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CONDITIONALITY OF EU FINANCIAL TRANSFERS - THE SHAKY HISTORY OF A LEGITIMATE SAFEGUARD FOR THE RULE OF LAW

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Conditionality of EU Financial Transfers – The Shaky History of a Legitimate Safeguard for the Rule of Law[1]

Peter Schiffauer

Abstract

The perspective of substantial enlargements following the end of the Cold War and the criteria set up for that sake at the 1993 Copenhagen European Council also gave cause for concern that the political order in an EU Member State might be reversed subsequently to adhesion. Under the EU-Treaties there is no explicit obligation of Member States to comply with such standards as set out for the adhesion. An instrument designed to protect the EU-system against any reactionary revolution in a Member State was established in the 1997 Amsterdam-Treaty. Since then it proved, however, to be an ineffective remedy in any of the cases where values enshrined in the EU-Treaties were gradually eroded. Therefore, the idea of making financial transfers within the EU conditional on the compliance with EU-values was considered in some Member States being net contributors to the EU budget. It was endorsed by the EU-Parliament and eventually retained in a Commission proposal for an EU regulation. This paper refers to the various stages of the EU legislative procedure: the proposal's main features as conceived by the Commission and modified in Parliament's first reading, the reactions at the level of the Council and the European Council, the institutional and political links of that debate with the EU multiannual financial framework 2021-2027 including the extraordinary Next Generation EU instrument. The paper explains the circumstances under which the proposed regulation was adopted, notably the arrangements agreed by the European Council concerning its application. Having regard to the established facts and considering possible alternative options available for attaining the envisaged political aim, the paper sheds light on the political accountability for the measure and evaluates its input and output legitimacy.

[1] This paper was first presented at a workshop on "EU Economic Governance and the COVID-19 Pandemic" as part of a project on "Representative Democracy in Pandemic Times: Decline or Resilience?" organised on 20 November 2020 by the Willy Brandt Centrum of the University of Wrocław in cooperation with the German Academic Exchange Service. It was subsequently updated to take into account the developments until April 2021. The author is Honorary Professor of the Faculty of Law and Deputy Director of the Dimitris-Tsatsos-Institute for European Constitutional Sciences at the FernUniversität in Hagen. The author thanks Tamás Lukacsi for his valuable comments as well as Gabriele Goetz, Sofia Marie Wolter and Lisa Maria Mennekes for proofreading and useful suggestions.

1. Introduction

The issue of making financial transfers within the European Union conditional on the respect of the Union's values has been discussed since tendencies of "democratic backsliding" began to emerge a few years after the Union's substantial enlargement in 2004.[2] That discussion has taken stock of the effectiveness of macroeconomic conditionality to which the management of EU funds was made subject earlier[3]. Concomitantly with public awareness of liberal values being threatened, the acceptance of protecting them through a conditionality mechanism increased significantly.

"77% of respondents across the EU agree: EU funds benefits should be made conditional upon the national government's implementation of the rule of law and of democratic values." These are the conclusions of a survey carried out by Kantar for the European Parliament, published on 12 October 2020[4].

Setting aside any doubts that may legitimately be raised against the pertinence of such surveys, the above findings might induce the conclusion that democratic principles did not leave any choice to the EU but to make benefits from EU funds subject to a conditionality rule. In doing so, the EU only follows the example of Norway. On the basis of the EEA-agreements Norway is compensating with the "European Economic Area and Norway Grants system" for its access to the EU internal market. But in 2014 the total of 214 million euro of grants attributed to Hungary for the period of 2014-21 was suspended because the Hungarian government had sought too much control over how the money was to be spent. In February 2020 Norway froze 65 million euro of funding for Polish courts after becoming concerned about a loss of judicial independence in Poland[5].

At the level of the EU, however, things were not thus simple.

- Firstly, albeit the European Treaties explicitly recognise democracy and the rule of law as values on which the European Union is founded and which are common to its Member States (Art. 2 TEU), there is legal uncertainty about how the respect of these principles can be imposed. This is explained in section 1.
- Secondly, the EU may not just legislate as appears best to its law-making bodies. The validity of any action by EU bodies depends on a specific conferral that must be laid down in the EU-Treaties. The implications for the adoption of a conditionality measure are discussed in section 2.

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2 *I. P. Karolewski*, Democratic backsliding and the Future of Democracy, Concilium Civitas Almanac-2020-2021; more specifically L. PECH, K. L. SCHEPPELE are referring to a "rule of law backsliding": Illiberalism Within: Rule of Law Backsliding in the EU, in Cambridge Yearbook of European Legal Studies, 2017, p. 3 et seq.

3 The European Council of 17-21 July 2020 agreed to maintain the mechanisms to ensure a link between Union funding policies and economic governance in the Union's Member States (Conclusions para. 69).

4 At least 70 percent of respondents said they either totally agree or tend to agree with the rule-of-law requirement, in all EU countries except the Czech Republic (where the number is 59 percent). 54 percent said the EU should have a bigger budget to overcome the pandemic crisis.

5 *Ch. Duxbury*, POLITICO, 12.10.2020, https://politico.eu/article/eu-rule-of-law-norway-makes-offenders-pay/

- Thirdly, the draft regulation[6] proposed by the EU Commission in May 2018 aimed at preventing any misuse of the Union's budget that is due to shortcomings in the respect of the rule of law in a Member State. Its contents is illustrated in section 3.
- Fourthly, substantially different positions evolved in the European Parliament, in the European Council and the EU Council; moreover, a political link has been made between the conditionality mechanism and the adoption of the Union's upcoming multiannual financial framework as well as the specific recovery effort under Next Generation EU (Recovery and Resilience Facility)[7]. The arrangements made for overcoming those complications are illustrated in section 4.
- Fifthly, notwithstanding the broad support for the conditionality of financial transfers in the popular and in the political sphere, serious arguments might put into doubt the legitimacy and usefulness of making financial transfers conditional on respect of the rule of law. Such arguments are discussed in section 5.

2. Do the European Treaties oblige EU Member States to comply with its values?

To put it bluntly, this is not entirely clear.
For a better understanding, a short excursion into the legal matter therefore appears useful. In accordance with the 1993 Copenhagen criteria (now laid down in art. 49 TEU), the respect of the rule of law is a condition for the adhesion of any new Member State to the European Union. But once the adhesion of a Member State is accomplished there is no provision explicitly ordering it to maintain compliance with the rule of law.

The first sentence of Article 2 TEU enumerates the values on which the Union is founded and does not refer to its Member States. The second sentence states that these values (i.a. respect of the rule of law) are common to the Member States. Article 7 TEU provides for a specific procedure in case a Member State seriously and persistently fails to comply with these values. Requiring unanimity, that procedure was never accomplished.

It is an open question whether or not the EU Member States are legally bound by the Union's values[8]. In legal language, it is not uncommon for an obligation to be expressed in the indicative modus as is the case in the second part of Article 2 TEU. It is uncertain whether or not the Court of Justice of the EU would consider the procedure set out in Article 7 TEU as a special one that excludes other remedies provided by the Treaty. To date neither the EU-Commission nor any Member State has brought a case to the Court of Justice of the EU in

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6 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 (2018/0136(COD)).

7 Proposal for a Regulation of the European Parliament and the Council establishing a Recovery and Resilience Facility (2020/0104(COD)).

8 For a deepened theoretical analysis see *R. Christensen*, Was bedeutet Pluralismus für die Werte Rechtsstaat und Demokratie in Art. 2 EUV, in: P. Schiffauer (ed.), Europa bedroht von innen und von außen?, Berlin 2020, p. 47 – 75.

accordance with Articles 258 or 259 TFEU only on the allegation that specific measures of a Member State are in breach of Article 2 TEU[9].

Article 6 TEU leaves no doubt that the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union have the same legal value as the Treaties. Pursuant to the Charter's Article 47, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to a fair and public hearing and an effective remedy by an independent impartial tribunal previously established by law. In other words: The Charter obliges Member States to respect the independence of the national judiciary whenever the latter is dealing with rights and freedoms flowing from the European Treaties.

An identical obligation flows from Article 19 TEU as understood by the European Court of Justice[10]. This provision gives concrete expression to the value of the rule of law affirmed in Article 2 TEU (47). Member States must establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law (48). The requirement for courts to be independent is part of the right to effective judicial protection and the fundamental right to a fair trial (58). When exercising their competences regarding the organisation of justice, the Member States are required to comply with their obligations deriving from EU law (52).

The principles of legality and proportionality enshrined in Article 49 of the European Union Charter of Fundamental Rights are another concrete expression of the rule of law. In its judgment "Taricco 2"[11] the European Court of Justice recognised that the respect of these principles may set limits even to the implementation of its own case law.

At the present state of the European Court's case law not every aspect of the rule of law that may be recognised in legal doctrine is likely to be reflected by a concrete legal obligation of Member States under the European Treaties. However, the statement that these Treaties oblige Member States to guarantee the independence of their judiciary can be made on safe grounds.

The question now is, how that obligation can be enforced if need be.

3. Does the EU have the means to defend the judiciary's independence?

The 1997 Treaty of Amsterdam conferred to the Council the power to impose sanctions on a Member State that is seriously and persistently in breach of the Union's values. Currently

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9 In the cases brought to Court against Hungary and Poland because of shortcomings of the judiciary's independence, the European Commission was not alleging infringements of the general values set out in Article 2 TEU, but of specific obligations such as specified in Article 19 TEU, Article 47 of the Charter of Fundamental Rights of the European Union or Directive 2000/78/EC on equal treatment in employment and occupation (see the judgments of the Court in cases C-619/18 and C-286/12).

10 See judgment of 24 June 2019 in case C-619/18, ECLI:EU:C:2019:531; in the following the numbers in brackets are referring to the respective paragraphs of the judgment; in the same vein judgment of 5 November 2019 in case C-192/18.

11 Judgment of 5 December 2017 in case C-42/17.

enshrined in Article 7 TEU, this power in theory could be dissuasive, in practise it is not. The lack of effectiveness is not so much due to the label of "nuclear option" that is frequently attributed to the provision with a view to the possible suspension of a Member State's voting rights. Reading the provision carefully, it allows to suspend in a measured and proportionate manner "certain of the rights deriving from the application of the Treaties". This could e.g. include cuts in the benefit of financial transfers. Rather, the ineffectiveness stems from the fact that a unanimous Council decision is required to determine the existence of a serious and persistent breach of the Union's values by a Member State, with the State concerned not taking part in the vote (Articles 7(2) TEU and 354(1) TFEU). The provision was conceived as a safeguard against a possible violent overthrow of democratic governance. Fears existed that such a possibility could not a priori be excluded, notably with a view to States newly adhering to the Union. At that time, nobody imagined scenarios of widespread discontent in the citizenry with the consequences of the transformation process, bringing to power, through democratic elections in more than one Member State, political forces that openly challenge occidental constitutional values and mutually backing each other. When at the times of the Berlusconi-governments in Italy and the first ÖVP-FPÖ government in Austria concerns of democratic backsliding were voiced, the first attempts to make use of the procedure of Article 7 TEU were soon paralysed by cross party solidarities. No wonder that, apart from a few debates held at the EU Council, there was no tangible outcome of the proceedings pursuant to 7 that were initiated by the European Commission against Poland and by the European Parliament against Hungary.

The classical instrument for counteracting a Member States' lacking compliance with the European Union law is the infringement procedure. The EU Commission (Article 258 TFEU) or a Member State (Article 259 TFEU) can bring an action to the European Court of Justice. When the Court finds that a Member State has failed to fulfil an obligation under EU law, this State is required to take the necessary measures to comply with the judgment. If the State fails to do so, upon a renewed action by the Commission the Court may impose a lump sum or penalty payment on it (Article 260 TFEU). The Member States' obligation under Article 19 TEU to provide for the judiciary's independence were already recognised by the Court in a precedent concerning the salaries of Portuguese judges[12]. On such grounds the Commission on 2 October 2018 brought an action against Poland. In its judgment of 24 June 2019[13] the Court held that by lowering the retirement age of judges in post of the Supreme Court (Sąd Najwyższy) and by granting the President of the Republic the discretion to extend the activity of these judges beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. On 25 October 2019 the Commission brought a second case against Poland. In the Commission's view the powers and the lack of independence of the disciplinary chamber of the Supreme Court (Izba Dyscyplinarna Sądu Najwyższego) and certain disciplinary powers of the Minister of Justice are in breach of the guarantee of the independence of the Polish judiciary enshrined in Article 19 TEU. On 8 April 2020 the Court's Grand Chamber ordered[14] Poland to suspend until the date of the final judgment the application of the relevant provisions and to abstain from

12 Judgement of 27 February 2018 in case C-64/16.

13 Case C-619/18.

14 Case C-791/19 R, ordonnance de la Grande Chambre (not available in EN); the final judgment is still awaited at the time of finalising the present text.

submitting disciplinary cases to a judicial body that does not comply with the requirements of independence set out in the Court's judgment of 19 November 2019[15]. In April 2020 the EU Commission launched another infringement procedure with a view to safeguard the independence of the Polish judiciary[16].

In theory and neglecting the time-factor, the European Union institutions seem to dispose of appropriate legal powers allowing to defend the independence of the judiciary. In practice, notwithstanding the European Court's order, in October 2020 several judges have been convened to hearings in procedures under the disputed provisions before the disciplinary chamber and at least two judges have been deprived of their immunity under Polish law. In an open letter, eminent legal authorities have urged the Commission President to return to the Court of Justice to apply for a penalty payment regarding the continuing violation of its order of 8 April 2020[17]. It is, however, an unsettled question[18] whether the Court may impose a penalty on a Member State in case of non respect of an order imposing an interim measure. The Court's power to impose penalties under Article 260 TFEU is explicitly provided for only in the event of non-compliance with a judgment. Legal hermeneutics may allow to extend that power beyond the wording of the provision on the grounds that only by doing so the power attributed to the Court under Article 279 TFEU will have real effect. For the Court it would be delicate to decide this matter since its own powers are at stake. The Commission apparently prefers to move on safe grounds so that the final judgment will have to be awaited before any further steps are taken.

The matter is also politically delicate. The Polish government has clearly stated that it considers matters concerning the organisation of the judiciary to be its sovereign prerogative. For political rather than legal grounds it may appear preferable for the Commission to rely on the support of a qualified majority of Member States rather than on the determination of federal bodies when insisting on the independence of a Member State's judiciary. Today's European Union is, at best, a polity in the making. The binding force of its law must not be overestimated and overstretched. In the absence of coercive powers, over-stretching the scope of supranational law could induce generalised attitudes of non-compliance. That would cause serious damage to a Union built on the law.

The doubtful practical effectiveness of legal remedies justifies the search for a meaningful policy instrument that satisfies two conditions:

- To be effective, such an instrument must be sufficiently persuasive to motivate governments to refrain from infringing on the independence of judicial bodies.
- A specific provision of the EU Treaties must allow for its adoption by the Union.

15 Cases C-585/18, C-624/18 et C-625/18, EU:C:2019:982.

16 European Commission Press Release IP/20/772 of 29 April 2020.

17 Open Letter by Laurent Pech, Kim Scheppele and Wojcjech Sadurski to the President of the European Commission regarding the rule of law Breakdown in Poland, 28 September 2020, available at https://verfassungsblog.de/before-its-too-late/

18 The question is not even raised by Grabitz/Hilf/Nettesheim/Karpenstein, 71. EL August 2020, AEUV Art. 260 Rn. 78.

4. Can compliance with the rule of law be achieved by protecting the Union's financial interests?

Compliance of the Member States' judiciary with the rule of law has a tangible impact on the functioning of the area of freedom, security and justice (Articles 67 – 89 TFEU) and on the functioning of the internal market (Articles 26 – 29, 45 – 66 TFEU). But none amongst these provisions allows for the adoption of any measure that could dissuade Member States from breaching the rule of law. A measure of this kind would, however, in any case aim at attaining the objectives of the Treaty. Theoretically, the European Union therefore could adopt it making use of the general complementary competence under Article 352 TFEU. In reality, however, it would never be adopted. As Article 352 TFEU requires unanimous approval by the Council, any Member State having an issue with the rule of law could block it. The adoption of any effective measure for the purpose specified above is unlikely, unless it is possible by a majority vote.

The protection of the Union's financial interests is the only promising instrument that could be identified under such legal and political conditions. Article 322 TFEU allows adopting financial rules for implementing the Union's budget in accordance with the ordinary legislative procedure. It has already been settled that financial transfers under the existing EU Structural and Investment Funds are subject to so-called "macro-economic" conditionality[19]. On such grounds it has been suggested in the European Parliament and in a wider public hat financial transfers in the EU should also be conditional on the beneficiary Member States' compliance with the rule of law.

The EU Commission concluded[20] that there is indeed a link between mutual trust between Member States and respect for the rule of law. It may, indeed, become a matter of serious and common concern within the European Union when generalised weaknesses in national checks and balances show a lack of respect for the rule of law. Political and legal control mechanisms cannot be effective unless supported by remedies in the case of wrongdoing. Therefore the Commission recognised the need to protect the Union's financial interests against the risk of financial losses caused by generalised deficiencies as regards the rule of law in a Member State. Among the relevant deficiencies, the Commission notably referred to irregularities in public procurement and grant procedures, to shortcomings in the prevention, prosecution and sanctioning of fraud or corruption in relation to the implementation of the EU budget and to an effective judicial review regarding such matters. Endangering the independence of judiciary and limiting the availability and effectiveness of legal remedies would in particular be considered as relevant deficiency. The deficiency could e.g. consist in restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation,

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19 See Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 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 ... etc., notably Article 23, OJ L 347, 20.12.2013, p. 320–469, last amended by Regulation 2020/1542 of 21.10.2020, OJ L 356, p. 1.

20 The arguments and evaluations in the following paragraph are drawn from the Commission proposal of 2 May 2018 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 (2018/0136(COD)).

prosecution or sanctioning of breaches of law. When such conditions are fulfilled, payments from the EU budget could be suspended and new commitments prohibited in accordance with the proposal. The Commission would first need to notify the grievances to the Member State concerned and consider all information provided by the latter. If the Commission considers, in the light of all this, a relevant deficiency being established, it would be bound to submit a proposal of the measure to be taken to the Council. That measure would be deemed adopted unless rejected or modified by the Council acting by a qualified majority (reversed qualified majority). Such a decision-making procedure would allow to overcome political hesitations at Council level while fully involving the latter with the political responsibility for the measures taken.

Based on legal considerations drawn from case law the proposal bridged the gap between the protection of the Union's financial interests and the protection of the Union's values. Thus the Commission could be confident to develop a tool the financial impact of which would persuade Member States' political authorities to abstain from acting to the detriment of the rule of law. Since adoption would not require unanimous agreement by the Member States its coming into effect had a fair chance. By submitting the legislative proposal to Parliament and Council on 2 May 2018 the Commission set in motion a process that triggered a major political crisis but eventually increased pressure on EU Member States to comply with their rule of law obligations.

5. Which political circumstances allowed adopting the EU conditionality mechanism?

The first reactions to the Commission's proposal were diverging. In the European Parliament a clear cross-party majority strongly supported measures ensuring effective implementation of the Union's values. Thus the proposal was generally welcomed and attention focussed on possible improvements. Governments of Member States importantly contributing to the EU budget welcomed the proposal too. The reactions of governments of Member States substantially benefitting from the EU budget were not uniform. Not surprisingly, the governments already facing a procedure under Article 7 TEU bluntly opposed the proposal and threatened to use any veto power they may have. Being subject to the ordinary legislative procedure, the adoption of the proposed regulation required an agreement between a majority in the European Parliament and a qualified majority in the Council. It could not be taken for granted to bring about such a majority in the Council, and if so, it was still difficult to work out an agreement in the usual procedure of trilogues involving also the Commission.

An additional complication resulted from the political linkage with the "1.8 trillion budget package" negotiated simultaneously in the Covid-19 year 2020. This package comprised the Union's multiannual financial framework for 2021 – 2027, together with the extraordinary efforts[21] to recover from the economic fallout of the COVID-19 pandemic. For the first time

[21] These efforts notably comprise the Recovery and Resilience Facility (2020/0104 (COD), the key programme of the European Union Recovery Instrument and part of the revised multiannual financial framework), the REACT EU under the structural and cohesion funds and the amended proposals for the European Fund for Strategic Investments (EFSI) and InvestEU. An initial instrument for temporary support

in the Union's history this package envisaged raising funds on the capital markets on behalf of the Union up to the amount of 750 billion euro.

The same majorities are required for the adoption of the EU legislation needed to implement the various elements of this package as for a general conditionality mechanism. Provided that a majority of Parliament and a qualified majority in Council proved sufficient political will, rule of law conditionality could be achieved throughout the implementing legislation either by referring to a general conditionality mechanism or by inserting conditionality clauses in every piece of legislation. The real complication stemmed from the need to provide resources for the intended programs. Pursuant to Article 322(2) TFEU the adoption of the Union's multiannual financial framework requires unanimity of the Council and the consent of the majority of the European Parliament's component members. Moreover, only by amending or replacing the decision on own resources[22] the Union could be enabled to borrow the intended substantial amounts on the capital markets. Pursuant to Article 311 TFEU on top of unanimity in Council that modification requires ratification in accordance with the constitutional requirements of the Member States. Because of the interdependence described above, the adoption of a conditionality mechanism could not be expected until it was certain that the budgetary arrangements would not be blocked by a government disapproving its being outvoted on conditionality or acting under the threat of the respective parliament to withhold the required ratification. Under such circumstances it was quite uncertain whether the proposal would ever be adopted.

Moreover, the positions worked out in the European Parliament and in the Council showed significant differences.

The European Parliament adopted a negotiating position on 17 January 2019[23] and confirmed it as its position at first reading on 19.4.2019[24]. The parliamentary debates had highlighted certain weaknesses of a rule of law conditionality mechanism. Seeking a remedy only when a breach of values has already caused a negative financial impact was considered as too late. The assessment of compliance with the rule of law only by political bodies, be it the Commission or the Council, appeared questionable. Sanctioning non-complying governments by suspending payments under EU programs would risk effectively hitting final beneficiaries, who in most cases would bear no responsibility for the breach of values. To counteract such weaknesses of the Commission proposal, Parliament amended it on the basis of a cross-party compromise, notably by

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to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak was already adopted on 19 May 2020 (Council Regulation (EU) 2020/672, OJ L 159, 20.5.2020 p. 1 ss.).

22 Decision 2014/335/EU of 26 May 2014, OJ L 168, 7.6.2014, p. 105 ss.

23 T8-0038/2019; the position is not accompanied by a legislative resolution; this leaves the door open for any modifications that may subsequently become desirable in order to achieve an agreement with the Council.

24 T8-0349/2019; the reason is to be seen in Parliament's discontinuity rule (currently Article 240 of its rules of procedure) that provides for all non finished businesses to lapse at the end of the parliamentary period. Adoption of the position in first reading at that stage had the advantage of avoiding the need to start the deliberations all over again subsequently to the May 2019 elections. However, it leaves the Council with the choice of either adopting its position right away (with the risk of an unpredictable conciliation procedure in case of any disagreement with Parliament) or negotiating an agreement with Parliament that secures the adoption of the act at second reading.

- enlarging the regulation's scope to cases of serious risks for the Union's financial interests;
- backing the Commission's assessments by a panel of independent experts in constitutional law and financial and budgetary matters;
- safeguarding the interests of the final beneficiaries of the budgetary funds by providing for a transfer of the suspended payments to the budgetary reserve, while obliging the Member State concerned to fully compensate the final beneficiaries;
- modifying the decision-making procedure to a Commission implementing act, which enters into force subsequently to the Parliament's and Council's approval of the budgetary transfers of the suspended amounts.

The European Parliament elected in May 2019 endorsed this position and on 13 November 2019 announced its intention to enter into interinstitutional negotiations.

When the Council started to scrutinise the proposal in the autumn of 2018, certain voices objected to its incompatibility with the Treaties[25]. The governments in favour of rule of law conditionality pursued the objective of having such an instrument adopted in time for the implementation of the multiannual financial framework 2021 – 2027 (MFF). Progress stalled in 2019 due to the European elections and the investiture of the new Commission. When the conditionality issue was again put on the table by the Finnish presidency in the first half of 2020, the governments of Poland and Hungary disagreed, pointing out that they were in a position to block the MFF and the envisaged decision that would allow the Union to raise the funds needed for its economic recovery program on the capital markets. Given that at the time these states were not amongst the most severely hit by the COVID-related economic downturn, their threat had certain credibility. Moreover, the budgetary envelopes demanded by the European Parliament for the next seven years were significantly higher than the ceilings considered in the Council. All this threatened to result in a deadlock of intersecting veto-rights. That was a sufficient reason to bring the matter before the European Council at the beginning of the semester of the German Council presidency, which had explicitly expressed interest in a conditionality mechanism. In an unprecedented marathon session from 17 to 21 July 2020 a compromise between Heads of Government and States was achieved on the various components of the package, including common language on the conditionality mechanism. For the MFF 2021 – 2027 an overall amount of 1,074.3 billion euro was agreed. On top of this, a consensus was reached to support the recovery and resilience of the Member States' economies by means of an extraordinary effort under the title "Next Generation EU". Exceptional grants and loans up to an amount of 750 billion euro would be financed through funds borrowed by the Commission on the capital markets. The decision on the Union's own resources would be modified to authorise the Commission to do so[26]. Regarding the conditionality issue unanimity was reached on the following wording:

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25 An assessment of the Commission proposal's compatibility with the Treaties was presented by the Council legal service of 25 October 2018 (Council document 13593/18). The legal service notably insisted that the chosen legal base would justify the proposed measures only when it is established that a breach of the rule of law affects in a sufficiently direct way the sound financial management of the EU budget.

26 Conclusions of the European Council meeting of 17, 18, 19, 20 and 21 July 2020, notably paragraphs A1, A2, A5, A23.

> *"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. The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law."*[27]

None of the arrangements forming the European Council's compromise had immediate effect. Arrangements of this kind indicate what is acceptable to all governments. However, they still needed to be incorporated in EU legal acts adopted by the Union's institutions in accordance with the relevant procedures. The agreements reached by the European Council naturally exert strong leverage on the Union's other institutional actors, in particular the Council, while the European Parliament not only in theory[28] disposes of a real margin of autonomy, when sufficiently strong convictions are shared in the House across its political groupings. This was the case regarding both the amounts needed for the MFF and the determination to effectively defend the respect of the Union's values[29]. In a joint letter of 26 August 2020[30] the Presidents of the groups EPP, S&D, Renew Europe and the Greens (together representing 498 out of 707 MEPs) explicitly stated that without formal conclusion of the legislative procedure establishing a conditionality mechanism it will be impossible for them to advance on the MFF.

The Council thus was trapped in the dilemma of intersecting veto threats. As long as the proposed conditionality mechanism was not adopted, Parliament would withhold its consent to the MFF. If it were approved by a qualified majority of the Council against the votes of Hungary and Poland, these governments would withhold their approval of the MFF and of the decision on own resources. In order to bring the matter forward, the German presidency worked out a compromise proposal for a conditionality mechanism endeavouring to conform to the guidelines agreed by the European Council. This document was approved by COREPER on 30 September 2020[31] as the mandate for negotiations with the European Parliament. The main deviations from the Commission proposal are

- the conditionality mechanism would not address "generalised deficiencies", but merely concrete "breaches of the principles" of the rule of law;

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27 Ibid. A24.

28 Cf. the freedom of the parliamentary mandate guaranteed in Article 6 of the Act concerning the election of the Members of the European Parliament by direct universal suffrage (OJ L 278, 8.10.1976, p. 5, renumbered by art. 2(1) of Council decision 2002/772, OJ L 283, 21.10.2002, p.1).

29 See e.g. already Parliament's resolution of 14 November 2018 on the Multiannual Financial Framework 2021-2027, P8_TA(2018)0449, para. 31.

30 Made public via Twitter on 26 August 2020, 2:58 p.m.

31 Council document 11045/1/20 REV 1; according to press reporting (Der Spiegel Politik online 30.9.2020) the representatives of seven Member States (notably Hungary and Poland) voted against the proposal. The parallel developments and negotiations regarding the MFF cannot be reported in this paper.

- the mechanism would only apply where breaches of the principles of the rule of law affect in a sufficiently direct way the sound management of the EU budget[32];
- the final decision to trigger the mechanism is taken by the Council.

Trilogue negotiations on the conditionality mechanism between Council, Commission and Parliament representatives took place on 12, 20, 27 and 29 October. On 5 November 2020 negotiations were concluded with a provisional agreement[33].

In the European Parliament spokespersons for the political groups welcomed the provisional agreement. The committees on budgets and on budgetary control endorsed it in principle on 12 November[34]. The agreement secured substantial claims of the European Parliament. In addition to corruption and fraud the scope of the regulation includes systemic aspects of compliance with the Union's values, notably the independence of the judiciary and access to justice. Measures can be taken not only when shortcomings in such fields directly affect the implementation of the Union's budget, but also when there is a serious risk thereof. In order to protect the interests of the final beneficiaries, an electronic complaint procedure will enable them to pursue their interests with the active support by the European Commission.

The agreement also met major concerns of the Council by requiring a sufficiently direct impact on financial management, shifting final decision-making to the Council and providing for the possibility that the matter is discussed by the European Council before a decision is taken. While the Council presidency warmly welcomed the agreement, Janusz Kowalski[35] commented it with the words: "Veto albo śmierć". Hungarian Prime Minister Orbán and Polish Prime Minister Morawiecki reiterated the threat of blocking the EU budget[36]. In Council the agreed text was submitted to COREPER on 16 November, together with the draft decisions on the MFF and the own resources. The presidency took note of the existence of a qualified majority in favour of the agreed text on the conditionality mechanism. However, the representatives of Hungary, Poland and Slovenia were not in a position to notify their approval of the drafts on the MFF and the own resources, as it is required for proceeding further with their adoption. Since all three texts were considered to form a 'package', the presidency did not forward any of them to the Council for final approval. On 17 November the General Affairs Council confirmed this state of affairs, with the Polish minster showing more openness to compromise solutions than his Hungarian colleague. On 18 November the European Parliament's Conference of Presidents reconfirmed the deal reached with the Council on the MFF and the regulation on rule of law conditionality, excluding any further concession on Parliament's side[37].

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32 The criterion of a sufficiently direct link between the breach of the principle and sound financial management was initially pointed out by the Council legal service. In order to justify the use of Article 322 TFEU as legal basis such a link must exist and be direct. This argument has most likely weighed on the final deliberations.

33 Council Press Release 750/20.

34 The draft provisional agreement was made available on the website of the European Parliament under https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/BUDG/DV/2020/11-12/RuleofLaw-Draftconsolidatedtext_rev_EN.pdf

35 Polish MP, since 2019 secretary of state at the Ministry of State Assets.

36 Der Spiegel online – Politik, 9.11.2020, quoting AFP; Agence Europe Bulletin 12598 of 10.11.2020 pt. 10.

37 EP Press Release 20201118IPR91990 of 18.11.2020.

Thus the decision-making process became stuck. Observers warned of conjuring up a deep crisis in the middle of the worst economic downturn in EU history. The issue was first raised at a virtual conference of the EU Heads of State or Government and on 19 November. The need for further negotiations was acknowledged. But apparently there was no margin of manoeuvre for a renegotiation of the conditionality mechanism. Several members of the Council were unwilling to reopen this dossier. The major political forces in the European Parliament showed strongest determination to stick to the agreed text and to withhold the consent needed for the adoption of the MFF unless the generalised conditionality mechanism is adopted. The way out could only be found within the sphere that is under the control of the European Council.

The matter became a topic of controversial public debate. One of the options discussed was to move straight forward. Poland and Hungary very substantially benefit from financial transfers under the EU budget. Obstructing the MFF would put those benefits at risk. However, the functioning of the EU would not really be blocked in the absence of the new MFF. Pursuant to art. 312(4) TFEU the ceilings and other provisions established in the current MFF for the financial year 2020 would have continued to apply until a new MFF is adopted. As the ceilings for 2020 were at the time conceived for a Union comprising the United Kingdom, the Union's existing own resources would not have been sufficient to fully utilise those ceilings. This would have probably resulted in losses for the countries benefitting most from financial transfers. The new decision on own resources agreed by the European Council of 17-21 July [38] notably should have enabled the Union to borrow from the capital markets the funds needed for the COVID-recovery program. This was broadly welcomed as a qualitative step towards the Union's deeper integration. If it were blocked the countries most affected by the first wave of COVID in spring 2020 would suffer most and the efforts to deepen financial solidarity within the EU would be spoiled. However, in case if a joint and several EU indebtedness were blocked, other means of financial engineering could have been imagined for raising the funds allocated to the intended recovery program. They could e.g. have been made available through an instrument under international law similar to the stability mechanism ESM[39], concluded amongst the States participating in the Euro with a possibility to opt in for other EU Member States wishing to do so.

Moving straight forward in the described manner could have proven determination in defending the rule of law. It would have, however, also risked causing a heavy political clash amongst EU Member States. Because of the manifold interdependences between them, it is good practice to iron out such conflicts at the level of the European Council by compromises saving the face to either side, allowing continued cooperation. It was therefore hoped and expected that at the conclusion of the German presidency the European Council will find a suitable compromise formula addressing the concerns expressed by the Hungarian and Polish Government. The conditionality mechanism could hardly be dropped or changed. Thus any understanding had to focus on the implementation of the mechanism, in particular defining modalities excluding subjective criteria and political bias.

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38 Council document 10046/20 of 10 October 2020.

39 The instrument could be designed as a Eurozone instrument with the possibility of opting in for Member States wishing to do so.

This is exactly what happened at the meeting of the European Council on 10 and 11 December 2020. The Heads of Government and States brokered an agreement consisting of 11 concrete points addressing the regulation's interpretation and application[40], which can be resumed as follows:

- The regulation will be applied in an objective, fair, impartial and fact-based manner in accordance with any relevant judgement of the EU Court of Justice, respecting the principle of proportionality, the subsidiary character[41] of the regulation and its aim to protect the Union budget against any kind of fraud, corruption and conflict of interest in accordance with guidelines to be set up by the Commission in close consultation with the Member States.
- The triggering factors set out in the regulation are to be read and applied as a closed list; the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism.
- The regulation will apply as from 1 January 2021 and may only affect budgetary commitments starting under the new MFF, including Next Generation EU; should an action for annulment be introduced with regard to the regulation[42], the mentioned guidelines will be finalised after the judgment of the Court of Justice and the Commission will not propose measures under the regulation until the guidelines are finalised.
- Prior to any formal opening of a procedure a thorough dialogue will give the Member State concerned the possibility to remedy the situation; if in the course of a procedure a Member State so requests the European Council will deal with the matter and strive to formulate a common position; any measure decided by the Council will be reviewed at the latest one year after its adoption.

Considering the European Council's conclusions as a legally binding agreement, the governments of Hungary, Poland and Slovenia found themselves in a position to express their agreement with the MFF and the Own Resources Decision at the meeting of the Council of 14 December while the Council's position on the conditionality mechanism was adopted by a qualified majority against the votes of these governments. This position being identical with the text agreed at the last trilogue, it was endorsed by the Commission[43] and approved by Parliament at its sitting of 16 December, followed by the signing of the regulation and its publication in the EU Official Journal[44].

Resumed in a nutshell, the new regulation allows suspending financial transfers from the EU budget to a Member State that endangers the independence of its judiciary or limits the availability and effectiveness of legal remedies, provided that the judiciary or legal remedy in question is concerned with the review of authorities that implement the EU budget or exercise

40 For the full text see the conclusions adopted by the European Council at its meeting of 10 and 11 December 2020, Council Document EUCO 22/20.

41 Measures would be considered only if more effective than other EU law instruments.

42 The governments of Hungary and Poland had made clear their intention to bring an action for annulment of the Regulation within the two months deadline subsequently to its adoption.

43 COM(2020) 843.

44 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, OJ L 433 I 22.12.2020, p. 1.

functions of financial control or prosecution of fraud affecting the Union's financial interests. The European Council conclusions emphasise various principles respect of which should be self-evident in a lawful order. But they also have the effect that the regulation, while formally entering in force on 1 January 2021, will not be applied prior to the judgment by the European Court of Justice on the actions of annulment that both the Hungarian and the Polish government brought on 11 March 2021. If the Court instructs the case speedily, the judgment would normally not be pronounced earlier than in the beginning of 2022. Even if the Court ordered an expedited procedure (as wished by the European Parliament), the judgment could hardly be handed down before Autumn 2021. The subsequent finalisation of guidelines for the application of the regulation will presumably require additional time. Moreover, any procedure aiming at sanctioning a breach of the rule of law may be significantly delayed by the Member State concerned bringing the matter before the European Council. With hindsight to the Member States currently facing criticism for various breaches of the rule of law, it may reasonably be expected that it will not be possible to make use of the regulation prior to the next general elections.

The reactions to this outcome varied from relief about the avoidance of a serious disruption of the Union's functioning to deception about a conditionality instrument that will bring remedy to the threatened independence of judiciaries, if at all, then only after the conclusion of the imminent litigation before the European Court of Justice and too late for bringing effective remedy in the countries concerned. As in the present context a full discussion of the pros and cons of the agreed compromise is not possible, in the following only two comments will be made:

Firstly, the European Council is not a legislative body. It does not have the institutional power to modify a legal act that has been or is to be adopted jointly by the two branches of the European Union legislature. It neither disposes of interpretative power, which is entrusted to the European Commission under the control and final authority of the European Court of Justice. One may therefore doubt the legally binding character of the agreed conclusions. Nevertheless, the Hungarian and Polish government may reasonably rely on the agreed arrangements being respected by the European Commission and the Council in the future[45]. The former has committed to them in the full respect of its autonomy and in the latter the representatives of the Member States governments are acting under the political control of the respective Head of Government, who in his/her own interest will insist that such agreements be respected as they are essential for maintaining the effectiveness of the European Council crisis management.

Secondly, the bitter deception of legal professionals striving for the independence of the judiciary merits full understanding. The authority of the European Union was not strong enough for bringing systemic breaches of the rule of law occurring in a Member State rapidly to an end. This state of affairs reflects the Union's non-hierarchical constitutional set-up. The weakness being not occasional but systemic, it is however legitimate to ask whether in the

[45] Currently five major political groups in the European Parliament consider bringing an action for failure to act (Article 265 TFEU) to the CJEU, if the Commission does not fulfil its obligations under the adopted regulation (sitting document B9-0208/2021 of 17 March 2021). This threat may exert useful political pressure. However, a CJEU ruling that would deny a reasonable margin of appreciation for the Commission when implementing the regulation and therefore determine that there is a failure to act in the sense of Article 265 TFEU, is highly unlikely.

Union in which we live and which cannot be easily changed, the described outcome of the legislative process usefully increases the pressure on any Member State to fully comply with the rule of law requirements. The adopted conditionality mechanism while principally aiming at protecting sound financial management could become useful as a corollary instrument of infringement cases in certain specific constellations of rule of law violations having a clear financial impact. Its triggering will not promise immediate relief. On the other hand, it would be short-sighted to underestimate the dissuasive effect flowing from the existence of a procedure institutionalised at the level of the Council of the Union in the course of which a Member State government under the threat of financial sanctions can be held to account for breaches of the rule of law. This dissuasive effect can help not only preventing a worsening of the situation (which can never be excluded), but also contributing to a gradual normalisation of the situation over time. As long as the EU institutions are not disrupted and dialogue continues, the strength of arguments has a chance.

6. Legitimacy and effectiveness of a conditionality mechanism

Taking stock of the facts and circumstances described above this chapter intends to throw some light on the question whether having regard to the European Union's institutional framework the aim of the adopted regulation appears as justified (input legitimacy)[46], whether that measure could be expected to achieve its aims or whether more appropriate alternative options were available instead (output legitimacy). It will notably discuss:

- the legitimacy for a union of states and citizens to impose on its Member States the respect of the rule of law;
- the appropriateness and effectiveness of financial sanctions for achieving compliance with the rule of law;
- the appropriateness of decision making on such sanctions by political bodies.

For assessing *the first aspect*, let us set aside any reference to a threat for the Union's financial interests. It was demonstrated above that the Union would not dispose of the powers necessary for adopting the regulation in question without referring to such a threat. Does this state of affairs reveal a regrettable lacuna? The Union's commitment to values that are common to all Member States seems to require uniform standards. The Union's motto 'united in diversity', the recognition of Member States' sovereignty and constitutional identity can be invoked as justifying the co-existence of different traditions and practises. Where the law is in question, it is legitimate for courts to decide. But is there any instance – be it of spiritual,

[46] For the sake of the assessment intended in this paper there is no need to unfold and take a stance with regard to the extremely complex and critical debate on the (democratic) legitimacy of the constitutional architecture of the European Union (see e.g. Rainer Forst and Rainer Schmalz-Bruns (eds), Political Legitimacy and Democracy in Transnational Perspective, ARENA Report No 2/11, Oslo 2011). For the present purposes may suffice recalling that in accordance with the Union's own understanding (expressed in Articles 10 – 12 TEU) as well as that of its Member States (confirmed by the acts of ratification and relevant constitutional provisions, e.g. Article 23 of the German Grundgesetz) the institutional setup of the European Union is based on democratic principles. The legitimacy of the powers exercised by the Union flows from compliance with those principles.

judicial or political nature – that has a legitimate claim to decide on ultimate controversial questions of values?

For the assessment intended here, fortunately we need not answer the said question. In a multi-level system of democratic governance as established in the European Union, a certain variety of equivalent traditions and understandings of the rule of law may coexist. All conceivable variants comprise the principle of the judiciary's independence, albeit this principle is not implemented in the same manner everywhere. Abstract values will hardly allow deducing mandatory and uniform modalities of implementation. However, in an economically and legally integrated area such as the European Union, the judiciary's strict independence from the executive and legislative powers is an indispensable functional requirement. With regard to the law of the Union, the European Court of Justice highlighted for a long time already that every judge of a national court is also sitting as judge of European Union law, exercising that office in case of doubts through requests to the European Court of Justice for preliminary rulings.

For the functioning of the area of freedom, security and justice constituted under Articles 67 – 89 TFEU full independence of the judiciary from political powers is essential. The implementation of the European arrest warrant[47] or the recognition of penal and civil judgments cannot be imagined without the certainty that on either side the judiciary is acting in full independence. Moreover, the freedom of movement and establishment in the internal market would be tangibly compromised if business undertakings and individual citizens could not rely on any litigation of theirs being heard by a fully independent court wherever they are acting within that economically integrated area. This provides sufficient functional legitimacy for the European Union to equip itself with instruments designed to prevent or remediate situations putting the independence of the judiciary at serious risk in any of the Member States. The Union is pursuing that goal with a variety of instruments, notably the infringement procedures and the recently introduced practice of annual rule of law reports[48]. The adopted regulation constitutes a useful and – according to the European Council – subsidiary complement of that toolbox.

The restrictions of the scope of the adopted regulation to present or expected threats to sound financial management may be regrettable. They were, however, necessary for legal reasons. The said regulation allows withholding budgetary transfers to a Member State in case of a serious breach of the rule of law. It was adopted making use of the powers conferred to the Union with regard to the implementation of its own budget. The appropriateness of the legal base used is still contested by Hungary and Poland. The European Court of Justice is expected to finally clarify this issue.

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47 On this matter see the judgements of the European Court of Justice with regard to the situation in Germany (27.5.2019, C-508/18, C-82/19), Lithuania (27.5.2019, C-509/18), Poland (25.7.2018, C-216/18), Austria (9.10.2019, C-489/19), Belgium, France and Sweden (12.12.2019, C-566/19, C-626/19, C-625/19, C-627/19); for a comprehensive analysis see W.van Ballegooij, European Arrest Warrant Implementation Assessment, European Parliament Research Service, Brussels 2020, http://www.europarl.europa.eu/thinktank.

48 2020 Rule of Law Report (COM(2020) 580), accompanied by staff working documents (SWD(2020) 300-326) taking stock of the situation in every Member State.

With regard to the second aspect, attention needs to be given to the argument that sanctioning a government that encroaches on the rule of law risks to damage the EU-programs' final beneficiaries who quite frequently will have no share in the responsibility for an encroachment on the rule of law. This concern has been explicitly addressed in Recital 19 of the adopted regulation clarifying that in case of suspension of payments to a Member State, the rights of final beneficiaries are maintained and inviting the Commission to inform beneficiaries of their rights through a dedicated website. Still the question remains whether the solution found is sufficient. On top of that, due consideration should be given to an inescapable flaw, which affects any attempt to impose certain institutional choices on a polity to ensure the respect of the rule of law. In the legal profession the insight is growing that institutional settings formally ensuring the judiciary's independence are not good enough. Compliance with the rule of law also depends on the existence of a culture of law[49].

Such legal culture can only develop over time within the legal profession[50]. Judges are bound by the legal texts in force. However, judicial rulings are not fully determined by such texts. This is acknowledged by contemporary legal methodology[51]. Insofar judges need to reflect on the consequences of their rulings for the society they are assuming a political role in the Aristotelian sense[52]. Even the more judicial self-restraint is a necessary corollary of judicial independence. Never may a judge assume a political role in the sense defined by Carl Schmitt[53]. Judges must be immune against any political partisan attitude. They should also be immune against the temptations of a career.

Moreover, the expectations towards such legal culture need to be deeply rooted in the civil society, the media and the political class[54]. In Germany e.g. the independence of the judiciary could theoretically be compromised by institutional weaknesses (such as political appointment procedures, powers of the Länder minsters of justice). As shown by concrete examples[55], any attempt of a public office holder to encroach on the judiciary would, however, immediately be stopped by a public uproar.

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49 When presenting the Commission's first annual Rule of Law Report to the public Commissioner Reynders stated that together with other tools it would contribute to the goal "to install a real culture of the rule of law" (quoted from POLITICO EU Confidential, 10 October 2020).

50 *T. Konczewicz* (No more "Business as Usual": Looking Beyond the Constitutional Oppression, VerfBlog, 2020/10/24, https://verfassungsblog.de/no-more-business-as-usual/, DOI: 10.17176/20201026-104859-0) describes how a rule of law culture had developed in the Polish Constitutional Court's case law during the years 1989-2008.

51 *F. Müller, R. Christensen*, Juristische Methodik, 3. Auflage, Berlin 2012.

52 The Greek philosopher Aristotle qualified the human being as „zoon politicon":"*...it is therefore clear that the city-state is a natural growth, and that man is by nature a political animal, and a man that is by nature and not merely by fortune citiless is either low in the scale of humanity or above it*". (Aristotle, Politics, 1253a, translation of H. Rackham).

53 *C. Schmitt*, Der Begriff des Politischen, first published in: Archiv für Sozialwissenschaft und Sozialpolitik 58 (1927), S. 1–33, considers the opposition of friend and foe to be essential for the political.

54 On the need of judicial independence being anchored in the convictions held in the society cf. recently *Sterk, Kees; van Dijk, Frans*: Judiciaries Must Build Support in Societies, VerfBlog, 2021/2/04, https://verfassungsblog.de/judiciaries-must-build-support-in-societies/, DOI: 10.17176/20210204-115958-0, with interesting data comparing the variety of situations in EU Member States.

55 Examples to be found at *P. Häberle/M. Kotzur*, Europäische Verfassungslehre, 6. Aufl. Baden-Baden, 2016, Rn. 232, *P. Schiffauer*, Recht und Politik in der europäischen Integration, DTIEV-Online 2018, Nr. 3, p. 23s. The institutional safeguards for the autonomy of the judiciary (in place in 2008) were assessed in a comparative perspective by Peter-Alexis Albrecht (ed.), Autonomy for the Third Power in Europe – A transfer task for rational and enlightened European societies, Berlin, 2018.

Awareness of the importance of a truly independent judiciary may be expected to grow in the citizenry only where the peoples' basic needs are well satisfied. In a society of need, people are likely to prioritise economic objectives. Once the state of basic necessity has been overcome by a certain well-being, citizens will be more sensitive to the experience that an independent judiciary tends to protect the individual and the weaker members of society. Then pressure by public opinion is likely not to tolerate encroachments on judicial independence any longer. It may be questionable to which extent financial sanctions imposed on a government are really apt to induce such processes of awareness building. They may even become counterproductive where a sanctioned government disposes of sufficient influence on public media and manages to make the public opinion consider the sanctions as unjustified.

Thirdly the question remains whether an organ of the judiciary should have rather been entrusted with the responsibility of assessing an alleged breach of the rule of law by the government of a Member State. Any assessment of that question by a political body is exposed to the suspicion of political bias. Such a suspicion, whether well founded or not, is difficult to refute. In the course of the deliberations on the regulation of 22 December 2020, the discussed modalities of decision-making were always political in nature, be it decision-making by the Commission subject either to the Council's supervision (as proposed by the Commission) or to an independent advisory body (as preferred by Parliament), be it decision-making by the Council on a Commission proposal (as eventually retained). As the EU-Treaties exhaustively enumerate the attributions of the Court of Justice, the legislator did not have the possibility to directly entrust the Court with decision-making. Eventually, however, any measure taken under the regulation is subject to the Court's review on filing a lawsuit. As to the initial decision making by a political body there is no suitable alternative under European Union law.

An ambiguous conclusion follows from these considerations.

The final word on the legitimacy of the regulation of 22 December 2020, in the sense of its lawfulness under the EU Treaties, is reserved to the European Court of Justice. It may be expected that in cases brought by Hungary and Poland the Court will uphold the regulation as lawful and legitimate under the European Treaties. It will probably consider the power conferred under Article 322 TFEU as sufficient for the adoption of the regulation, as its scope is strictly linked to the implementation of the EU budget. Having regard to that limitation and some of the modalities for its implementation agreed by the European Council, the Court could consider the measures to which the regulation enables as proportionate and useful contributions to further stabilising the respect of the rule of law within the European Union.

On the other hand, amongst the interested publics there is tangible deception since the conditionality instrument set up by the regulation could have been designed more forcefully and effectively. It is unlikely that the regulation as it stands can be of immediate help for the members of the judiciary who in Hungary and Poland are currently struggling for keeping their independence. The European Parliament had fully endorsed the text of the regulation, but strong concerns were expressed with regard to the restrictive modalities agreed by the European Council. It was correctly stressed that the European Council does not exercise

legislative functions and therefore cannot legitimately modify a European Union legislative act adopted by the two branches of its legislative authority (European Parliament and Council) that are politically accountable for it[56]. While this argument cannot be confuted, it is also difficult to deny that in the absence of a compromise as achieved by the European Council of 11 December 2020 the European Union would have entered into an institutional conflict of explosive nature. The present result appears to be the utmost that could reasonably be reached under current legal and political circumstances. Its weaknesses are apparent. Its real effects, and therefore its concrete output legitimacy, can only be measured upon time.

Moreover, some deeper wisdom may be hidden in the instrument's softening that was politically unavoidable. Its greatest added value will not consist in the frequency of sanctions that one day may be applied against a recalcitrant government. Its rationale may rather be found as an external stimulus and a moral support. The will of a country's legal profession to assert its independence towards the political sphere and its own culture of the rule of law will hopefully be encouraged by the institutional recognition of such efforts at the EU level. Moreover, the final adoption of the conditionality instrument demonstrates the resolution of the EU political institutions and of all Member States' governments but two to defend the independence of the judiciary everywhere in the Union, even overcoming destructive veto threats if need be. Together with the ongoing infringement procedure[57] and the Commission's yearly rule-of-law reports, once applied the conditionality mechanism will ensure that no government encroaching the judiciary's independence can be confident to escape any longer from being held to account by its European partners within the common institutional framework. Thus breaches of the rule of law will not be made impossible by the new mechanism but the latter is likely to deploy a strong dissuasive effect. Such a state of affairs fits perfectly with the EU's constitutional structure as a Union of citizens and sovereign states and corresponds to its peculiar legitimacy patterns, characterised by the joint exercise of sovereign rights and an unsettled ambiguity about where the sovereignty lies[58]. In any case, since the sovereignty of the Member States is laid down in their respective constitutions and is therefore a category of law, respect for this sovereignty can be legitimately claimed only on condition and to the extent that it is itself exercised in accordance with the rule of law.

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56 Additional research will analyse more in detail the political accountability for the adopted regulation, measuring the impact on its contents exercised by the European Commission, the European Parliament and the Council as well as by national parliaments of the EU Member States. The findings will be published in a follow-up paper.

57 In this context the Commission decision of 31 March 2021 to refer Poland to the Court of Justice of the European Union pursuant to Article 258 TFEU is of particular interest. The Commission alleges that the Polish law on the judiciary undermines the independence of Polish judges and is incompatible with the primacy of EU law. Together with pending cases C-182/18, C-619/18 and C-791/19 the new proceedings are a forceful instrument for seeking compliance with the rule of law, since judgments handed down in such proceedings may be followed by tangible financial sanctions under Article 260 TFEU, in case if a Member State does not comply with them. Moreover, the Commission also requests interim measures so as to prevent the aggravation of serious and irreparable harm inflicted to judicial independence and the EU legal order (European Commission Press Release of 31 March 2021).

58 Cf. *Andrew Glencross*, The uses of ambiguity: representing 'the people' and the stability of states unions, International Theory (2012), 4:1, 107–132, Cambridge University Press, 2012.