



INSIGHT

RULE OF LAW CONDITIONALITY: THE LONG-AWAITED STEP TOWARDS A SOLUTION OF THE RULE OF LAW CRISIS IN THE EUROPEAN UNION?

NIELS KIRST*

ABSTRACT: In December 2020, the European Parliament and the Council adopted a new piece of legislation aimed at protecting the rule of law in the Member States of the Union – the so-called rule of law Conditionality Regulation. This contribution tracks the legislative process in the run up to the new Regulation, analyses the substance and the procedure, and provides an outlook onto the future application and its obstacles. Finally, and by placing a particular emphasise on the Conclusions of the European Council in December 2020, this contribution inquires whether the European Council exceeded its remit by giving the European Commission precise instructions regarding the application of the new Regulation.

KEYWORDS: conditionality – rule of law – effective judicial protection – institutional balance – multi-annual financial framework – next generation fund.

I. INTRODUCTION

In retrospect, 2020 might turn out as a significant year for the rule of law in the European Union. The global pandemic and the corollary of an economic downturn compelled the Union and the Member States to take extraordinary measures. The ground-breaking proposal in June 2020 by France and Germany for the Union to issue bonds in addition to the seven-year budget based on Member States' contributions¹ was dubbed as the Hamiltonian Moment² in European Union law in a reference to the United States' first Treasury Secretary Alexander Hamilton's proposal to nationalize the individual states' debts in 1790.³ However, it also provided the necessary momentum for progress in a more long-standing crisis in the Union – the rule of law crisis. The European Council Conclusions of

* PhD Researcher, Dublin City University, niels.kirst2@mail.dcu.ie.

¹ E Sánchez Nicolás, 'Macron and Merkel propose € 500bn EU recovery fund' (19 May 2020) EU Observer euobserver.com.

² T Grzegorz Grosse, 'A Hamiltonian Moment for the European Union' (31 August 2020) The Warsaw Institute Review warsawinstitute.org.

³ JE Cooke, 'The Compromise of 1790' (1970) The William and Mary Quarterly 523.



July 2020 (July Conclusions) envisioned a conditionality mechanism which would link both the forthcoming budget of the Union (Multiannual Financial Framework, MFF) and the Recovery Fund (Next Generation EU Fund, NGEU) to the principles of the rule of law.⁴

The rule of law crisis has its beginning with changes in the Member States which reach back to the year 2010, and has grown into a major constitutional crisis of the European Union.⁵ It is a crisis that threatens the very essence of the European project since it concerns the fundamental values upon which the Union is built and which are spelled out in art. 2 TEU. The rule of law crisis is one of the most fundamental crises that the European Union currently faces, together with the withdrawal of one Member State from the European Union, the aftermath of the financial crisis, the migration crisis, and the pandemic. Indeed, as Fabbrini points out, the Union is living through a watershed period.⁶ In a new attempt to promote and protect the rule of law in the Member States, the European Parliament (the Parliament) and the Council of the European Union adopted the European Commission's draft for a Regulation to establish a general regime of conditionality for the protection of the Union's budget in December 2020 (the Conditionality Regulation).⁷

II. THE ADOPTION OF THE CONDITIONALITY REGULATION

The idea of a link between the rule of law and European funds was born in 2017,⁸ as other measures to rein in rule of law backsliding Member States, specifically through art. 7 TEU, had failed.⁹ This idea was further developed and supported by academic contributions which highlighted the need for a European budget conditionality.¹⁰ In its vision for the new seven-year budget, the Commission acknowledged the need for a Conditionality Regulation that would link the funds of the Union to rule of law standards. This was clearly outlined in the Commission's Communication explaining the priorities for the new seven-year budget of the Union.¹¹ On the very same day – 2 May 2018 – the Commission also put forward a proposal for a Regulation framing a condi-

⁴ European Council Conclusions of 17-21 July 2020, Special meeting of the European Council.

⁵ A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done' (2014) CMLRev 59.

⁶ F Fabbrini, 'The Future of the EU 27' (2019) European Journal of Legal Studies 305

⁷ Proposal for a Regulation of the European Parliament and the Council of 5 November 2020, General Regime of Conditionality for the Protection of the Union budget

⁸ E Zalan, 'Justice commissioner links EU funds to 'rule of law'' (31. October 2017) EU Observer eu-observer.com.

⁹ L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) Cambridge Yearbook of European Legal Studies 3.

¹⁰ G Halmi, 'The Possibility and Desirability of Rule of Law Conditionality' (2019) Hague Journal on the Rule of Law 171.

¹¹ Communication COM(2018) 321 final from the Commission of 2 May 2018, A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027.

tionality between the disposal of EU funds and adherence to rule of law standards.¹² Hence, the first legislative proposal for a Regulation addressing systemic deficiencies in the rule of law was put forth by the Commission in May 2018.

Following the ordinary legislative procedure, the Parliament adopted a position on this proposal in April 2019.¹³ However, in 2019, the proposal did not gain any steam, as the Council was generally very hesitant towards it. The turning point for the proposal came in 2020, with the adoption of the new MFF and the NGEU. In a historical European Council Summit in July 2020, the Member States agreed that a conditionality regime should be introduced together with the MFF and the NGEU.¹⁴ This finally gave the political backing by the Heads of State for a conditionality regime linked to the Union's budget.¹⁵

In the historic July Summit, the European Council agreed on a new seven-year budget – the MFF, a recovery fund – NGEU, an increase of the own resources of the EU (from 1.6% to 2.0%) – the Own Resources Decision, as well as on a Conditionality Regulation regarding the rule of law. Following the July European Council Summit, the German Council Presidency took the legislative dossier and proposed a compromise in September 2020.¹⁶ With this compromise, it returned to the Parliament and started negotiating. Intensive trilogue meetings between the Council, Parliament, and the Commission eventually led to a conclusive legislative draft published on 5 November 2020.¹⁷

Following the publication of the draft and the accompanying support by a majority of the Parliament and a majority of Member States in the Council, Hungary and Poland – the Member States which are currently subject to an art. 7 procedure – threatened to veto the Own Resources Decision and thus the NGEU and the MFF.¹⁸ While the Conditionality Regulation could be adopted under qualified majority voting, the MFF had to be adopted at unanimity and the Own Resources Decision had to be ratified by each national parliament, thereby providing the Hungarian and Polish government with significant leverage in their negotiating position. Only a new European Council Summit

¹² Proposal for a Regulation of the European Parliament and the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States COM(2018) 324 final - 2018/0136(COD).

¹³ European Parliament Legislative Resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

¹⁴ European Council Conclusions of 17-21 July 2020, cit.

¹⁵ J Morijn, 'Op-Ed: The July 2020 Special European Council, the EU budget(s) and the rule of law: Reading the European Council Conclusions in their legal and policy context' (23 July 2020) EU Law Live eulawlive.com.

¹⁶ Council Multiannual Financial Framework (MFF) 2021-2027 and Recovery Package of 30 September 2020, Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget.

¹⁷ Proposal for a Regulation of the European Parliament and the Council of 5 November 2020, General Regime of Conditionality for the Protection of the Union budget.

¹⁸ Government of the Republic of Poland, Joint Declaration of the Prime Minister of Poland and the Prime Minister of Hungary of 26 November 2020,

on 11 December 2020 could solve this impasse.¹⁹ During this Summit, the Heads of States agreed on comprehensive declaratory statements regarding the adoption, application, and interpretation of the Conditionality Regulation. In turn, these statements lifted the blockage of the MFF and the Own Resources Decision by Hungary and Poland, and enabled the Union to move on with the legislative package. Finally, on 14 December 2020, the Regulation was adopted by the Council.²⁰ On 16 December 2020, the Regulation was adopted by the Parliament²¹ and thus became law with the publication in the Official Journal of the European Union.

The adoption of the Conditionality Regulation together with the new seven-year budget seems logical from a legal and a political point of view. From a legal point of view, the adoption of the new budget allowed to establish new rules for the disposal of funds, and created a further incentive for Member States to agree to a package of legislation. From a political perspective, scholars have been warning for years that EU funds are used illegally by some Member State governments to support cronyism, anti-EU projects, and illiberal structures and called on the Commission to act on this.²² The new seven-year budget enabled the Commission to put forward this crucial piece of legislation as a *sine non qua* together with the new budget. Thus, Member States were forced to agree on the Conditionality Regulation to avoid the lapse of the previous budget and a potential financial shutdown. The economic downturn of the pandemic further increased the pressure on Member States' governments to enable further stimulus (in form of the NGEU). Various trends in 2020 were therefore cumulating factors in creating momentum for a Conditionality Regulation linked to EU funds. Hence, it was a logical, practical and intelligent idea to link the Conditionality Regulation to the EU budget.

III. PRECONDITIONS OF THE REGULATION

As art. 1 of the Regulation defines, this piece of legislation concerns the principles of the rule of law.²³ In the liberal constitutional tradition, the principles of the rule of law encompass numerous aspects. Lon Fuller, for example, described eight criteria of the rule of law in his principal work, and thus describes a thick rule of law understanding.²⁴ Oth-

¹⁹ European Council Conclusions of 10 and 11 December 2020, European Council meeting.

²⁰ Draft Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget of 14 December 2020, Adoption of the Council's position at first reading and of the statement of the Council's reasons; Outcome of the written procedure completed on 14 December 2020.

²¹ European Parliament, *Parliament approves the "rule of law conditionality" for access to EU funds* www.europarl.europa.eu.

²² RD Keleman and KL Scheppele, 'How to Stop Funding Autocracy in the EU' (10 September 2018) [Verfassungsblog verfassungsblog.de](http://Verfassungsblog.verfassungsblog.de).

²³ Regulation (EU) 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.

²⁴ LL Fuller, *The morality of law* (Yale University Press 1964).

er scholars have defined other criteria of the rule of law.²⁵ It should be welcomed that the Commission refers to the principles of the rule of law. The reader of the Regulation is therefore directly guided towards seeing the rule of law as a set of practical aspects of a legal system. art. 2 of the Regulation consequently gives a comprehensive definition of what is to be understood under the principles of the rule of law.²⁶ The Regulation's understanding of the rule of law is relatively thick. It includes legality, legal certainty, the prohibition of executive arbitrariness, effective judicial protection, separation of power, non-discrimination, and equality before the law.

However, this Regulation's big caveat is that its application is strictly tied to the Union's budget. This is undoubtedly a substantial limitation of its future application. It means in practice, that if a breach of the principles of the rule of law is identified, in a second step, the Commission has to prove an effect of that breach on the Union's budget. This was a crucial prerequisite in the Council's position in the negotiations over the Regulation with the objective of limiting the scope of the Regulation. Therefore, this Regulation is not a panacea for the deep and structural deficiencies in the rule of law in some Member States. Regarding the protection of the Union's budget, the Regulation's scope of application is twofold, first, to protect *the sound financial management of the EU budget*, and second, *the protection of the Union's financial interest*. While the two elements clearly overlap, each of them suffices to fulfil the link to the Union's budget and enable the Regulation's application.

IV. PROCEDURAL STEPS OF THE REGULATION

The Regulation's procedure is laid out in art. 6 and comprises several steps of procedural rules. Some of the procedural steps can be compared to the infringement procedure under art. 258 TFEU, while others are taken from the macroeconomic conditionality rules introduced with the establishment of the European Monetary Union (EMU).²⁷ If the Commission believes to have found a breach of the principles of the rule of law in a Member State which affects the Union's budget, it will send a reasoned letter to that Member State (art. 6 (1)). The concerned Member State can then address the findings of the Commission with a reply and/or by proposing remedial measures (art. 6 (5)). The Commission shall take Member State's observations into account before deciding if it wants to submit an implementing act to the Council to cut funds to the Member State concerned or cease the case.

Initially, the position of the Commission and the Parliament was to propose voting by reverse qualified majority. The macroeconomic conditionality rules of the EMU operate by reverse QMV, which presumably was the inspiration for the attempt by the

²⁵ RA Cass, *The rule of law in America* (Johns Hopkins University Press 2001).

²⁶ Regulation 2020/2092 cit.

²⁷ A von Bogdandy and J Lacny, 'Suspension of EU funds for breaching the rule of law - A dose of though love needed?' (2020) European Policy Analysis.

Commission to have reverse QMV here. However, in the trilogue meetings, the Council pushed this back to the usual qualified majority voting.²⁸ A reverse qualified majority would have been an even more robust tool since it would have put the burden of proof upon the accused Member State. The feasibility of such a reverse qualified majority voting was also not opposed by an Opinion of the Legal Service of the Council.²⁹

There is, however, one caveat to the whole procedure, which can be found in Recital 17a of the Regulation. If a Member State believes that the Commission's proposal of an implementing act would violate the principle of objectivity, non-discrimination, or equal treatment, it may exceptionally request that the matter be discussed at a European Council meeting. If a Member State is convinced that the Commission's claims are unfounded, it will most likely trigger this procedure even to delay the case or raise it to the political level. In these cases, the 'deadline' to decide for the Council is extended to three months.

V. SUBSTANTIVE DEFINITIONS OF THE REGULATION

The mechanism of the Regulation covers breaches of the principles of the rule of law if they are linked to the Union's budget. art. 4, which entails the detailed conditions for applying the Regulation, makes this very clear. The Regulation's scope explicitly covers breaches of the principles of the rule of law that risk affecting the Union's budget in a *sufficiently direct way*. A mere violation of the principles of the rule of law in a Member State would not suffice to trigger the mechanism. The link to the Union's budget or the Union's financial interest is indispensable.

Art. 1 (a) specifies that the principles of the rule of law should be understood having regard to the other Union values and principles enshrined in art. 2 TEU. This art. also defines that fundamental rights are only considered under this Regulation if judicial protection or equal treatment is affected. In the following art. 3, the Regulation entails an indicative and non-exhaustive list of examples of what would be considered a breach of the principles of the rule of law.

Art. 4 (2), which lays out the detailed conduct which constitutes a breach of the principles of the rule of law, can then be understood as lying at the heart of the Regulation. There is, thus, a duplication in art. 3 and art. 4 (2). However, art. 3 must be understood as a definitional provision, whereas art. 4 (2) would be the operative art.. Moreover, art. 4 (2) directly links the Regulation's two main elements – the principles of the rule of law and the Union's budget – together by pointing out potential fields of application. This list colours the potential fields of application of the Regulation.

²⁸ A Dimitrovs, 'Analysis: "Rule of law conditionality for the EU budget: agreement is there"' (5 November 2020) EU Law Live eulawlive.com.

²⁹ Council Legal Service Opinion of 2018 on the 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.

VI. SANCTIONS UNDER THE REGULATION

Art. 5 of the Regulation provides for the measures the Commission can propose against a Member State that violates the principles of the rule of law. This article builds substantially on the Financial Regulation,³⁰ which governs the disbursement of funds from the Union's budget, and the Common Provisions Regulation, which administers the Union's structural funds' distribution.³¹ The article is split in two streams. One stream outlines the measure which can be adopted for (i) funds which are implemented by the Union itself and, a second stream, (ii) for funds which are implemented under shared management.³² Funds under shared management comprise the Common Agricultural Policy and the cohesion policy. These funds are implemented by the Member State and make up approximately 70% of the Union's budgetary expenditures.³³ The protocol of the Council vote on the Regulation even foresees the possibility of incorporating the content of the Conditionality Regulation into the Financial Regulation in the long run.³⁴

There is also the possibility of lifting measures after breaches on the principles of the rule of law have been remedied by the concerned Member State. The procedure for lifting measure can be found in art. 7 of the Conditionality Regulation. With remedial measures, the accused Member State may refute the findings of the Commission and prove that the conditions are no longer fulfilled. In any case, the Council is instructed to review existing measures annually at the latest. Finally, art. 7 (3) foresees the possibility for a Member State to recoup funds from the budget that were withheld due to implementing acts. However, after two years in which the deficiencies have not been remedied, the funds will be lost for the Member State.

VII. THE RULE OF LAW IN THE MEMBER STATES V THE RULE OF LAW OF THE INSTITUTIONS?

The Conclusions of the European Council of 10-11 December 2020 (December Conclusions) deserve a special mention since they extensively address the Conditionality Regulation and entail substantive caveats to its application. The European Council made sev-

³⁰ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) 1296/2013, (EU) 1301/2013, (EU) 1303/2013, (EU) 1304/2013, (EU) 1309/2013, (EU) 1316/2013, (EU) 223/2014, (EU) 283/2014, and Decision 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

³¹ Regulation (EU) 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 and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006.

³² Art. 62 Regulation (EU, Euratom) 2018/1046 cit.

³³ A von Bogdandy and J Lacny, 'Suspension of EU funds for breaching the rule of law' cit.

³⁴ Council's position at first reading and statement of the Council's reasons of 14 December 2020.

eral declaratory statements – arguably to get the deal over the line – which sharply contrast the reading of the legal text. The legal value of the declaratory statements is disputed among scholars,³⁵ and creates the bizarre image of a European Union that compromises the institutional rule of law against the rule of law in the Member States.³⁶

The first caveat can be found in para. I.1(c), in which the European Council foresees that the Commission shall develop guidelines for the application of the Regulation. This would be a normal development for Regulations that are applied with broad leeway. However, para. I.2(c) states that those guidelines shall only be developed, taking into account a legal challenge against the Regulation based on art. 263 TFEU. This would also not be extraordinary since the Commission often adapts its application practices to the jurisprudence of the Court of Justice. However, the same paragraph states that the Commission shall not apply the Regulation until the guidelines are finalized. This entails that the Commission would have to wait for a court case, and subsequently, to adopt guidelines before it is entitled to apply the Regulation. Realistically, the whole process could take up to two years and would be a significant impediment to the success of the Regulation.³⁷

A second caveat is to be found in the subsequent paragraph (d), which states that the Regulation should only apply when there are no other more efficient means to protect the Union's budget. The paragraph mentions the Common Provisions Regulation³⁸, the Financial Regulation,³⁹ and infringement procedures explicitly. This implies that the Commission eventually has to carefully weigh an infringement proceeding under art. 325 TFEU against the application of the Regulation, as art. 325 TFEU allows the Commission to bring an infringement proceeding against a Member State in which the financial interest of the Union is negatively affected.

Thirdly, para. (e) explicitly states that 'the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism' and highlights the indispensable link to the Union's budget to trigger the application of the Regulation. This, once again, highlights that the connection between the rule of law and the Union's fi-

³⁵ T Nguyen, 'The EU's New Rule of Law Mechanism: How it Works and Why the 'Deal' Did Not Weaken it' (17 December 2020) Hertie School Policy Brief [hertieschool-f4e6.kxcdn.com](https://www.hertieschool.org/policy-briefs/the-eu-s-new-rule-of-law-mechanism-how-it-works-and-why-the-deal-did-not-weaken-it/).

³⁶ KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de/); A Alemanno and M Chamon, 'To Save the Rule of Law you Must Apparently Break It' (11 December 2020) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de/).

³⁷ According to the Judicial Statistics of the Court 2019, a Court proceedings lasts approximately 14,4 months, while the process of adopting guidelines by the Commission takes additional time. See CJEU, *The Year in Review - Annual Report 2019*.

³⁸ 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 and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006.

³⁹ Regulation (EU, Euratom) 2018/1046 cit.

nancial interest will be essential when applying the Regulation. Additionally, the following para. (f) emphasizes that the triggering factors in art. 4 of the Regulation are an exhaustive list of elements and are not open to events of a different nature. Additionally, the concept of generalized deficiencies in the rule of law is explicitly excluded according to para. (f). By this wording, the European Council Conclusions turn the initial 2018 proposal by the Commission upside down, whose legislative intention was to address generalized deficiencies in the rule of law. Thus, and in large part, the Council Conclusions emphasise and restate the restrictive scope of the Regulation.

The European Council Conclusions of 10-11th December 2020 will undoubtedly lead to a long-lasting legal discussion about the roles of and the relationship between the European Council and the Commission. Strictly following the Treaties, the Commission is the guardian of the Treaties according to art. 17 TEU. The Commission is thus obliged to act within its remit to protect the interests of the Union. However, and as the Court has repeatedly held, the Commission has a wide discretion in exercising this role. Nevertheless, it can hardly be argued that it is in the interest of the Union to defer the application of a crucial piece of legislation that has the intention to protect the Union's budget and the rule of law in the Member States. The Legal Service confirmed the European Council Conclusion's conformity with the Treaties and with the text of the Regulation.⁴⁰ This affirming legal opinion makes an opposition by the Commission against the Council Conclusions less likely. Then again, the Parliament declared that there is no legal value to the European Council Conclusions and the Commission as an independent body is bound to ensure the application of the Treaties as well as secondary legislation.⁴¹ An ongoing inter-institutional contest over the prerogative of interpretation of the Regulation and the European Council Conclusions is therefore likely.

VIII. PROSPECTS OF THE CONDITIONALITY REGULATION

This Regulation puts flesh on the bones of the principle of the rule of law in the European Union. First and foremost, it does so by legally describing what the rule of law in the European Union entails (art. 2 of the Regulation). Therefore, it may be used by the Court of Justice or the Commission as a legislative authority if the meaning and the definition of the rule of law is disputed among the institutions and the Member States. This gives the Commission gradually more legal ground to protect and argue for the rule of law in the Member States.

Regarding the Regulation's application, it will likely take time until the first implementing act under this Regulation is brought by the Commission into the Council given

⁴⁰ Council Legal Service Opinion on Part I of the Conclusions of the European Council of 10 and 11 December 2020 - Conformity with the Treaties and with the text of the Regulation on a general regime of conditionality for the protection of the Union budget.

⁴¹ European Parliament Resolution of 16 December 2020 on the Multiannual Financial Framework 2021-2027, the InterInstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation.

the caveats erected by the European Council, and potentially, by some Member States via a claim for annulment of the Regulation. Nonetheless, the Regulation's interpretative possibilities are far-reaching, and it will be open to the Commission and, eventually, the Court of Justice to interpret them accordingly. For example, the Regulation, for the first time, provides a holistic definition of the rule of law in art. 2, which has significance for the Union and the Member States. Generally speaking, the Regulation provides for various applications in the future, which all serve to protect the rule of law in the European Union. While the Regulation is not a panacea for the rule of law crisis, it should be welcomed as further leverage of the Union to protect the rule of law in the Member States. The December European Council Conclusions, on the other hand, are highly contentious. The immediate questions arise regarding the legal value of those Conclusions.⁴² In general, the European Council shall give broad directions to the European polity project. However, in this case, the Conclusions entail precise rules for applying a single piece of legislation. It puts the Commission on the horns of a dilemma. The Commission either decides to follow the European Council Conclusions and thus dishonours its obligation to act as guardian of the Treaties, or it applies the Regulation with immediate effect in which case the Commission would disregard the European Council Conclusions. It remains to be seen how the College of Commissioners will act in the months to come. Altogether, the declaratory statements in the Council Conclusions set a dangerous precedent for intergovernmental overreach in the rule of law crisis and the current institutional set-up of the EU.

Whether this Regulation will significantly change adherence to the rule of law by Member States remains to be seen in the light of the several caveats within the Regulation, the December Council Conclusions, and the looming review of the legality of the Regulation before the Court of Justice.⁴³ However, the Regulation's deterrent function is beyond dispute and will undoubtedly have an impact on the actions of those Member State governments currently violating the rule of law. Finally, the Council and Parliament are free to amend the Regulation at any time in the coming years via qualified majority voting to tighten the sanctions, reduce the conditions, and widen the Regulation's scope to better protect the rule of law in the Member States. The first step towards an objective is sometimes the most important and this one has been taken with the adoption of the Conditionality Regulation.

⁴² A Alemanno and M Chamon, 'To Save the Rule of Law you Must Apparently Break It' cit.; T Nguyen and A Dimitrovs, 'Op-Ed: Rule of law-conditional as interpreted by EU leaders' (11 December 2020) EU Law Live eulawlive.com.

⁴³ P Pohjankoski, 'New Year's Predictions on Rule of Law Litigation' (7 January 2021) [Verfassungsblog](https://www.verfassungsblog.de) [verfassungsblog.de](https://www.verfassungsblog.de).