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

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on a general regime of conditionality for the protection of the Union budget

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (a) of Article 322(1) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the Court of Auditors[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, enshrined in Article 2 of the Treaty on European Union (TEU). As recalled by Article 2 TEU, those values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

(2) In its conclusions of 21 July 2020, the European Council stated that the financial interests of the Union are to be protected in accordance with the general principles embedded in the Treaties, in particular the values set out in Article 2 TEU. It also underlined the importance of the protection of the financial interests of the Union and the importance of respect for the rule of law.

(3) The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality[(3)] implying a transparent, accountabledemocratic and pluralistic law-making process; legal certainty[(4)]; prohibition of arbitrariness of the executive powers[(5)]; effective

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council. (See end of Document for details)*

judicial protection, including access to justice, by independent and impartial courts[6]; and separation of powers,[7] be respected[8].

(4) The accession criteria established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995 are the essential conditions that a candidate country has to satisfy to become a Member State of the Union. Those criteria are now enshrined in Article 49 TEU.

(5) Once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected.[9] The laws and practices of Member States should continue to comply with the common values on which the Union is founded.

(6) While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

(7) Whenever Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094[10], and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 of the Treaty on the Functioning of the European Union (TFEU).

(8) Sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.

(9) The independence and impartiality of the judiciary should always be guaranteed, and investigation and prosecution services should be able to properly execute their functions. The judiciary, and investigation and prosecution services should be endowed with sufficient financial and human resources and procedures to act effectively and in a manner that fully respects the right to a fair trial, including respect for the rights of defence. Final judgments should be implemented effectively. Those conditions are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union.

(10) The independence of the judiciary presupposes, in particular, that the judicial body concerned is able to exercise, both under the relevant rules and in practice, its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

(11) Respect for the rule of law is essential not only for Union citizens, but also for business initiatives, innovation, investment, economic, social and territorial cohesion, and the proper functioning of the internal market, which will flourish most where a solid legal and institutional framework is in place.

(12) Article 19 TEU, which gives concrete expression to the value of the rule of law set out in Article 2 TEU, requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget. The very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts[(11)]. Maintaining the independence of the courts is essential, as confirmed by the second paragraph of Article 47 of the Charter[(12)]. This is true, in particular, for the judicial review of the validity of measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures which may also be brought before the courts.

(13) There is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.

(14) The Union has developed a variety of instruments and processes that promote the rule of law and its application, including financial support for civil society organisations, the European Rule of Law Mechanism and the EU Justice Scoreboard, and provide an effective response from Union institutions to breaches of the rule of law through infringement proceedings and the procedure provided for in Article 7 TEU. The mechanism provided for in this Regulation complements these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union.

(15) Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.

(16) The identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.

(17) Measures under this Regulation are necessary in particular in cases where other procedures set out in Union legislation would not allow the Union budget to be protected more effectively. Union financial legislation and the applicable sector-specific and financial rules provide for various possibilities to protect the Union budget, including interruptions, suspensions or financial corrections linked to irregularities or serious deficiencies in management and control systems. The measures to be adopted in the event of breaches of the principles of the rule of law and the procedure to be followed to adopt such measures should be determined. Such measures should include the suspension of payments and of commitments, the suspension of the disbursement of instalments or the early repayment of loans, a reduction of funding under existing commitments, and a prohibition on entering into new commitments with recipients or to enter into new agreements on loans or other instruments guaranteed by the Union budget.

(18) The principle of proportionality should apply when determining the measures to be adopted, in particular taking into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, the duration and recurrence of the conduct, the intention, the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law, and the effects on the sound financial management of the Union budget or the financial interests of the Union.

(19) It is essential that the legitimate interests of final recipients and beneficiaries are properly safeguarded when measures are adopted in the event of breaches of the principles of the rule of law. When considering the adoption of measures, the Commission should take into account their potential impact on final recipients and beneficiaries. Taking into consideration that in shared management payments from the Commission to Member States are legally independent from payments by national authorities to beneficiaries, appropriate measures under this Regulation should not be considered to affect the availability of funding for payments towards beneficiaries according to the payment deadlines set out under the applicable sector-specific and financial rules. Decisions adopted under this Regulation and obligations towards final

recipients or beneficiaries set out in this Regulation are part of applicable Union law with respect to implementing funding in shared management. The Member States concerned by the measures should regularly report to the Commission on compliance with their obligations towards final recipients or beneficiaries. Reporting on compliance with payment obligations towards beneficiaries set out in the applicable sector-specific and financial rules should allow the Commission to verify that decisions under this Regulation do not impact in any way, directly or indirectly, payments to be made under the applicable sector-specific and financial rules.

To strengthen the protection of the final recipients or beneficiaries, the Commission should provide information and guidance via a website or internet portal, together with adequate tools to inform the Commission about any breach of the legal obligation of government entities and Member States to continue making payments after measures pursuant to this Regulation are adopted. The Commission should follow up on such information to verify whether the applicable rules have been respected, in particular Article 63, point (b) of Article 68(1) and Article 98 of Regulation (EU) …/… of the European Parliament and of the Council of … laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument[(13)]. Where necessary, in order to ensure that any amount due by government entities or Member States is effectively paid to final recipients or beneficiaries, the Commission should recover payments made, or, where appropriate, make a financial correction by reducing Union support to a programme in line with the applicable sector-specific and financial rules.

(20) In order to ensure uniform conditions for the implementation of this Regulation and in view of the importance of the financial effects of measures adopted pursuant to this Regulation, implementing powers should be conferred on the Council, which should act on the basis of a Commission proposal.

(21) Before proposing the adoption of any measure pursuant to this Regulation, the Commission should inform the Member State concerned why it considers that breaches of the principles of the rule of law might exist in that Member State. The Commission should inform the European Parliament and the Council without delay about any such notification and its contents. The Member State concerned should be allowed to submit its observations. The Commission should take those observations into account.

(22) When setting time limits in accordance with this Regulation for the Member State concerned, the Commission should take into account, in particular, the amount of information provided and requested, the complexity of the relevant facts and of their assessment, as well as the administrative capacity of the Member State concerned.

(23) Where the Commission, after analysing the observations of the Member State concerned, considers that the conditions for the adoption of measures are fulfilled, it should submit a proposal for the adoption of appropriate measures to the Council. The Council should act upon the proposal of the Commission to adopt appropriate measures by means of an implementing decision within a period of one month, which