The EU Parliament's Abdication on the Rule of Law (Regulation)

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To paraphrase a previous blog entry by Scheppele, Pech and Kelemen, if the *The Decline and Fall of the European Union* is ever written, historians will conclude that not only the EU's two key intergovernmental institutions – the European Council and the Council – should bear the greatest responsibility for the EU's demise, but also the EU Parliament. Indeed, by failing to challenge the legality of the EUCO's December conclusions encroaching upon its own prerogatives, the EU Parliament might have just become an enabler of the ongoing erosion of the rule of law across the Union. Paradoxically, it did so after relying on incomplete and partial opinion of its own legal service advising the Parliament to trade the respect of the rule of law away for political convenience.

Let's take a step back.

The European Council (EUCO), like any other EU institution, must "act within the limits of the powers conferred on it in the Treaties […] and practice mutual sincere cooperation". In particular, the EUCO shall not exercise legislative functions.

Yet that's exactly what happened when the EU Council in its December Conclusions disposed the de facto suspension of the Rule of Law (RoL) Regulation (until the Court of Justice will judge on its legality), and made its application conditional upon the adoption of guidelines not provided for by the Regulation.

The EU Commission presented this self-inflicted breach of its own prerogatives as co-legislator as the political price to be paid to break the deadlock regarding the Multiannual Financial Framework (MFF) and the Next Generation EU. The EU Parliament instead immediately denounced this behaviour as illegal but set aside the possibility bring the EUCO to Court on the basis that, not being legally binding, its conclusions would have not produced legal effects.

In its December 15, 2020 resolution, the Parliament strongly regretted the modalities of adoption of the entire package, and dismissed the content of the European Council conclusions on the Regulation on a general regime of conditionality for the protection of the Union budget as "superfluous". It also stressed that "the Parliament has several legal and political means at its disposal to make sure that the law is enforced by everyone and by EU institutions in the first place". In particular, it expressed its readiness to lodge an action for failure to act – under Article 265 TFEU – against the Commission, should this fail to activate the RoL Regulation.

Then Christmas came, and with it some seasonal self-praise for wrapping up the Hamiltonian moment into law.

It is only at the end of January that Antonio Tajani, as chair of the Committee on Constitutional Affairs (AFCO), addressed a letter to the Committee on Legal Affairs asking it to examine the possibility of a legal action by the EU Parliament against the EU Council's conclusions as being ultra vires. The ultimate goal pursued by this action would be to remedy the dangerous precedent the conclusions caused inter alia on the principle of inter-institutional balance.

In the meantime, a legal opinion was prepared by the EU Parliament's legal service addressing the AFCO's request. Let's now turn to – and focus our attention on – this legal opinion.

A legal political opinion

The legal service of the European Parliament, like its counterparts within other EU institutions, advises the Parliament on legal questions and represents it in legal cases. Its legal opinions are by definition *pro veritate*, being intended to provide a "frank, objective and comprehensive advice", as recognized by the Court in *Turco* (para 42). More recently, the EU Civil Service Tribunal further qualified the nature and required quality of the legal advice expected from a legal service, by stating that:

> a legal service, by virtue of its role and its specific knowledge, is called upon to supply, to the institution it is supposed to serve, *all the information* necessary for it to adopt, in the exercise of its powers and throughout the wherever possible, acts in accordance with Union law.

Yet, when measured against this legal standard, the European Parliament's legal service opinion recently provided to IURI's members shows some inherent, manifest and structural weakness.

Rather than offering a full analysis of the EUCO's conclusions under EU institutional law, this 9-page document contains an unprecedented mix of selected legal arguments combined with political considerations, which together appear meant to dissuade the EU Parliament from challenging the December conclusions.

Instead of facilitating it, the legal opinion actually prevents its beneficiaries, the Members of the EU Parliament (MEPs), from forming an informed opinion regarding the legal possibility – not the political opportunity – to challenge this act before the EU Court of Justice. As such, and largely due to its incompleteness nature, this legal opinion might have failed "to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice" (*Turco*, para 42).

Even before embarking on its own evaluation of facts and the applicable law, the EP Legal Service warns the reader (the MEPs) that it "considers it highly probable that such an action would be declared inadmissible". It also added that "even if a case were to be declared admissible, it is not guaranteed that it would succeed".

Let's briefly tackle these two claims, by addressing both the legal and political arguments invoked in their support.

Admissibility

While addressing the question of whether the December's conclusions are reviewable acts, the EP's legal service opinion immediately cautions that: "If the case is rejected as inadmissible, this would imply that Parliament tried to contest the European Council deal but lost its case. From a political perspective, certain interested parties would no doubt seek to use this outcome to their own advantage".

No, this is not an *ad colorandum* note added at the end of the legal analysis to fully inform the members of the EU Parliament. It is its logical premise. Yet suffice to say that by bringing this case to the Court's attention, it would enabled it to neutralize the most pernicious effects of the Conclusions, as analysed in detail here and here, and that regardless of the actual final decision on the admissibility or the merits per se.

Instead, by embracing a fundamentally formalistic interpretation, the legal opinion denies that the EUCO conclusions may be a reviewable act because: (i) they are not mentioned in the Treaties (well, not the strongest of arguments), (ii) do not take the form of acts producing legal effects (well, since the 1971 *AETR* what matters is whether the contested act is *intended to* have legal effects, full stop), and (iii) and based on "the most relevant judgment" of the Court, conclusions are 'mere political in nature' – expressing the 'political will' of the European Council – and as not producing binding effects vis-à-vis the Parliament, the Council and the Commission in the exercise of their functions in the legislative domain.

This analysis – either intentionally or not – neglects to distinguish the facts underlying the previous case law of the Court from the current situation. What makes the December conclusions different – and therefore the previous case-law not immediately relevant – is the nature of the December conclusions themselves, as expressed by their unprecedented level of detail and wording. Their Article 2 de facto re-wrote the Regulation, by suspending its effects until the ECJ issues a judgment (a straightforward violation of EU primary law) and making its enforcement conditional upon the adoption of guidelines, that were not originally foreseen by the co-legislators. Dismissing this unprecedented set of de facto amendments to the Regulation as a mere expression of 'political will, as the EP 'legal' opinion does in a rush, is deeply problematic.

As it has become apparent, the EP Legal Service is not only ignoring the law but also the already existing real-world consequences of the EUCO conclusions. Yet reality speaks for itself.

As of February 26, 2021 – 57 days after its entry into force – it appears manifest that the December Conclusions have already produced some major legal effects. Despite a number of developments (some long-standing, others relatively recent) that could have justified the triggering of the RoL Regulation since January 1, 2021 – by seriously affecting the sound financial management of the Union or the protection of the financial interests of the Union as of 1 January 2021 in a sufficiently direct way –, the EU Commission showed no intention to trigger its application. Rather Commissioner Jourová publicly stated that the Regulation can't be used until the

Court of Justice will have had the chance to judge on its legality. That's exactly what the EUCO's Conclusions disposed last December, while acting ultra vires.

Likewise, Commissioners Reynders and his services publicly confirmed that work regarding the adoption of the guidelines publicly has already begun. Yet those guidelines are not foreseen in the Regulation, but were an add-on of EUCO.

In these circumstances, to argue that the EUCO's conclusions do not produce legal effects appears slightly disingenuous. As the EU Commissioners' statements, actions and inactions unquestionably confirm, the EUCO's amendments to the Regulation are alive and kicking.

Given what's at stake, the Members of the EU Parliament would have deserved to receive a full legal – as opposed to political – analysis by its legal service. Instead, the latter made them to believe that "there is a high probability that the Court would consider that the Conclusions are not acts intended to produce legal effects".

As stated in the aftermath of the adoption of the December's conclusions, even if the EUCO were to insist that its Conclusions are non-binding and the Court would accept this, it would not necessarily result in the inadmissibility of the Parliament's action. The Court in *France v. Commission* (para. 40) rejected "the Commission's argument that the fact that a measure […] is not binding is sufficient to confer on that institution the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty […] be duly taken into account." As noted by AG Sharpston in the *Swiss Memorandum* case (paras 57-62), the Court seems "prepared to be less rigorous on admissibility in interinstitutional disputes where an important issue of principle needs to be resolved."

It's unfortunate that no trace of these references can be found in the suspiciously selective, and therefore incomplete, 'legal' opinion of the Parliament legal service.

Substance

When it comes to the merits of the case, the incompleteness of the analysis provided by the EP's legal service appears equally problematic. Rather than focusing on the numerous apparent breaches of EU law brought about by the conclusions – from the principle of institutional balance to the independence of the Commission –, the legal opinion opts instead to trivialize the nature of the Council's interference into the legislative domain. After acknowledging that it remains "not entirely clear where the line should be drawn between Conclusions that interfere too deeply into the legislative domain and Conclusions that are intended to provide impetus for the Union's development", it precipitously concludes that in the present circumstances the conclusions are an expression of 'political will'. In its support, the Parliament relies on a previous opinion by the Legal Service of the Council – the very same institution that has concocted the contested EUCO conclusions – according to which, allegedly in line with Article 15(1) TEU, "the European Council *legitimately* provided ‚*impetus'* for the Union's development by unblocking the political impasse

concerning the MFF/NGEU package and the draft Regulation on a general regime of conditionality". As legal services' opinions don't represent a source of (EU) law, this reasoning is as tautological as it sounds.

The Parliament's abdication on the rule of law

Based on this legal opinion, the standing rapporteur for disputes – Lara Wolters, MEP – diligently recommended on February 12, 2021 her colleagues within the IURI Committee "not to bring a legal action against the Conclusion of the European Council of 10-11 December 2020 concerning the draft Regulation on a general regime of conditionality for the protection of the Union budget'. A decision along these lines was adopted in writing by the committee's meeting of 22-23 February 2021.

This EU Parliament's decision, which amounts to a self-inflicted mutilation of its own prerogatives vis-à-vis both the EU Commission and EU Council, is based on a set of wrong assumptions, both of legal and political nature.

First, the Parliament assumes that to challenge the EUCO conclusions would automatically imply to consider that the conclusions produce legally binding effects, which would contradict the Parliament's stance in its December resolution (conclusions are "superfluous" as they can't add anything to the Regulation). Yet it is perfectly legitimate – and legally expected under the principle of institutional balance – for the EU Parliament to remedy the consequences which derive from EUCO violating inter alia Art 14-16 TFEU. That's what the 1971 *AETR* established: what matters is whether the contested act is *intended to* have legal effects. And, as shown above, those effects are under the public's eye. Let's face it: the application of the RoL Regulation has been suspended *sine dia* (nobody can predict how long the Hungaro-Polish challenge will take for the Court to decide) and has been amended by the heads of state and government sitting in EUCO.

Second, there is concern that a successful action by the EU Parliament against the conclusions might negatively affect the Regulation itself, by even going as far as invalidating it. This concern is legally unsubstantiated. Should the Court find the action for annulment well-founded, it would merely acknowledge – under Article 264 TFEU – the breaches of the abovementioned principles by the EUCO, without necessarily affecting the lawfulness of the Regulation – which is set to be the object of another, autonomous case. Under Article 266 TFEU, the institution whose act has been declared void is required to take the necessary measure to comply with the judgment of the Court, notably by eradicating the consequences of the relevant act that are affected by the illegalities found. It's not to the Court to determine the measures through which the defendant institution has to execute the judgement, but – in these circumstances – the EU Council itself.

Another interrelated concern, clearly expressed by Lara Wolter's recommendations to her colleagues within IURI, is that the EU Parliament's legal action against the Council's conclusions might intersect with the parallel action for annulment that Hungary and Poland are set to lodge with the ECJ in March. According to this

argument, having the Parliament challenging the EUCO conclusions while defending the validity of the Regulation would amount to a 'balancing act' for the Parliament. Yet, these would have been two different legal proceedings, each of which would have been directed to two different legal acts, driven by different grounds for annulment and whose effects would have not transcended each case. As illustrated above, a successful case by the Parliament against the Council conclusions would have not affected the Regulation, and *a fortiori* they would have not entailed the nullity of the Regulation. To the contrary, a successful challenge by the Parliament would have enabled the Court to neutralize the EUCO conclusions, thus saving the Regulation as agreed by the co-legislators.

The last assumption, this time of a purely political nature, is that should the Parliament had challenged the EUCO conclusions with the ratification of the own resources decisions still pending in most of the EU member states, this might have emboldened Hungary and Poland to slow down, boycott or even veto such a ratification, thus hijacking the NextGenerationEU programme across the Union.

While this last argument has probably carried more weight than the legal considerations debated above, it is unfortunate that the EU Parliament had irreversibly accepted – being poorly advised by its own legal services – to trade the respect of the rule of law away for political convenience. It is particularly telling that this argument was enough to frighten the very same MEPs who have been elected and – by sitting within the IURI committee – are tasked to defend the Parliaments' prerogatives and, more broadly, uphold the rule of law across the Union. Who would like to be blamed by one's electors for delaying the disbursement of NextGenerationEU?

At a time in which the European Parliament remains the sole defender of the rule of law – within its limited competences –, its deliberate inaction in this instance is both self-defeating and precedent-setting. This does not only go to the detriment of the Parliament's institutional place, but also of the Union's credibility – and therefore ability – in defending the respect of the rule of law across and within the European Union. As discussed elsewhere, this self-inflicted, complacent erosion of the rule of law is inevitably set to affect the EU's ambition to self-sufficiency and its strategically autonomous future.

The last hope is that the Court of Justice might – in the framework of the imminent Hungro-Polish action for annullement against the RoL Regulation – be given the opportunity to assess the legal nature and effects of the conclusions as atypical act, so as to clarify, possibly rectify, the damage caused by the December's Conclusions. It is no mystery that, in Kirchberg, this case has been long-awaited for.

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