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The EU Conditionality Regulation – Variations on Procrastination

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Introduction

In its [resolution of 10 June 2021](#) the European Parliament made it clear that it is starting preparations to take the European Commission before the Court of Justice of the European Union (CJEU) for failing to take appropriate measures to defend the EU's financial interests under the Conditionality Regulation and to uphold the fundamental EU value of the rule of law. This Briefing explains why the application of the Conditionality Regulation has become a political and legal minefield for the Commission, and why the European Parliament is threatening legal action to finally put in place the mechanism envisaged by this law.

The Conditionality Regulation

In their search for ways to rein in rule of law backsliding in EU Member States, the EU institutions have long contemplated withholding payments from the EU budget to EU Member States which violate this fundamental EU value (see [here](#), [here](#) and [here](#)). The Conditionality Regulation, adopted in December 2020, allows the suspension of payments and budgetary commitments to Member States in which breaches of the rule of law 'affect or seriously risk affecting' the management of EU funds. The Regulation lays down the procedure for adopting appropriate measures in order to suspend payments from the EU's budget, while also ensuring that final beneficiaries do not end up suffering the financial consequences of payments being withheld.

The European Council Conclusions of 11 December 2020

Adoption of the Conditionality Regulation was never going to be easy. The proposed linkage between budget payments and rule of law performance sounded alarm bells in Poland and Hungary. These two countries are currently subject to the 'Article 7 TEU' procedure in the Council, which determines whether a Member State risks violating the fundamental values of the EU, including the rule of law. Since agreement on the Conditionality Regulation was subject to a qualified majority vote in Council, the two countries started to play hardball in the run-up to the negotiations, threatening to veto the Multiannual Financial Framework and the Recovery and Resilience package, both of which required unanimity in Council. It was in this context that the German Presidency, in trying both to adopt the Conditionality Regulation and to secure the financial instruments, reached a peculiar compromise. This compromise curiously takes the form of [European Council conclusions](#) that directly address application of the Conditionality Regulation. This unprecedented solution has prompted intense debates over its effects, scope and legal nature.

These conclusions raise several problematic issues, starting with their nature. European Council conclusions are not legally binding, as has been [confirmed](#) by the CJEU. Yet the conclusions adopted on 11 December 2020 arguably do create legal effects as they provide instructions to the Commission and intend to add to the text of the Regulation.

The second contentious issue in relation to the conclusions is that they seem to go against the institutional balance. The European Council is explicitly interpreting and redefining the scope of application of the Conditionality Regulation, and calling upon other EU institutions to follow course. With regard to the institutional relationship and position of the European Council vis-à-vis the European Commission and the CJEU, this is clearly problematic, given that the European Council does not have the competence either to participate in legislative procedures or to interpret EU law. EU legislation is never supported by interpretative declarations, since legal acts are exclusively interpreted by the CJEU.

Third, besides the more doctrinal concerns there are serious practical issues. To start with, the conclusions not only say that the European Commission should adopt guidelines on how it will apply the Regulation: these guidelines should be finalised only after the CJEU has ruled on the conformity of the Conditionality Regulation with EU law, should an action for annulment be brought to the attention of the CJEU. The conclusions further state that the Commission shall not propose any measure under the Conditionality Regulation until such guidelines are finalised. Quite apart from the question of whether or not the European Council is in a position to do this, the result is that application of the Regulation is immediately suspended and significantly delayed.

Finally, the conclusions also substantively affect the text of the Conditionality Regulation. They seek to narrow the scope of the Regulation, and place additional procedural obligations on the Commission, by requiring that a ‘thorough dialogue’ shall take place between the Member State concerned and the Commission before the Regulation is triggered, while the Regulation itself does not foresee this at all.

Procrastination

It took more than two years to adopt the Conditionality Regulation. Its effective application is now further delayed by the constraints put in place by the European Council conclusions.

These various ways of postponing actual use of the Regulation can only be interpreted as deliberate procrastination. The application of the Regulation has been delayed in a series of consecutive steps. First, the European Commission was obliged to write guidelines, and was even prohibited from applying the Regulation before they were in place. Second, the guidelines were made subject to a future CJEU ruling in the clear expectation that the Regulation would be challenged before the CJEU (as was eventually done by [Poland](#) and [Hungary](#)). And finally, after all this, the Commission is now expected to launch a dialogue with the Member State concerned before actually applying the mechanism created by the Regulation.

The postponed application of the Regulation and the parallel crippling of the Commission completely emasculates the rule of law mechanism designed to defend the EU’s financial interests.

How to fend off the delay in application?

The European Parliament made clear its concerns about this situation when the conclusions were adopted, and has considered different means of responding to the European Council's approach.

One option could have been to seek annulment of the conclusions by the CJEU on the grounds that the European Council was acting beyond its powers. Following the advice of its Legal Service, this move for annulment was abandoned by the Parliament, out of a fear of getting lost in the question of what legal effects the conclusions create. As indicated above, one central legal issue is whether European Council conclusions produce any legal effects. In other words, do the conclusions impose enforceable obligations on the European Commission, or are they no more than the political wishes of the European Council which other EU institutions may voluntarily accommodate in some legal arrangement? And even if the substantive review of the conclusions led to a finding that the European Council had acted *ultra vires*, the end result of all this would, in the most favourable scenario, have been to take the EU back to square one, leaving it up to the Commission to apply the Regulation at last.

Instead, the Parliament has chosen to prepare court proceedings against the Commission for a failure to act. By directly challenging the Commission for not acting under the Conditionality Regulation, for not adopting the guidelines and for not triggering the mechanism, the EP has opted for a more direct and, for the Commission, a more painful route. In this way the EP hopes to get a more straightforward outcome, leaving no doubt that the Commission is obliged to apply the Regulation.

This also seems intended to restore the legal status of the Regulation, which at the moment is in danger of becoming 'quasi law', a piece of legal regulation in name only.

A pragmatic move this may seem, one has to be reminded that the EP has yet to refer the Commission's failure to act to the CJEU. Should this procedure be initiated the focus of the case shifts to the Commission to see whether it had a clearly defined obligation to act. It will be for the EP to demonstrate that the Commission made a manifest error of judgement in not applying the Regulation. In the Commission's defence the European Council and the adopted conclusions, being the cause of the problem will only play a marginal role. It is for this reason that the more principled stance would have been to challenge the conclusions at the moment of their adoption, an opportunity missed.

Conclusions

The proper and timely application of the Conditionality Regulation is crucial if the EU is not to finance rule of law backsliding by EU Member States. Trust in the full-fledged applicability of EU law is also at stake. It cannot be the new norm in EU legislation that the highest political body of the EU institutional structure, which does not participate directly in the adoption or enforcement of EU legislation, should dictate when and how to apply EU law. It should not become an acceptable *modus operandi* in the EU for political actors to meddle with legislation after it is adopted, and to instruct EU institutions to suspend the exercise of their legal obligations. The EU cannot itself descend to the level of the rule of law backsliding witnessed in some of its Member States.