



INSIGHT

# CONSTITUTIONAL LANGUAGE AND CONSTITUTIONAL LIMITS: THE COURT OF JUSTICE DISMISSES THE CHALLENGES TO THE BUDGETARY CONDITIONALITY REGULATION

MATTEO BONELLI\*

**ABSTRACT:** In two parallel decisions delivered in February 2022, the Court of Justice has rejected the actions for annulment brought by Hungary and Poland against the new “Budgetary Conditionality Regulation”. The Court has confirmed that the institutions used the correct legal basis (art. 322(1)(a) TFEU), that the Regulation does not circumvent the procedures of art. 7 TEU, and that it adequately guarantees legal certainty. The judgments of the Court use bold and explicit constitutional language, stating for example that the rule of law and art. 2 TEU values form the very identity of the Union. At the same time, the Court is much more careful when it analyses the more concrete questions on the legality of the Regulation. This shows the continuous mismatch between the constitutional relevance of the values of art. 2 TEU in the EU legal and political structure, and the concrete powers the EU and its institutions have to protect those values. Still very often, the institutions are forced to rely on indirect mechanisms to defend the values, as is the case with the Regulation under discussion, which is to be considered a budgetary tool rather than an explicit rule of law mechanism.

**KEYWORDS:** rule of law – conditionality – Court of Justice – action for annulment – European Union – legal basis.

## I. INTRODUCTION

In one of the most anticipated decisions in recent times, the Court of Justice, sitting in Full Court,<sup>1</sup> decided in February 2022 on the validity of the new Regulation “on a general regime of conditionality for the protection of the Union budget” (in the following the “Budgetary Conditionality Regulation” or simply “the Regulation”).<sup>2</sup> The Court dismissed in their

\* Assistant Professor of EU law, Faculty of Law, Maastricht University, [matteo.bonelli@maastrichtuniversity.nl](mailto:matteo.bonelli@maastrichtuniversity.nl).

<sup>1</sup> Aside from the situations specifically provided by the Treaties, the Court of Justice sits as a Full Court for cases of “exceptional importance”, see art. 16 of the Statute of the Court of Justice.

<sup>2</sup> See Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. It is often called the “Rule of Law Conditionality Regulation”, but I wish here to highlight that the title of the Regulation



entirety the actions for annulment brought by Hungary and Poland in two separate cases. The decisions were not unexpected or surprising, also because they largely followed the Opinions of Advocate General Sánchez-Bordona published in December 2021,<sup>3</sup> but are nonetheless of great “constitutional significance”,<sup>4</sup> at least for two reasons. First, the judgments finally paved the way for the concrete enforcement of the Regulation, which was *de facto* suspended pending the Court’s decision, following the controversial political agreement in the European Council (EuCo) meeting of December 2020 that unlocked the adoption of the Next Generation EU Recovery Plan, the new Multiannual Financial Framework, and the budgetary conditionality Regulation.<sup>5</sup> In those Conclusions, the Commission had agreed not to initiate procedures under the Regulation before the Court of Justice had delivered its final decision on the legality of the new instrument. The Commission ultimately waited until April 2022 – shortly after the Hungarian parliamentary elections – before issuing the first formal notification under the Regulation, targeted against Hungary.<sup>6</sup> Second, the decisions contain a series of key considerations on the importance and status of the rule of law, and art. 2 TEU values more generally, in the EU’s legal and political structure. These considerations build on and develop the recent jurisprudence of the Court in particular in its judicial independence line of case law.<sup>7</sup>

This *Insight* reflects on the significance of the judgment for the EU rule of law and values’ oversight system and for the Union’s constitutional framework more broadly. It appreciates how the Court firmly and clearly responded to the claims brought by the Hungarian and Polish governments, and its contribution to making the hidden premises of the Union’s legal structure more explicit and more visible. But it also highlights how next to the broad and bold proclamations on the importance of the values for the EU legal structure and the

does not actually explicitly refer to the rule of law, and this was a precise choice made during the legislative process: see for further discussion *infra*.

<sup>3</sup> Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2021:974, opinion of AG Campos Sánchez-Bordona, and in case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2021:978, opinion of AG Campos Sánchez-Bordona.

<sup>4</sup> On the “constitutional significance” of the judgment, see *Hungary v Parliament and Council*, AG Opinion, cit. para. 1. See also the early reactions of P Pohjankoski, ‘The Unveiling of EU’s Constitutional Identity: Judgments in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council’ (2022) and N Kirst, ‘Rule of Law Conditionality before the Court: A Judgement of Constitutional Nature’ (2022) EULawLive both at eulawlive.com.

<sup>5</sup> European Council Conclusions EUCO 22/20 of 11 December 2020 on the MFF and Next Generation EU, COVID-19, climate change, security and external relations.

<sup>6</sup> Earlier in March, the Commission had adopted its Guidelines on the application of the Regulation: see Communication C(2022) 1382 final of the Commission of 2 March 2022 on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget.

<sup>7</sup> See, among many, the judgments specifically mentioned in the decision: case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117; case C-896/19 *Repubblika* ECLI:EU:C:2021:311; joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația ‘Forumul Judecătorilor din România’ and Others* ECLI:EU:C:2021:393; joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034.

Union's identity, the Court shows – again correctly, in my view – awareness that the concrete powers and competences of the EU and its institutions are limited. And the judgment well illustrates that any instrument to protect the rule of law and other EU values must still respect the limits provided by the Treaties. From a more critical perspective, the judgments reveal the persisting mismatch between the constitutional relevance of the rule of law and other values, on the one hand, and the limited powers of the EU to define, operationalize and protect those same values, on the other. This mismatch often forces the institutions to rely on “indirect” ways to act.<sup>8</sup> After offering a brief overview of the legislative and factual background, this *Insight* summarizes the judgments of the Court and then analyzes these two dimensions of the Court's ruling.

## II. THE BACKGROUND

The process that led to the adoption of Regulation 2020/2092 has been discussed in great detail in recent years, including on the pages of this Journal.<sup>9</sup> As it is well known, the new instrument allows the Council, acting at qualified majority on a proposal by the Commission, to suspend payments or commitments of EU funds<sup>10</sup> when a Member State breaches the rule of law and that breach affects or 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”.<sup>11</sup>

The Regulation is the product of a long and complex legislative process that started back in 2018 and was only resolved by the much-discussed EuCo Conclusions of December 2020, which anticipated the formal adoption of the Regulation in the last weeks of 2020. Having already described this complex legislative history elsewhere,<sup>12</sup> I will only point here two elements that are crucial to understand the judgments of the Court. First, it is to be highlighted how the very nature of the Regulation changed during the legislative process.<sup>13</sup>

<sup>8</sup> I evoke here the work of M Dawson and E Muir, ‘Hungary and the *Indirect* Protection of EU Fundamental Rights and the Rule of Law’ (2013) GLJ 1959.

<sup>9</sup> See M Fiscaro, ‘Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values’ (2019) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 695; N Kirst, ‘Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?’ European Papers (European Forum Insight of 22 April 2021) [www.europeanpapers.eu](http://www.europeanpapers.eu) 101; Editorial, ‘Neither Representation nor Values? Or, “Europe’s Moment” – Part II’ (2020) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 4.

<sup>10</sup> On the measures that can be adopted, see art. 5 of the Regulation (EU, Euratom) 2020/2092 cit.

<sup>11</sup> *Ibid.* art. 4(1).

<sup>12</sup> A Baraggia and M Bonelli, ‘Linking Money to Values: The New Rule of Law Conditionality Regulation and its Constitutional Challenges’ (2022) GLJ 131.

<sup>13</sup> For a close analysis of the drafting history, see also *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit.

While the Commission strived to introduce a true “rule of law protection” instrument,<sup>14</sup> following the amendments pushed by the Council and inspired by a controversial Council’s legal service opinion,<sup>15</sup> what was ultimately approved is a “budgetary protection” tool, as for example the amended title of the Regulation makes clear.<sup>16</sup> Crucially, the amendments introduced the “genuine” or “direct” link criterion: art. 4 of the Regulation now provides that measures can only be adopted when a breach of the rule of law affects or risk affecting the budget “in a sufficiently direct way”.

Second, the already mentioned December 2020 EuCo conclusions raised the stakes of the Court’s ruling. The Conclusions reflected the Commission’s commitment to adopt guidelines on the application of the Regulation and that, in case an action for annulment against the Regulation would be introduced, the guidelines should have only been finalized after the CJEU’s ruling. Furthermore, the Commission agreed not to propose any measure under the Regulation before finalizing those guidelines. This was perhaps the most discussed part of the Conclusions, with many criticizing the alleged interference of the EuCo over the Commission’s powers,<sup>17</sup> though I would submit that it can be best seen as evidence of a broad political compromise between the institutions to which the Commission more actively contributed.<sup>18</sup> Be it as it may, *de facto*, the enforcement of the regulation was suspended until the CJEU ruling, which thus assumed a key significance.

The cases started by Hungary and Poland in parallel procedures were assigned to Advocate General Sánchez-Bordona and to the Full Court. The importance of the Court’s decision was also highlighted by the fact that ten Member States decided to intervene – together with the Commission – in support of the Parliament and the Council. As observed by Morijn, commenting on the Court’s hearing in Luxembourg, this finally signalled a desire to “close ranks”<sup>19</sup> on rule of law protection. To highlight the importance of the

<sup>14</sup> In the Explanatory Memorandum to the proposal, the Commission explicitly referred to the need to take action in order to fill gaps in the EU rule of law oversight instrument, see European Commission, Proposal for A Regulation COM(2018) 324 of the European Parliament and of the Council of 2 May 2018 on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States, Doc. 2018/0136(COD).

<sup>15</sup> Opinion of the Legal Service 2018/0136(COD) Proposal for a Regulation 135932/18 of the European Parliament and of the Council of 25 October 2018 on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States.

<sup>16</sup> As noted earlier, the final title of the Regulation does not explicitly mention the rule of law; in contrast, the original proposal was for a Regulation “on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States”.

<sup>17</sup> A Alemanno and M Chamon, ‘To Save the Rule of Law you Must Apparently Break It’ (11 December 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de); KL Scheppele, L Pech and S Platon, ‘Compromising the Rule of Law while Compromising on the Rule of Law’ (13 December 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).

<sup>18</sup> For a similar reading HT Nguyen, ‘The EU’s New Rule of Law Mechanism: How it Works and Why the “Deal” Did Not Weaken it’ (17 December 2020) Jacques Delors Centre – Policy Brief [www.hertie-school.org](http://www.hertie-school.org).

<sup>19</sup> J Morijn, ‘A Closing of Ranks: 5 Key Moments in the Hearing in Cases C-156/21 and C-157/21’ (14 October 2021) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).

moment, the Court of Justice even decided for the first time ever to livestream the pronouncement of the judgment.

### III. THE COURT OF JUSTICE'S JUDGMENTS

The Court delivered its decisions on 16 February 2022, a little more than two months after the AG Opinions that were largely followed in the decisions. In separate judgments,<sup>20</sup> the Court dismissed all arguments brought by Hungary and Poland, which may be summarised as follows: *a)* both Member States argued that the EU lacked the competence to adopt the Regulation, as art. 322(1)(a) TFEU could not be considered an appropriate legal basis for the new instrument and that no other provisions of EU law could be used instead; *b)* the two governments argued that the Regulation circumvented the procedures established by art. 7 TEU; *c)* they claimed that the Regulation breached the principle of legal certainty; *d)* Poland made a series of additional claims based on an infringement of the principle of subsidiarity (Protocol no. 2); of the duty to state reasons (art. 296 TFEU); of the principle of equality and of respect for national identities (art. 4(2) TEU); and of the principle of proportionality; *e)* Hungary then called for the partial annulment of specific provisions of the Regulation. This *Insight* concentrates on the first three main pleas.

#### III.1. LEGAL BASIS

Both Hungary and Poland challenged the use of art. 322(1)(a) TFEU as the legal basis for the Regulation. While, the Member States argued, art. 322 correctly serves as the legal basis for the “Financial Regulation”<sup>21</sup> and other legal measures setting up procedures for establishing or implementing the budget, the “essential elements” of the Budgetary Conditionality Regulation could not be regarded as financial rules.<sup>22</sup> Essentially, Hungary and Poland claimed that the “ultimate objective” of the Regulation was not to introduce financial rules, but to allow the institutions to examine and determine whether a Member State is breaching the rule of law, and if so, to impose penalties. Furthermore, focusing at the content of some of provisions of the Regulation, they argued that the latter did not establish genuine financial rules for the purpose of art. 322 TFEU.<sup>23</sup>

Having recalled its standard case law on the choice of legal basis, the Court starts with the analysis of the aim of the challenged Regulation. The first obvious element considered is art. 1, which defines the “subject matter” of the new instrument stating it establishes “the rules necessary for the protection of the Union budget in the case of

<sup>20</sup> Most, but not all, paragraphs of the two decisions are identical. Unless specifically noted, this contribution refers to the decision in the case brought by Hungary.

<sup>21</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

<sup>22</sup> Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 70.

<sup>23</sup> *Ibid.* para. 121, with reference in particular to arts 2 to 4 and 5(2) of the Regulation.

breaches of the principles of the rule of law in the Member States".<sup>24</sup> The Court then considers arts 4(1) and 6(1) of the Regulation, laying down the conditions and procedures for the adoption of measures: When read together, the two provisions clarify that measures can be adopted not simply when there has been a breach of the rule of law, but when that breach affects or risks affecting the financial management of the budget or the Union's financial interests.<sup>25</sup> This is then confirmed by looking at the concrete measures that can be adopted, which are financial in nature, and at the fact that they must be proportionate to the impact of the rule of law breaches on the Union's budget.<sup>26</sup> Thus, seen together, "the types of measures which may be adopted, the criteria relating to the choice and scope of those measures and the conditions for the adoption of lifting of measures (...) support the finding that the purpose of the contested regulation is to protect the Union budget during its implementation",<sup>27</sup> shielding it from the effects resulting from rule of law breaches, and not to "penalise those breaches as such".<sup>28</sup> In turn, that purpose is consistent with the use of art. 322(1)(a) TFEU.<sup>29</sup>

The Court then looks at the content of the Regulation. In this respect, the parties agreed that art. 322(1)(a) can be used to create conditionality mechanisms, or in other words, that conditionality mechanisms may be considered as "financial rules" under art. 322.<sup>30</sup> However, Hungary and Poland, on the one hand, and the institutions and the intervening Member States, on the other, disagreed as to what the content of such conditionality mechanism may be. The former claimed that the condition at stake must always be "closely linked" to the specific objectives of a programme or action, or to the sound financial management of the budget; the latter, in contrast, supported the view that a mechanism of horizontal conditionality, where the condition in question is respect for the value of the rule of law, is also permissible.<sup>31</sup>

Here the Court relied on explicit constitutional language, as will also be pointed out later,<sup>32</sup> with the aim to show that the rule of law is capable of forming the basis of a conditionality mechanism adopted on the basis of art. 322 TFEU.<sup>33</sup> In doing so, the Court stresses that compliance with the values of art. 2 TEU is not only an accession requirement, but also "a condition for the enjoyment of all the rights deriving from the application of the Treaties",<sup>34</sup> and must be thus respected in all areas of EU action. The Court

<sup>24</sup> *Ibid.* para. 110.

<sup>25</sup> *Ibid.* para. 111.

<sup>26</sup> *Ibid.* para. 112.

<sup>27</sup> *Ibid.* para. 114.

<sup>28</sup> *Ibid.* para. 119.

<sup>29</sup> *Ibid.* para. 120.

<sup>30</sup> *Ibid.* para. 122.

<sup>31</sup> *Ibid.* para. 123.

<sup>32</sup> See section IV.1. *infra*.

<sup>33</sup> See in particular *Hungary v Parliament and Council* cit. paras 127 and 128.

<sup>34</sup> *Ibid.* para. 126, relying on the findings of *Repubblika* cit.

also supports its findings with two original considerations on the Union budget. First, it points out that the budget is one of the main instruments to give concrete meaning to the Union principle of solidarity, the latter being also mentioned in art. 2 TEU as one of the main values and fundamental principles of EU law. Second and in turn, it highlights that the implementation of solidarity through the budget “is based on mutual trust between the Member States in the responsible use of the common resources”.<sup>35</sup> And as the Court has repeated since *Opinion 2/13*,<sup>36</sup> mutual trust itself is based on commitment of each Member State to comply with EU law and values. There is therefore a “clear relationship”<sup>37</sup> between the rule of law and the budget, considering also how breaches of the rule of law may seriously compromise the sound financial management and the financial interests of the Union. For example, the lack of effective judicial review may compromise compliance with budgetary conditions and objectives set out by EU law.<sup>38</sup> These reflections thus contribute to the conclusion that a conditionality mechanism adopted on the basis of Art. 322 TFEU may legitimately make the receipt of EU funding subject to a horizontal conditionality clause based on respect for the rule of law and which relates to the implementation of the budget.<sup>39</sup>

### III.2. THE CIRCUMVENTION OF ARTICLE 7 TEU

The second plea raised by Hungary and also by Poland related to the lack of competence of the Union focused on the alleged circumvention of the mechanisms of art. 7 TEU. The argument of the two governments was that only art. 7 TEU grants to the EU institutions the power to determine the existence of a breach of the rule of law, assessing even national situations that fall outside the scope of EU law, and to eventually impose penalties for such breaches. Furthermore, Hungary and Poland recalled that neither art. 7 nor any other provision under the Treaties allow to establish “parallel procedures” for finding breaches to EU values and setting out their possible consequences.

The Court first responds pointing out that the values of art. 2 TEU and in particular the rule of law are further clarified and specified in several other provisions of the Treaties and the Charter of Fundamental Rights<sup>40</sup> and implemented in secondary legislation, and thus actually “numerous provisions of the Treaties [...] grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU”.<sup>41</sup> In particular, when it comes to the rule of law, the Court makes reference to art. 19 TEU and art. 47 of the Charter, the former

<sup>35</sup> *Ibid.* para. 129.

<sup>36</sup> *Opinion 2/13 Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

<sup>37</sup> *Hungary v Parliament and Council* cit. para. 130.

<sup>38</sup> *Ibid.* para. 132.

<sup>39</sup> *Ibid.* para. 133.

<sup>40</sup> *Ibid.* paras 157-158.

<sup>41</sup> *Ibid.* para. 159.

setting out the principle of effective judicial protection and the latter establishing the right to a fair trial and to an effective remedy.<sup>42</sup> As it has been clear since the infringement action against Poland in the “Supreme Court” case,<sup>43</sup> Member States’ compliance with art. 19 TEU – and thus with key aspects of the rule of law including judicial independence – can be reviewed by the Court in infringement actions. The Court thus excludes Hungary’s argument that the value of the rule of law can only be protected under the art. 7 procedures.<sup>44</sup> The Court also rejects the view of both governments that only art. 7 allows to extend the institutions’ oversight outside the scope of EU law.<sup>45</sup> It does so in a cautious way, arguing that the new Regulation does not actually extend the Council’s or the Commission’s power to review Member States’ action, as that review is limited to situations which relate to the implementation of the Union budget, and which therefore fall within the scope of EU law.<sup>46</sup>

The Court moves then to the second line of argument raised by the two Member States, namely that the Regulation would circumvent the existing procedures of art. 7 and unlawfully extend the powers of the Court that are clearly limited by art. 269 TFEU. In this respect, the CJEU first acknowledges that indeed the legislature could not establish a procedure parallel to art. 7, having the same subject matter and objectives and allowing for the adoption of identical measures, but involving different institutions and providing different procedural conditions.<sup>47</sup> Creating different procedures “relating to values” is only possible if the procedures are different in aim and subject matter,<sup>48</sup> or in other words if the “essential characteristics” of the other instruments are different.<sup>49</sup> The Court confirms that the Regulation fulfils these conditions. First, the Court distinguishes the aims of the two procedures. While the purpose of art. 7 is to penalize serious and persistent breaches of the rule of law and other EU values, with the goal to compel the Member State to put an end those breaches,<sup>50</sup> the objective of the Budgetary Conditionality Regulation is to protect the Union budget in the event of breaches of the rule of law. Or to see it from the opposite perspective: The Regulation does not strive to “penalize, through the Union budget, breaches of the principles of the rule of law”.<sup>51</sup> A second distinctive element is that art. 7 allows to assess and eventually sanction *any*

<sup>42</sup> *Ibid.* paras 160-162.

<sup>43</sup> Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

<sup>44</sup> *Hungary v Parliament and Council* cit. para. 163. See also *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 209.

<sup>45</sup> *Hungary v Parliament and Council* cit. paras 164-165 Hungary, and also C-157/21 *Poland v Parliament and Council* ECLI: EU:C:2021:98 paras 220-221.

<sup>46</sup> *Hungary v Parliament and Council* cit. paras 164-165.

<sup>47</sup> *Ibid.* para. 167. See also *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 208.

<sup>48</sup> *Hungary v Parliament and Council* cit. para. 168.

<sup>49</sup> See also *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 209.

<sup>50</sup> *Hungary v Parliament and Council* cit. para. 170.

<sup>51</sup> *Ibid.* para. 171.



serious and persistent breach of the rule of law; in contrast, the Regulation is only concerned with breaches that have budgetary implications.<sup>52</sup> This is stressed again in para. 176 of the judgment, which highlights that the Regulation has different substantive conditions compared to art. 7 and requires two distinct conditions for its activation: first, the breach of the principle of the rule must concern one or more situations clearly identified in art. 4(2) of the Regulation as relevant to the sound financial management of the budget or the protection of the financial interests of the Union; second and again, the breaches must affect or seriously risk affecting the implementation of the budget in a sufficiently direct way. There must therefore be a genuine link between the breaches and the Union budget, a condition which is of course not required under art. 7 TEU.<sup>53</sup> Other substantive conditions are also different: for example, art. 7 allows the suspension of any right deriving from Union membership, whereas the Regulation only provides for the adoption of budgetary measures.<sup>54</sup> The Court's conclusion is thus unequivocal: The Regulation cannot be considered a parallel procedure that circumvents art. 7.

### III.3. LEGAL CERTAINTY

The third main plea put forward by Hungary and supported by Poland<sup>55</sup> was that the Regulation breached the principle of legal certainty. The argument in this respect was that some of the concepts used in the legislative text, and most crucially the concept of the rule of law, "[revealed] serious conceptual uncertainties and serious inconsistencies",<sup>56</sup> leaving excessive discretion to the EU institutions in the application of the Regulation<sup>57</sup> and ultimately making the application of the new instrument unforeseeable.<sup>58</sup> The Hungarian government in particular argued that the rule of law in the EU is merely "an ideal or, at most, a guiding standard",<sup>59</sup> which can only be assessed in relative terms as no state can fully achieve it in practice. Furthermore, according to Hungary, the clarifications offered by art. 2(a) of the Regulation, the provision which offers a definition of the concept of the rule of law for the purpose of the Regulation itself, are insufficient. In fact, they merely reproduce the abstract values affirmed in art. 2 TEU, confirming that those

<sup>52</sup> *Ibid.* para. 174.

<sup>53</sup> *Ibid.* para. 176.

<sup>54</sup> *Ibid.* para. 177.

<sup>55</sup> Poland also presented observations linked to legal certainty within its first plea on the lack of legal basis, arguing that the Regulation made payments from the EU budget conditional on obligations not defined with sufficient precision, see *Poland v Parliament and Council* cit. para. 168.

<sup>56</sup> *Hungary v Parliament and Council* cit. para. 199.

<sup>57</sup> *Ibid.* paras 206-209.

<sup>58</sup> *Ibid.* para. 204.

<sup>59</sup> *Ibid.* para. 200.

values “inspire political cooperation” at the EU level, “but do not have their own legal content”.<sup>60</sup> Hungary relied here also on art. 4(2) TEU and the obligation to respect the national identity of the Member States, which would in any event not allow the EU institutions to fully define and give a uniform interpretation to the concept of the rule of law.

The Court responds by first acknowledging the importance of legal certainty as a key general principle of EU law. However, the requirements deriving from that principle do not prohibit relying where necessary also on more abstract legal notions, within certain parameters of foreseeability.<sup>61</sup> On the basis of these two preliminary observations, the CJEU then first reminds Hungary that art. 2(a) of the Regulation does not provide an “exhaustive” definition of the concept of the rule of law but simply sets out a number of rule of law principles that are relevant for the application of the Regulation.<sup>62</sup> Those principles, furthermore, “do not go beyond the limits of the concept of ‘the rule of law’”.<sup>63</sup> Recalling its earlier findings on the obligation to guarantee the values post accession,<sup>64</sup> the Court clearly responds to the Hungarian government’s argument on the lack of legal relevance of the values of art. 2 TEU. The Court affirms that such provision “is not a merely a statement of policy guidelines or intentions”, as the Hungarian government had tried to argue. On the contrary, it “contains values which [...] are an integral part of the very identity of the European Union as a common legal order” and those values are then “given concrete expression in principles containing legally binding obligations for the Member States”.<sup>65</sup>

The Court tackles also the objections relating to national identity.<sup>66</sup> It acknowledges that art. 4(2) TEU allows the Member States to enjoy some discretion in defining and implementing the rule of law, but within the boundaries of a common concept of the rule that is shared by all Member States, and which the Member States must respect at all times.<sup>67</sup> Even if the assessment of the Council and the Commission under the Regulation must take into account the contexts and particular features of the Member States legal systems, this is not incompatible with the application of uniform assessment criteria.<sup>68</sup> Thanks to the definition offered in art. 2(a) of the Regulation, read together with the recitals and the CJEU case law,<sup>69</sup> the Court concludes that the essential content and requirements

<sup>60</sup> *Ibid.* para. 205.

<sup>61</sup> *Ibid.* paras 224-225.

<sup>62</sup> *Ibid.* para. 227.

<sup>63</sup> *Ibid.* para. 229.

<sup>64</sup> *Ibid.* para. 231, which refers back to paras 124-127 discussed earlier.

<sup>65</sup> *Ibid.* para. 232.

<sup>66</sup> In the Polish case, the possible breach of art. 4(2) TEU was presented as a separate plea for annulment, see *Poland v Parliament and Council* cit. para. 280. The Court responded to it by relying on the arguments used in the Hungarian case in the paragraphs of legal certainty here discussed.

<sup>67</sup> *Ibid.* para. 234.

<sup>68</sup> *Ibid.* para. 235.

<sup>69</sup> See recitals 3, 8-10 and 12 of Regulation (EU, Euratom) 2020/2092 cit.

of the rule of law can be determined with sufficient precision by the Member States, and that they can be subject of a “strictly legal” and not “purely political” analysis.<sup>70</sup>

In the following paragraphs, the Court rejects also a series of other legal certainty arguments, including most importantly the suggestion that the inclusion of the concept of “risk” in art. 4(1) of the Regulation – saying that measures can be imposed when the breach of the rule of law “seriously risk affecting” the budget – would infringe legal certainty as it would allow for the imposition of arbitrary penalties “in uncertain or unproven situations”, giving rise to a presumption of the effect of a rule of law breach on the budget when no clear links can be legally established.<sup>71</sup> The Court responds, also by reference to the AG’s Opinion,<sup>72</sup> that it would be incompatible with the sound financial management and the protection of the financial interests of the Union to limit the adoption of budgetary protective measures to cases of proven negative effects. In order not to compromise the purpose of the Regulation it is necessary to include also instances in which the effects, even if not yet proven, are highly probable.<sup>73</sup> The “prevention” of negative effects necessarily supplement the “correction” of those effects,<sup>74</sup> but the Court also reminds us that, first, the Regulation requires that the breaches “seriously” risk affecting the budget, meaning that the risk must have a ‘high probability of occurring”, and, second, that the condition of a “genuine” link between the breach and the serious risk always applies.<sup>75</sup>

#### IV. BOLD BUT CAREFUL: ON THE COURT’S APPROACH IN THE JUDGMENTS

##### IV.1. “THE EUROPEAN UNION MUST BE ABLE TO DEFEND THOSE VALUES...”

As noted in the Introduction and as emerges from the analysis of the ruling, the Court of Justice took up the challenges posed by the Hungarian and Polish applications in a very direct and explicit fashion. The view constantly supported by the two governments is that the Union has extremely limited powers in the rule of law and EU values field. For Hungary and Poland, art. 2 TEU and the rule of law are at best generic policy statements, which cannot and should not be defined at the EU level, cannot be “mainstreamed” in EU laws and policies, and their protection would be almost entirely left to the largely inter-governmental mechanisms of art. 7 TEU. The idea of a “Union of Values” that is often promoted at the EU level is certainly foreign to the visions of the current Hungarian and Polish leaders.

<sup>70</sup> *Hungary v Parliament and Council* cit. para. 241.

<sup>71</sup> *Ibid.* para. 261.

<sup>72</sup> See *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 311.

<sup>73</sup> *Hungary v Parliament and Council* cit. para. 262.

<sup>74</sup> *Ibid.* para. 266.

<sup>75</sup> *Ibid.* para. 267.

The Court responded by adopting a clear constitutional tone, delivering two thick<sup>76</sup> decisions, rich of considerations on the nature of the Union's legal order, the legal relevance of the values of art. 2 TEU, and the constitutional identity of the Union. Those references, together with other procedural considerations such as assigning the case to the Full Court, or even the choice to livestream the Court's pronouncement, clearly suggest that the Court wanted to send clear messages to its audience and ultimately issue truly landmark decisions. At a close look, arguably not all those considerations were strictly necessary to the resolution of the case – take those on the Union's identity, for example – and can often be seen as *obiter dicta* that clearly shows the Court's constitutional approach.

The Court relies on that constitutional language in particular in the context of the first plea related to the legal basis of the challenged Regulation, and crucially where it assesses whether a mechanism of “horizontal conditionality” that poses as its key condition the respect for the value of the rule of law could be adopted on the basis of art. 322(1)(a) TFEU.<sup>77</sup> Building on its recent case law, and in particular on a series of decisions adopted in the area of judicial independence,<sup>78</sup> the Court illustrates how respect for the rule of law is not only a pre-accession membership condition, but also and crucially a post-accession membership obligation, “a condition for the enjoyment of all the rights deriving from the application of the Treaties”.<sup>79</sup> In fact, at the moment of accession, the candidate-becoming-Member State “joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member states, and recognises that they share with it, the common values contained in Article 2 TEU”, as affirmed by the Court in para. 125 of the ruling, which borrows the language of recital (5) of the preamble of Regulation 2020/2092. The Court thus continues its approach of bringing to light and making explicit some of the hidden or implicit premises of the EU constitutional structure.

In these paragraphs, the Court also adopts for the first time<sup>80</sup> the language of “identity” referred to the Union's legal order.<sup>81</sup> It holds that the values of art. 2 TEU “define the very identity of the European Union as a common legal order”,<sup>82</sup> and a similar concept is also evoked in the next paragraph stating that “the rule of law ... forms part of the very foundations of the European Union and its legal order”.<sup>83</sup> The values of art. 2 are the core pillars of the Union's identity, and the EU “must be able to defend those values”, to defend

<sup>76</sup> See also N Kirst, ‘Rule of Law Conditionality Before the Court’ cit.

<sup>77</sup> *Hungary v Parliament and Council* cit. paras 121 and 123.

<sup>78</sup> *Associação Sindical dos Juizes Portugueses* cit.; *Repubblica* cit.; *Asociația ‘Forumul Judecătorilor din România’ and Others* cit.; *Euro Box Promotion and Others* cit.

<sup>79</sup> *Hungary v Parliament and Council* cit. para. 126. The formula was first used in *Repubblica* cit.

<sup>80</sup> Of course, the Court had already faced and dealt with *national* identity arguments brought on the basis (mostly) of art. 4(2) TEU.

<sup>81</sup> On this issue, see also P Faraguna and T Drinóczi, ‘Constitutional Identity in and on EU Terms’ (21 February 2022) *Verfassungsblog verfassungsblog.de*.

<sup>82</sup> *Hungary v Parliament and Council* cit. para. 127.

<sup>83</sup> *Ibid.* para. 128.

its identity.<sup>84</sup> As just suggested, these references to the concept of identity is arguably not crucial to arrive to the conclusion which is offered soon after – the rule of law may ultimately constitute the basis of a horizontal conditionality mechanism based on art. 322(1)(a) TFEU – but enrich and thicken the reasoning of the Court.

The Court develops its reasoning on art. 2 TEU and the values of the Union also in another key part of the ruling, where it answers the Hungarian and Polish objections that the rule of law lacks a precise definition and cannot be given a sufficiently uniform interpretation, and thus using it as a benchmark for assessing Member States' action would undermine the principle of legal certainty. Art. 2 TEU, according to the Court, is more than a statement of policy guidelines or intentions. As already noted earlier, it contains values which "are an integral part of the very identity" of the EU and which are then given "concrete expression in principles containing legally binding obligations for the Member States".<sup>85</sup> The obligation to respect the rule of law flows from that provision. The Court then links the two identity discourses (the EU and the national). While the national identity provision of art. 4(2) TEU gives Member States a "certain degree of discretion in implementing the principles of the rule of law",<sup>86</sup> the obligation as to the result to be achieved (*i.e.*, respect for the rule of law) does not vary from one Member State to another, as the Member States adhere to a shared concept of the rule of law.<sup>87</sup> As noted earlier, the concept has been already adequately defined by the Regulation, its Preamble, as well as the case law of the Court, and can be identified with sufficient precision. The message to Hungary, Poland, and any other Member State is clear: First, the national identity clause cannot be used to derogate from the common rule of law core; second, that core has been determined with sufficient precision and respect for it is a clear legal obligation under EU law, not simply a political commitment.

Perhaps with a degree of irony, the Court therefore used the robust challenge created by Hungary and Poland's objection to actually restate with strength the importance of the values of art. 2 TEU in the Union's legal structure. In some respects, the judgment is even bold, most crucially where it adopts the language of identity. While the concept only plays a very limited role in the judgment, its introduction is still a significant novelty in the Court's case law, and it will be stimulating to see what – if any – practical consequences the CJEU will derive from it.

#### IV.2. "...WITHIN THE LIMITS OF ITS POWERS AS LAID DOWN BY THE TREATIES"

The broad statements on the key importance of the rule of law and the other values of art. 2 as defining the identity of the Union as a common legal order do not however mean

<sup>84</sup> *Ibid.* para. 127.

<sup>85</sup> *Ibid.* para. 232.

<sup>86</sup> *Ibid.* para. 233.

<sup>87</sup> *Ibid.* para. 233-234.

that the institutions have *carte blanche* to act in defence of the values. Certainly, the EU “must be able to defend [the] values”, but, the Court immediately reminds us, “within the limits of its powers as laid down by the Treaties”.<sup>88</sup> Thus, while the Court is bold in affirming the basic principles underpinning its decision, it is much more careful when it comes to the specific mechanisms that can be designed – including the new Budgetary Conditionality Regulation – to protect those values. The Court therefore has to carefully check whether art. 322(1)(a) is an adequate legal basis for the adoption of the Regulation, or whether the new instrument does not circumvent the procedures of art. 7 TEU.

On the issue of the legal basis, the Court, as discussed earlier, was called to examine whether art. 322 TFEU was the appropriate legal basis for the Regulation, and the first step of that assessment was establishing the *aim* or *purpose* of the new piece of legislation. While Hungary and Poland claimed that the ultimate objective of the Regulation was to allow for the examination, determination, and sanctioning of rule of law breaches, the Court concludes<sup>89</sup> that the purpose is actually the protection of the Union budget, and that in turn that such a purpose is in line with the use of art. 322 TFEU as legal basis. The Court could not be clearer: “the purpose of the contested Regulation is to protect the Union budget from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not to penalise those breaches as such”.<sup>90</sup> Moving to the *content* of the Regulation, the Court, forced to do so by Hungary and Poland, had to assess whether all provisions contained in the regulation could be considered financial rules for the purpose of art. 322. In this respect, the Court stresses the importance of the “direct link” criterion that was introduced during the legislative process: It is that element that makes the new Regulation a real conditionality tool. As the AG had also argued, in fact, the use of art. 322 TFEU implies that what is produced is a genuine financial conditionality instrument.<sup>91</sup>

The Court is also careful in pointing out that the Regulation does not in any way expand the scope of its own and the other institutions’ purview over Member States actions. It repeats that the Regulation only allows to consider breaches of the rule of law that concern situations or conduct of authorities relevant for the implementation of the Union budget,<sup>92</sup> recalling several times that those situations fall within the scope of EU law.<sup>93</sup>

The assessment of whether the new Regulation may circumvent the art. 7 TEU system is rather careful as well. While the Court firmly rejects the view that the rule of law may only be protected under the procedures of art. 7,<sup>94</sup> showing that aspects of the values

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* para. 114.

<sup>90</sup> *Ibid.* para. 119.

<sup>91</sup> *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 136.

<sup>92</sup> *Hungary v Parliament and Council* cit. para. 142.

<sup>93</sup> *Ibid.* paras 145 and 164-165. See also *Poland v Parliament and Council* cit. paras 220-221.

<sup>94</sup> *Hungary v Parliament and Council* cit. para. 163.

that find more concrete expression in art. 19 TEU or 47 of the Charter have already been defended with different mechanisms, it then closely verified that the purpose and subject matter of the two procedures were sufficiently distinct. In this respect it stressed again that the purpose of the Regulation is the protection of the Union budget in the event of a breach of the rule of law, “and not to penalise, through the Union budget, breaches of the principles of the rule of law”.<sup>95</sup> And it highlighted once more how the Regulation requires a “genuine link” between the breach and the effects on the budget, as well as other elements – such as the fact that it only allows for the imposition of budgetary measures – that qualify the Regulation as a budgetary tool.

Throughout the judgment, the Court has therefore to repeatedly emphasize that the new Regulation is not a rule of law protection tool, but a budgetary one. The perhaps uncomfortable truth is that despite the bold proclamations on the importance of values in the EU constitutional framework, the room to create new instruments to protect those values is extremely limited. Art. 2 TEU cannot be used as a legal basis for the adoption of EU measures and does not extend the competences of the Union, and the Treaties still assign to art. 7 TEU – with its extremely high thresholds and a complex, politicised and inter-governmental procedure – a key role in the values’ oversight architecture. There is still a mismatch, in this respect, between the values firmly proclaimed by the Treaties and the Court, and the concrete mechanisms for their defence, notwithstanding the attempts of the Court<sup>96</sup> and of the political institutions to fill that gap.<sup>97</sup>

This mismatch becomes even more evident if one assesses the original proposal of the Commission against the parameters developed by the Court in the judgments here discussed. It can be briefly recalled that the Commission proposed a more explicit rule of law protection instrument, which would have allowed the EU institutions to adopt measures whenever a “generalised deficiency” in a Member State rule of law system affected or risk affecting the sound financial management of the budget or the EU’s financial interest, without requiring a direct or genuine link between the rule of law deficiency and the budgetary effects. Furthermore, the Commission’s proposal left much more open what could constitute a relevant rule of law deficiency under the envisaged system.<sup>98</sup> Following a critical opinion of the Council legal service, the Council pushed for the introduction of the direct or genuine link criterion and a more precise definition of the relevant rule of law breaches

<sup>95</sup> *Ibid.* para. 171.

<sup>96</sup> See for example the broad reading of art. 19 TEU in *Associação Sindical dos Juizes Portugueses* cit., which paved the way for infringement actions to protect judicial independence, or the recent creation of the non-regression principle in *Republika* cit., the consequences and impact of which still remain to be understood.

<sup>97</sup> Including with the creation of the Regulation here discussed; but see also the monitoring and dialogue instruments developed by the Commission, such as the Commission Rule of Law Framework or the annual Rule of Law Reports.

<sup>98</sup> Art. 3(b) of the draft Regulation only gave illustrative examples of what could constitute a generalised deficiency.

under the Regulation.<sup>99</sup> The final text of the Regulation reflects the Council's position, and the need to prove the "causal link" between the rule of law breach and the negative consequences on the budget is also highlighted in the December 2020 EuCo Conclusions.

The opinion of the legal service, the amendments adopted and the EuCo conclusions have been received negatively by part of the literature, as it is claimed they would have watered down the scope and impact of the Regulation, showing once again the reluctance of the (European) Council and the Member States to take on their responsibilities in rule of law protection.<sup>100</sup> Yet that criticism should be at least partially revisited in the light of the Court's decisions as well as the AG Opinions in the cases here discussed. It is certainly true that the changes adopted during the legislative process have made the activation of the Regulation more cumbersome, and from a rule of law protection point of view, this might be regrettable. But my reading, as I have also suggested elsewhere before the Court's judgment,<sup>101</sup> is that some of the amendments that limited the scope of the new Regulation<sup>102</sup> were actually necessary to ensure that the instrument would pass the scrutiny of the Court, rather than merely a sign of the Member States and of the (European) Council's desire to compromise on the rule of law. The reasoning of the CJEU and of the Advocate General supports this conclusion.

Both the Court and the Opinion of Sánchez-Bordona stressed in fact the importance of the introduction of the direct link criterion, which implemented into the legislative text the observation of the Council's legal service that in order to qualify as a genuine conditionality, the Regulation had to ensure a "sufficient link" between the "compliance failure" and the "loss of entitlement".<sup>103</sup> The AG's Opinions paid much attention to the legislative process *inter alia* when assessing whether the content of the Regulation, and in particular the conditions for the adoption of measures, could be covered by the legal basis of art. 322(1)(a) TFEU.<sup>104</sup> AG Sánchez-Bordona stressed how while the original proposal focused on the protection of the rule of law, the Council's involvement produced what is "more clearly a financial conditionality instrument",<sup>105</sup> most crucially thanks to the introduction

<sup>99</sup> See the closed list of art. 4(2) of Regulation (EU, Euratom) 2020/2092 cit.

<sup>100</sup> See on the legal service's opinion, KL Scheppele, L Pech and RD Kelemen, 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law Mechanism' (12 November 2018) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de/verfassungsblog/2018/11/12/council-legal-service-opinion-on-the-commission-s-eu-budget-related-rule-of-law-mechanism/); on the EuCo Conclusions, Editorial, 'Neither Representation nor Values?' cit. and KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' cit.

<sup>101</sup> A Baraggia and M Bonelli, 'Linking Money to Values' cit. 146 and ff. In the contribution, we argue *inter alia* that the inclusion of the "direct link" criterion legitimized the use of art. 322 TFEU as a legal basis for the Regulation.

<sup>102</sup> Certainly not all the amendments: The decision to transition from reverse qualified majority voting to ordinary QMV, for example, was certainly not required and the result of a political choice of the Council which the EP was forced to accept.

<sup>103</sup> Opinion of the legal service 2018/0136(COD) cit. para. 20.

<sup>104</sup> *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 163.

<sup>105</sup> *Ibid.* para. 164.



of the sufficiently direct link requirement. Although perhaps less explicitly, the importance of those amendments is also acknowledged by the Court in its decisions,<sup>106</sup> which highlight how the requirement of the genuine link contributes both to making sure that the new Regulation actually falls within the scope of the concept of “financial rules” within the meaning of art. 322 TFEU,<sup>107</sup> and to distinguishing the new Regulation from the system of art. 7 TEU.<sup>108</sup> In the Polish case, the Court also stresses that the direct link criterion should be taken seriously: It cannot be determined automatically, but must always be proven by the Commission.<sup>109</sup>

As said earlier, the addition of the genuine link criterion was not uncontroversial, and was criticized also on the pages of this *Journal*.<sup>110</sup> The *Editorial* argued that art. 322 TFEU, interpreted in the light of art. 3, para. 1 TEU - the provision setting out the Union’s objectives<sup>111</sup> - would have allowed the EU institutions to adopt the Regulation as originally proposed, that is to say, without the inclusion of the direct link requirement. The AG and the Court however endorsed a narrower reading of the legal basis in question and more generally, of the EU’s competence to adopt new rule of law protection mechanisms. They concluded, in particular, that the direct link criterion ensures that the new mechanism is a genuine financial conditionality, strictly linked to the implementation of the EU budget, which does not circumvent art. 7 TEU and falls within the scope of the chosen legal basis.<sup>112</sup>

In light of these considerations, it is at the very least questionable whether the proposal originally presented by the Commission would have been compatible with the legal basis of art. 322 TFEU and possibly also with the system of art. 7 TEU.<sup>113</sup> The legal basis, it may be recalled, only allows for the introduction of “financial rules ... for establishing

<sup>106</sup> On the “emphasis” of the Court and the AG on the genuine link requirement, see also M Fiscaro, ‘Protection of the Rule of Law and ‘Competence Creep’ Via the Budget: The Court of Justice on the Legality of the Conditionality Regulation’ (2022) *EuConst* 9. See also J Alberti, ‘Adelante, presto, con juicio. Prime considerazioni sulle sentenze della Corte di giustizia che sanciscono la legittimità del “Regolamento condizionalità” (2022) *Eurojus* 33.

<sup>107</sup> *Hungary v Parliament and Council* cit. para. 147.

<sup>108</sup> *Ibid.* para. 176.

<sup>109</sup> *Poland v Parliament and Council* cit. para. 180.

<sup>110</sup> See again *Editorial*, ‘Neither Representation nor Values?’ cit. It is also to be highlighted that the “causal link” criterion was not a novelty brought by the EuCo conclusions, but a key component of the legislative text, see art. 4(1) of the Regulation (EU, Euratom) 2020/2092.

<sup>111</sup> Which include the promotion of its values: ‘The Union’s aim is to promote peace, its values and the well-being of its peoples’.

<sup>112</sup> See again. *Hungary v Parliament and Council* cit. para. 147.

<sup>113</sup> Doubts were expressed in the past by MJ Rangel de Mesquita, ‘European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027 - The Commission’s Proposal to protect the EU budget against threats to the Rule of Law’ (2018) *ERA Forum* 287 and M Fiscaro ‘Rule of Law Conditionality in EU Funds’ cit. 713. See of the latter author also M Fiscaro, ‘Protection of the Rule of Law and ‘Competence Creep’ via the Budget: The Court of Justice on the Legality of the Conditionality Regulation’ cit, confirming his original assessment.

and implementing the budget". While it may support the creation of a horizontal conditionality regime, that legal basis still requires that there is a robust degree of connection between the behaviour targeted (in this case, breaches of the rule of law) and the negative effects of that behaviour on the Union's budget.<sup>114</sup> That connection, that direct link, ensures that the scheme that is introduced can be considered a "genuine" financial conditionality and thus falls within the scope of art. 322 TFEU.

In turn, this shows the mismatch that has been illustrated earlier: The Treaties arguably do not contain an adequate legal basis for a broader and more ambitious rule of law conditionality mechanism, such as that presented by the Commission. The institutions are thus forced to find other indirect ways to fulfil the overall ambition of better ensuring the rule of law across the Union, which explains ultimately why the key aim of the new instrument becomes the protection of the Union budget, which is safeguarded against the negative effects produced by possible rule of law breaches. That is not (or at the very least, not only) a political choice due to the reluctance of the Member States to introduce robust rule of law defence mechanisms. It is first and foremost a consequence of the limited competences of the Union and the mismatch between the broad proclamations of values as the Union's identity on the one hand, and the limited concrete powers of the Union on the other.

## V. CONCLUSION AND THE NEXT STEPS

In conclusion, the judgments of the Court in the two annulment actions brought by Hungary and Poland against the budgetary conditionality Regulation confirm the legality of the new mechanism and pave the way for the concrete enforcement of the new instrument, removing the stumbling block created by the 2020 EuCo conclusions. They do so by using an ambitious constitutional tone and language, which places the rule of law and the values of art. 2 TEU at the centre of the European Union legal and political order, defining them as the very identity of the EU system. At the same time, the Court is well aware that the Treaties create limited competences and powers to construct new mechanisms to protect those values, and in fact the new Regulation is only an indirect way to do so, based on a narrow legal basis which only allows for the introduction of "financial rules" linked to the implementation of the Union budget. Therefore, the Court has to carefully check whether the limits of that legal basis have been respected, concluding in the affirmative; but in doing so, it confirms that the Regulation should be genuinely intended as budgetary protection tool, rather than a true rule of law instrument.

<sup>114</sup> This is also in line with the decisions of the Court of Justice in joined cases T-99/09 and T-308/09 *Italy v European Commission* ECLI:EU:T:2013:200, in which the CJEU accepted that the Commission may suspend EU structural funding when there are indications of a breach of EU law and there is a 'sufficiently direct link' between the alleged infringement and the operations to which the fund in questions relate.

This highlights a certain tension in the system created by the Regulation, a tension which was present since the very beginning, and that has only become more evident over time, also a result of the Court's ruling. The real key ambition of the Regulation, which led the institutions to propose and introduce it, was to provide another and hopefully more effective tool to fight rule of law and constitutional backsliding in the Member States.<sup>115</sup> But there is no competence in the Treaties to do just that, to adopt a true rule of law conditionality that can be activated "simply" when a breach of the rule of law is identified. The institutions were forced to rely on art. 322(1)(a) TFEU and to introduce a mechanism whose key purpose and content is the protection of the budget, not of the rule of law. The limitation of the scope of the breaches of the rule of law that can be considered under the Regulation and the introduction of the direct link criterion were necessary to stay within the boundaries of that legal basis and competence.

The judgments and the Regulation itself – as well as the guidelines elaborated by the Commission after the Court's judgment – therefore show the persisting mismatch in the Union's constitutional scheme between the proclamations of art. 2 TEU and the concrete "values-related powers" of the institutions. This is not to blame the Court or the political institutions. The mismatch is a direct consequence of the current Treaty framework and could arguably only be fixed at the level of Treaty reform. In the meantime, creating new indirect mechanisms – but also of course relying on much more direct forms of intervention where possible<sup>116</sup> – is still a necessary step, which contributes to filling the gap between the proclamation of a "Union of Values" and the concrete reality in the Union and its Member States.

<sup>115</sup> See again recital 14 of the Regulation which well shows the Commission's original ambition.

<sup>116</sup> For example, by continuing and/or starting infringement actions based on art. 19 TEU or on the Charter of Fundamental Rights, as done in recent times; or also under art. 7 TEU.

