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**The Rule of Law Conditionality in the EU: Regulation No 2092/2020, the EU  
Recovery Instrument and the cases of Hungary and Poland**

a postgraduate thesis on the field of European Law

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## **ABSTRACT**

The rule of law conditionality mechanism constitutes an instrument that has been added in the toolbox of the European Union since January 2021 according to the Regulation 2092/2020. The validity of the Regulation was contested by Hungary and Poland before the Court of Justice of the European Union (CJEU), which published its final judgments in February 2022 by rejecting both cases of annulment against the Regulation. The conditionality mechanism established by the Regulation allows for the protection of the financial interests of the EU in case of breach of the principles of the rule of law which affect, or seriously risk affecting, the sound financial management of the EU budget. This dissertation discusses the scope of application of the conditionality mechanism established under the Regulation 2092/2020 by further analyzing the judgments of the CJEU in the cases C-156/21 and C-157/21. The analysis is concluded by providing the background of the advancements due to the abovementioned judgments in the context of the actions of the EU institutions and of the invasion of Russia to Ukraine.

Keywords: *conditionality, rule of law, Regulation 2092/2020, RRF, EURI, case C-156/21, case C-157/21, EU institutions*

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## INTRODUCTION

The European Union has gone through subsequent crises, *inter alia*, the financial (2008), the migration (2014), the public health (COVID-19 pandemic, 2020), the rule of law (2018) and recently the one related to the invasion of Russia in Ukraine (2022). One could argue, and it wouldn't be far from reality, that the Union has grown through those crises moving through turbulent times when unity and Union were not always taken for granted. In order to strengthen and at the same time to protect the Union and its binding mechanisms, in December 2020, the European Union adopted the Regulation 2020/2092 “on a general regime of conditionality for the protection of the Union budget” (hereinafter, the “Regulation”), which lays down the new rule of law conditionality mechanism. According to the Regulation, a link between the rule of law and the distribution of EU funds to the member states should be guaranteed in relation to the Union budget, i.e. the Multiannual Financial Framework (MFF) for the period 2021–2027, as well as in connection with the Recovery and Resilience Facility (the “RRF”) and React-EU further to the adoption of the Regulation 2021/241.

Two member states of the EU, Hungary and Poland, launched legal actions for the annulment of the Regulation, claiming the absence of appropriate legal basis in the EU Treaties. On 16 February 2022, the CJEU delivered its judgments for both cases (C-156/21 and C-157/21) further to the previous publication of the Opinions of the Advocate General (AG) on 2 December 2021 for Hungary<sup>1</sup> (Case C-156/21, *Hungary v Parliament and Council*, 2022) and Poland<sup>2</sup> (Case C-157/21, *Poland v Parliament and Council*, 2022) (hereinafter, the “Judgments”). The CJEU rulings of 2022 confirm the Opinions of the AG and conclude for each one that “the action must be dismissed in its entirety”.

In the aftermath of the COVID-19 crisis, the Regulation 2020/2094 was adopted by the Council establishing a European Union Recovery Instrument to support the recovery in the EU. Soon afterwards, the Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the RRF was adopted, laying down

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<sup>1</sup> See:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=250424&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=5452074>.

<sup>2</sup> See:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=250425&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5452230>.

the procedures in relation to the recovery and resilience plans to be submitted by the member states of the EU (the “Member States”, and each one a “Member State”). The cornerstone of the Regulation 2021/241 is the establishment of the mechanism which ensures the link between the financial support through the RRF and the sound economic governance, empowering at the same time the Commission to suspend all or part of the commitments or payments to a Member State under the RRF following a proposal to the Council.

This contribution discusses the legal background of the adoption of the Regulation in view of establishing a conditionality mechanism linking the financial support by the EU and the sound economic governance between the EU and the Member States. Further, this paper discusses the conditionality mechanism under Regulation 2021/241 where the financial support to the Member States following the COVID-19 crisis is linked to the completion of several country-specific milestones, as those specified in the recovery and resilience plan of each Member State. Thirdly, this contribution presents and analyzes the judgments in connection with the two actions for annulment brought before the CJEU and against the Regulation, namely the cases C-156/21 and C-157/21 of Hungary and Poland vs European Parliament respectively. Lastly, the paper draws some conclusions on the current status of the rule of law conditionality and on the politicization (or not) of the conditionality mechanism in the context of the recent geopolitical situation in the region.

## **CHAPTER 1**

### **The Rule of Law Conditionality**

#### **1.1 Conditionality in the EU Law – A brief analysis of the recent history**

The increasing role of conditionality in EU spending has been reinforced as a preventive measure since the implementation by the European Commission (EC) of the EU rule of law toolbox (European Commission, 2020), including the European Rule of Law Mechanism, the EU Justice Scoreboard, the European Semester, the Cooperation and Verification Mechanism, support for civil society, networks and projects as well as structural reforms. The complementary limb to the prevention and promotion tools of the EU rule of law toolbox is the “response” to potential breaches to the rule of law, which includes: infringements pursuant to article 258 TFEU; the application of article 7 TFEU; the Rule of Law Framework; and recently the regime of conditionality to protect the EU budget (i.e. the Regulation and other financial mechanisms directly linking EU funds’ granting to conditionality) (Staudinger, 2022).

Following the policies of the International Monetary Fund (IMF, 1979, 2006) and the World Bank (World Bank Group, 2013), the EU has endorsed conditionality measures since the 1980s. Ex-ante or ex-post (depending on whether the conditionality applies prior to or following the disbursement of funds) as well as positive or negative (in the context of granting a benefit, withdrawing resources or imposing sanctions), conditionality clauses have been included in international agreements (Bartels, 2005; Fierro, 2003). In the 1990s, the accession policy of the EU has been made conditional on the compliance with the Copenhagen Criteria (Kochenov, 2008).

Narrowing down conditionality in relation to the financial mechanisms of the EU, during the financial crisis of 2008 onwards, “macroeconomic conditionality” has been applied with regard to the granting of financial assistance under international law, i.e. through the European Stability Mechanism<sup>3</sup> (Borger, 2013) or under EU Law (Two-

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<sup>3</sup> Arts. 13(3) and 16 of the Treaty Establishing the European Stability Mechanism [2012] and Regulation (EC) 332/2002 of the Council of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States’ balances of payments.

Pack<sup>4</sup>) (Ioannidis, 2014). Meanwhile, conditionality requirements in connection with the EU funding under the regime of the European Structural and Investment Funds<sup>5</sup> have been introduced to the EU's budgetary policy (Fiscaro, 2020; Bieber & Maiani, 2014).

Before targeting the status of the rule of law in Hungary and Poland, the EC, as early as in 2014, had issued a communication regarding “A new EU Framework to strengthen the Rule of Law” (European Commission, 2014). There, the legal basis for the conditionality on the EU budget and other financial mechanisms was set, and the same has been repeated throughout the whole procedure of the adoption of the Regulation, up until the CJEU rulings on Hungary and Poland. In particular, the EC (2014) noted that the rule of law is the “backbone” of the EU and a founding principle upon which the Union is based.

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<sup>4</sup> Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>5</sup> Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013.

## **1.2 The rule of law conditionality under the Regulation**

The EC, after consideration of potential threats to the rule of law in the EU, issued a proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law in 2017 (European Commission, 2017). Similarly, the European Parliament (2018) presented a proposal “calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded”. The EC, in May 2018, finally proposed the adoption by the Council and the EP on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States. The Regulation was adopted in 16 December 2020 and entered into force on 1 January 2021 (art. 10). In 2021, the Common Provisions Regulation<sup>6</sup> further expanded the budget conditionality.

The Regulation introduces the importance of the EU values described in Article 2 of the Treaty of the European Union (TEU) (recital 1) and proceeds to a detailed definition of what comprises the rule of law (recital 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 implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected”.

A definition of the rule of law is further found under article 2(a) of the Regulation, whereby: “‘the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the

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<sup>6</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.



executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU”. The latter definition adds one more element, which is the “non-discrimination and equality before the law”. A novelty of the Regulation is, in addition, the reference to “corruption”, unlike any past rule-of-law frameworks. Indeed, corruption is well established as an indicative case of a breach of the rule of law, according to Article 4(2)(c) of the Regulation; it is subsequently emphasized, as also mentioned in the following chapter on the Commission’s qualitative assessment regarding a breach of the rule of law (recital 16 of the Regulation), where sources of such assessment include, among others, the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission. It is therefore understood that the rule of law principle is directly linked to the TEU; the rule of law is a cornerstone principle of the European integration process and a common value, explicitly mentioned in Article 2 TEU (Kölling, 2022). Recitals 8 to 14 of the Regulation provide the background of the strong link between the rule of law and EU expenditure, the latter including the annual budget, the whole Next Generation EU package and any other type of funds deriving from the Union.

The Regulation establishes the regime for application of the rules in relation to the protection of the EU budget in case there are breaches in the rule of law by the Member States (art. 1). The rule of law conditionality established therewith requires that breaches affect, or seriously risk affecting, the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way (Recital 13 and art. 3).

The Regulation focuses on two main objectives: i) to protect the EU budget, and ii) to safeguard the rule of law in EU Member States (Łacny, 2021). Whenever Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094 (further analysis in Chapter 2), 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) (recital (7)). The EU budget and the rule of law in EU Member States seem, thus, under a preliminary consideration, interconnected.

### **1.2.1 Conditions for application**

#### **a. The Union budget and the financial interests of the Union**

According to Regulation 2018/1046 (the Financial Regulation), the Union budget is a financial plan on an annual basis of the EU and the European Atomic Energy Community, prepared according to budgetary principles that present forecasts and estimation of future expenditures and revenues for every financial year, accompanied by a description and justification of such forecasts. The Commission, according to article 317 TFEU and articles 2(7) and 62 of the Financial Regulation, shall implement the Union budget, by carrying out a series of administrative actions such as managing, monitoring and auditing the funds in relation thereto. The MFF includes such annual Union budget in a broader scope of a prediction for a larger period of time (7 years). As it will be further analyzed in Chapter II, the EU Recovery Instrument is also bound by the rule of law conditionality, with a relevant direct reference in the Regulation itself (Recital 7 of the Regulation).

Two notions are particularly highlighted in the Regulation regarding the funds of the European Union: the sound financial management of the Union budget and the protection of the financial interests of the Union (Art. 4). The sound financial management, as enshrined in article 317 TFEU, is ensured when the public authorities of the Member States act in accordance with the law, and an indicative list of cases is presented in the recitals of the Regulation and article 4 itself on what constitutes a proper function of such authorities. Cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law should be effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law enforcement authorities, are issued, these can be subject to effective judicial review by independent national courts and by the CJEU. This list is indicative since art. 4 para (h) leaves space for more situations or conduct of authorities that are relevant to such breach of the sound financial management of the Union budget.

The definition of the sound financial management of the Union budget, apart from article 317 TFEU, whereby the Commission shall implement the budget in cooperation with the Member States, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management, is further found in the Financial Regulation, which provides that sound financial management “means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness”. Furthermore, the CJEU has ruled that the principle of sound financial management of EU funds is linked to the principle of sincere cooperation between the Member States and the Union, a notion that has a broader application in EU law. The Regulation establishes its definition of the principle of sound financial management, as provided in the previous paragraph, and thus creates a link between this principle and the legality and effectiveness of administrative procedures, prosecutions, and ultimately the independence of the national judicial systems.

The second notion significantly cited throughout the Regulation is the protection of the financial interests of the Union, which expands the scope of application of the Regulation beyond the Union budget. This notion originates from articles 310(5) and 325 TFEU, where a clear link is established between this notion and fraudulent and other illegal activities affecting the financial interests of the Union (including all institutions, bodies, offices and agencies). Article 2(1) of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) defines, for the purposes of that regulation, the ‘financial interests of the Union’ as being “revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them”, while article 2 (1)(a) of the Directive (EU) 2017/1371 provides that this includes “all revenues, expenditure and assets covered by, acquired through, or due to: (i) the Union budget; (ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them”. The CJEU has further expanded on this notion based on the above definitions. Moreover, and according to the TFEU, the Member States shall apply the assimilation principle, i.e. they should counter fraud or any other illegal activities affecting the Union’s financial interests as if those interests were their own national

financial interests. The Regulation expands as well on this notion and provides the minimum guarantees against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union: the judiciary, 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 defense (Recital 9 of the Regulation).

**b. Breaches of the rule of law**

As already underlined, the fundamental idea and the second condition for application of the Regulation is the creation of a strong bond between the respect for the rule of law, on the one hand, and the protection of the EU budget, on the other hand. This means that the area of application of the Regulation is restricted only to cases wherein a breach of the rule of law by a Member State occurs and which has a “sufficiently direct” impact on the Union budget (Art. 4 of the Regulation). It is noteworthy that the initial proposal by the European Commission did not include the “sufficiently direct” impact of the rule of law breach to the Union budget (European Commission, 2018), which resulted during the Council’s conclusions of July 2020. Therefore, the Regulation intends to safeguard both the mutual trust and the financial solidarity among the EU and its Member States. The condition, thus, in relation to the application of measures to protect the Union budget is fulfilled when the breach of the rule of law has a direct impact on this mutual trust, either actual or potential.

For the purpose of the Regulation, the “rule of law” is defined under Article 2(a) of the Regulation. This implies the principles of legality in the context of a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The Regulation makes clear reference to the jurisprudence of the CJEU in relation to the principle of the rule of law, recognizing thus the commonly accepted and established notions on the matter through the rich relevant case law over the last years.

Article 3 of the Regulation provides an indicative list of the cases that may constitute a breach of the rule of law. These include: endangering the independence of the judiciary; failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities; withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest; limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

### **1.2.2 The legal basis**

The legal basis invoked by the Regulation is Article 322(1)(a) TFEU, which, as we shall further analyze in Chapter III, has been contested by Hungary and Poland before the CJEU. This article authorizes the EP and the Council, after prior consultation with the Court of Auditors, to introduce regulations which would determine the procedures to be adopted for the establishment and implementation of the Union budget. The selection of article 322(1)(a) TFEU as the legal basis of the Regulation may indicate that the purpose of the Regulation is to protect the Union budget from negative effects due to breaches of the principles of the rule of law in a Member State, and not, as it has also been argued (Goldner Lang, 2020), to protect the rule of law as such. This can fairly be reinforced by the established “direct” link between the breach of the rule of law and the impact on the Union budget or the financial interests of the EU.

As a preliminary assumption, one could also argue that the role of the EC regarding the implementation of the rule of law conditionality mechanism reinforces the selected legal basis; the Commission observes the state of the rule of law in the Member States and accordingly, if a conduct is reported, the Commission triggers the conditionality mechanism. The Commission thus functions both as the defender of the Union budget, intervening accordingly when needed, and as the guardian of the EU Treaties.

### **1.2.3 The measures: types, selection and criteria for application**

The measures to be introduced, in case the conditions for application are met, are summarized throughout Articles 5(1) and 3 of the Regulation. They consist, essentially, in the suspension of payments, of the implementation of legal commitments, of the disbursement of instalments, of the economic advantage under a guaranteed instrument, of the approval of programmes, or of commitments; terminations of legal commitments; prohibitions on entering into new legal commitments or entering into new agreements; early repayments of guaranteed loans; reductions of the economic advantage under a guaranteed instrument, of commitments or of pre-financings; and interruption of payment deadlines.

The choice of which measures should be applied is the consequence of whether, pursuant to points (a) and (c) of Article 62(1) of the Financial Regulation, the implementation of the Union budget occurs (directly or indirectly) exclusively under the management of the EC granting funds to the Member States or the EC does so, pursuant to point (b) of Article 62(1) of the Financial Regulation, in cooperation with the Member States under shared management (Art. 5 of the Regulation). It is highlighted that one or more measures can apply in case there is a breach of law by a Member State.

Certain criteria need to be considered when the enforcement authorities are about to impose such measures according to the Regulation. These measures must be proportionate taking into account the nature, duration, gravity and scope of the breaches of the principles of the rule of law (Art. 5(3) of the Regulation); in particular, according to recital 18 of the preamble, 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. They shall be determined after due consideration of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. These measures shall, insofar as possible, target the Union actions affected by the breaches. In addition, these remedial measures, insofar as possible, shall be adequate vis-à-vis the breach of law in target (Art. 6(6) of the Regulation).

It is noteworthy that, according to the conclusions of the European Council of 10 and 11 December 2020 (para I(2)(c), December Conclusions), the Council, further to its concessions in relation to the objections of Hungary and Poland, declared that the EC would adopt guidelines on the application of the Regulation, including a methodology for carrying out its assessment and, most importantly, in close consultation with the Member States. In a controversial declaration at the same December Conclusions, the Council “agreed” that the EC would not proceed to the issuance of such guidelines until the judgment of the CJEU is published in case an action for annulment of the Regulation is presented before the CJEU.

The subsidiarity of the conditionality mechanism of the Regulation is another criterion to be taken into consideration during the selection of the Regulation’s measures to be introduced. Both the Council in its December Conclusions (para I(2)(d)) and the Regulation (Art. 6(1)) explicitly provide that the application of the conditionality mechanism under the Regulation will respect its subsidiary character. Going further, the measures under the mechanism will be considered only where other procedures set out in Union law, including under the Common Provisions Regulation, the Financial Regulation or infringement procedures under the Treaty, would not allow for the protection of the Union budget more effectively. In other words, the EC shall first investigate whether other procedures set out in primary or secondary EU law could be more effective, before diving into the application of the measures under the Regulation.

At this point, the complementary function of the conditionality mechanism under the Regulation is emphasized. 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 (European Parliament, 2023). The link between the conditionality mechanism under the Regulation and the sector-specific EU legislation is therefore established; in case the EC decides that measures should be imposed on a Member State under the Regulation’s conditionality mechanism, the content of such measures would then be decided by the sector-specific legislation that is applicable (i.e., the Cohesion Policy or the Common Agricultural Policy, etc.).



The procedure regarding the imposition of any measure under the conditionality mechanism is described under article 6 of the Regulation. The Regulation emphasizes that any 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 (judgments of the CJEU, 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), 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), as well as it may consult the European Union Agency for Fundamental Rights and the Venice Commission, if necessary, for the purpose of preparing a thorough qualitative assessment.

Following such an assessment, the Commission officially initiates the procedure by sending a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings regarding an alleged breach of the rule of law, and informing, at the same time, the European Parliament and the Council without delay of such notification and its contents. The Commission shall gather and present all available information in order to justify the rule of law violation by the Member State. It may also request any additional information from the Member State any time before or after the written notification has been communicated. In its turn, the Member State shall provide all the required information, and it may make observations regarding the findings, in a timeframe set by the Commission of between one and three months from the written notification.

If the Commission, despite the observations from the Member State, considers that the conditionality mechanism should be triggered, then the Council shall be involved. The Commission, thus, is required to submit a proposal for an implementing decision on the appropriate measures to the Council within one month from receiving the Member State's observations or, in the event that no observations were delivered, within one month of the

abovementioned deadline set by the Commission. Again, the proposal shall set out the specific grounds and evidence on which the Commission based its findings. The Council, by means of an implementing decision and by a qualified majority vote, shall (amend, if needed, and) adopt the Commission's proposal, within one month, in principle, of the Commission's proposal.

#### **1.2.4 The impact**

The impact of the measures imposed according to the Regulation can be dual: on the Member States and on the beneficiaries. As previously analyzed, the decision on the determination of measures, as well as their potential impact, needs reference to the sector-specific regulations that regulate them. Article 7 paragraph 3 of the Regulation provides for the impact of two of the measures if EU funds are spent under shared responsibility; these are the suspension of the approval of one or more programmes or amendments thereof (point (i) of article 5(1)(b) of the Regulation) and the suspension of commitments (point (ii) of Article 5(1)(b) of the Regulation).

According to the Regulation, if such measures are lifted, the EU funds corresponding to those commitments shall be entered in the Union budget (where they came from). The crucial factor is that if such EU funds are suspended in year 'n', then they cannot enter in their budget of origin before year 'n+2'. In other words, this is a temporary suspension of said funds, motivating thus the Member States affected to proceed to remedial measures allowing for the correction of the breaches of the rule of law that triggered their alleged suspension. In case the Member State concerned fails to comply with the purpose of the implied measure, it permanently loses those funds, which are then available to the rest of the Member States.

The rest of the measures to be imposed in case of a breach of the rule of law may lead to either the suspension of EU funds or even their permanent loss. Such measures, in case of a direct or indirect management of the Union budget, include: the termination of the legal commitment; prohibition of entering into new legal commitments; reduction of the economic advantage under an instrument guaranteed by the Union budget; and a prohibition against entering into new agreements on loans or other instruments guaranteed by the Union budget. Where the Commission implements the Union budget under the regime of shared management, the same impact (i.e., permanent loss of funds) can be achieved in cases of reduction of commitments, including through financial corrections (article 5 (a) of the Regulation). It is therefore straightforward that the reduction of commitments or the prohibition of entering into new commitments/agreements may definitely lead to the irretrievable loss of EU funds for the Member State concerned.

As regards the impact towards the beneficiaries of EU funds of the measures imposed under the Regulation, the Regulation provides –in principle– for the protection of the final beneficiaries of such funds. In particular, unless otherwise stipulated in the decision implementing the measures, these should solely affect the Member State; any government entity’s obligations to end-beneficiaries, including payments, should not be affected. Towards this end, proper legal safeguards were included in the Regulation to ensure the legal interests of the beneficiaries of Union funds. In the case of direct management, it is noteworthy that the management is made directly by the Commission.

On the contrary, under the shared management regime, while the disbursement of funds by the Commission is independent of the one to be made by the competent national authorities, the latter shall fulfil the obligations they have towards the beneficiaries, and they are still obliged to implement the EU programmes affected. In addition, the Member States are required to report to the Commission on the implementation of such affected programmes or Union funds every three months, starting from the implementation of the Regulation measures. Further, according to article 5(4) of the Regulation, the Commission shall provide tools so that the beneficiaries can report any breach of the obligation of the concerned state party that directly affects them. A real novelty is that if the Commission finds out that such state obligations are not fulfilled towards the end beneficiaries, it may impose measures according to sector-specific regulations allowing, for example, the recovery of payments or the correction of participation in programmes (recital 19 of preamble and article 5 (2) of the Regulation). Therefore, if the interests of beneficiaries are violated, there are sufficient safeguards that may lead to further suspension or deprivation of EU funds for the Member State.

### **1.3 The EU Recovery Instrument and Conditionality – The Legal Framework: Regulation 2020/2094**

The Commission, further to a Communication (2020b), presented a recovery plan with the aim to mitigate the impact of the COVID-19 pandemic. The Council, in December 2020, with the Regulation 2020/2094 (or EURI), established this new recovery instrument called Next Generation EU (NGEU), which constitutes a temporary recovery instrument to boost the immediate economic and social damage caused by the pandemic. The NGEU itself shall be financed up to an amount of EUR 750 billion, while the whole recovery plan includes also the EUR 1,074.3 billion of the new Multiannual Financial Framework (MFF) for 2021–2027 (see also July Conclusions).

The recovery package was agreed at political level in July 2020 (during the July Conclusions); however, it was not until December 2020 that it was transposed into EU law. The rule of law conditionality regime, which would cover both the Union and in this case the NGEU (July Conclusions, para A24 and annex, paras 22-23), was the outstanding point regarding the implementation of the NGEU. The Council therein emphasized that “[t]he Union’s financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU”. It further underlined the importance of the protection of the Union’s financial interests and of the respect of the rule of law. A regime of conditionality to protect the budget and NGEU would then be introduced, calling the Commission to propose measures, in case of breaches of the rule of law, for adoption by the Council by qualified majority.

Following the above advancements towards the conditionality regime as analyzed in the previous chapter, the Council reached an agreement on the content of the conditionality regime in September 2020 (European Council, 2020b). Hungary and Poland, in a joint declaration on 26 November 2020<sup>7</sup>, rejected the proposed “direct” link between the rule of law in the Member States and the EU budget, a declaration that constituted the preamble of the judiciary procedure before the CJEU that commenced soon afterwards (see further in Chapter 2). Meanwhile, according to the December

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<sup>7</sup> See <https://www.gov.pl/web/eu/joint-declaration-of-the-prime-minister-of-poland-and-the-prime-minister-of-hungary>.

Conclusions, the Council reached the final agreement, which paved the way for the adoption of the recovery package. This recovery package is based on four pillars, namely: i) the Council Regulation laying down the multiannual financial framework for the years 2021 to 2027; ii) the Council Decision on the system of own resources of the European Union (the Own Resources Decision); iii) the Regulation (no 2020/2092); and iv) the Regulation of the European Parliament and of the Council establishing the Recovery and Resilience Facility (the RRF Regulation) (Tridimas, 2021).

Under this four-pillar package, the EC is empowered to borrow up to EUR 750 billion at 2018 prices, out of which EUR 390 billion are to be used as non-repayable support (EUR 312.5 billion) and repayable support through financial instruments and budgetary guarantees (the latter in relation to investment operations in the field of Union internal policies), and EUR 360 billion to be channeled to the Member States as loan support (para. A5 of the July Conclusions; art. 2 EURI; art. 5 Council Decision 2020/2053; and art. 6 RFF). The repayment date of the capital raised through the recovery package is foreseen for 31 December 2058 (Art. 5 Council Decision 2020/2053). It is noteworthy that out of the total EUR 750 billion, EUR 672.5 billion is allocated to the RFF in relation to the financial recovery due to the pandemic crisis.

## **CHAPTER 2**

### **THE CASES OF HUNGARY AND POLAND**

#### **2.1 Introduction – Background**

The rule of law conditionality became a controversial issue shaking the unanimity of the European Union before the adoption of the recovery package. Hungary and Poland, both before and after their joint statement in November 2020, had made clear to the legislature of the EU that they do not recognize any direct link between the recovery package benefits and the Union budget. Hungary and Poland had threatened to use their veto on the approval of the MFF 2021–2027 as well as on the NGEU initiative, and gained ground in the relevant negotiations (Progin-Theuerkauf & Berger, 2022), which required the previous amendment of the Own Resources Decision. Nevertheless, the necessity of a package to the Member States in relation to the urgent and long-awaited recovery from the COVID-19 pandemic, pushed for further compromises.

Further to negotiations and according to the Council’s December Conclusions, as mentioned in the previous Chapter, a compromise was reached, which enabled the implementation of the Regulation. According to this compromise, the Commission would “develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment” regarding the potential implementation of the measures under the Regulation, in case there is a breach of the rule of law by a Member State. The Council, therefore, accepted that, should an action for annulment be introduced with regard to the Regulation, the guidelines would be finalised after the judgment of the CJEU so as to incorporate any relevant elements stemming from such judgment and that until such guidelines are finalised, the Commission would not propose measures under the Regulation. The actions for annulment raised by Hungary and Poland later in February 2021 were not the outcome of a prophetic declaration in the December Conclusions, but rather the outcome of the clearly communicated intentions of both countries, which refused any backslide in the rule of law in the interior of their national boundaries.

In this Chapter, the main findings of the two rulings of the CJEU will be analyzed through a careful examination of the pleas of the two applicants, Hungary and Poland. In

parallel, the findings of the CJEU for each one of the pleas of these Member States are presented via a comparative analysis among the findings of the CJEU and the allegations of both states, in order to avoid an extensive and repetitive analysis of both “twin” judgments in separate sub-sections. However, emphasis is given on the parts of the judgments where these do not necessarily coincide.



## **2.2 Analysis of the C-156/2022 and C-157/2022 Judgments**

The “twin” judgments of the CJEU issued on 16 February 2022 go hand in hand with the Opinions issued on 2 December 2021 by Advocate General Campos Sánchez-Bordona (CJEU Press Release, 2021). The issues that arose prior to the adoption of the Regulation were now definitively ruled on according to the CJEU C-156/2022 and C-157/2022 judgments. The annulment actions against the Regulation contained a series of claims, with the main ones being the alleged institutional competence issues in relation to the adoption of the Regulation.

It is noted that the pleas of both Hungary and Poland can be categorized under the following main subjects: i) lack of competence of the EU legislature; ii) procedural conditions before the adoption of the measures; iii) insufficient reasons in connection with the proposal of the EC for the Regulation; iv) breach of the principle of equality of the Member States before the Treaties and non-respect for their national identities; v) infringement of the principle of legal certainty; and vi) infringement of the principle of proportionality. While the main focus of this contribution will be driven towards the first of the alleged infringements of the contested Regulation (i.e., the questions around the competence of the EU legislature to adopt the contested Regulation), it is important to note that the procedure- and reason-related pleas were rejected by the Court based on sufficient reasoning supported by the so far established jurisprudence.

### **2.2.1 Lack of competence of the EU legislature**

#### ***(a) The legal basis***

The first competence-related allegation of the applicants refers to the legal basis of the impugned Regulation. Both Hungary and Poland argued, through their relevant pleas<sup>8</sup> examined by the Court in a single section combined, that neither Article 322(1)(a) TFEU nor any other provision of the TFEU could constitute an appropriate legal basis for the adoption of the contested Regulation, in particular of articles 2 to 4 thereof. Poland, alternatively, claimed that, should the Court find that the EU legislature was competent to adopt the contested regulation, this ought to have been adopted on the basis of the third paragraph of Article 311 TFEU or of Article 312(2) TFEU. Both states, therefore, claimed that Article 322(1)(a) TFEU did not constitute an appropriate legal basis for the establishment of the conditionality mechanism provided by the contested Regulation.

It is stated by the parties that Article 322(1)(a) and (b) TFEU authorises the EU legislature to adopt, respectively, “the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts” and “rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers”. It is added that, in accordance with Article 322(2) TFEU, the Council is to determine the methods and procedure to be made available to the Commission regarding the revenue provided under the arrangements relating to the Union’s own resources, and is to determine the measures to be applied to meet cash requirements. According to the applicants, the Regulation allows the EU institutions to determine the existence of, and to impose sanctions for, breaches of the principles of the rule of law. Subsequently, the above legal basis does not provide the EU with sufficient legal grounds for the establishment of a general regime of rule-of-law conditionality because the provisions of the contested Regulation are not to be considered as “financial rules” within the meaning of the TFEU. In other words, the applicants submitted that the TFEU does not authorize the EU legislature to determine the breaches of the rule of law, and prior to that, it does not even provide a definition of this principle. Therefore, the TFEU cannot constitute the legal basis of this Regulation, neither can it determine the legal consequences in case of such a breach.

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<sup>8</sup> Hungary: first and second pleas; Poland: first, second, fifth, sixth and eleventh pleas.

The applicants claimed that the Regulation does not fall under the scope of what constitutes the financial rules of the Union, setting up procedures and checks in order to impose the correct implementation of the Union budget or to mitigate budgetary outcomes of misconduct by the Member States. Such Regulations, the applicants claimed, are *inter alia* the Financial Regulation, Regulations 2020/558 and 2020/2221, the rules of which are effectively and directly related to the Union budget, the MFF and the aid provided from the various EU funds. Hungary claimed that such provisions of the Regulation are not financial rules that determine the procedure for the implementation of the Union budget. It extended its reasoning to the mere fact that if the legal basis of the contested Regulation is accepted, then it can be used as the legal basis for almost all EU legislation, since the latter is always, to some extent, relevant in a direct or indirect way to the Union budget and the dispersion of EU funds. Hungary, thus, understood the Regulation as a means for the EU legislative and executive bodies to penalize a Member State in the event of a breach of the rule of law, being thus incompatible with the chosen legal basis.

In response, the CJEU ruled that the European Union is founded on values as stipulated in the Treaties, and among others, on the principle of the rule of law, according to article 2 TEU (Hungary, para 124). When a Member State joins the legal structure of the EU, this is fundamentally based on the recognition and acceptance that the Member State will respect those common values of the EU, implying therefore that the mutual trust between the Member States is recognized and that those values and the EU law that implements them will be respected (para 125). Since those values, as enshrined in Article 2 TEU, constitute the “very identity of the European Union as a common legal order” (para 127), it follows that the rule of law is capable of constituting the basis of a conditionality mechanism covered by the concept of “financial rules” within the meaning of Article 322(1)(a) TFEU (para 128).

The Court proceeded with the argument that the Union budget constitutes a practical instrument that gives effect to the principle of solidarity (also under article 2 TEU) that the Member States need to apply. The implementation of that principle is, as already mentioned, based on the mutual trust between the Member States (para 129). In addition, the CJEU emphasized the strong link between the respect for the rule of law and the efficient implementation of the Union budget, in line with the notions of sound

financial management and the protection of the financial interests of the EU (para 130). Further, these notions can be highly compromised by breaches in the rule of law by a Member State, and they cannot be guaranteed in case there is a lack of effective judicial review that would ensure the compliance with EU law. The latter can be achieved, as the Regulation indicatively proposes, through an independent judicial system in the very essence of the rule of law (para 132).

Contrary to the relevant Hungary's and Poland's submission, as analyzed at the beginning of this section, a conditionality mechanism, as the one introduced by the Regulation, may fall within the scope of the concept of "financial rules" referred to in Article 322(1)(a) TFEU, where the receipt of financing from the Union budget becomes subject to horizontal conditionality that is linked to respect by a Member State for the principle of the rule of law contained in Article 2 TEU, and that relates to the implementation of the Union budget (para 133). Such a "horizontal" conditionality mechanism is provided by article 4(1) of the Regulation since it provides that measures are to be taken in case the breach of the rule of law by a Member State affects or seriously risks affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way (para 134).

Subsequently, the Court concludes that the conditions for application, the measures exhaustively described, as well as the procedure provided by the Regulation, all these form an integral part of the proposed conditionality mechanism, and therefore fall within the concept of "financial rules", within the meaning of Article 322(1)(a) TFEU. The first competence-related submission by Hungary and Poland regarding the legal basis of the Regulation had thus fallen.

*(b) Article 7 TEU and 269 TFEU: parallel procedure*

The second competence-related allegation concerns the relation between the conditionality mechanism and Article 7 TEU (Fisicaro, 2022). Hungary and Poland claimed that the Regulation infringes, first, Article 7 TEU, secondly, Article 4(1) and article 5(2) TEU and, thirdly, Article 13(2) TEU and Article 269 TFEU. This is to say that, according to the applicants, Article 7 TFEU is the only legal basis which can serve any procedural or other measure to be imposed as regards the breaches of the values of the EU contained in article 2 TEU, among others of the principle of the rule of law. It was, thus, submitted that the procedure established by the Regulation circumvents the one laid down in Article 7 TEU, which is nevertheless exclusive for the protection of the values contained in article 2 TEU, and that it adversely affects the limitation of the Court's powers provided for in Article 269 TFEU. Expanding on Article 269 TFEU, the applicants claimed that the Court, through the contested Regulation, acquires jurisdiction to review decisions adopted by the Council on the basis of the Regulation, and therefore, to assess whether a Member State has breached the principles of the rule of law, violating thus the limitation of powers not only of the Council and the Commission, but also of the CJEU.

This parallel procedure to the one provided through Article 7 TFEU, the contestants claimed, established by the Regulation, is not compatible with TFEU's provisions. First of all, and according to the Regulation, the Commission shall determine, pursuant to articles 3 and 4 of the Regulation, that there has been a breach of the principles of the rule of law. Next, it is to be established, under article 4(1) of the Regulation, whether that breach has a sufficiently close link with the Union budget or the protection of the financial interests of the Union. Lastly, it is to be determined whether a decision should be adopted, under article 5 of the Regulation, determining the measures deemed necessary for the protection of the Union budget. Therefore, Hungary and Poland submitted that the first step towards a potential proposal by the Commission for a Council implementing decision according to the Regulation is identical in substance to the determination which is up to the Council and the European Council to make under Articles 7(1) and (2) TEU. Similarly, the determination of the measures, according to article 5 of the Regulation, establish a procedure parallel to that of suspending certain of

the rights of the Member State in question, provided for in Article 7(3) TEU, since such a suspension may relate to the budgetary resources payable to the Member State concerned.

*(c) Principle of conferral*

Poland, supported by Hungary, claimed that no provision of the Treaties confers on the EU legislature competence to adopt the contested Regulation, such that, in adopting it, it infringed the principle of conferral laid down in Articles 4(1) and 5(2) TEU. By doing so, it also breached the obligation provided for in the second sentence of Article 4(2) TEU to respect the Member States' essential functions. In other words, the applicants submitted that certain conditions set out in articles 3 and 4 of the Regulation may relate to breaches which are not limited to the areas where the EU has jurisdiction, possibly violating, therefore, the national exclusive competence of the Member States. In particular, such competences may aim at safeguarding territorial integrity, maintaining public order, and ensuring national security, and that they concern both the functioning of state bodies, such as the national courts, the authorities responsible for the award of public contracts, and the financial control and investigation and public prosecution services, and also their organisation, including the provision of financial and human resources necessary for the proper functioning of those authorities, and the procedural rules applicable to them. The applicants refer to the above infringement as a "spillover effect" case that involves inferring from the legitimate objective of protecting the Union budget the need to recognize the Union's competence to assess both the procedures and the financial and staffing needs of the investigation and public prosecution services of the Member States, even though such competence has no legal basis in the Treaties.

The Court ruled that the EU institutions are limited to examine cases of a breach of the rule of law (under the Regulation) by the Member States only insofar as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union. Similarly, appropriate measures can be adopted under the Regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects, or seriously risks affecting, that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way.

It is sufficiently explained in the Court's judgment (para 143) that each and every one of the situations described under the eight points of article 4(2) of the Regulation refer to the implementation of the EU budget and any assessment of a breach of law is subject

to this limitation. In particular, points (a) and (b) of article 4(2) of the Regulation refer to the implementation of the Union budget in connection with the relevant monitoring, financial controls and auditing actions. Point (c) of the same article concerns the investigation and public prosecution services only to the extent that the proper function of such services and authorities relates to breaches of the rule of law concerning the implementation of the Union budget or the protection of the financial interests of the Union. Under point (e), prevention and sanctioning by national courts or administrative authorities refers also to such breaches of the rule of law. The judicial review under point (d) concerns the authorities mentioned in points (a) and (c), while recovery of unduly paid funds according to point (f) and cooperation with OLAF and EPPO under point (g) cover funds deriving from the Union budget. Finally, point (h) directly refers to any other conduct of authorities or situations that are directly relevant to the sound financial management or the protection of the financial interests of the EU.



### **2.2.2 Principle of equality of the Member States before the Treaties and non-respect for their national identities**

Hungary and Poland further take the view that the Regulation constitutes the source of infringements of the first sentence of Article 4(2) TEU, according to which the European Union shall respect the equality of the Member States before the Treaties and their national identities, inherent in their fundamental structures, political and constitutional. The main issue here, according to the contestants, is that the Regulation, under article 6, provides for decisions concerning the measures to be adopted by the Council by the qualified majority defined in article 16(4) TEU, which implies the participation of the Member State concerned and thus directly discriminates against small and medium-sized States. According to Poland, while the qualified majority voting system reflects the standard voting procedure as regards the adoption of normative acts, it cannot be equaled with a punishment mechanism such as the one provided by the Regulation, particularly due to the fact that the effects of such mechanism are going to affect a single Member State.

Taking into account the above, Hungary and Poland went on to claim that the procedural position of the Member State in connection with the potential breach of the rule of law is weakened, having regard in particular to the fact that, under Article 7(2) and (3) TEU, the adoption of measures pursuant to that provision requires a unanimous decision of the European Council. As a consequence, the two Member States had the understanding that the qualified majority vote at Council level when deciding for the measures of a punishment mechanism, as the conditionality mechanism, to be imposed to a Member State, violates the principle of equality of the Member States before the Treaties. They also refer to the non-respect for the national identities of the Member States, inherent to Article 4(2) TEU.

The CJEU ruled that the Commission, when examining whether the adoption of appropriate measures is justified, falls under the obligation to use an evidence-based approach and to respect the principles of objectivity, non-discrimination and equality of the Member States before the Treaties (Hungary para 148). Additionally, that assessment should be objective, impartial and fair, while the Court undertakes, if necessary, the task of the judicial review of the compliance with such obligations (para 149). Furthermore, the Court addressed the claims of Poland that the Commission commits a breach of the

principle of respect of the national identities of the Member States when consulting opinions and studies from the Venice Commission (an advisory body of the Council of Europe) (Poland para 280); the Commission, taking into account the obligation for evidence-based assessments and respect for the principles of objectivity, non-discrimination and equal treatment of Member States, is not deprived of the right to use reliable sources and information relevant towards that goal (paras 281-286).

On top, the Court concludes, pursuant to article 6(1) to (9) of the Regulation, that the Member State under assessment possesses the right to submit observations on the information which the Commission intends to use with a view to proposing the adoption of appropriate measures. Subsequently, it stays in a position to challenge the probative value of each piece of evidence relied on, and the merits of the Commission's assessments may, in any event, be subject to review by the EU judicature in the context of an action brought against a Council decision adopted under the Regulation (para 287). These are basic procedural requirements expressly provided by the Regulation that the Commission and the Council are subject to.

It also argues that by adopting the Regulation, the Council provides an 'easier', 'more rapid' and 'more effective' means of establishing and penalising breaches of the principles of the rule of law.

### **2.2.3 Infringement of the principle of legal certainty**

Poland, supported by Hungary, submitted with its ninth plea that the Regulation does not respect the requirements of clarity and precision deriving from the principle of legal certainty (Poland para 311). To support this plea, the applicants claimed that the Regulation is not clear enough in defining the requirements under which a Member State can be deprived of access or utilization of EU funds and that the Commission and the Council have been granted with an exaggerated discretion in defining these requirements. More precisely, the said Member States imputed this lack of clarity to article 2(a) of the Regulation and to the concept of the “rule of law” as defined therewith. It was highlighted that the rule of law is a concept not identically defined by each Member State, depending on their interpretation of the non-exhaustive principles deriving from it, according to each jurisdiction’s legal tradition or constitutional features (para 312). Further, it was also submitted that the definition under article 2(a) of the Regulation unreasonably extends the scope of the concept of the rule of law as a value of the EU enshrined under article 2 TEU to all other EU values described in the latter provision. Similarly, Hungary added that the Regulation does not satisfy the fundamental condition of the uniform application of the law.

In addition, the contestant parties claimed that clarity and precision are neither satisfied by articles 3 and 4 of the Regulation regarding the criteria for assessing the observance of the rule of law. It was submitted that the lack of clarity is obvious when referring to the concepts of ‘pluralism’, ‘non-discrimination’, ‘tolerance’, ‘justice’ and ‘solidarity’, which despite being preconditions for the assessment on a breach of the rule of law, have never been defined under the Treaties or the CJEU case law. Other concepts like ‘the proper functioning’ of ‘authorities’ or ‘services’ and ‘the proper functioning of effective and transparent financial management and accountability systems’ indirectly, and unduly, authorize the Commission and the Council to define them when applying the Regulation (para 315). Lastly, the parties claimed that the sources of information that the Commission is obliged to use under article 6(3) of the Regulation include sources that are not legally binding for the Member States under EU law. These sources include conclusions and recommendations of EU institutions, other relevant international

organisations and other recognised institutions. To sum up, it was submitted that the infringement of the principle of legal certainty through the lack of clarity and precision is identified under (i) the concept of “the rule of law”,’ as it is defined in article 2(a) of the Regulation, (ii) the criteria in its article 3 and article 4(2), and (iii) the sources of information on which the Commission is required to base its assessments pursuant to article 6(3) of the Regulation.

The Court’s response to the above allegations of Hungary and Poland was based on an extensive list of case law. It countered their arguments by referring to the foreseeability of the legal provisions, which does not exclude the discretion of the EU institutions, under the condition that its scope and manner of application do not allow any arbitrary interference, taking into account the legitimate aim of such provisions (para 321).

Commencing by this basis, the Court explained that the definition of the rule of law under article 2(a) does not intend an exhaustive enumeration of its possible situations of application, but rather intends to cover the most relevant aspects of it having regard to the purpose of this specific Regulation, i.e. the protection of the Union budget and the financial interests of the EU (para 323). In addition, the Court finds that the reference to principles under article 2(a) is not extensive neither exceeds the limits of the concept of the rule of law among other EU values. That is to say that the principles of non-discrimination or equality are a prerequisite when examining the status of the rule of law in a Member State, in the sense that in case a Member State does not respect the former, then the latter is also annulled. The conclusions of the Venice Commission on the adoption of a rule-of-law checklist are also cited in the decision (as well as in the recitals of the Regulation), reinforcing the argument that the judicial independency and a fair, impartial and stable decision-making and judicial system are key factors when assessing the status of the rule of law (para 325).

The Court, in the course of dismantling the first of the three sub-allegations of this argument, ruled that the argument is unfounded as regards to the alleged lack of definition of the concept of the rule of law throughout the EU law (primary and secondary legislation included) (paras 326 to 328). Persuasively enough, the Court went on to conclude that, hypothesizing that it would have been called to interpret any one of the

concepts of “pluralism” and the alike –as mentioned at the beginning of this section–, following an act of annulment of a decision issued under the contested Regulation, then it would do so by exercising only the powers conferred on it by the Treaties (in particular by article 263 TFEU) (para 329). It is, therefore, not a matter of excessive discretion given to the EU institutions to define the scope of the principle of the rule of law, but rather a legitimate power granted to them, and in the last hypothesis, to the Court.

With regard to the second sub-allegation of their argument, the Court’s response to Hungary and Poland was equally well-founded. The criteria described in articles 3 and 4(2) of the Regulation are merely indicative situations of a breach of the principle of the rule of law. Their only purpose is to facilitate the application of the Regulation by indicating some core aspects of the principle of the rule of law. Moreover, the alleged lack of precision of the concepts stipulated under article 4(2) is unfounded, since, as previously explained in the judgments, those concepts are either sufficiently defined in the recitals of the Regulation or they refer directly to core notions explained throughout the Regulation (e.g. the “effective and transparent financial management and accountability systems” referring to the “financial management”, which is directly linked to the “sound financial management”) (paras 331-333). It is further noted by the Court that the specification of the concept of “breach” is by no means necessary, due to the indicative purpose of the situations described under the relevant articles for the needs of this type of the introduced horizontal conditionality mechanism under the Regulation (para 334).

As regards the argument of lack of precision around the sources of information to be utilized during the assessment procedure by the Commission, the Court provides the following conclusion: it is up to the Commission to establish whether the conditions set out in article 4 of the Regulation are satisfied, and it possesses the discretion to do so by all available means of information. Therefore, the Commission may take into account any relevant information from all available sources, including decisions, conclusions and recommendations of EU institutions, other relevant international organisations, and other recognised institutions. What is more, the Commission ought to provide to the Member State under assessment the factual proof, on which it based its assessment, setting out the specific reasonable grounds that led to the conclusions of its assessment.

The Commission must conduct a qualitative assessment, following a non-partisan and evidence-based approach, of the facts that led to the launch of the conditionality mechanism procedure. This assessment must be, subject to judicial review by the Court, objective, fair and impartial. It thus follows that the Commission is required to ensure that the information it used has its origins in reliable sources (paras 340 – 341). Such sources, as also cited under recital 16 of the Regulation, include, inter alia, judgments of the Court, reports of the Court of Auditors, the Commission’s annual Rule of Law Report and EU Justice Scoreboard, reports of OLAF, the European Public Prosecutor’s Office and the European Union Agency for Fundamental Rights, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as GRECO and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary (para 342). Last but not least, the Court emphasizes that no binding character is conferred on such recommendations to be taken into consideration by the Commission, according to article 6(3) and (8) of the Regulation, contrary to the applicants’ argument (para 344).

#### **2.2.4 The infringement of the principle of proportionality**

Poland and Hungary continued to their next argument as regards the alleged infringement of the principle of proportionality (Poland, tenth plea; Hungary, ninth plea). They claim was that, since there are other EU law provisions in place to protect the Union budget, the proportionality principle is infringed, as long as the Regulation itself directly makes reference to the subordination of this conditionality mechanism to other procedures that would most likely ensure the effective protection of the financial interests of the EU. It was therefore submitted that the EU legislature did not sufficiently explain the reasons why the existing EU legislation would not be effective to protect the Union budget or in what way the Regulation would complement the alleged insufficiencies to EU law (Poland, para 346).

It was further added that the protection of the Union budget should not be linked to the rule of law, but rather to the principle of the sound financial management of the Union funds, which is clearly defined under the Financial Regulation. According to the argumentation of these parties, the EU legislature failed to provide a reasoning of the alleged added value of the conditionality mechanism of the Regulation and its link with the existing EU law provisions on the protection of the EU budget (para 349). Another aspect of the alleged infringement of the principle of proportionality, according to Hungary and Poland, lies with the lack of any specific provisions in the Regulation that, pursuant to article 5(3), would result in the adoption of proportional measures, especially assessing the nature, duration, gravity and scope of the breach of the rule of law (para 350). As a consequence, the applicants claimed that such disregard of the principle of proportionality in connection with the adoption of measures by the Council intends to bypass the competences of the Council, the Commission and the Parliament conferred by the Treaties, so that those EU bodies, especially the Council and the Commission, have an “unlimited right to assess, from a political perspective,” whether a Member State abides by the principles of the rule of law and links any identified breach of those principles, in a general manner, to the principle of sound financial management of Union funds (paras 348 and 350).

The Court's response to the above arguments commenced with a reminder on the established definition of the principle of proportionality, according to the rich case law settled by the Court. The principle of proportionality is one of the EU principles that needs to be followed by the EU institutions when acting in the context of attaining the legitimate objectives pursued by legislation and that such acts should not go beyond what is necessary in order to achieve those objectives; when the EU bodies possess the discretion to choose among the most appropriate measures to be adopted, the final choice needs to be made among the less onerous, and any disadvantages should not prevail over the objectives pursued (para 353).

Through an extensive presentation of its case law in relation to this matter, the Court counterargued that the EU legislature is allowed discretion as to the nature and scope of the measures to be adopted in areas where its choices imply political, economic or social interference. This statement implies that the findings on basic facts that facilitate the assessment of the EU bodies lie in such a level of discretion by those bodies that it is not merely assessed whether the chosen measure for adoption was the sole or the best possible towards the objective, but whether the measure is evidently inappropriate having regard to the objective which the competent institution is seeking to pursue (para 354). It was therefore assumed by the Court that Poland and Hungary did not provide any evidence demonstrating that this discretion of the European institutions has been violated.

It was further ruled that, in connection with the argument of the parties on the alleged circumvention of the powers of the EU institutions to an unlimited assessment of the status of the rule of law in a Member State, by no means the EU legislature conferred on the Commission and the Council to act within an unlimited framework in relation thereto, especially in the light of political considerations as implied by the applicants. The Court insisted that the criteria for assessment of any breach of the rule of law that harms the financial interests of the EU have been clearly set out by EU law and extensively analyzed in the present judgments. These institutions, therefore, assess, when necessary, such breach as a legal rather than a political issue (para 358).

Lastly, the Court addressed the third sub-allegation of the parties, in connection with the infringement of the principle of proportionality and the precision of the criteria that determine the scope, duration and selection of the measures to be adopted. Taking



into account article 5(3) of the Regulation and points 177 and 178 of the Opinion of Advocate General Campos Sánchez-Bordona in *Hungary v Parliament and Council* (C-156/21, EU:C:2021:974), it follows from the systematic interpretation of said article and from the terms used therein that the proportionality of the measures to be adopted is ensured, decisively, by the criterion of the “impact” of the breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union. Hence, the criteria that rely on the nature, scope, duration and gravity of the breach of the principles of the rule of law can serve only for the determination of the impact of such breach by the Member State to the Union budget (paras 359-361).

### **2.3 The outcome of the Judgments**

The Court dismissed both applications for annulment of the Regulation raised by Hungary and Poland. The legal value of the judgments lay thus primarily, and in particular, in the confirmation of the legality of the Regulation. This aspect constitutes a clear victory against the EU's rule of law backsliding, although the validity of the Regulation does not upgrade the latter to the ultimate rule of law protection tool, as initially intended (Baraggia & Bonelli, 2022). In other words, the judgments reaffirmed that the Regulation can be established as an expansion to the rule of law and the conditionality toolboxes of the EU. However, the validity of the legal basis of the Regulation, being article 322 TFEU, limited the scope of what was initially intended by the EC (i.e. a broader use of a regulatory tool directed towards the respect of the rule of law in the Member States); it cannot be argued, in any case, that the Regulation constitutes an expenditure conditionality mechanism, being applicable to breaches of the rule of law directly linked to the EU budget and the financial interests of the EU. It is not by any way a generally applicable sanctioning mechanism against any breach of the rule of law, but rather a much narrower mechanism bridging such a potential breach with the (real or potential) impact that this might have on the financial interests of the EU (Baraggia & Bonelli, 2022). The Court confirmed that the legal basis of the Regulation is the correct one; by doing so, it made clear that the Regulation is not substituting and is not a parallel procedure to article 7 TEU (Mavrouli, 2022).

**CHAPTER 3**  
**THE AFTERMATH OF THE JUDGMENTS –**  
**CURRENT UPDATES**

**3.1 The actions of the EU Institutions in the light of the Court’s rulings**

The Commission, soon after the Court’s rulings as analyzed in the previous chapter, issued its well-awaited guidelines, as (non-bindingly) agreed with the Council at the level of the December Conclusions to abstain from doing so until the final rulings of the Court in case an action of annulment was to be submitted. On 2 March 2022, the Commission published these guidelines (Guidelines) in order to explain “(i) the conditions for the adoption of measures; (ii) the relation between the Conditionality Regulation and other instruments; (iii) the proportionality of the measures to be proposed to the Council; (iv) the procedure and assessment process; and (v) the protection of the rights of final recipients or beneficiaries”. The Guidelines merely summarize and repeat the Regulation by directly referring to the reasoning of the Court’s rulings in the cases of Hungary and Poland. The added value of the Guidelines lies mostly in Annex I, where a summary of specific examples is given, in connection with possible cases of a breach of the rule of law.

On 10 March 2022, the Parliament stipulated the Commission’s inactiveness to proceed already to the issuance of the guidelines provided for by the Regulation<sup>9</sup>. It further called the Commission to make full and immediate use as appropriate of all the instruments available under EU financial legislation and the applicable sector-specific and financial rules to effectively protect the EU budget, including interruption of payment deadlines, suspension of payments, financial corrections or exclusion of expenditure from EU financing, infringement proceedings under Article 258 TFEU, checks and audits, enforcing compliance with Article 61 of the Financial Regulation or, in duly justified cases, the application of Article 7 TEU addressing risks to the foundational values of the EU in the Member States, and once more reminded the Commission that the Regulation must have been applied without exception as of 1 January 2021.

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<sup>9</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0074\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0074_EN.html)

a. **Hungary**

The first notification from the Commission was sent, according to article 6(1) of the Regulation, to Hungary on 27 April 2022. In this notification, the Commission raised concerns and presented its findings over the issues related to the public procurement system in Hungary. This action marked the beginning of a process which included the assessment and exchange of information with Hungary, lasted until mid-September 2022, and led to the submission of a proposal for a Council decision on 18 September 2022<sup>10</sup>.

On 15 September 2022, the Parliament resolved that the situation of the rule of law has deteriorated, describing Hungary as an “electoral autocracy”, a constitutional system where respect for the democratic norms and standards is absent, despite the fact that elections occur (European Parliament, 2022a). In the same resolution, the Parliament considered that the “deliberate and systematic efforts of the Hungarian government” have resulted in the deterioration of the EU values since 2018 (when the procedure of article 7 TFEU was triggered), and that, ultimately, a part of EU funds should be withheld until full compliance of the country with the EU recommendations and court rulings ensues.

On 18 September 2022, the Commission proposed the suspension of the payment of EUR 7.5 billion to Hungary, based on the considerations over the situation of the rule of law in this Member State, and in order to ensure the protection of the Union budget and the financial interests of the EU (European Commission, 2022b). The Parliament welcomed the Commission’s proposal, raising at the same time concerns on the superficial manner through which Hungary will most likely fulfill its obligations, as well as on the enforcement of the measures to be proposed in case Hungary declines to abide by such measures (European Parliament, 2022b).

At this stage, the Commission, taking into account the remedial measures proposed by Hungary, and in order to protect the financial interests of the Union, proposed the following measures: i) a suspension of 65% of the commitments for three operational programmes under EU Cohesion Policy; ii) a prohibition to enter into legal commitments with the public interest trusts for programmes implemented under direct and indirect management. On 15 December 2022, the Council, following the revision of the

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<sup>10</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5623](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623).

remedial measures previously proposed by Hungary, found that the conditions have been met for the adoption of appropriate measures for the protection of the Union budget against breaches of the principles of the rule of law by Hungary (article 1) (Council, 2022c). Therefore, the final proposal from the Commission that is reflected in the Council's implementing decision has been the suspension of 55% of the budgetary commitments under three of the Cohesion Policy programmes. The total amount suspended through the conditionality mechanism finally was EUR 6.3 billion<sup>11</sup>.

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<sup>11</sup> <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>.

**b. Poland**

It is noteworthy that following the judgment of the CJEU for Poland, the conditionality mechanism was not triggered by the competent EU institutions. In the light of the Russian invasion in Ukraine and following the threatening of a veto by the Polish government in relation to the adoption by the EU of the sanctioning package against Russia, the Commission entered into negotiations with the Polish government and Poland showed a rapprochement spirit towards the EU. As it will be analyzed below in this chapter, the Russian war against Ukraine served as a catalyst on the functioning of the rule of law conditionality mechanism.

### **3.2 The National Recovery Plans of Hungary and Poland**

#### **Poland: EURI and current status**

Poland submitted its Recovery and Resilience Plan (RRP) and, on 14 June 2022, the Council published its implementing decision on the approval of the assessment of such plan (Council of the European Union, 2022). The plan included proposed measures under a budget of EUR 23.9 billion in grants and EUR 11.5 billion in loans, split into milestones in connection with reforms towards the independence of the judiciary system, securing Poland's green and digital transition, reinforcing economic and social resilience and supporting flagship investment and reform projects<sup>12</sup>.

The de facto suspension of the disbursement of funds of the RRF to Poland was connected with Poland's willingness to fulfill the agreed milestones between the Commission and the Polish government. One of such milestones is the reform in the judiciary; in October 2021, the CJEU ordered a fine of EUR 1 million per day against Poland for failing to introduce legislation in connection with the disciplinary chamber for judges of its Supreme Court (i.e. for failing to provide safeguards against any possible political meddling in the judiciary). In January 2023, the Polish government introduced a law dismantling the disciplinary chamber in an effort to reform its judiciary and unblock the RRF's funds. In April 2023, the CJEU, considering the implementation of such partial, albeit insufficient, reforms, reduced the daily fine against Poland to EUR 500,000 per day. On 5 June 2023, the CJEU put an end to the long-standing dispute between Poland and Brussels by ruling that Poland has violated EU law for failing to respect the rule of law (CJEU, 2023). The Court's decision ended the daily fine against Poland; the latter, however, remains accountable for the past approximate EUR 557 million fines. That said, funds will not flow to Poland until it progresses with adequate reforms in the judiciary.

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<sup>12</sup>See: [https://commission.europa.eu/system/files/2022-06/recoveryandresilience\\_poland-factsheet\\_en.pdf](https://commission.europa.eu/system/files/2022-06/recoveryandresilience_poland-factsheet_en.pdf).

### **Hungary: EURI and current status**

While the Council decided to suspend the EUR 6.3 billion expected by Hungary in relation to the MFF 2021-2027 and the cohesion funds under the budgetary conditionality mechanism, it had previously approved, on 5 December 2022, Hungary's EUR 5.8 billion RRP, including twenty-seven "super milestones" in the following fields: justice, transparency in public procurement, and the fight against fraud, corruption and conflicts of interest (Council of the European Union, 2022). These twenty-seven measures reflect the shortcomings identified in the conditionality mechanism procedure and correspond to the recommendations expressed in the framework of the European Semester. It was highlighted by the Council that these milestones must be "fully and correctly" implemented before Hungary can request the payment of its first installment.



### **3.3 The Russian-Ukrainian war**

The Russian invasion in Ukraine triggered significant changes at an EU level within its own borders. Not only the EU swiftly progressed with sanctioning measures and migration and defense initiatives, but it also put aside internal discussions about the rule of law and subsequently the conditionality mechanism. On the latter, rather negative side of these advancements, Poland, hosting the vast majority of Ukrainian refugees, as well as Hungary, pushed for political concessions in exchange for the unanimous position of the EU members on sanctions against Russia and the assistance to Ukraine.

Scholars have been arguing that such concessions on behalf of the EU do not only put at risk the internal discussions in relation to the risk that the rule of law runs in several member states due to the violation of certain EU values, but they also jeopardize the application of the Regulation and the uniformity of the EU (Bárd & Kochenov, 2022). This is partially true since the Commission decided not to trigger the Regulation's conditionality mechanism against Poland, but it did so in the meantime for Hungary, even for a small portion of the RRF's funds.

## CONCLUSIONS

The twin judgments of the CJEU on 16 February 2022 upheld the validity and the substantial value of the new EU conditionality mechanism. The CJEU explicitly stated that the values deriving from article 2 TEU “define the very identity of the European Union as a common legal order”<sup>13</sup> and that the EU must be able to defend effectively these values. Therefore, Article 7 is not the only legal refuge in order to defend, among the other values, the rule of law, but according to the CJEU judgments, the EU can create more tools to be used in the same direction, as far as they do not constitute a parallel procedure to the one laid down in Article 7 TEU. The Regulation does not constitute such a parallel procedure, since it does not regulate a general conditionality regime in the sense of sanctioning Member States that fail to respect the rule of law. Instead, the novelty of the Regulation’s conditionality mechanism is the link to the EU budget; the Regulation is not sanctions-oriented as in a generalized manner linked to any breach of the rule of law, but rather aims to stipulate the legal consequences (which can eventually end up in sanctions) that arise from the decline of the rule of law in connection with the EU budget. Such consequences indeed involve a sanctioning mechanism –if ever to be triggered–. However, this mechanism is established to potentially deprive the Member State from the disbursement of EU funds rather than sanctioning *per se* the Member State against rule of law breaches. Even though the demonstration of a direct link between the breaches of the rule of law and the sound financial management remains a difficult task, and this problem has been highlighted throughout the judgments, the rule of law toolbox of the EU has ultimately been strengthened.

The Judgments, following the Opinions of the Advocate General in the cases of Hungary and Poland, leave no doubt as to the application of various legal tools that the EU now possesses. The rule of law is now protected by the Regulation, coexisting with other similar legal procedures like the one of Article 7 TEU. Under the light of the Judgments, it is now uncontested that the legal basis of the Regulation and the conditionality mechanism it introduces lays with Article 322(1)(a) TFEU, thus bridging

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<sup>13</sup> CJEU, Case C-156/21 *Hungary v Parliament and Council*, para. 127, Case C-157/21 *Poland v Parliament and Council*, para. 145.

the contested ground (by Hungary and Poland) between the breaches of the rule of law and the impact (current or potential) on the EU budget.

An important finding of this thesis is that an existing regime of preventive protection measures has been in place via various sector-specific regulations (e.g. CAP, the RRF). These layers can protect the EU budget against breaches of the principles of the rule of law. However, the conditionality mechanism of the Regulation can be used in parallel with such existing layers of protection. In fact, the conditionality mechanism of the Regulation is not to be seen as the means of last resort against any breach of the rule of law in connection with the financial interests of the EU, but rather as another tool in the toolbox of the EU for the protection of the EU budget.

Despite the self-identification of the Regulation as a regulation for the “general” regime of conditionality, this might not be completely accurate, as many scholars and the CJEU claim. In fact, the CJEU shed light on the requirements and limitations of the Regulation before measures can be imposed against a Member State. This means that the Regulation does not function as the ultimate tool in defense of all kinds of breaches of the rule of law, but rather only of the ones (potentially) affecting the sound financial management of EU funds. It is therefore evident that the scope of application of the Regulation has been restrained in comparison with the initial purpose of a proposal for a general conditionality mechanism.

The rest of the arguments of Poland and Hungary also collapsed; no infringements of the principles of equal treatment of the Member States before the Treaties, of legal certainty and of proportionality were found by the CJEU. The constitutional language and tone of the Judgments intend to highlight that the rule of law and the rest of the values of Article 2 TEU lay in the epicenter of the EU legal order, comprising the very identity of the EU legal and political system. At the same time, the legal basis, as described above, narrows down the competences of the EU institutions in introducing mechanisms and legal constructions for the protection of those values; the Regulation is linked to the “financial rules” of said legal basis and to the sound implementation of the EU budget.

The inaction of the Commission has been heavily criticized (Baraggia & Bonelli, 2022). The European Parliament has called on the Commission’s failure to apply the

Regulation, and mainly on its agreement with the Council to await the CJEU's judgments in the cases of Hungary and Poland before moving forward to the issuance of the guidelines as well as to the active sanctioning of EU Member States that fail to respect the rule of law. The judgments of the CJEU have certainly contributed to the publication by the Commission of its long-awaited Guidelines and to the proposal to the Council of an implementing decision against Hungary in relation to the suspension of funds of the RRF.

The Regulation entails criteria that can effectively impose pressure to the Member States; depending on the nature, duration, gravity and scope of the breaches of the principles of the rule of law, the measures to be adopted can range from reduction of economic contributions, prohibition to enter into new commitments to suspension of funds. It is also noted, although little discussed among the current bibliography, that a definitive loss of EU funds can certainly occur for a Member State according to the "n+2" principle as analyzed in the first chapter. Although the sanctioned Member State has a timespan of two years to remediate the rule of law status and avoid the application of measures, this is not always an easy accomplishment depending on the severity of the reforms that usually a correction of a breach of the rule of law entails.

While the conditionality mechanism of the Regulation has not been triggered but in one case against Hungary in April 2022 for the suspension of EUR 6.3 billion of budgetary commitments under the Cohesion Policy budget, various other conditionality procedures have been activated vis-à-vis both Hungary and Poland. The Commission has used such mechanisms to freeze more than EUR 20 billion destined for Hungary and more than EUR 110 billion destined for Poland.

EURI and its cornerstone, the RRF, have introduced the direct application of the Regulation in exchange for the disbursement of funds to the Member States for the post-COVID recovery. The RRF Regulation has introduced a financial conditionality mechanism whereby the payment of EU funds in form of grants or low-interest loans is subject to the fulfillment of country-specific recommendations according to the European Semester. This bridge between economic conditionality and rule-of-law conditionality has demonstrated that the paths towards withholding funds are indeed numerous.

The Member States must submit their national recovery and resilience plans to the Commission for approval, which can then assess the fulfillment of the European Semester country-specific recommendations and refuse the plan or the disbursement of funds in case those recommendations are not addressed. In the cases of Hungary and Poland, both recovery and resilience plans have been approved by the Commission (European Commission, 2022c); the distribution of funds has been, nonetheless, subject to the fulfillment of milestones mostly in connection with rule-of-law aspects (reforms in the judiciary for both Hungary and Poland) and the fight against corruption (Hungary). Poland has been now cut off the EUR 35.4 billion of the RRF funds until it fulfills the milestones set out by the Commission, while Hungary is deprived of the EUR 5.8 billion RRF allocation unless the Commission is ultimately convinced of the determination of the country to proceed to the proposed reforms.

In view of the suspension of 55% of Hungary's funds related to three Cohesion Policy programmes, it is important to highlight the impact of such conditionality measures on the beneficiaries of EU funds. Even though this is not broadly analyzed in the current bibliography, the final recipients of EU funds shall be protected according to the Regulation. Member States remain responsible for any installments to be paid towards final beneficiaries of the affected EU funds, and they should carry out from their own budgets any obligations towards them under EU programmes. While the Regulation provides for a framework that would allow the beneficiaries to report any breach of these obligations by the Member State concerned, it is highly likely that this will not have an impact on the expected outcome, especially in cases such as the ones concerning this thesis where the Member States' unwillingness –if not inability– to meet such obligations leaves no further remedies to the affected beneficiaries.

As a matter of fact, the recent suspension of EU funds to Hungary in December 2022, affecting, among others, its academic institutions in the context of the Horizon programme, has allegedly alerted the final beneficiaries of such funds<sup>14</sup>. In such case, a vague promise about information on the available options to mitigate the consequences

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<sup>14</sup>See: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/support/faq/21741?type=0,1;categories=:tenders=:programme=null;keyword=:freeTextSearchKeyword=council%20implementing:matchWholeText=true;period=null;status=0;sortQuery=relevance;faqListKey=faqSearchTablePageState>.

obviously does not echo a robust protection of the affected end users of EU programmes. Based on this concern, one could argue that the conditionality mechanism may have adverse effects not only on the final recipients of EU funds, but also on the Member States, or on the EU at large. Without sufficient protection of the beneficiaries and the long-term sustainability of solutions like the above (i.e. the long-term coverage of EU funds by the affected state's budget in case of rule-of-law conditionality measures), such measures may carry more costs than others for the Member States, the EU citizens, or the EU at large. This conclusion might open the debate on whether and to what extent the EU carries the responsibility of effectively protecting the final beneficiaries, even though it is legally authorized to protect its budget in the first place.

A series of events has further led to watering out the conditionality mechanism of the Regulation (and of other relevant conditionality procedures). The Russian invasion in Ukraine has become a bargaining point by Member States in exchange for unanimity in the adoption of sanctions against Russia. On the one hand, Poland has received millions of Ukrainian refugees, provided Ukraine with substantial military equipment, and campaigned broadly for the international isolation of Russia, among others, for the expulsion of Russia from the Council of Europe. On the other hand, Hungary has threatened multiple times with veto the Commission's proposals for the sanctioning packages against Russia. Humanitarian aid to Ukraine has been insignificant, while at a certain level Hungary backed trade and energy initiatives from Russia. While the Commission's uncertainty in triggering the conditionality mechanism against Poland could be understandable, given the country's overall solidarity to Ukraine, it is, therefore, also wrong (Jaraczewski, 2022).

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