting of the European Council in July 2020*, 2020, [<https://www.eu2020.de/eu2020-en/news/article/-/2370576>], Accessed on 21 March 2021.

⁵¹ Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20.

⁵² 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, Brussels, 27.05.2020, COM/2020/456 final.

⁵³ Sullivan, A., *Unmasking the EU’s coronavirus recovery fund — the fine print*, 2020, [<https://www.dw.com/en/unmasking-the-eus-coronavirus-recovery-fund-the-fine-print/a-54255523>], Accessed on 1 March 2021.

⁵⁴ Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20, p. 2.

⁵⁵ *Ibid.*, p. 3.

⁵⁶ *Ibid.*, pp. 3-4.

⁵⁷ The original proposal by France and Germany comprised granting the Commission authority to borrow 500 billion Euro, which would then be disbursed entirely in the form of grants. The reduction of the amount of grants was a compromise with the so-called “Frugal Four” group of countries, made up by Austria, Denmark, the Netherlands and Sweden. Sullivan, *op. cit.*, note 53.

million Euro) and 80% of the amount of grants (312,5 billion Euro).⁵⁸ It was left to the Commission to propose the set of allocation criteria for RRF commitments for years 2021 and 2022. For 2023, it was agreed that the unemployment criterion would be replaced by the loss in real GDP observed in 2020-2021, i.e. resulting from the Covid-19 pandemic. All grants under the RRF would have to be fully committed by the end of 2023.⁵⁹ The allocation of funds under the RRF was also made conditional upon the assessment of recovery and resilience plans which each Member State would have to prepare. In addition to previously established criteria for such plans, a requirement was added that “effective contribution to the green and digital transition shall also be a prerequisite for positive assessment.”⁶⁰ The European Council statement included clear indications of the limited purpose of the NGEU: “given that NGEU is an exceptional response to those temporary but extreme circumstances, the powers granted to the Commission to borrow are clearly limited in size, duration and scope”, as well as that “the Union shall use the funds borrowed on the capital markets for the sole purpose of addressing the consequences of the Covid-19 crisis.”⁶¹ The European Council Statement laid out a plan for increasing own resources of the Union, which was clearly related to the increased financial obligations of the EU in the coming decades due to the NGEU. The plan provided for, *inter alia*, a levy on non-recycled plastic waste.⁶²

A rather interesting wording was included in the European Council statement in relation to the agreement: “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.”⁶³ In other words, the values of Article 2 TEU would not be enforced for their absolute binding effect, but because it was necessary to protect the Union’s financial interests in accordance with, *inter alia*, the said values. The subsequent paragraph included the stipulation that “a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority.”⁶⁴ It seems that this was the point at which the Commission was forced to abandon its push for voting by reverse qualified majority, made in the 2018 Regulation proposal.

⁵⁸ Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20, p. 5.

⁵⁹ *Ibid.*, pp. 4-5.

⁶⁰ *Ibid.*, p. 6.

⁶¹ *Ibid.*, p. 3.

⁶² *Ibid.*, p. 8.

⁶³ *Ibid.*, p. 15.

⁶⁴ *Ibid.*, p. 16.

2.3.3. *Regulation on rule of law conditionality*

The transposition of the substance of the political agreement of July 2020 into a package of legislation involving EU long-term budget and Covid-19 recovery funding was hindered, during the Fall of 2020, by the opposition of Poland and Hungary to the linking of the respect of rule of law with the EU budget and the recovery fund. The texts of the key parts of the package were largely agreed upon by the Parliament and the Council on 5 and 10 November 2020.⁶⁵ Following intense negotiations to break the political impasse, a compromise was reached by the European Council on 11 December 2020,⁶⁶ enabling the enactment of the entire legislative package in the days that followed, comprising the Multi-annual Financial Framework Regulation for years 2021-2027 (MFF 2021-2027),⁶⁷ i.e. the EU's 7-year budget, the Regulation on the EU Recovery Instrument,⁶⁸ which represented the legislative articulation of the NGEU fund stipulations made by the European Council in July 2020, and therefore the centrepiece of the EU response to the Covid-19 pandemic, the new Own Resources Decision enabling the borrowing of the NGEU funds and joint repayment thereof,⁶⁹ and the Rule of law conditionality regulation (the Regulation).⁷⁰ The package included also the Proposal for a Regulation establishing a Recovery and Resilience Facility (the RRF Regulation), which was enacted in February 2021,⁷¹ and the Interinstitutional

⁶⁵ Council of the EU Press Release 5 November 2020, *Budget conditionality: Council presidency and Parliament's negotiators reach provisional agreement*, 2020, [<https://www.consilium.europa.eu/en/press/press-releases/2020/11/05/budget-conditionality-council-presidency-and-parliament-s-negotiators-reach-provisional-agreement/>], Accessed on 21 March 2021; Council of the EU Press Release 10 November 2020, *Next multiannual financial framework and recovery package: Council presidency reaches political agreement with the European Parliament*, 2020, [<https://www.consilium.europa.eu/en/press/press-releases/2020/11/10/next-multiannual-financial-framework-and-recovery-package-council-presidency-reaches-political-agreement-with-the-european-parliament/>], Accessed on 21 March 2021.

⁶⁶ European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8.

⁶⁷ Council Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433 I/11.

⁶⁸ Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020], OJ L 433I/23.

⁶⁹ 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, Euratom [2020], OJ L 424/1.

⁷⁰ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.

⁷¹ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17.

Agreement between the Commission and the legislative bodies of the EU on budgetary discipline, sound financial management and new own resources.⁷²

The enactment of the package was clearly a result of a series of compromises along several lines of disagreement. The so-called Frugal Four group of Member States opposed involvement of grants, which was being advocated by the countries whose economies were most affected by the pandemic, primarily Spain and Italy. The negative rule of law conditionality was supported by the Frugal Four, together with Germany and France, but it was fiercely opposed by Poland and Hungary, the most likely targets of such mechanism. According to de la Porte and Jensen, the compromise on the rule of law negative conditionality was made possible by the fact that details and procedures for application of that mechanism were not specified, as well as that the NGEU had been negotiated in parallel with the MFF, which had made possible incentives in the form of side payments and rebates.⁷³ While the compromise between the Frugal Four and Germany, on one hand, and France, Spain and Italy on the other, comprising rule of law conditionality as counterbalance to grants and an *ad hoc* and limited debt mutualization, seems to have been agreed at arm's length, the explanation offered by the said authors as the reason why Poland and Hungary abandoned their opposition to the negative rule of law conditionality does not seem plausible. The significance of the said conditionality, as well as its potential impact upon the political structures in Poland and Hungary far outweighed the prospect that opposing such mechanism by those two countries on the basis of ambiguous and incomplete legislation could be successful, as well as possible significance of side payments and rebates from the EU budget for the same two countries.

The changes undertaken in the Regulation with respect to the 2018 Regulation proposal resulted from a series of compromises between the Council and the European Parliament.⁷⁴ The difference between the title of the 2018 Regulation proposal and the title of the Regulation is conspicuous. The title of the Regulation

⁷² Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433 I/28.

⁷³ De la Porte, C.; Jensen, M. D., *The Next generation EU: An analysis of the dimensions of conflict behind the deal*, Social Policy & Administration, Vol. 55, 2021, pp. 1-15.

⁷⁴ According to Dimitrovs and Droste, the difference between the approaches of the two institutions may be summarized as follows: for the Parliament, "the aim of the regulation was to protect the rule of law principle through the protection of the EU budget," whereas for the Council it was "to protect the EU budget through the protection of the rule of law." Dimitrovs, A.; Droste, H., *Conditionality Mechanism: What's In It?*, 2020, [<https://verfassungsblog.de/conditionality-mechanism-whats-in-it/>], Accessed on 16 March 2021.

lacks the wording “in case generalised deficiencies as regards the rule of law.” The abbreviated title clearly shows the focus of the conditionality instrument which has been stipulated in the Regulation: the protection of the EU budget. The subject matter of the Regulation is defined as the establishment of “rules necessary for the protection of the Union’s budget in case of breaches of the principles of the rule of law in the Member States,”⁷⁵ instead of “generalised deficiencies as regards the rule of law in the Member States.”⁷⁶ The general condition for application of punitive measures against a Member State from the 2018 Regulation proposal, which required that a generalised deficiency as regards the rule of law “affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union”⁷⁷ has been somewhat narrowed in the Regulation by the requirement that that the said risk must be “serious”, as well as that the subject influence must transpire “in a sufficiently direct way.”⁷⁸ The use of the term “breaches,” as well as the other two described changes, seem to have been devised to satisfy the objections to the 2018 Regulation proposal raised in the Council Legal Service opinion, the bottom line of which was that the causality between perceived breaches of rule of law and the negative consequences upon the EU budget and financial interests had to be concretized in order that the new mechanism could be sufficiently differentiated from the Article 7 TEU mechanism.

The set of measures which the EU bodies may implement against a Member State remained essentially the same in the Regulation as it has been envisaged in the 2018 Regulation proposal, comprising primarily suspension or reduction of payments from the Union budget, suspension or reduction of economic advantages under instruments guaranteed by the Union budget, or prohibition of undertaking new such instruments.⁷⁹ As has been already noted in relation to the July 2020 agreement, the voting requirement in the Council was significantly modified – reverse majority that had been provided for in the 2018 Regulation proposal did not remain in the Regulation.⁸⁰

Another novelty in the Regulation was the so-called “emergency brake,” which was stipulated in Recital 26 of the Regulation. The mechanism authorizes the Member State which is the subject of the proceedings under the Regulation, in case that it

⁷⁵ Regulation 2020/2092, Art. 3.

⁷⁶ 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), Art. 3.

⁷⁷ 2018 Regulation proposal, Art. 3 para. 1.

⁷⁸ Regulation 2020/2092, Art. 4 para. 1.

⁷⁹ 2018 Regulation proposal, Art. 4: Regulation 2020/2092, Art 5.

⁸⁰ 2018 Regulation proposal, Art. 5 para. 7: Regulation 2020/2092, Art 5.

“considers” that there were serious breaches of the principles of objectivity, non-discrimination and equal treatment in relation to imposing or lifting the measures based on the Regulation, to request that the President of the European Council refer the matter to the next meeting of the European Council, so that voting in the Council on the measures proposed by the Commission may not take place before the matter is discussed by the European Council. The “break” may not, however, stop the process for longer than 3 months.⁸¹ It has been already explained by several authors that this mechanism has been placed in recitals because the European Council is not a legislative body, and cannot stop the adoption of measures.⁸² It seems that the purpose of the mechanism is to secure additional time for high-level political consultations, but only in situations in which the affected Member State may reasonably claim that the procedure before the Commission violated due process principles.

2.3.4. *Political or legal compromise?*

As has been previously noted, the enactment of the entire financing package with the Regulation as its integral part was made possible by a compromise at the EUCO, following a political impasse, which had been created by Poland and Hungary, which threatened to block the adoption of the MFF 2021-2027 and NGEU due to the Regulation.⁸³ An important aspect of the compromise was articulated in the form of a declaration by EUCO, which was included in the EUCO statement on conclusions from the meeting (the EUCO Conclusions). It comprised two assertions about future actions of the Commission: that “the Commission intends to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment... in close consultation with the Member States”, as well as that “should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment... Until such guidelines are finalised, the Commission will not propose measures under the Regulation.”⁸⁴ Another assertion, included in the EUCO Conclusions, which in effect represents an instruction to the Commission on how the Regulation should be applied, was the following: “the application of the mechanism will respect its subsidiary character.”⁸⁵

⁸¹ Regulation 2020/2092, Recital (26).

⁸² Dimitrovs; Droste, *op. cit.*, note 74.

⁸³ Alemanno, A.; Chamon, M., *To Save the Rule of Law You Must Apparently Break It*, 2020, [<https://verfassungsblog.de/tosave-the-rule-of-law-you-must-apparently-break-it/>], Accessed on 21 March 2021.

⁸⁴ European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8, I.2.c).

⁸⁵ *Ibid.*

The European Parliament enacted a resolution on 17 December 2020 whereby it welcomed the political agreement on the package, recalled the historic importance of the package, but also expressed strong regret “that, due to the unanimity rule in the Council, the adoption of the entire package, ... , cause unduly delay for the entire process”, and, in relation to the abovementioned declaration by the EUCO on the manner in which the Commission should proceed to apply the Regulation, it recalled that “the content of the European Council conclusions on the Regulation on a general regime of conditionality for the protection of the Union budget is superfluous;,,, the applicability, purpose and scope of the Rule of Law Regulation is clearly defined in the legal text of the said Regulation.”⁸⁶

The EUCO Conclusions were met with harsh criticism by legal scholars. According to Alemanno and Chamon, the issuance of the interpretative declaration by the EUCO “despite its political nature”, represents, first, an *ultra vires* exercise of legislative function by the European Council, due to the requirement that the Commission adopts the guidelines and to the “conditioning the application of the mechanism to the finalisation of such guidelines,” and, second, a violation of the principle of institutional balance, because it effectively gives suspensive effect to an action for annulment, contrary to Art. 278 TFEU, and because it comprises instructions to the Commission, contrary to Art. 17(3) TEU.⁸⁷ Scheppele, Pech and Platon claim that the adoption of the package, including the Regulation, “is not a victory for the rule of law”, because “the Conditionality Regulation was once designed primarily for that purpose but now appears primarily designed to protect the budget because it can only be triggered when funds have already been misspent.”⁸⁸ These authors claim that the EUCO Conclusions “systemically undermine” the Regulation. The principal basis for such finding is the view that the EUCO Conclusions substantially delay enforcement of the Regulation, by adding additional stages of application of the Regulation, including additional “layers of dialogue” (in points I.2.c) and I.2.g)), and making the duration of some of these stages dependent on the completion of proceedings before the CJEU. In view of the fact that NGEU funds should be spent by 2023, the warning of these authors, that the subject delay may very well mean that the Commission will be able to proceed with enforcing the application only after NGEU funds have been spent,⁸⁹ seems well-founded. A major departure from the language and meaning of the

⁸⁶ European Parliament resolution on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation 2020/2923(RSP), Art. 4.

⁸⁷ Alemanno, A.; Chamon, M., *To Save the Rule of Law You Must Apparently Break It*, 2020, [<https://verfassungsblog.de/tosave-the-rule-of-law-you-must-apparently-break-it/>], Accessed on 21 March 2021.

⁸⁸ Scheppele; Pech; Platon, *op. cit.*, note 31.

⁸⁹ *Ibid.*

Regulation is included in point I.2.f) of the EUCO Conclusions, which reads, *inter alia*: “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.”⁹⁰ As Scheppele, Pech and Platon rightly note,⁹¹ the cited phrase directly contradicts the wording of Art. 4(2)(h) of the Regulation, which makes the list of possible breaches of the rule of law principle, included in Art. 4(2), open-ended.

In accordance with what had been already expected at the time of the EUCO meeting in December 2020, in March 2021 Hungary and Poland challenged the rule of law conditionality mechanism entailed in the Regulation before the CJEU.⁹² If the EU Commission follows the instruction entailed in the EUCO Conclusions, the application of the Regulation will thus be suspended until the CJEU decides upon the subject challenge.

2.4. Possible implications of adopted solutions

The contentiousness of the rule of law conditionality originated from pragmatic interests of the Member State governments and political structures which that conditionality had been designed to affect. It has generated the conceptual dilemma of whether the primary of aim of that mechanism is to protect the rule of law *per se*, or the financial interests of the Union. The paramount significance of the rule of law principle makes it harder to conceive the conceptual ambiguity that has burdened the introduction of that mechanism from the outset.

Having regard to the political impasse, that was overcome in midst of December 2020, with respect to the introduction of the rule of law conditionality, however, it may be proper to conceive that the introduction of that mechanism became subordinated to the need of adoption of the EU budget and the NGEU facility. After the compromise has been reached, new issues arise what should be the effects and legal implications of the European Council Conclusions,⁹³ that served as the basis for the compromise, and, consequently, what shall be the practical impact of the conditionality mechanism envisaged in the Regulation. Having regard to how that

⁹⁰ European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8, I.2.f).

⁹¹ Scheppele; Pech; Platon, *op. cit.*, note 31.

⁹² *Poland and Hungary file complaint over EU budget mechanism*, 2021, [<https://www.dw.com/en/poland-and-hungary-file-complaint-over-eu-budget-mechanism/a-56835979>], 2021, Accessed on 1 April 2021.

⁹³ European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8.

situation unfolded, one may wonder, in the context of the Covid-19 crisis, as well as of the readiness of certain Member State governments to condition adoption of the entire Covid-19 recovery instrument upon protection of their patently illegitimate particular interests, is it even possible to uniformly and effectively protect rule of law through such a mechanism? Having in mind the fact that Hungary and Poland managed to substantially delay the enforcement of the Regulation, the effects of the mechanism are put in doubt. It is probable that by the time the Court decides on the challenges to the Regulation initiated by Hungary and Poland, and by the time the Commission guidelines are adopted, the NGEU funds will have already been delivered and spent. A definitive EU-wide answer to such challenges is yet to be articulated, both by the CJEU in relation to the proceedings initiated by the Commission on one side and Poland and Hungary on the other, and by the Commission, in the form of either the guidelines for implementing the mechanism, or of actual enforcement of the Regulation.

Another consequence of the contentiousness of the mechanism was the need for compromises related to its enactment. The large extent to which the adoption of the recovery package has been burdened with compromises is well illustrated by the statement of the French President Mr. Macron, describing the July 2020 agreement as “not a perfect mechanism, but a mechanism that is able to change something fundamental.”⁹⁴ Another illustration of the high level of controversiality of the rule of law conditionality, as one of the central features of the entire package, is the statement of the former president of the EU Commission, Jean-Claude Juncker, about the plan to link entitlement to receive EU funds with observation of the rule of principle, at the time when the plan was *in statu nascendi*, circulating in the form of a position paper presented and proposed by the German Government: “That would be the poison for the continent.”⁹⁵ Juncker added that linking financial threat and some sort of the “punishment” for the lack of respect of rule of law would even divide the EU, and would also present a threat to the mutual trust and solidarity.

The fear that the conditionality mechanism may prove counterproductive in practice therefore seems natural. Notwithstanding certain provisions of the Regulation which aim to protect end-beneficiaries of EU funding from negative effects of the measures, eventually the citizens of a Member State against which measures under the Regulation are enforced shall become the hostages and victims of their

⁹⁴ *How Europe reacted to the new EU budget and coronavirus recovery fund deal?*, 2020, [<https://www.politico.eu/article/madness-and-historic-day-europe-reacts-to-the-budget-deal>], Accessed on 21 March 2021.

⁹⁵ *Juncker: German Plan to link funds and rules would be “poison”*, 2017, [<https://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/>], Accessed on 18 March 2021.

government's actions. A similar criticism of the mechanism was proposed by Gros, Droste and Corti, who feared, *inter alia*, that “linking the budget to rule of law conditionality risks creating a paradox whereby a national government's infringement of the rule of law comes at the expense of the well-being of its citizens, especially the most disadvantaged among them.”⁹⁶ The measures may also foster EU pessimism and negative feelings towards the EU among such citizens. The issues related to the breaches of the rule of law principle have so far been concentrated in the East, in former communist countries, so that application of the measures may strengthen the East-West divide.

Relying on the experience gained through application of the EU accession conditionality, as well as of economic sanctions, Blauburger and van Hüllen proposed a set of criteria for assessing the chances of success of the Commission's 2018 Regulation proposal: likelihood of application, size and speed of measures, determinacy of conditions for imposing the measures, context of application, perceived legitimacy of the measures.⁹⁷ The context of application relates to the “nature of the target regime and of the sender's relations with it.” Some of the problems they identified were not sufficiently determined conditions for application of measures, as well as the *de facto* unequal vulnerability of Member States and lack of systemic monitoring procedures, affecting perceived legitimacy.⁹⁸ The changes made in the Regulation in comparison with the 2018 Regulation proposal, as well as the introduction of the EU Rule of law mechanism, that transpired in the meantime, seem to contribute to an improved score of the Regulation in terms of perceived legitimacy. In our view, the issues related to the “context of application”, which concern the constitutional nexus between the EU, Member States and their citizens, remain to be pronounced, because the EU is able to tackle the rule of law deficiencies in one or more Member States only to a limited extent. For that reason, the assessment by Gros, who pointed out that it would not have been realistic to expect that a mechanism for protecting the rule of law *per se* could have been adopted, seems true.⁹⁹

⁹⁶ Gros, D.; Blockmans, S.; Corti, F., *Rule of law and the Next Generation EU recovery*, 2020 [<https://www.ceps.eu/rule-of-law-and-the-next-generation-eu-recovery/>], Accessed on 16 January 2021.

⁹⁷ Blauburger; van Huellen, *op. cit.*, note 38, pp. 3-13.

⁹⁸ *Ibid.*, pp. 12-13.

⁹⁹ “... the Regulation ... represents the utmost of what can be done within the existing legal order of the Union”, since “the mechanism had to be limited to the ‘defence of the financial interests’ of the Union.” Gros, D., *The European Council's compromise on the Rule of Law Regulation, Capitulation to illiberal states or misplaced expectations?*, 2020, [<https://www.ceps.eu/the-european-councils-compromise-on-the-rule-of-law-regulation-capitulation-to-the-forces-of-evil-or-misplaced-expectations/>], Accessed on 21 March 2021.

3. NEXT GENERATION EU AND SOLIDARITY

Solidarity as an ethical value transverses the domains of law, politics and ethics, but as a legal principle, it lies in the very foundation of EU law.¹⁰⁰ As has been already noted in the introductory part of this paper, the EU has been facing several crises throughout the past decades, some of which transpired simultaneously. Solidarity was the principal basis of the EU response to the sovereign debt crisis, which put the Euro in danger. On that occasion, however, solidarity did not cause a widespread use of grants for helping heavily-indebted countries, and rescue mechanisms in the form cheap loans, tied to macroeconomic austerity, were used instead. The crisis, however, was not overcome until the ECB President Mr. Draghi pledged “to do whatever it takes”, referring to buying of bonds of the troubled Member-States by the ECB, which kept borrowing costs of such Member States sufficiently low.¹⁰¹ Solidarity was at the very core of the migration crisis that ensued. The EU did not even consider closing its borders for migrants altogether, *inter alia* due to its commitment to solidarity as an ethical value. It was solidarity as the principle of EU law that motivated the EU bodies to require that Member States share with Italy and Greece the burden of accommodating migrants, since the borders of those two countries were the primary entry points for the waves of migrants.

Whenever an assistance mechanism is analysed from the perspective of solidarity, one should assess whether there were other reasons at play, other than solidarity, that motivated the creation of such mechanism, e.g. pragmatic self-interest. In relation to the Eurocrisis, it is conceivable that the benefits of preserving the Euro outweighed the risks associated with extending loans to Greece, Italy, Spain and Portugal, as well as of not objecting to bond-buying by the ECB. By the same token, did certain countries of the EU, faced with the impending workforce shortages, impose the *de facto* opening of EU borders to waves of migrants in 2015-2017? In respect of the NGEU, the following assessment of Darvas is worth noting: “even if NGEU has only a modest effect on growth, all EU countries are net beneficiaries.”¹⁰²

The fact that the EMU is asymmetric is widely known: it is a monetary union lacking a corresponding fiscal union. A fiscal union would entail full mutual-

¹⁰⁰ Lukić Radović, M., *Solidarnost u pravu Evropske unije*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2018.

¹⁰¹ Dullien, S.; Theobald, T.; Tober, S.; Watt, A., *Why Current EU Proposals for Corona-Related Financial Aid Cannot Replace Coronabonds*, Intereconomics – Review of European Economic Policy, Vol. 55, No. 3, 2020, pp. 152-153.

¹⁰² Darvas, Z., *The nonsense of Next Generation EU net balance calculations*, Policy Contribution, Issue no. 03, 2021, p. 15.

ization of debt. One may argue that the Member States with low debt-to-GDP ratios have reasonable and legitimate reasons not to mutualize debt with heavily-indebted States, but it may be argued as well that unwillingness to mutualize debt raised for the purpose of absorbing shocks, which hurt indebted countries disproportionately more than those which are not so much indebted, is a symptom of a lack of solidarity. The optimal balance lies in between such extremes, remaining largely dependent on the level of political integration within the EU at any given point in time.

The shock-absorbing function of the common budget is important in federations,¹⁰³ and is an embodiment of the principle of solidarity among constituent members of a federated entity.¹⁰⁴ Alcidi and Gros rightly point to the fact that “the bulk of Next Generation EU is not expected to have a shock-absorbing function, ... its purpose resembles the traditional EU budget where common financial resources are pre-allocated at the beginning of programming period.”¹⁰⁵ Such assessment is in stark contrast with black letter law of the Council Decision on the system of own resources of the EU, authorizing the Commission to borrow EUR 750 billion on behalf of the EU “for the sole purpose of addressing the consequences of the COVID-19 crisis through the Council Regulation establishing a European Union Recovery Instrument and the sectoral legislation referred to therein...”¹⁰⁶ It seems as though it was important to nominally promote the shock-absorbing function of the NGEU, and, consequently, the perception of solidarity in the EU.

In this respect, and for the purpose of putting the NGEU into a wider historic perspective of EU and EMU constitutional dynamics, it may be worth reminding of the roadmap for ensuring resilience of the EMU, comprised in the report by Mr. Van Rompuy, the president of EUCO, of December 2012. The roadmap comprised three stages: first, ensuring fiscal sustainability and breaking the link between the sovereigns and the financial sector, second, completing the integrated financial framework and promoting sound structural policies, and third, planned for realization after 2014, improving the resilience of the EMU through the creation of a shock-absorption function at the central level. The third stage was more closely described as „establishing a well-defined and limited fiscal capacity to improve the absorption of country-specific economic shocks, through an insurance

¹⁰³ Alcidi, C.; Gros, D., *Next Generation EU: A Large Common Response to the COVID-19 Crisis*, Intereconomics – Review of European Economic Policy, Vol. 55, No. 4, 2020, p. 203.

¹⁰⁴ Gros, D., *Next Generation EU*, 2020, [<https://www.ceps.eu/next-generation-eu-2/>], Accessed on 21 March 2021.

¹⁰⁵ Alcidi; Gros, *op. cit.*, note 103, p. 203.

¹⁰⁶ Council Decision 2020/2053, Art. 5(3).

system set up at the central level.”¹⁰⁷ The mechanism of funding of the NGEU, as well as the planned purpose of NGEU funds, certainly make the NGEU a step in the direction indicated in the cited report.

Although NGEU is both a temporary and an *ad hoc* mechanism, not entailing a full-fledged debt mutualization comprising joint and several liability of Member States for each other’s debts, it is nevertheless of undisputedly historic significance, since it entails joint debt issuance by the Member States, as well as sharing of the burden of a very large recovery fund.

4. NET EFFECT OF NGEU – A STRONGER OR A WEAKER EU?

While the Covid-19 pandemic has attained historic proportions, the response of the EU to its negative economic consequences, in the form of the NGEU, seems to be on the path to gaining a commensurately historic significance for further EU legal, economic and political integration. The view that the pertinent legislative package represents one of the most ambitious EU integration projects so far¹⁰⁸ seems well justified for several reasons besides the sheer scale of the fund. From the perspective of its immediate effects, the package was a timely and adequate response to fears of the global markets in relation to the ability of certain EU Member States to withstand consequences of the Covid-19 pandemic. From a structural-constitutional perspective, the package entailed large-scale bond-issuance by the EU Commission and the mutualization of the debt thus created at the EU level. The recovery funds shall be to a large extent granted to those in need, whereas the repayment of bonds shall be shared equally, according to a *pro rata* allocation based on gross national incomes of Member States at the time of repayment. As concisely pointed out by Tridimas, the package “interlaces response to the pandemic with policy priorities,” and entails a substantial difference in comparison to the rescue mechanisms devised in response to the Eurocrisis, consisting in the fact that it had not been based on intergovernmental agreements outside of the Treaties, but was instead enacted within the realm of EU law.¹⁰⁹ The latter claim however seems excessively formalistic. It has been shown in the analytical parts of this paper that intergovernmental compromises in fact played a decisive role in the creation of the package. At this point in time it is difficult to predict which of the two facets of the package shall have a more pronounced

¹⁰⁷ Towards a genuine economic and monetary union, Report by the President of the European Council Herman Van Rompuy, 5 December 2012.

¹⁰⁸ Gros, D.; Blockmans, S.; Corti F., *Rule of law and the Next Generation EU recovery*, 2020 [<https://www.ceps.eu/rule-of-law-and-the-next-generation-eu-recovery/>], Accessed on 16 January 2021.

¹⁰⁹ Tridimas, T., *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, Croatian Yearbook of European Law and Policy, Vol. 16, 2020, p. 11.

long-term influence: the intergovernmental bargaining over particular interests of Member States, or the core substance of the package – the joint action required by solidarity, involving debt mutualization to certain extent, as well as the rule that every action of the Union, including an urgent response to a crisis with harsh economic consequences, must involve safeguards for respecting the core principles of the EU, rule of law in particular. It seems that from a future perspective, the latter shall be more prominent.

In view of the attempt by Hungary and Poland to blackmail the Council not to adopt the conditionality at the moment of dire need, of both the entire EU and certain of its less economically successful members in particular, for the recovery package to be adopted at the end of 2020, many voices in politics, law and academia have been asking whether a price tag was being attached to the commitment to rule of law. The question seems to have been misplaced for several reasons. First, mere linking, in the form of negative conditionality, of financial entitlements to the respect of rule of law does not necessarily mean that rule of law is supposed to be either sold or bought at a price. The second reason concerns the democratic legitimacy of the mechanism. Citizens of Member States which did not need the recovery package at all had the right to demand that their contributions to the recovery fund managed by the Union, and to grants in particular, be spent in line with the core values of that very Union; the citizens of Member States whose governments violate rule of law, on the other hand, should not benefit from EU funds if they continue to tolerate such governments.

In the multi-dimensional bargaining over the terms of the package, the inclusion of the rule of law conditionality was surely an important motive for the Frugal Four and Germany to accept grants and large-scale joint debt issuance. The reasons why Hungary and Poland accepted the conditionality, however, are less clear, since these two countries did not need recovery funds. Their acceptance probably may be only understood outside of purely legal/institutional framework. It is reasonable to assume that one of the reasons may have been the fear of the governments of those two Member States that they would face a strong negative backlash in domestic politics had they been perceived as the direct culprits for the failure of the EU to adopt the recovery mechanism, or forcing other Member States to circumvent the Treaties and adopt the new mechanism on an intergovernmental basis.

One should never overlook the fact that the legal basis on which the Regulation has been adopted defines its ultimate aim: protection of sound implementation of the EU budget, and not of the rule of law principle *per se*. Being aware of that fact, first, facilitates proper understanding of the Regulation and its potential ef-

fects, and second, puts an emphasis on the necessity of increasing direct political relations between EU bodies and EU citizens, since only increasing democratic accountability and legitimacy of EU bodies may successfully and sustainably counterbalance deficiencies of democratic governance at the level of Member States.

The fear, expressed by some authors,¹¹⁰ that the package has somehow diminished the importance of solidarity in the EU constitutional framework, by coupling solidarity with conditionality, does not seem justified. First, as has been already noted, the large-scale joint debt-issuance, for the purpose of securing limited fiscal capacity with a shock-absorbing function at the central level, is a strong expression of solidarity. Second, the package seems to be the result of a considerable level of solidarity among Member States, in view of the fact that a substantial portion of the package comprises grants, as well as that there was no systemic risk for “frugal” Member States, which would make their participation in the recovery fund pragmatic. Both of these reasons represent marked differences in comparison with the circumstances and the EMU response to the Eurocrisis. Third, the manner in which the negotiations from July to December 2020 developed makes it obvious that in the present constitutional set-up of the EU the adoption of the package represents an outstanding achievement, opening the possibility of subsequent steps along the same normative path in the future. Although the NGEU is not a permanent mechanism, it clearly sets a precedent on the basis of which a more lasting solution may be devised in the future.

The Regulation by no means represents a valuable addition to the set of tools at the disposal of the EU Commission for safeguarding rule of law at the Member State level, complementary to the existing mechanisms. The controversies over the terms of its application should not cloud the broader view, which should take into account that adherence to the principle of solidarity enabled the EU to generate a globally competitive response to the Covid-19 crisis, and, at the same time, that the severity of that crisis could not have been exploited by certain Member States to prevent the EU from including the rule of law conditionality in the Regulation altogether. The attempt by such Member States to profit from the urgency of the recovery package, and the limited success these states realized in relation to delaying the application and limiting the scope of the Regulation, clearly shows that the constitutional set-up of the EU has reached the limits of intergovernmentalism, as well as that the core values of the EU may only be adhered to if political responsibility and political powers at the EU level are increased. The reason

¹¹⁰ Fiscaro proposed the view that the Regulation marks a departure from the long-held paradigm of the decoupling of solidarity and conditionality in EU constitutional matters, paraphrasing the famous collocation by Schuman “*de facto* solidarity” as “*de facto* conditional solidarity.” Fiscaro, *op. cit.*, note 41, p. 718.

is pretty straightforward – EU citizens, as individuals, are much more prone to pursuing values, such as rule of law and solidarity, than Member States, whose responsibilities may be distorted by self-serving interests of their governing political structures. Relying on the dichotomy from the Commission’s 2019 Blueprint for action, it may be concluded that the extent to which the Europeans may promote rule of law as their shared value seems to be far greater than the extent to which rule of law may be upheld by the Member States as their shared responsibility.

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