

Footnotes and annexes: 6 reasons why the EU should use the approval of National Recovery and Resilience Plans to enforce the rule of law in Hungary and Poland

[1] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I, 22.12.2020, p. 1). This includes a detailed definition of the rule of law which includes willingness and capacity to deal with corruption and problems with judicial independence

[2] In the latter case, this means no release of cash unless and until rule of law problems are fully addressed by the authorities of the relevant Member State.

[3] The EU Commission has to cut funding to Hungary: the legal case, July 2021, at: https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf

[4] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57/17, 18.2.2021.

[5] Article 8 and corresponding recital 71 refers on multiple occasions to the Rule of Law Conditionality Regulation.

[6] The same Regulation instructs the Commission to assess the “relevance, efficiency, effectiveness and coherence of plans submitted by Member States” (Article 19(3)-header).

[7] See annex 2 for a comprehensive overview of all relevant wording of Regulation 2021/141.

[8] Article 19(3)(b). This suggests a measure of discretion on the part of the Commission and the Council.

[9] Article 19(3)(j)

[10] Articles 18(4)(b); 19(3)(b); Annex V, point 2.2 and corresponding recitals 32 and 42.

[11] Annex V, point 2.10 (“adequate” or “insufficient”).

[12] See L. Pech and D. Kochenov, Respect for the Rule of Law in the Case Law of the European Court of Justice, SIEPS, 2021 (forthcoming): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850308

[13] European Commission, Statement on the decision of the Polish Constitutional Tribunal of 14 July, 15 July 2021, at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_3726

[14] https://twitter.com/EU_Commission/status/1417487022479003661?s=20

[15] Polish government, Communiqué on the government’s response to the European Commission, 17 August 2021, at: <https://www.gov.pl/web/premier/komunikat-cir-ws-odpowiedzi-rzadu-do-komisji-europejskiej>

[16] European Court of Human Rights, Xero Flor v. Poland, Application nr. 4907/18, 7 May 2021; European Court of Human Rights, Broda and Bojara v. Poland, Application nr. 26691/18 & 27367/18, 29 June 2021; European Court of Human Rights, Reczkowicz v. Poland, Application nr. 43447/19, 22 July 2021.

[17] Article 8 and corresponding recital 71.

[18] See supra n. 2.

Annex 1: Rule of law language in country-specific recommendations for Hungary and Poland

For Hungary (2019)¹:

Recital 16: Concerns remain over the **prevention and prosecution of corruption. Several indicators suggest that Hungary's exposure to corruption has increased in recent years.** Corruption risks and favouritism distort the allocation of resources as these are not channelled to the most productive firms. The functioning of the prosecution service is of crucial importance to fighting corruption... **[T]here are still no signs of determined action to prosecute corruption involving high-level officials or their immediate circle when serious allegations arise. Accountability for decisions to close investigations is a matter of concern, as there are no effective remedies to contest such decisions.** The prevention of corruption is further hindered by public institutions applying restrictions, including dissuasive fees for access to information.

Recital 17: The independence, efficiency and quality of the justice system are crucial to attracting business and enabling economic growth. Checks and balances, which are crucial to ensuring judicial independence, are seen to be under further pressure within the ordinary courts system. **The National Judicial Council faces increasing challenges in counter-balancing the powers of the President of the National Office for the Judiciary. Questions have been raised regarding the consequences of this for judicial independence.** With regard to the Administrative Courts Law, it is noted that the government tabled a bill withdrawing the Act on the entry into force and transitional rules for the administrative courts on 30 May 2019.

Recommendation 4: **Reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information, and strengthen judicial independence... (..).**

For Hungary (2020)²:

Recital 31: ... The 2019 country-specific recommendations remain pertinent and will continue to be monitored throughout next year's European Semester... All of the 2019 country-specific recommendations should be taken into account for the strategic programming of post-2020 cohesion policy funding, including for mitigating measures and exit strategies with regard to the current crisis.

Recital 32: ...Corruption, access to public information and media freedom caused concerns even before the crisis ...**Investigation and prosecution appears less effective in Hungary than in other Member States. Determined systematic action to prosecute high-level corruption is lacking. Accountability for decisions to close investigations remains a matter of concern as there are no effective remedies against decisions of the prosecution service not to prosecute alleged criminal activity...** Dissuasive practices for accessing public information can deter citizens and non-governmental organisations from exercising their constitutional rights.

For Poland (2019)³:

Recital 18: ... The unstable regulatory framework and other barriers to the expansion of firms are negatively affecting investment activity and productivity. Establishing an effective dialogue with all stakeholders would help improve the quality of legislation ... Guaranteeing the rule of law and the independence of the judiciary are also essential in this context. It is recalled that **in December 2017, the Commission presented to the Council a reasoned proposal to determine that there is a clear risk of a serious breach by Poland of the rule of law.** These concerns are the subject of a judgement and on-going procedures which are pending before the Court of Justice ... **Legal certainty and trust**

¹ Council recommendation of 9 July 2019 on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary, OJ C 301/101, 5.9.2019, at: https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:C:2019:301:TOC&uri=uriserv:OJ.C_.2019.301.01.0101.01.ENG

² Council recommendation of 20 July 2020 on the 2020 National Reform Programme of Hungary and delivering a Council opinion on the 2020 Convergence Programme of Hungary, OJ C 282/107 26.8.2020, at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2020.282.01.0107.01.ENG&toc=OJ%3AC%3A2020%3A282%3AFULL

³ Council Recommendation of 9 July 2019 on the 2019 National Reform Programme of Poland and delivering a Council opinion on the 2019 Convergence Programme of Poland, OJ C301/123, 5.9.2019, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019H0905%2821%29>

in the quality and predictability of ... institutions are important factors for the investment environment.

For Poland (2020)⁴:

Recommendation 4: Enhance the investment climate, in particular by safeguarding judicial independence.

⁴ Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, OJ C 282/135, 26.8.2020, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020H0826%2821%29>

Annex 2: Relevant language in Regulation 2021/141

- Recital 17: Currently, no instrument foresees direct financial support linked to the achievement of results and to the implementation of reforms and public investments of the Member States in response to challenges identified in the context of the European Semester...
- Recital 29: A mechanism to ensure the link between the Facility and sound economic governance should be established, allowing the Commission to make a proposal to the Council to suspend all or part of the commitments or payments under the Facility...
- Recital 32: ... Recovery and resilience plans **should be consistent with the relevant country-specific challenges and priorities** identified in the context of the European Semester...
- Recital 40: **The implementation of the Facility should be carried out in line with the principle of sound financial management, including the effective prevention and prosecution of fraud, including tax fraud, tax evasion, corruption and conflicts of interest.**
- Recital 42: Appropriate guidelines should be set out in an annex to this Regulation [i.e. Annex V] to serve as a basis for the Commission to assess in a transparent and equitable manner the recovery and resilience plans ... In the interest of transparency and efficiency, a rating system for the assessment of the proposals for recovery and resilience plans should be established to that effect. **The criteria related to the country-specific recommendations ... should require the highest score of the assessment...**
- Recital 45: The Council should approve the assessment of the recovery and resilience plans by means of an implementing decision, based on a proposal by the Commission, which it should endeavour to adopt within four weeks of the adoption of that proposal. **Provided that the recovery and resilience plan satisfactorily addresses the assessment criteria**, the Member State concerned should be allocated the maximum financial contribution ... **No financial contribution should be awarded to the Member State if the recovery and resilience plan does not satisfactorily address the assessment criteria...**
- Recital 52: The release of funds under the Facility is contingent on the satisfactory fulfilment of the relevant milestones and targets by the Member States set out in the recovery and resilience plans, the assessment of such plans having been approved by the Council. ... **If, exceptionally, one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council. The respective Member States should also inform the Council without undue delay, and the Council should, in turn, without delay inform the European Parliament. In such exceptional circumstances, no decision authorising the disbursement of the financial contribution and, where applicable, of the loan should be taken until the next European Council has exhaustively discussed the matter...**
- Recital 53: For the purposes of sound financial management, while respecting the performance-based nature of the Facility, specific rules should be laid down for budget commitments, payments, suspension, and recovery of funds as well as the termination of agreements related to financial support. ... Payments should be made in instalments and be based on a positive assessment by the Commission of the implementation of the recovery and resilience plan by the Member State concerned. **The Member States should take appropriate measures to ensure that the use of funds in relation to measures supported by the Facility complies with**

applicable Union and national law. In particular, they should ensure that fraud, corruption and conflicts of interests are prevented, detected and corrected ...

Recital 71: Horizontal financial rules adopted by the European Parliament and the Council pursuant to Article 322 TFEU apply to this Regulation. ... **Rules adopted pursuant to Article 322 TFEU also include a general regime of conditionality for the protection of the Union's budget.**

Article 8 (implementation):

The Facility shall be implemented by the Commission in direct management in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and [Regulation] (EU, Euratom) 2020/2092 [Rule of Law Conditionality Regulation].

Article 17 (Eligibility):

Article 17(1): ... Member States shall prepare national recovery and resilience plans. Those plans shall set out the reform and investment agenda of the Member State concerned. Recovery and resilience plans that are eligible for financing under the Facility shall comprise measures for the implementation of reforms and public investment through a comprehensive and coherent package...

Article 17(3): **The recovery and resilience plans shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester...**

Article 18 (Recovery and Resilience Plan):

Article 18(1): A Member State wishing to receive a financial contribution ... shall submit to the Commission a recovery and resilience plan as defined in Article 17(1).

Article 18(4): The recovery and resilience plan shall be duly reasoned and substantiated. It shall in particular set out the following elements:

.. (b): **an explanation of how the recovery and resilience plan contributes to effectively address all or a significant subset of challenges identified in the relevant country-specific recommendations...**

.. (r): **an explanation of the Member State's system to prevent, detect and correct corruption, fraud and conflicts of interests, when using the funds provided under the Facility...**

Article 19 (Commission assessment):

Article 19(1): The Commission shall assess the recovery and resilience plan or, where applicable, the update to that plan submitted by the Member State in accordance with Article 18(1) and 18(2) within two months of the official submission, and make a proposal for a Council implementing decision in accordance with Article 20(1). ... The Commission may make observations or seek additional information. The Member State concerned shall provide the requested additional information and may revise the recovery and resilience plan if needed...

Article 19(2): When assessing the recovery and resilience plan ..., the Commission **shall take into account the analytical information on the Member State concerned available in the context of the European Semester** as well as the justification and the elements provided by that Member State, as referred to in Article 18(4), **as well as any other relevant information** ...

Article 19(3): **The Commission shall assess the relevance, effectiveness, efficiency and coherence of the recovery and resilience plan and, for that purpose, shall take into account the following criteria which it shall apply in accordance with Annex V:**

Relevance:

.. (b): **whether the recovery and resilience plan is expected to contribute to effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations...**

... Efficiency:

.. (j): **whether the arrangements proposed by the Member State concerned are expected to prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided under the Facility...**

Article 20 (Commission proposal and Council implementing decision):

Article 20(1): On a proposal from the Commission, the Council shall approve by means of an implementing decision the assessment of the recovery and resilience plan submitted by the Member State in accordance with Article 18(1) or, where applicable, of its update submitted in accordance with Article 18(2).

..

Article 20(7): The Council shall adopt the implementing decisions referred to in paragraph 1, as a rule, within four weeks of the adoption of the Commission proposal.

Article 22 (Protection of the financial interests of the Union):

Article 22(1): In implementing the Facility, the Member States ... shall take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds in relation to measures supported by the Facility complies with the applicable Union and national law, **in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests. To this effect, the Member States shall provide an effective and efficient internal control system and the recovery of amounts wrongly paid or incorrectly used.** Member States may rely on their regular national budget management systems.

Annex V: Assessment guidelines for the Facility

1. Scope

The purpose of these guidelines is to serve together with this Regulation as a basis for the Commission to assess - in a transparent and equitable manner - the recovery and resilience plans proposed by Member States and to determine the financial contribution in conformity with the objectives and any other relevant requirements laid down in this Regulation. These guidelines represent the basis for the application of the assessment criteria and the determination of the financial contribution as referred to, respectively, in Articles 19(3) and 20(4).

The assessment guidelines are designed to:

- (a) give further guidance on the assessment process of the proposals for recovery and resilience plans submitted by Member States;
- (b) provide further details on the assessment criteria and provide for a rating system to be established with a view to ensuring an equitable and transparent process

...

The guidelines are a tool to facilitate assessment by the Commission of the proposals for recovery and resilience plans as submitted by Member States and to ensure that the recovery and resilience plans support reforms and public investment that are relevant and display high added value with regard to the objectives of the Facility, while ensuring equal treatment among the Member States.

2. Assessment criteria

In accordance with Article 19(3), the Commission shall assess the recovery and resilience plans under the criteria of relevance, effectiveness, efficiency and coherence. As a result of

the assessment process, the Commission shall give ratings to the recovery and resilience plans submitted by the Member States under each of the assessment criteria referred to in Article 19(3), with a view to establishing the financial allocation in accordance with Article 20(4). For the sake of simplification and efficiency, the rating system shall range from A to C, as set out in the following:

Relevance

...

2.2 The recovery and resilience plan is expected to contribute to effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations...

The Commission shall take into account the following elements for the assessment under this criterion:

Scope

— the recovery and resilience plan is expected to contribute to effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations

...

And ..

Rating

A – the recovery and resilience plan contributes to effectively addressing all or a significant subset of challenges identified in the country-specific recommendations ...

B – the recovery and resilience plan contributes to partially addressing all or a significant subset of challenges identified in the country-specific recommendations ...

C – the recovery and resilience plan does not contribute to addressing any challenges identified in the country-specific recommendations ...

...

2.10 The arrangements proposed by the Member State concerned are expected to prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided under the Facility, including the arrangements that aim to avoid double funding from the Facility and other Union programmes.

The Commission shall take into account the following elements for the assessment under this criterion:

Scope

— the internal control system described in the recovery and resilience plan is based on robust processes and structures, and identifies clear actors (bodies/entities) and their roles and responsibilities for the performance of the internal control tasks; it notably ensures appropriate segregation of relevant functions; and

— the control system and other relevant arrangements, including for the collection and making available of data on final recipients described in the recovery and resilience plan, in particular to prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided under the Facility are adequate; and ..

— the actors (bodies/entities) responsible for controls have the legal empowerment and administrative capacity to exercise their foreseen roles and tasks.

Rating

A – adequate arrangements

C – insufficient arrangements