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Emanuele Rebasti

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### **The Expanding Role of the Council in the Implementation of EU Spending Instruments**

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# Shifting the Institutional Balance in Times of Crisis? The Expanding Role of the Council in the Implementation of EU Spending Instruments

Emanuele Rebasti\*

## Abstract

This paper examines the evolving role of the Council of the European Union in the implementation of EU law, particularly regarding crisis-related spending instruments. The Treaties reserve the implementation of EU law for the Commission and Member States and only exceptionally for the Council. However, instruments adopted to tackle recent crises—the COVID-19 pandemic, rule of law crisis, and the war in Ukraine—have conferred to the Council extensive implementing powers. The same instruments have foreseen an unusual role for the European Council in relation to the adoption of implementing decisions by the Council (so called “emergency brakes”).

After having examined the legal framework for both the conferral of implementing powers to the Council and their exercise in light of the case law of Court of Justice, the paper will turn to the way these greater implementing powers have been exercised and show that in practice the Council has acted with considerable restraint and limited its role to one of political oversight rather than active shaping of implementing decisions.

Despite concerns that this evolution could undermine the institutional balance, findings suggest that the new expanded role for the Council has instead reinforced the Commission, by providing political backing to its actions, particularly when decisions have major financial or political implications for Member States. At the same time, the

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\* The author is Senior Legal Counsellor at the Legal Service of the Council of the European Union. This working paper is the result of the work carried out as a Visiting Scholar at the Jean Monnet Center for International and Regional Economic Law & Justice in the spring of 2024. The author is grateful to Prof. Weiler for the rich discussions and valuable suggestions on a earlier version of this paper. The views expressed in this paper do not represent the position of the Council and are the sole responsibility of its author.

conferral of greater implementing powers to the Council, as well as the “emergency brakes”, have concurred to create the political conditions for the adoption of crisis instruments at the Union level by providing reassurances to the Member States as to the way decisions involving key national interests would be taken. In so doing, the expanded role of the Council has been crucial in enhancing integration and solidarity in times of crisis and preventing a return to national or intergovernmental crisis responses, instead fostering EU-wide solutions.

## Introduction

The repeated crisis of the last decade have reshaped the role of the Council and the European Council, expanding their functions well beyond the traditional law making or political steering, deep into roles that the Treaties normally reserve to other institutions. Since 2018, the need to tackle the manifold crises resulting from the Covid-19 Pandemic first (e.g. sanitary measures, economic measures to support the recovery), the Rule of Law crisis then and finally the war in Ukraine (e.g. measures to tackle the energy crisis prompted by the interdiction on Russian oil and gas, measures to provide financial support to Ukraine) has further increased the pace of this process, prompting to wonder whether we are witnessing a shift in the institutional balance within the Union.

This phenomenon concerns different areas of activity in which the role of the Council or of the European Council is usually limited or not existent, such as policy design (that is the shaping of future measures *before* the presentation of a Commission proposal), and acts of implementation of EU law. My current research aims at looking into the role that the Council and the European Council have exceptionally been playing in all those areas, and at questioning whether and to what extent this evolution can be reconciled with the Treaties.<sup>1</sup> This paper focuses on a specific

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<sup>1</sup> The current work is part of a broader research project on EU emergency law carried out together the colleague Anne Jensen Funch, Senior Legal Counsellor at the Council Legal Service, and aimed at establishing the Institutional Report on the topic for the 2025 FIDE congress.

aspect of this trend, namely the growing role that Council and the European Council have been playing in the *implementation* of EU law in response to crises.

After having identified the recent trends in this area (section I), the paper will look at the legal framework for the conferral of implementing powers to the Council and their exercise and will argue that the empowerment of the Council in the recent crisis-related spending instruments remains compatible with the Treaties as interpreted by Court of Justice (section II). The paper will then turn to the way the implementing powers have been so far exercised in practice by the Council. It will show that far from being a zero sum game, the expanded role of the Council in the implementation of EU law has in turn enhanced and strengthened the role of the other institutions, and in particular of the Commission, notably by providing political backing for its action (section III, part 2). It concludes therefore that the expanded role for the Council and the European Council in times of crisis has ultimately represented an important occasion for furthering the process of EU integration, by gathering adherence of political actors in a EU response and thus mitigating the risks associated with national or intergovernmental solutions.

## **I. The evolving role of the Council and of the European Council in the implementation of EU Spending Instruments**

In the system of the Treaties, implementation is a matter left first and foremost to the Member States and, where uniform conditions for implementation are needed, to the Commission. Only in duly justified and specific cases, can implementing powers be conferred on the Council by the legislator (Article 291 (1) and (2) TFEU). This possibility has been used in the past, but has remained generally confined to domains where the Council has specific responsibilities under the Treaties,<sup>2</sup> or in domains which, albeit progressively falling under Union competence, touch the core of Member States' sovereignty.<sup>3</sup> In the framework of the measures taken by the EU to react to the crisis of the recent years, the conferral of implementing powers on the Council has

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<sup>2</sup> This is for instance the case of the coordination of economic policies, where the implementing role of the Council is defined in Article 121, 126 and 136 TFEU. See for instance the specific role conferred to the Council within the various instruments of the Stability and Growth Pact, and in particular Regulation (EU) 2024/1263 on the effective coordination of economic policies and on multilateral budgetary surveillance, OJ L 30.4.2024, Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209 2.8.1997, p. 6, Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011, p. 1–7, Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23.11.2011, p. 8–11, Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306, 23.11.2011, p. 25–32.

<sup>3</sup> This is typically the case of areas falling with the former third pillar and now covered by Title V of TFEU (the area of freedom, security and justice), and notably in relation to border controls and visa. See for instance the implementing powers conferred on the Council by Articles 21a, 28 and 29 of the Schengen Borders Code, Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L 077 23.3.2016, p. 1; see also Article 42 of Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, OJ L 295, 14.11.2019, p. 1–131; Article 25a of the Visa Code, Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas, OJ L 243 15.9.2009.

Another area where implementing powers are traditionally conferred on the Council is taxation. See for instance, Article 397 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 11.12.2006, p. 1.

In areas of exclusive EU competence, the conferral of implementing powers to the Council remains exceptional, but can nonetheless occur when based on an assessment which touches domains close to Member States' sovereignty. See for instance the Regulation on the protection from economic coercion by third countries which confers on the Council the powers to determine the existence of a situation of economic coercion by a third state and the appropriateness of requesting reparation. While adopted on the basis of Article 207(2) TFEU on common commercial policy, it is clear that the instrument has an essential foreign policy dimension. The determination that a third country is engaging in economic coercion is an act of foreign policy, as it forms the Union's policy vis-à-vis that particular country. See Article 5 of Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ L, 2023/2675, 7.12.2023.

however expanded. This expansion in part reflects the peculiar role that the Treaties confer to the Council for the adoption of emergency measures in certain domains and thus reflects the usual competence-based logic.<sup>4</sup> However, the expansion has gone beyond those domains, and implementing powers have been increasingly conferred on the Council in areas traditionally reserved to the Commission to implement. This is in particular the case of a number of crisis-related EU spending instruments which will be examined in this paper. In some of these instances, the conferral of implementing powers on the Council was already a feature of the original Commission's proposal for the measure at stake. In most of cases, however, it was the result of requests from the Council which were finally accepted during the legislative negotiations. The result is a widening and deepening of Council's implementing powers in crises-related spending instruments if compared to their traditional use (section 1). In another significant development, the exercise of implementing powers has been combined with provisions that introduce the possibility of a discussion at the European Council on certain implementing decisions (section 2).

### *1. Widening and deepening of Council's implementing powers*

Recent crisis-related spending instruments have expanded the implementing role of the Council both in scope and in depth.

First, the conferral of implementing powers on the Council has expanded to policy areas that were so far left to the Commission to implement – such as cohesion policy and macrofinancial assistance to third Countries. These are areas where the action of the Union normally takes the form of spending programmes that mobilise resources from or assigned to the Union budget and where the central implementing role of the Commission derives directly from its Treaty competence to implement of the Union budget, according to Articles 17 TEU and 317 TFEU.

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<sup>4</sup> Thus, for instance, the Crisis Regulation, adopted as part of the recent Pact on Asylum and Migration on the basis of Article 78(2) (an ordinary legal basis) empowers the Council to adopt implementing decisions to establish the appropriate derogations and solidarity measures to tackle a situation of migration crisis. This is an area where Article 78(3) TFEU already confers on the Council the powers to adopt measures to tackle an emergency situation characterised by a sudden inflow of nationals of third countries. See Article 4 of Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22.5.2024.

Second, the conferral of implementing powers on the Council has deepened, in the sense that it has expanded beyond the adoption of specific key decisions with a particular relevance, to include decisions relating to the granular and individual implementation of a policy instrument.

A first example of this dynamic is provided by the instrument for temporary support to Member States which was rapidly adopted in the early days of the Covid outbreak on the basis of article 122 TFEU to mitigate unemployment risks in the emergency situation created by the pandemic (SURE).<sup>5</sup> SURE, which anticipated many of the legal innovations later mainstreamed in other EU crisis measures,<sup>6</sup> empowered the Commission to borrow on the capital markets in order to provide financial assistance to the Member States in the form of loans. Given the amounts involved, the borrowing by the Commission had to be assisted by adequate financial guarantees to be provided by Member States on a voluntary basis beyond the system of own resources. The financial assistance would however not be made available by the Commission itself, but via a Council implementing decisions, following a positive assessment by the Commission of the requests submitted by Member States (Article 6 of Council Regulation(EU) 2020/672). The justification for such an approach was identified by the Commission's proposal with reference to the particular financial implications for the Member States of the decisions to grant financial assistance. The approach was confirmed by Council upon adoption of the Regulation.<sup>7</sup>

A second example is the one of the Rule of Law Conditionality Regulation, the instrument adopted to ensure that the sound implementation of Union funding is not put at risk by serious breaches of the rule of law in the Member States.<sup>8</sup> While not an emergency measure *per se*, the Conditionality Regulation was part of the political package associated with the adoption of the 2021-2027 MFF Regulation and the economic

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<sup>5</sup> Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L159, 2020.

<sup>6</sup> As in particular regards the financing method of crisis-related spending instruments, their governance and the overall architecture of the spending programme.

<sup>7</sup> See Recital 13 of the Regulation.

<sup>8</sup> 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 L433, 2020.



measures to finance the recovery from the Covid pandemic, as various Member States and the Commission considered it essential that budgetary solidarity at the EU level is matched with a strong commitment to the common values, and notably to the rule of law. Under the Regulation, the power to adopt measures for the protection of the budget in case of breaches of the Rule of Law in a Member State that affect or risk affecting the legality and soundness of the EU spending is conferred on the Council. The Council is also conferred the power to lift those measures once the conditions for their adoption is no longer fulfilled. The direct involvement of the Council in the implementation of the instrument was proposed since the outset by the Commission on the basis of arguments revolving around the significance of the financial effects of the decision. Such a choice was confirmed by the co-legislators<sup>9</sup> which introduced some additional changes that further strengthened the margin of manoeuvre of the Council when exercising the implementing power for the adoption of measures under the Regulation.<sup>10</sup>

A third example is provided by the spending instrument established to support the recovery of Member States' economies from Covid-19, the Recovery and Resilience Facility.<sup>11</sup> The RRF was designed around the idea of a reform and investment agenda to be negotiated between each Member State and the Commission and ultimately incorporated in a Recovery and Resilience Plan, setting milestones and targets for the disbursement of financial support. In the original Commission proposal, both the adoption of the Plan and the individual decisions on payments following a positive assessment of the achievement of the milestones and targets were meant to be left to the Commission, as it is normally the case for other spending instruments based on article 175 TFEU (the legal basis for cohesion policy).<sup>12</sup> However, following a request by

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<sup>9</sup> See Recital 20 of the Regulation which refers to the “importance of the financial effects of the measures adopted pursuant to this Regulation”.

<sup>10</sup> The adoption of the measures in Council was subject to QMV, rather than to reverse QMV, thus making less automatic the adoption of the Commission proposal. Moreover, it was explicitly provided for the possibility for the Council to amend the Commission's proposal by qualified majority, regardless of the position of the Commission. See Article 6 (10) and (11) of the Regulation. On the significance of these provisions for ensuring an effective decision making, see section II.2 below.

<sup>11</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L57, 2021.

<sup>12</sup> In ordinary cohesion instruments, Member States negotiate and then submit programmes that the Commission adopts by means of implementing decisions. See Article 23 of the Common Provision Regulation (CPR), Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just

the Council during the legislative discussions, the governance shifted towards a greater role for the Council, which was ultimately given the power to adopt the plans following a proposal of the Commission based on its positive assessment of the plans submitted by the Member States.<sup>13</sup> The decision on individual payments, based on the fulfillment of the milestones and targets set out in the Member States' plans, was left to the Commission,<sup>14</sup> but supplemented by an "emergency brake" mechanism which would allow the possible involvement of the European Council (see next section).

A final example is provided by the recently adopted Regulation establishing a Ukraine Facility,<sup>15</sup> a new instrument for financial assistance to Ukraine aimed at providing immediate budget support as well as mid term assistance for the future reconstruction and accession to the Union, and able to mobilize up to 50 billion in grants and loans. While the instrument was initially proposed by the Commission on the basis of the RRF model of governance (adoption of the Ukraine plan by the Council + payment decisions by the Commission), the Council leveraged its position during the legislative negotiations in order to deepen its control on the implementation of the instrument. This resulted in a final agreement which conferred on the Council the control on the suspension or reduction of the financial assistance to Ukraine,<sup>16</sup> on the provision of exceptional financing in case of a significant deterioration of the war,<sup>17</sup> and on the assessment of the satisfactory fulfillment of the qualitative and quantitative conditions linked to individual payments.<sup>18 19</sup>

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Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231 30.6.2021, p. 159.

The CPR Regulation (and its predecessor) exceptionally provides for implementing powers to the Council in the framework of the macroeconomic conditionality, a conditionality mechanism that allows the Council to suspend commitments or payment under the funds in case of failure to take corrective actions in reaction to Council recommendations and decisions under the corrective arm of the Stability and Growth Pact: see Article 19 CPR.

<sup>13</sup> See Article 20 and Recital 45, which does not, however, provide an explicit justification for the conferral of implementing powers on the Council.

<sup>14</sup> Article 24 and Recital 52.

<sup>15</sup> Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, OJ L 792, 2024.

<sup>16</sup> Article 5 and 26(6) of the Ukraine Facility Regulation.

<sup>17</sup> Article 13 of the Ukraine Facility Regulation.

<sup>18</sup> Article 26(4) of the Ukraine Facility Regulation.

<sup>19</sup> The justification for all these exceptional empowerments is globally provided in recital 108 of the Ukraine Facility Regulation, which refers to the importance of the financial effects of the support to Ukraine and to

This last innovation represents a significant departure from the RRF model and an even more significant departure from the previous financial assistance instruments to Ukraine and the ordinary macro financial assistance instruments to third countries (or MFAs) based on Article 212 TFEU. For the first time, the Council requested and obtained to have a direct involvement in the assessment of the conditions for the releasing of payments, which have traditionally been claimed by the Commission as falling within its exclusive responsibility for the implementation of the Union budget in light of Article 17 TEU and 317 TFEU.<sup>20</sup> The need for an urgent adoption of the Facility so to provide to Ukraine with a much needed support explains the fact that the Commission accepted the amendments to the governance of the instrument without obliging the Council to proceed at unanimity as required by Article 293 TFEU. Nonetheless, the Commission issued a unilateral declaration regretting the choice of the legislators and stressing that the decisions related to payments to Ukraine under the Ukraine Facility belong to the power of budget implementation that is part of its institutional prerogatives under the Treaties.<sup>21</sup>

The table in the annex shows the expansion of the Council role in the implementation of recent spending instruments by using a colour code: blue identifies areas where implementing powers are conferred the Commission while green identifies areas where powers are conferred to the Council. A comparison between the governance

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the consequences of certain decision to be taken for the implementation of the Facility in light of the specific situation of Ukraine.

<sup>20</sup> As part of the concessions allowing Parliament to accept a greater role of the Council in the implementation of the instrument, a joint declaration was issued by the three Institutions upon adoption of the UA Facility Regulation stressing the exceptional and specific context justifying the governance arrangements and the fact that such a solution should not be considered a precedent for future instruments of assistance to third countries.

<sup>21</sup> Summary Record of Coreper (part 2) meetings of 7, 8 and 9 February, Council ST doc. 6412/24 ADD1 of 1 March 2024:

“The Commission recalls that, under Article 17 TEU and Article 317 TFEU, the implementation of the budget remains its own responsibility and is part of its institutional prerogatives under the Treaties. It considers that the decisions related to payments to Ukraine under the Ukraine Facility belong to such budget implementation. The Commission regrets that the text agreed by the co-legislator provides for Council implementing decisions under Article 291 TFEU for the adoption of these measures. It considers that the solution agreed by the co-legislators could be exceptionally justified in light of the very specific circumstances of the Ukraine Facility – a medium-term single instrument of high geopolitical importance adapted to the uncertainty and unprecedented challenge of supporting a country at war with direct implications for the security of the Union. This solution should not be considered as a precedent for any other Union spending programme.”

system of traditional MFAs and the Ukraine Facility shows clearly both the widening and the deepening of Council implementing powers.

*2. A role for the European Council in relation to the adoption of implementing decisions by the Council*

A second relevant trend in the governance of crisis-related spending instruments is the combination of the conferral of implementing powers on the Commission or the Council with provisions that introduce the possibility of a discussion in the European Council on certain elements that are relevant to the adoption of the implementing decision. These provisions, commonly referred to “emergency brakes”, take inspiration from mechanisms which the Treaties provide for in specific areas (and notably in the area of freedom, security and justice - see for instance Article 82(3) TFEU concerning minimum rules for judicial proceedings in criminal matters), and export them to completely unrelated sectors.

A first example is the emergency brake laid down in recital 52 of the RRF Regulation in relation to the payments for which implementing powers are conferred on the Commission. If, before the adoption of the relevant Commission implementing decision, a Member State exceptionally considers that there are serious deviations from the satisfactory fulfillment of the relevant milestones and targets, it can request a discussion in the European Council. In such exceptional circumstances, no decision authorising disbursement should be taken until the following European Council has exhaustively discussed the matter.

A similar, but narrower, provision can also be found in recital 26 of the Conditionality Regulation to complement a governance framework which confers on the Council the powers to take the implementing measures for the protection of the Union budget. According to recital 26, in case of breach of the principles of objectivity, non-discrimination and equal treatment in the procedure for the adoption of the measures, a Member State can request a referral of the matter to the next European Council for a debate. In such exceptional circumstances “*no decision concerning the measures should be taken until the European Council has discussed the matter*”.

In the case of the Ukraine Facility a lighter solution was found, which falls short of the qualification as an emergency brake. At the moment of adoption of the Regulation, the Council has issued a unilateral declaration in which it takes note and is committed to follow up on the European Council conclusions of 1 February 2024, “*according to which, on the basis of the Commission annual report on the implementation of the Ukraine Facility, the European Council will hold a debate each year on the implementation of the Facility with a view to providing guidance. If needed, in two years the European Council will invite the Commission to make a proposal for review in the context of the new MFF.*”<sup>22</sup>

In all these instances, the involvement of the European Council in matters of policy implementation has been introduced at request of the Council during the legislative discussions leading to the adoption of the relevant legislative act. Such a request addresses the political need to ensure that matters which are of particular relevance and sensitivity for Member States are ultimately considered at the highest political level . Despite the reasons of political expediency that may explain the proliferation of “emergency brakes”, the phenomenon has been strongly criticised by the European Parliament and in the doctrine<sup>23</sup> as a step too far, fundamentally altering the institutional balance laid down in the Treaties as well as the ordinary voting rules for the adoption in Council.

## **II. The legal framework for the conferral of implementing powers on the Council and their exercise**

The expanding role of the Council in the implementation of EU law needs to be assessed in light of the legal framework applicable to the conferral of implementing

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<sup>22</sup> Statements upon adoption of the Council Regulation amending Regulation 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027. Council doc. ST 6712/24 ADD1 of 23 February 2024.

<sup>23</sup> See *inter alia*, “Compromising (on) the general conditionality mechanism and the rule of law”, Editorial Comment, *Common Market Law Review*, 58: 267-284, 2021.

powers and to the modalities for their exercise. The case law of the Court of justice has underlined the need for a proper justification of the conferral of implementing powers to the Council but at the same time has recognised a wide margin of discretion to the co-legislators in the matter (section 1). The Court has also clarified that the co-legislators have a certain leeway in defining the decision making rules for the exercise of implementing powers by the Council. These procedural rules are supplemented by internal organisational arrangements and working methods and together determine the way Council exercises the conferred powers (section 2).

1. *The legality of conferral of implementing powers on the Council in light of the case law*

When requested to assess the legality of a conferral of implementing powers, the Court of Justice has consistently noted that in the system provided for by the Treaties, *when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power*.<sup>24</sup> It follows that when the co-legislators intend to confer implementing powers on the Council instead, they are required to duly justify their choice and provide a detailed statement of reasons.<sup>25</sup> In particular, the Court has made it clear that the co-legislators “*must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by the treaty*”.<sup>26</sup>

In light of this case law, the General Court has recently annulled a Council implementing act<sup>27</sup> adopted to specify the methodology for the calculation of ex ante contributions by banks to the Single Resolution Fund on the basis of

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<sup>24</sup> Judgment in case C-440/14 P, *NIOG v Council*, point 50 and 60 and the case law quoted there.

<sup>25</sup> Judgment of the Court of 24 October 1989 in case C-16/88, *Commission v Council*, ECLI:EU:C:1989:397, point 10; judgment of the Court of 18 January 2005 in case C-257/01, *Commission v Council*, ECLI:EU:C:2005:25, point 50; judgment of the Court of 16 July 2015 in case C-88/14, *Commission v Parliament and Council*, ECLI:EU:C:2015:499, point 30; judgment of the Court of 1 March 2016 in case C-440/14 P, *NIOG v Council*, ECLI:EU:C:2016:128, point 49; judgement of the Court of 28 February 2023 in case C-695/20, *Fenix*, ECLI:EU:C:2023:127, para 37.

<sup>26</sup> Judgment in case C-440/14 P, *NIOG v Council*, point 50

<sup>27</sup> Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation No 806/2014 with regard to ex ante contributions to the Single Resolution Fund, OJ 2015 L 15, p. 1.

Article 70(7) of Regulation 806/2014.<sup>28</sup> The General Court noted that the recitals of the implementing act merely set out the purpose and content of the implementing act to be adopted, “*without however providing the slightest indication of the reasons why the implementing power was conferred on the Council rather than the Commission for those purposes*”.<sup>29</sup> In the absence of any textual element from which it would be apparent that the conferral of implementing powers on the Council was justified by the specific role that it is called on to perform in the specific field at stake, the justification could not be simply inferred by the context in which the conferral was made.<sup>30</sup> Nor could such a justification be found either in a general reference to “political reasons”, since such a reference is neither detailed nor related to the nature or the content of the relevant basic act.<sup>31</sup> The judgment is currently under appeal.

When the basic act contains a justification of the conferral of implementing powers on the Council, the Court has shown a great deal of deference to the discretionary choices that the co-legislators make on this matter. Thus it has accepted justifications generally referring to the significant impact that the measures may have either on the Member States<sup>32</sup> or on the individuals that may be concerned by the measures at stake or on the need to ensure consistency in light of the allocation of competence between institutions, notably in light of the role played by the Council in related areas.<sup>33</sup>

Taking account of this case law, the short but clear justifications provided in the relevant recitals of the SURE Regulation, the Conditionality Regulation and the Ukraine Facility Regulation - which in various ways refer to the significant financial implications for the Member States and the Union of the implementing acts to be adopted - appear to meet the standard of review that the Court has used to

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<sup>28</sup> Regulation (EU) No 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225, p. 1.

<sup>29</sup> Judgment of the General Court of 29 May 2024 in case T-395/22, *Hypo Vorarlberg Bank v. SRB*, ECLI:EU:T:2024:333, point 32 and following.

<sup>30</sup> *Ibidem*, points 37 to 40.

<sup>31</sup> *Ibidem*, Point 41.

<sup>32</sup> Judgement of the Court in case C-695/20, *Fenix*, quoted above, para 39 and 40.

<sup>33</sup> Judgment of the Court of 1 March 2016 in case C-440/14 P, *NIOC v Council*, ECLI:EU:C:2016:128, para 52 and ff.

assess the justification of the conferral of implementing powers on the Council.

The same cannot be said of the RRF Regulation, recital 45 of which does not provide an explicit justification as to why implementing powers should be conferred on the Council for the adoption of the recovery and resilience plans but merely describes the relevant procedure. The relevant statement of reasons can however be derived from the broader context as captured by other recitals of the Regulation, and notably by the many references to the European Semester for economic policy coordination as the relevant framework for identifying national reform priorities on which the national resilience and recovery plans shall be based<sup>34</sup>, and for the central role played by the Council in that context.<sup>35</sup> The need for coherence and consistency with the Semester process is thus key for the pursuit of the RRF objectives and therefore justifies conferring powers on the Council to adopt the recovery and resilience plans, which aim to provide direct financial support linked to the implementation of reforms and investments that responds to the challenges that the same Council has identified in the Semester.

Beyond the obligation of motivation, the conferral of powers on the Council needs also to respect the prerogatives that the Treaties confer on the Commission and in particular its specific responsibility for the implementation of the Union budget (Article 17(1) TEU and 317(1) TFEU). In that regard, however, the Court has followed a restrictive interpretation of the reserve of competence of the Commission. According to old but established case law, the competence that Article 317 TFEU confers on the Commission for implementing the budget is limited to the power of committing appropriations and payments from the EU budget (budget execution *stricto sensu*).<sup>36</sup> As a consequence the Court has recently confirmed that the complex assessments linked to triggering the horizontal conditionality mechanism established by Conditionality Regulation “*forms part of a conception of budget implementation that goes beyond that which (...) falls within the Commission’s powers in cooperation*

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<sup>34</sup> See recitals 4, 5, 17, 32, 39 and 58.

<sup>35</sup> See in particular recital 36.

<sup>36</sup> Judgment of the Court of 24 October 1989 in case C 16-88, Commission v Council, ECLI:EU:C:1989:397, para. 16 and ff.



*with the Member States*<sup>37</sup> and could therefore validly be conferred on the Council without infringing the Commission's prerogatives.

It remains to be seen whether this case law also applies to the conferral on Council of powers for authorizing individual payments, as now provided for in the Ukraine Facility Regulation and strongly opposed by the Commission.<sup>38</sup> In that regard, it should be stressed that the provision in question falls short of conferring on the Council the powers to execute payments, but rather empowers it to decide whether the conditions for payments are met. These conditions are complex ones: they include the fulfillment of quantitative and qualitative steps set out in the Plan as well as the fulfillment of the political preconditions laid down in Article 5 of the Regulation. The assessment is therefore not just a technical assessment on criteria of a financial nature, but includes an important political dimension, which justifies the role for the Council. Moreover, the Council is conferred the power to act only in case the Commission makes a preliminary positive assessment of the satisfactory fulfillment of the relevant qualitative and quantitative steps: in case of negative assessment by the Commission, the Council is merely informed. This asymmetry confirms the different nature of the involvement of the Council, if compared to the one of the Commission, and the fact that the conferral of implementing powers on the Council have no vocation to replace the Commission's role of budget implementation. Thus the Commission's powers of budget execution *stricto sensu* remains safeguarded by the design of the provision in light of case law.

A final point concerns the compatibility with the Treaties of the involvement of the European Council (emergency brake) in the implementing of spending instruments. The Court has already had the occasion to take position on the matter in relation to the procedure leading to the adoption of Council implementing measures for the protection of the budget under the Conditionality Regulation. Once more the design of the relevant provision appears crucial to conclude for the full respect of the institutional balance:

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<sup>37</sup> Judgment of the Court of 16 February 2022 in case C-156/21, Hungary v. European Parliament and Council, ECLI:EU:C:2022:97, para. 186-189.

<sup>38</sup> See above, footnote 21.

the Court stresses that no role is envisaged in the operative part of the Regulation (Article 6) for the European Council, whose involvement is only contemplated in a recital. Given that the preamble of an EU act has no binding legal force, there is no need to discuss whether the role envisaged for the European Council is compatible with the powers conferred on it by Article 15(1) TEU.<sup>39</sup> Such a solution confirms the political and non binding nature of the “emergency brake” but at the same time it preserves its *effet utile*.

## *2. The framework for the exercise of Council implementing powers*

The way implementing powers conferred to the Council are exercised depends on the set of procedural rules that defines its decision making. It is this legal framework that ultimately determines the relevance and effectiveness of Council’s powers.

The Treaties do not regulate the matter directly. In foreseeing the possibility to confer implementing powers on the Council, Article 291(2) TFEU does not set out specific rules for their exercise. Thus, as far as the basic act does not regulate the matter, the default voting rules and modalities applicable for the decision making in Council under the Treaties will apply by analogy. These includes the need for the Council to act on the basis of a Commission proposal (Article 17(2) TEU), the vote at qualified majority as defined in Article 238(3) TFEU (Article 16(3) TEU), the need for unanimity in order to amend the proposal unless Commission support the amendment (Article 293(2) TFEU), and the absence of deadlines for the Council to act.

The recourse to the default voting modalities laid down in the Treaties presents some significant drawbacks when applied to decision making procedures aimed at the adoption of implementing decisions, and in particular of implementing decisions addressed to individual Member States like the ones foreseen in most of the spending instruments analysed in this paper. First, the absence of an obligation to act and to do so within a clear deadline runs against an effective decision making, especially in case of decisions concerning issues which are controversial and where the attempt to reach the

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<sup>39</sup> Judgment of the Court of 16 February 2022 in case C-156/21, Hungary v. European Parliament and Council, ECLI:EU:C:2022:97, para. 190-191.

broader possible support in Council may defer the adoption of the act. Second, the need for unanimity in order to amend the Commission's proposal prevents the Council from modifying such a proposal without the consent of the Member State to which that decision is addressed. This ultimately precludes the possibility for the Council to adopt more stringent conditions for the concerned Member State unless the Commission agrees in that sense. However, such an agreement does not appear likely in those cases where the Commission's proposal is based on a plan which has been thoroughly negotiated with the concerned Member State. In such a case, the application of the default rule on the approval of amendments to the Commission's proposal *de facto* limits the action of the Council to a mere approval/rejection alternative.

These constraints explain the interest in defining specific procedural arrangements for the adoption of implementing decisions by the Council in the basic act. The Court of Justice has made clear that a departure from the default rules foreseen by the Treaties is possible and that "*the EU legislature has the ability to have the provisions implementing the basic regulations adopted according to a procedure different from that followed for the adoption of the basic regulation*".<sup>40</sup> The extent to which the co-legislators may depart from the default Treaty rules has not been clarified in detail by the Court. It is however sound to consider that the procedural arrangements for the adoption of implementing by the Council needs to be drawn up in line with the Treaties and in particular to respect the essential features of the institutional set up of the Union.<sup>41</sup> As a consequence, the alternative procedural arrangements laid down in the basic act cannot modify the share of powers among the members of the institutions, or affect their fundamental prerogatives, or, more generally, have the effect of undermining the balance of powers between Union institutions. In practice this means that co-legislators could not introduce qualified majority arrangements that would be based on different shares of population or member states than the ones laid down in Article 238(3) TFEU or

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<sup>40</sup> Judgment of 16 February 2022, Poland v European Parliament and Council, C-157/21, EU:C:2022:98, paragraph 307. See also judgment of 18 June 1996, Parliament v. Council, C-303/94, EU:C:1996:238, at paragraph 23.

<sup>41</sup> On this line, see the Opinion of the Council Legal Service of 25 October 2018, "Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States - Compatibility with the EU Treaties", doc. ST13593/2018, point 48 and following.

arrangements that would exclude a member of the Council from the vote when this exclusion is not rooted in primary law. Similarly, it can be reasonably argued that the co-legislators could not set for the adoption of implementing decisions a stricter voting rule than the one required for the adoption of the basic act in the relevant legal basis, as this would alter the power balance identified by the Treaties for that matter and ultimately undermine the possibility of an effective implementation of the act (e.g. by allowing the Member State that would have opposed the adoption of the act, to block the adoption of implementing decisions).

Even with these limitations in mind, the margin of discretion left to the co-legislators to shape the framework for the exercise of Council implementing powers remains significant. In the case of the spending instruments analysed in this paper, the co-legislators decided to exercise such discretion and introduced a number of adjustments to the default voting rules. These adjustments were in most cases introduced during the legislative negotiations, mostly at the request of the Council, to ensure a greater effectiveness in its decision making and enhancing its role.

To start with, with the exception of SURE, the spending instruments discussed in this paper set out a temporal framework for the adoption by the Council of implementing decisions. In the case of the Conditionality Regulation, the system of mandatory deadlines set out in Article 6 was a central element of the legislative negotiations, as the co-legislators had to find the balance between a timely adoption of the measures for the protection of the budget and the need to ensure a fair process for the concerned Member State. In case of the RRF Regulation and of the Ukraine Facility, provisions were introduced to set a deadline by which *as a rule* Council shall adopt the decisions approving the relevant plans.<sup>42</sup>

Second, the voting arrangements in Council have been adjusted to enhance the role of the Council. Thus, the possibility for the Council to amend the Commission's proposal at qualified majority regardless of the Commission's position has been expressly provided for the adoption of the decision approving the Ukraine plan<sup>43</sup> as well as for the

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<sup>42</sup> Article 19(1) of the Ukraine Facility Regulation and 20(7) of the RRF Regulation.

<sup>43</sup> Article 19(1) of the Ukraine Facility Regulation.

adoption of measures for the protection of the budget under the Conditionality Regulation.<sup>44</sup> In the case of the Conditionality Regulation, the co-legislators – upon request of the Council – have also rejected the original proposal of the Commission to have the decision on measures adopted by reversed qualified majority in Council, and confirmed the use of ordinary qualified majority instead. Reverse qualified majority requires the Council to vote on the rejection (rather than adoption) of the proposal and, in so doing, makes abstentions count in favor of the adoption of the act. All in all, these adjustments point at the legislative choice to give Council a greater leeway in the exercise of its implementing powers and in departing from the Commission's proposals.

Such a choice, however, has not gone as far as subverting the principle that Council needs to act only on the basis of a Commission's proposal. While the principle can be derogated in the case of conferral of implementing powers to the Council,<sup>45</sup> in all the spending instruments considered in this paper the Commission's right of initiative has been confirmed. This significantly frames the exercise of the Council's implementing powers, both in terms of the possibility of the Council to act and in terms of determining the content of the decision, which will have to be based on the assessment carried out in the Commission's proposal. In other words, the Commission remains the effective gatekeeper of the Council's powers also in the domain of implementation.<sup>46</sup>

In fact, as it will be shown in the next section, the Commission's role has been further enhanced by the design of the various instruments.

This is particularly evident under the Conditionality Regulation, where the conferral to the Commission of the right of initiative implies that is up to the Commission to identify which breaches of the Rule of Law in a Member States risk affecting the Union

<sup>44</sup> Article 6(11) of the Conditionality Regulation.

<sup>45</sup> Article 17(2) TEU makes clear that, beside legislative acts, "*other acts shall be adopted on the basis of a Commission's proposal where the Treaties so provide*". Article 291(2) does not in principle provide a role for the Commission in the adoption of implementing powers by the Council.

<sup>46</sup> In the case of the Conditionality Regulation, the refusal of the Commission to submit a proposal for a Council decision lifting the measures for the protection of the budget could leave the Member State that remains subject to those measures without an effective remedy. It is for this reason, that the Article 7(2), fourth alinea, provides – in the version agreed by the co-legislators – that "*where the Commission considers that the situation... had not been remedied, it shall address to the Member State a reasoned decision*".

budget at a given time and to frame its proposal accordingly. An extension of the scope of the assessment to new breaches at the stage of the Council decision would prevent the concerned Member State from fully exercising its rights to submit observations and to propose remedial measures during the preparatory phase of the procedure<sup>47</sup>. It follows that any amendment by the Council to the proposed decision must remain within the scope of the proposal tabled by the Commission and cannot target different rule of law breaches.

Moreover, the fact that under SURE, the RRF Regulation and the Ukraine Facility, the Council is required to approve a plan which is the result of extensive and very technical negotiations between the Commission and the concerned Member State (for SURE, RRF Regulation) or between the Commission and a third State (Ukraine Facility), reduces the possibility for the Council to intervene in the substance of the plan. To a certain extent the same applies to the Conditionality Regulation, where the Commission proposal to lift measures according to Article 7 Conditionality Regulation is in practice preceded by negotiations with the concerned Member State as to the adequacy of the remedial measures adopted or proposed to address the issue.

A final remark concerns the internal organisation and working methods of the Council when exercising implementing powers. While both the Commission and the European Parliament have set up specific administrative structures to prepare and control the implementation of the spending instruments,<sup>48</sup> the Council has not established any specific preparatory body (working parties) dedicated to prepare the implementing decisions, nor has it strengthened its administrative services to support those activities. Rather, the additional work strand generated by the conferral of implementing powers has been accommodated within the existing structures and resources. The task to prepare the Council's implementing decisions has been attributed to existing working parties with expertise in law making, economic policy or external relations rather than in budgetary control or spending instruments.

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<sup>47</sup> Article 6(1) to 6(7) of the Conditionality Regulation

<sup>48</sup> The Commission has set up within its Secretariat-General a Recovery and Resilience a Task Force responsible for steering the implementation of the RRF and within DG NEAR, a specific Ukraine Service to implement the Ukraine Facility. The European Parliament has set up a dedicated Working Group of Members on the Scrutiny of the RRF, supported by a Economic Governance and EMU Scrutiny Unit.

### **III. Shifting the institutional balance? The role of the Council in the implementation of EU spending instruments in practice**

The analysis of the applicable legal framework provides the basis to assess the expanding role of the Council in the implementation of EU law. It is however also necessary to take into account how that role has been played in practice. A few examples show that the new set of implementing powers conferred on the Council have been so far exercised with a great deal of self-restraint (section 1). In fact, the conferral of implementing powers on the Council has strengthened, rather than undermined, the action of the Commission. If a shift in the institutional balance is taking place, it is one that mutually expand and strengthen the role of the EU institutions, rather than a zero-sum game where only the Council is the winner (section 2).

#### *1. The exercise of the new Council implementing powers in practice*

In order to consider the wider impact of the conferral of implementing powers to the Council on the institutional balance, it is necessary to move from the letter of the legislative provisions to the way those powers have so far been exercised in practice. Such an analysis allows us to make a number of interesting observations.

In contrast with the importance that Council had attached during the legislative negotiations to the objective of securing a key role in the implementation of crisis instruments, the same Council has then not made a significant use of the possibilities that the newly acquired powers have offered. It is somehow remarkable that in none of the many instance in which the Council had to adopt implementing decisions under SURE or the RRF it decided to reject or amend the Commission's proposals, or to request their modification as a condition for adoption. Rather, the proposals for implementing decisions put forward by the Commission have systematically been confirmed after relatively short deliberations in Council.

In the case of the Ukraine Facility, the Commission's proposal for a Council decision<sup>49</sup> was modified during Council deliberations. The modifications, however, were very limited: in the operative part of the Council decision<sup>50</sup> as adopted, Article 4 on the entry into force was added, correcting an omission of a technical nature; in the recital, some additions underline the importance for Ukraine of respecting certain obligations of Ukraine in the implementation of the Plan (e.g. addition of a last sentence in recital 20, clarifying the scope of reporting obligations for Ukraine; addition of a last sentence in recital 19, recalling the rules on procurement as defined in the Ukraine Facility Regulation itself). More significantly, no changes were introduced to the Annex to the Council decision which details the reforms and investment projects described in the Ukraine Plan, including the qualitative and quantitative steps to be achieved by Ukraine.

Thus, the practice shows that once presented with the result of a lengthy and complex negotiation, and required to act within a very limited time frame, the Council has little margin for reopening an agreement that has already been reached bilaterally.

The Council played a more significant role in occasion of the first application of the Conditionality Regulation which led to the adoption of measures against Hungary.<sup>51</sup> In this case the Council did exercise control both on the process (by extending the deadline for the adoption of measures so to allow Hungary to adopt additional remedial measures that could have remedied the rule of law issues identified in the Commission's proposal) and on the substance so to include in the assessment the evaluation of the additional remedial measures adopted by Hungary in the time span between the Commission's proposal and the measures.<sup>52</sup> Crucially, on the basis of that assessment, the Council concluded for the adoption of measures of a different – and lower – level of

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<sup>49</sup> Proposal for a Council Implementing Decision on the approval of the assessment of the Ukraine Plan, COM/2024/172 final

<sup>50</sup> Council implementing decision of 14 May 2024 on the approval of the assessment of the Ukraine Plan, OJ L, 2024/1447, 24.5.2024

<sup>51</sup> Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022, p. 94–109.

<sup>52</sup> This required extensive redrafting of the recitals, in order to supplement the statement of reasons of the original proposal with the assessment of the remedial measures subsequently adopted by Hungary.



suspension than the one originally proposed by the Commission, as it considered that the risk for the budget of the Union had decreased.<sup>53</sup>

At a closer look, however, the Council largely followed the Commission's assessment and it departed only marginally from the Commission's proposal, albeit such a departure was surely politically significant. First, the Council based its decision on the elements of fact provided by the Commission and confirmed the Commission's assessment as to the existence of certain breaches of the rule of law and a of a risk for the sound implementation of the budget or the financial interests of the Union. Second, it equally relied on the Commission to assess whether the additional measures adopted by Hungary could remedy the situation and confirmed that they couldn't.<sup>54</sup>

Confronted with the obligation to state reasons, a very complex factual situation and a tight time frame, the power of amendment by the Council is limited by the fact that such power must rely on objective factors and not on criteria of political convenience. In different words, the Council cannot set aside the relevant facts, circumstances and elements of law as provided by the Commission in its proposal to come to a different conclusion, as far as the Commission's assessment remains sufficiently justified. In the case of Hungary, having regard to the principle of proportionality, the Council was not convinced by the position of the Commission that, despite the adoption of a number of remedial measures, the risk for the implementation of the EU budget in Hungary remained exactly the same and therefore the level of the suspension should remain unaffected. It therefore decided for a lower level of suspension.

Finally, no case has so far occurred where the "emergency brakes" discussed in section I were triggered so to allow the European Council to discuss the matter and provide political input to the Council for the adoption of implementing acts. This is

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<sup>53</sup> See in particular recital 60 and Article 2 which lowered the level of suspension of the funds from 65% originally proposed by the Commission to 55%.

<sup>54</sup> Following a request of the Council, the Commission published on 30 November 2022 a Communication on the remedial measures notified by Hungary, providing Council with its assessment of the adequacy of the remedial measures adopted by Hungary as of 19 November 2022. Following a request made by the Council on 6 December 2022, the Commission, on 9 December 2022, provided an updated assessment on the further measures taken by Hungary up to 7 December 2022. See recital 33 of the Council Implementing Decision (EU) 2022/2506.

particularly remarkable in the case of the Conditionality Regulation, where Hungary did take assertive action in other unrelated files (notably the approval of the Macro Financial Assistance Plus Instrument to support Ukraine and a connected MFF amendment requiring unanimity in Council) but did not ask for a discussion at the European Council. The “emergency brakes” appear therefore to have exhausted their role at the negotiating table for the adoption of the spending instruments, as concessions made to gather the required support for the adoption of the instrument, but never really meant to be used in practice.

## *2. Conferral of implementing powers on the Council and its wider impact on the institutional balance*

It is now possible to draw some conclusions on the expanding role of the Council in the implementation of EU law and its impact on the institutional balance of the Union.

The widening and deepening of the powers conferred on the Council for the implementation of recent crisis-related instruments has not corresponded to an increased influence of the Council in determining the content of the implementing acts as adopted in practice. This paper has identified a number of factors that seem to concur to determine this situation: certain limitations resulting from the design of the framework for the exercise of Council implementing powers; some limitations linked to the internal organisation and working methods of the Council; a combined effect of the power of initiative of the Commission and of the inherent constraints of implementing powers; the highly technical nature of the assessments to be made combined with the narrow time frame to adopt the decision. Globally, the overall impression is that the Council remains satisfied with a role of mere political oversight on the implementation of the spending instruments rather than seeking to actively shape the relevant decisions.

This leads us to an important observation. Even where implementing powers are conferred to the Council, the Commission continues to play the key role in implementing the spending instruments via its power of initiative. It is the Commission that identifies the relevant facts and carries out the technical assessments (on the quality of the plans, the conditions for the payments, the existence of the

breaches of the Rule of Law, etc.) on which the Council implementing decisions are taken. When necessary, it is the Commission that negotiates with the concerned Member State the content of the measures to be adopted and incorporate the result of such negotiations into its proposals. In practice, the Council does not interfere, and nor is it equipped to interfere, with the technical assessments and negotiations carried out by the Commission. Ultimately it is the Commission that exercises discretion and shapes the implementing decisions submitted to the Council for approval.

A second remark follows from the previous one: the conferral of powers on the Council does not seem to undermine the Commission's role, but – on the contrary – enhances it. And it does so in two different ways.

First, the need for the Commission to obtain the approval of the Council obliges it to provide a very solid statement of reasons and a convincing narrative for its proposals. While the Commission is normally accountable to the European Parliament in the exercise of its implementing powers, when acting in the framework of its right of initiative for the adoption of Council implementing powers, it becomes accountable to the Council too. Paradoxically, the conferral on a political body of the final decision makes the process more objective and enhances democratic accountability. This phenomenon was clearly at play in occasion of the first implementation of the Conditionality Regulation as explained above.

Second, and perhaps most importantly, the conferral of implementing powers on the Council gives it the legal and political responsibility for the acts that are adopted. This assumption of political responsibility has the effect of also providing political backing to the action of the Commission in areas where it enjoys exclusive implementing responsibility but for some reason it is reluctant to act.

An example of this phenomenon is the adoption of measures for the protection of the budget in relation to the Rule of Law situation in Hungary and in Poland. The discussions and then adoption by the Council of measures under the Conditionality Regulation and the adoption of the RRF plans for the two Member States, which included super-milestones related to the rule of law, has paved the way for the Commission to

activate on the same grounds another conditionality mechanism. I am referring here to the horizontal enabling condition relating to the respect of the Union fundamental values which is incorporated in the Common Provision Regulation to implement the cohesion funds (CPR).<sup>55</sup> It must be stressed that under the CPR the horizontal enabling conditions are activated by the Commission on its own; however, the Commission has been very reluctant to use its powers under CPR conditionality (and its predecessors) to suspend payments to Member States.

It is thus remarkable that once the Council showed its support for imposing the other set of budgetary conditionality on the two Member States under the Conditionality Regulation and the RRF, the Commission finally decided to follow up and to make full use of its prerogatives. It is also interesting to note that the political reactions to the triggering of the CPR conditionality was negligible despite the importance of their effect (comparable if not superior in volume to the suspensions decided by Council under the Conditionality Regulation). Admittedly, the Commission took advantage of the shouldering by Council of the political responsibility for triggering the mechanisms against the two Member States.

## **Conclusions**

Rather than undermining the institutional balance, the conferral of implementing powers on the Council in the framework of the emergency measures has contributed to ensure timely and effective reactions by the political institutions of the Union to crisis situations.

The conferral of powers to the Council has served the objective of giving Member States a degree of control on the implementation of instruments that were controversial for the impact they may have on national interests (e.g. conditionality regulation) and for

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<sup>55</sup> Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L231, 2021, in particular its Article 15 and Annex III.

the dynamic they introduce in the process of integration (e.g. RRF and the mobilisation of a common debt on a massive scale to finance the recovery from Covid).

In that regard, a creative and sometimes unorthodox design of the relevant provisions (e.g. EuCO emergency brakes), managed to create the conditions for the necessary political support for the adoption of crisis instruments by the Union by providing reassurances to the Member States as to the fact that decisions involving key national interests would be taken only after sufficient ponderation at the highest level and by consensus. Due to a careful legal design, this objective has been pursued in a way which respects the role of the institutions involved as made clear by the Court of Justice. The result has been more EU rather than intergovernmental solutions to crises, if compared to past experiences (financial crisis, Greek debt crisis). This in turns contributed to reducing fragmentation, enhancing solidarity and avoiding the risk of a race to the bottom between Member States, thereby maintaining a level playing field.

In practice, the Council does not seem to have taken great advantage of the newly acquired powers to actively exercise its discretion in the implementation of spending instruments. In fact, with very limited exceptions, the Council has systematically confirmed the proposals for implementing decisions put forward by the Commission, which therefore has played the key role in carrying out the relevant assessments and making the necessary discretionary choices. Ultimately therefore, the conferral of implementing powers provides the Council with a possibility of final political oversight on implementation more than the shaping of the relevant decisions.

Regardless of such self-restraint, the fact remain that implementing decisions are legally adopted by the Council which bears the legal and political responsibility for them. It has been shown that such a development introduces positive dynamics in the functioning of other institutions, as it requires the Commission to be particularly rigorous in its assessments and adds another level of accountability to the one it already owes to the European Parliament. More than that, the assumption of responsibility by the Council has allowed the Commission to take a more assertive stance in areas where it already enjoyed exclusive implementing responsibilities but was reluctant to act.

Finally, the enhanced role of the Council in the implementation of the EU law entails an assumption of political responsibility by the representative of the Member States sitting in Council. Till the recent past, the lack of action by the Council has prompted the supranational institutions of the Union (Commission, European Central Bank, Court of Justice) to play an expanded role in order to find ways to tackle the crisis of the day. The new centrality of the Council has the merits to finding solutions to political problems (and the debate around them) at a political level. This helps shielding the supranational institutions from the recurring criticism as to their political activism and lack of democratic credentials and concurs in defusing the tensions that have lately been emerging around the final authority of the Court of Justice and the primacy of EU law.

**Annex - Governance Models For Ukraine Facility, RRF, SURE and typical Macro Financial Assistance instrument**

		Adoption Basic Act	Decision on amounts: grants, loans	Reforms/ Conditionality	Framework Agreement / MoU / Reform Agenda	Decisions on payments	Decision on Suspension/ Reductions of Support	Exceptional Bridge Financing	Eligibility of Suppliers	Exceptional Financing
Ukraine Facility	FINAL TEXT	Ukraine Facility Regulation	Art 19 - 20: CID approving and amending the UA Plan Total amounts for grants and loans + max annual amount grants and <i>indicative</i> max annual amount for loans Proposal modified at QMV - 1 Month deadline	Art 17: laid down in the Ukraine plan (CID)	Art 9: Comm ID	Art 26(4) CID Payment Approval Proposal modified at QMV 3 Weeks deadline	Art 5 Suspension on Preconditions: CID 1 Month deadline	Art 25: Comm ID	Art 11 Comm ID examination procedure	Art 13 CID 1 Month deadline
							Art 26(5) Comm ID Temporary Suspension	Art 25 MoU Comm ID examination procedure		
							Art 26(6) CID Final reduction of support Proposal QMV 1 Month deadline			
	COMM Proposal	Ukraine Facility Regulation	Art 19: CID approving plan sets indicative amounts	Art 16 : laid down in the Ukraine plan (CID)	Art 9: Comm ID	Art 25: Comm ID	Art 5: Comm ID Suspension on Preconditions	Art 24: Comm ID	Art 11: Comm ID	Art 13: CID After Framework Agreement Approved
Recital 48 Exact amounts in annual budgetary procedure			Art 25(5): Comm ID Temporary Suspension							
Selected Spending Instruments	RRF	RRF Regulation	Art 20: CID approving the RR Plan – 4 weeks deadline	Art 18: In RR Plans (CID)	None	Art 24(5): Comm ID examination procedure + ex ante consultation EFC + Recital 52: EUCO emergency brake	Art 24: Comm ID	None		
							Art 10: CID at RQM for macroeconomic conditionality			
	SURE	SURE Regulation	Art 6: CID approving request for finacial assistance	Article 3: In the CID	None	Art 7: Comm ID	None	Extension of availability of the instrument Article 12(4): CID		
Typical Macro Financial Assistance	MFA Decision	Art 1: In MFA Decision	In MoU with third country Comm ID comitology	Comm ID under examination or advisory p.	Art 4: Comm ID	Art 4: Comm ID	None			

**Legend**

	EP and Council acting as colegislators or budgetary authorities
	Council Implementing Decision (CID)
	EuCo brake + EPF involvement

	Commission under comitology examination procedure
	Commission implementing decision without comitology (Comm ID)