

# EDITORIAL

## ON LAW AND POLITICS IN THE EU: THE RULE OF LAW CONDITIONALITY

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### **1. Rule of law, separation of powers and the courts**

Not surprisingly, there are various opinions about what the rule of law means and implies. Long-standing debate has emphasised either the procedural or the substantive aspects of the question. In a similar vein, a distinction has been made between formal and substantive theories of the rule of law. The formal theories argue that laws are not required to have any particular kind of content but should simply constrain the exercise of power, while the latter emphasises the necessity of 'good laws', also protecting at least certain individual rights<sup>1</sup>. Although this is an important distinction, it must be observed that both theories reject the assertion that constraining political institutions and simultaneously protecting rights in courts is inherently undemocratic.

In Western Europe, this assertion became widespread after 1945, when the intolerable consequences of unlimited and unchecked power became manifest, even more so after 1989. Within the EU, it is axiomatic that the rule of law is one of the central values on which the Union is based, together with liberty, democracy, and the respect of fundamental rights. Judicial review plays a critical role because national authorities carry out most EU policies under the control of national courts. Weakening judicial review, for example, by undermining judicial independence on the part of the executive branch, poses threats for the supremacy of EU law over national law, which is why the rule of law crisis in the wake of the actions of certain Member States, notably

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<sup>1</sup> P. Craig, *Formal and Substantive Conceptions of the Rule of Law*, 51 *Publ. L.* 467 (1997).

Hungary, Poland and Romania, is so severe and has been taken very seriously by the Court of Justice. National measures running counter to the rule of law have thus been found to be tainted with invalidity. The political mechanism established by Article 7 TEU has been activated too, but it has not thus far produced any concrete effects, while a reaction has emerged against what is perceived to be a sort of “tyranny of values”, as they are unilaterally regarded by EU institutions. Meanwhile, the European Court of Human Rights has handled various issues according to the standards it has defined and refined in previous decades, including the appointment of judges, the duration of their term in office, and the existence of guarantees against external pressure (for example, in its Judgment of 23 June 2016, *Baka v Hungary*, application n. 20261/12).

## **2. The rule of law and EU finances**

It is against this background that more recent developments, which concern the rule of law in the context of the conditional use of the finances of the EU, will be examined.

In what some observers view as a fundamental institutional and political change, the EU has elected to address the pandemic crisis by establishing the Next Generation EU, a package worth 750 billion euros, due to operate from 2021 to 27. Within this framework, EU institutions currently provide both loans and subsidies to the Member States intending to receive them. These then submit their national plans, setting out their objectives, targets, and instruments. NGEU is innovative firstly because of the choice to use common debt and secondly because its legal framework governing expenditure is based on conditional funding.

Conditional funding is in itself neither new nor surprising. Within federal and confederal polities, central institutions often provide other public authorities such as regional and local governments, with grants-in-aid: public funds which must be used for a specified purpose and in a specified manner. These funds must therefore be distinguished from those, often termed block grants, that may be spent in a more discretionary manner. Within federations and confederations, there is continuous debate between advocates of grants-in-aid and supporters of block grants

as to which method of distributing public money promotes its more effective use, all the while respecting the autonomy of the institutions and bodies that receive the grants.

The conflict between these views has been exacerbated by the ambiguity of the action taken by the European Council. On the one hand, exercising its power of political direction in its meeting of 10 and 11 December 2020, the Council agreed on the essential features of the draft Regulation governing a general regime of conditionality to protect the EU budget. On the other hand, its declaration is, to say the least, ambiguous in several respects, to which we will return shortly.

Meanwhile, it may be observed that, after the meeting, the Council of Ministers adopted both Regulation n. 2020/2092 and the decision on the own resources of the EU. The Regulation was adopted with a qualified majority due to the opposition of Hungary and Poland concerning the rule of law. It requires the Member States to satisfy several conditions regarding the use of the financial resources provided by NGEU. Among these conditions are various standards traditionally associated with the rule of law, such as the principle of legality, the prohibition of arbitrariness, effective judicial review, and judicial independence. The Member States will have to elaborate and implement their plans without breaching the standards. Any breach of the rule of law, such as endangering judicial independence and limiting accountability, will give rise to “appropriate measures” to protect the EU budget in accordance with the principle of proportionality. Considered in itself, the Regulation may thus be viewed as being “a step forward in protecting the rule of law, albeit more timid than might have been hoped”<sup>2</sup>.

### **3. The ambiguity of the European Council**

The provisions described above would appear to give the Commission discretion to handle breaches of the rule of law. However, the European Council’s declaration is framed in different terms. Firstly, it refers to full respect of Article 4 (2) TEU concerning the national identities of Member States. It is clear that

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<sup>2</sup> T. Tridimas, *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, 16 *Croatian Yearbook of Eur. L. & Pol.* VII (2020).

such national identities are invoked as a sort of counterweight to the emphasis placed on the rule of law.

Secondly, the declaration impinges on the Commission's action. Not only does it require the Commission to define guidelines ("in close consultation with the Member States") and a methodology for carrying out its assessment, but, if an action is brought against 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". Moreover, until the guidelines are finalised, "the Commission will not propose measures". This implies that the Commission's action on measures that affect the budget is not subject to the standard rules for such an action because the guidelines must follow judicial decisions instead of being reviewed by the Court. There will be no difficulty challenging the Regulation before the Court, as has already been the case. This raises an interesting question as to how far the criteria agreed by the European Council will apply – if they affect the institutional balance of the EU – given that they are highly detailed, as opposed to the broad policy guidelines that it ought to give.

It could be argued that the European Council resolves the matter by clarifying that the mechanism delineated by the Regulation is subsidiarity in character. The first argument in favour of this conclusion is that the measures it establishes will be applied only where other procedures, including infringement procedures and budgetary instruments, "would not allow to protect the Union budget more effectively". On the one hand, however, this presupposes that the Commission has the authority to decide the matter of the "effective protection" of budgetary interests for itself. This is not self-evidently correct. Another argument is that the Commission may only act if there has been an impact on the budget. Moreover, the declaration specifies that the negative consequences on the financial interests of the EU "will have to be sufficiently direct and be duly established".

Thirdly, according to the Council's declaration, the "mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism". If the elements of fact and law do not suffice to trigger the new mechanism, it is because any formal opening of the procedure must be "preceded by a

thorough dialogue with the Member State concerned". The preconditions thus tend to look like obstacles.

#### **4. A perspective**

The new mechanism to safeguard the rule of law and the financial interests of the EU will evolve over time, and several factors will be of prime importance in shaping its legal effects in the coming years. The most immediate of these is the internal balance of power within the political institutions of the Union. In formal terms, the Regulation confers power on the Commission. Nevertheless, the preconditions set out by the European Council have the potential to paralyse its operation. The problem is not that the Commission's actions must be preceded by dialogue, which is already the case in infringement procedures. Instead, the problem is the extent to which no action can be taken prior to the judicial challenge brought by a Member State being considered by the Court. The second factor that will exercise notable influence over the mechanism is, therefore, the Court. Its assessment and weighing of the relevant interests will clearly be crucial. By contrast, room for independent policy initiatives by the European Parliament is limited within this mechanism. It is therefore not surprising that some of its members have urged the Commission to act without delay.

Last but not least, the role of legal scholarship should be considered. In recent years, some public lawyers have called for heightened attention to systemic deficiencies in the rule of law. The European Council's declaration, however, takes the opposite tack. It distinguishes "the closed list" of elements that the Commission can consider and "generalised deficiencies". The political intent is clear. However, our regime of public law has been shaped not only by political initiatives and judicial decisions; it has also grown from the work of writers who have not hesitated to criticise both these factors in the light of their conceptions of, among other things, respect for the rule of law and fundamental rights, as well as the separation of powers. Their observations have often led to changes in the norms with which we currently operate, or else they have constituted a constant and vital source for their critique. There is no reason why this should not also happen in relation to the conditions that will influence the implementation of the new mechanism.