



ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

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THE RISE AND FALL OF RULE OF LAW CONDITIONALITY

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ABSTRACT: During the last decade, a deterioration of the respect for the EU's common values occurred. On the EU level, various procedures and instruments have been created and applied to cope with the crisis. The latest instrument, Regulation 2020/2092, was designed to establish a rule of law conditionality mechanism but has turned out as a budget conditionality mechanism. This *Article* examines the evolution and nature of the conditionality mechanism in said Regulation and shows why rule of law conditionality can currently rather be located in the financial instruments breathing life into the EU Green Deal than in the so-called rule of law conditionality Regulation.

KEYWORDS: rule of law – conditionality – EU Green Deal – financial assistance – enforcement – funds.

I. INTRODUCTION

Since the 2010 financial and sovereign debt crisis, a phenomenon called rule of law and democratic backsliding¹ has become increasingly salient in the Member States (MS) of the EU. A deterioration of the EU's common values in art. 2 TEU could be observed especially in some of the newer Member States: after some time, the EU institutions launched several initiatives to address the emerging crisis: the European Commission (Commission)

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¹ On the term, see KL Scheppele and L Pech, 'What is Rule of Law Backsliding?' (2 March 2018) [VerfassungsBlog](http://VerfassungsBlog.com) www.verfassungsblog.de.



triggered an art. 7 TEU procedure concerning Poland,² the European Parliament did so regarding Hungary;³ besides, cases against Poland⁴ and Hungary⁵ were brought before the Court of Justice of the European Union (CJEU). In 2020, the Commission highlighted “prevention and promotion” and “response” as the two main limbs of tackling the rule of law crisis. The latter category consists of four instruments: (i) the Rule of Law Framework (dialogue),⁶ (ii) the art. 7 TEU procedure (political sanctions), (iii) infringements pursuant to art. 258 TFEU (judicial determination and enforcement), and, most recently, (iv) “a proposed regime of conditionality to protect the EU budget” (administrative enforcement). Moreover, the instruments that breathe life into the European Green Deal, REACT-EU,⁷ the Recovery and Resilience Facility,⁸ and the envisaged Just Transition Fund⁹ and InvestEU,¹⁰ contain links to the “horizontal financial rules” of the newly established regime of conditionality in Regulation 2020/2092 (hereinafter: the Regulation).¹¹

This *Article* aims at analysing the new rule of law conditionality regime from various angles. Section II explains the road to rule of law conditionality. Section III analyses the critical aspects of the Regulation such as its legal basis, scope of application and relationship with other procedures. That section also shows why the Regulation has been transformed to an instrument of budget conditionality and focuses on the Court of Justice’s findings in two actions for annulment brought against the Regulation.¹² Then, section IV

² Communication COM(2019) 163 final from the Commission of 3 April 2019 on Further strengthening the Rule of Law within the Union, 3-6.

³ European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland* www.europa.eu.

⁴ Most importantly, case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924; case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

⁵ Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687; case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792; case C-78/18 *Commission v Hungary (Transparency of associations)* ECLI:EU:C:2020:476.

⁶ Communication COM(2014) 158 final from the Commission to the European Parliament and the Council of 11 March 2014 on A new EU Framework to strengthen the Rule of Law.

⁷ Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU), recitals 7, 23, art. 92(b).

⁸ Recital 71 of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁹ Recital 9 of Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund.

¹⁰ Recital 65 of Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017.

¹¹ 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.

¹² Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97; case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

shifts the focus to some of the instruments breathing life into the European Green Deal, where rule of law conditionality has been applied by the Commission even without applying the Regulation in the stricter sense. Thereby, the *Article* puts the recent application of rule of law conditionality in the broader context of EU budget conditionality.

II. THE ROAD TO RULE OF LAW CONDITIONALITY

After (potential) threats to the rule of law have been brought to the surface, the Commission has developed a toolkit for containing the deteriorating respect for the rule of law (as one of the common values of Art. 2 TEU) by some Member States.¹³ In the area of “prevention & promotion”, one of the two main limbs of tackling the rule of law crisis,¹⁴ the Commission mentions the following instruments: European Rule of Law Mechanism, EU Justice Scoreboard, European Semester; Cooperation and Verification Mechanism, support for civil society, networks and projects, and structural reforms. The other limb “response” consists of four instruments: (i) the Rule of Law Framework (dialogue), (ii) the art. 7 TEU procedure (political sanctions), (iii) infringements pursuant to art. 258 TFEU (judicial determination and enforcement), and, most recently, (iv) a regime of conditionality to protect the EU budget (administrative enforcement). In the end of 2021, the Regulation has been adopted, but a closer look on the underlying conditionality mechanism reveals that there is not much left of the initial idea of a conditionality mechanism based on the compliance with the rule of law.

Following the blueprint of the International Monetary Fund's (IMF)¹⁵ and the World Bank's¹⁶ policies, the EU has applied conditionality since the 1980s. Human rights clauses have been inserted to international agreements in the form of *ex-ante* or *ex-post* (ie conditionality is applied before or after the disbursement of funds) and positive or negative (ie granting a (non-)pecuniary benefit, withdrawing resources or imposing a sanction) conditionality.¹⁷ In the 1990s, the EU's accession policy has been made conditional on the

¹³ Starting with Communication COM(2014) 158 final cit., followed by Communication COM(2019) 163 final cit.

¹⁴ European Commission, *The EU's Rule of Law Toolbox – Factsheet* www.ec.europa.eu.

¹⁵ International Monetary Fund, Guidelines on Conditionality, Decision of the Executive Board No 6056-(79/38) of 2 March 1979; International Monetary Fund, Guidelines on Conditionality, Decision of the Executive Board No 12864-(02/102) of 25 September 2002, as amended by Decision No 13814-(06/98) (November 2006).

¹⁶ World Bank Group, *Development Policy Lending* web.worldbank.org.

¹⁷ Among the first, L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 60 ff.; E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003) 98 ff. For further references see AC Prickartz and I Staudinger, 'Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union's International Trade Agreements' (2019) *Europe and the World: A Law Review* 1, 5 ff.

compliance with the Copenhagen Criteria.¹⁸ In the aftermath of the 2008/9 financial crisis, macroeconomic conditionality, a term that has recently also been used by Advocate General Campos Sánchez-Bordona,¹⁹ has been applied *vis-à-vis* EU MS when granting financial assistance under international law (European Stability Mechanism)²⁰ and EU law (Two-pack).²¹ Conditionality has also been introduced to the EU's budgetary policy in the form of *ex-ante* conditionalities as requirements for the disbursement of resources under the regime of the European Structural and Investment Funds.²² In 2021, budget conditionality in the Common Provisions Regulation has been expanded and deepened.²³ The Commission proposed a conditionality mechanism linking compliance with the rule of law to the disbursement of all EU funds,²⁴ which resulted in the adoption of the Regulation. This so-called general regime of conditionality for the protection of the Union budget is the latest legislative product of countering a deterioration of the respect for the common values of the EU enlisted in art. 2 TEU. In 2018, the Commission adopted a proposal on the Protection of the

¹⁸ The accession criteria were first mentioned in the European Council Presidency Conclusions of 21-22 June 1993 www.consilium.europa.eu para. 7.A.iii. See, among others, D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Field of Democracy and the Rule of Law* (Wolters Kluwer 2008).

¹⁹ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2021:974, opinion of AG Campos Sánchez-Bordona, paras 105, 107, 113, 114.

²⁰ 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. For example, V Borger, 'The ESM and the European Court's Predicament in Pringle' (2013) *German Law Journal* 113, 123 ff.

²¹ 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. See M Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"' (2014) *Heidelberg Journal of International Law* 61, 76 ff.

²² Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006. See R Bieber and F Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) *CMLRev* 1057, 1076 ff. See also V Vita, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) *CYELS* 116, 122 ff; M Fiscaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2020) *European Papers* www.europeanpapers.eu 695, 704.

²³ 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.

²⁴ G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2018) *Hague Journal on the Rule of Law* 171, 182 ff; A von Bogdandy and J Łacny, 'Suspension of EU Funds for Breaching The Rule of Law – a Dose of Tough Love Needed?' (SIEPS 7-2020).

Union Budget against Generalised Deficiencies as regards the Rule of Law.²⁵ In December 2020, “rule of law” conditionality has been introduced to the EU’s budgetary policy with Regulation 2020/2092 and entered into force on 1 January 2021.²⁶ As a result of lengthy discussions and threats to block the adoption of the Multiannual Financial Framework (MFF) and the own resources decision,²⁷ the Regulation was adopted with the caveat that the enforcement will be delayed until after the Court of Justice’s decision on a potential action for annulment and the Commission’s adoption of guidelines on the application of the Regulation.²⁸ Voices in the literature have characterised the Conclusions of the European Council on the Commission’s enforcement *moratorium* illegal.²⁹

On 11 March 2021, Hungary brought said action for annulment before the Court of Justice and sought to either annul the entire Regulation or arts 4(1), 4(2)(h), 5(2) 5(3) penultimate sentence, 5(3) final sentence, and 6(3) and (8) thereof.³⁰ Poland followed suit.³¹ The European Parliament announced in June 2021 to bring an action for failure to act against the European Commission under art. 265 TFEU, which has eventually been brought to the Court in October 2021, accusing the Commission of inaction as it had decided to await the Court of Justice’s findings in the annulment actions, before implementing the Regulation.³²

III. HOW THE RULE OF LAW CONDITIONALITY REGULATION BECAME AN INSTRUMENT OF BUDGET CONDITIONALITY

In 2020, the proposal of a rule of law conditionality regulation has been created under the headline of adding a new instrument to European Commission’s rule of law toolbox. With the Regulation, conditionality has eventually been introduced to the implementation

²⁵ Proposal COM(2018) 324 final from the Commission of 2 May 2018 for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States. On the draft and the subsequent developments, see also I Staudinger, ‘Der Konditionalitätsmechanismus als Instrument zum Schutz des Rechtsstaatsprinzips: COM(2018) 324 final’ in M Kopetzki and others, (eds), *Autorität-res vs Liberales Europa* (Jan Sramek 2019) 183, 195 ff; M Fiscaro, ‘Rule of Law Conditionality in EU Funds’ cit.; I Staudinger ‘Reflections on the General Regime of Conditionality for the Protection of the Union Budget’ in Stefan Mayr and Andreas Orator (eds), *Populism, Popular Sovereignty and Public Reason Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook* (Peter Lang 2021) 223, 228 ff.

²⁶ Art. 10 Regulation 2020/2092 cit.

²⁷ The entire process was described in detail in *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras 77-95. See also, A Baraggia and M Bonelli, ‘Linking Money to Values: the New Rule of Law Conditionality Regulation and its Constitutional Challenges’ (2022) *German Law Journal* 131, 141 ff.

²⁸ European Council Conclusions of 11 December 2020, EUCO22/20 para. I.2.c.

²⁹ On the illegality, see 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](https://www.verfassungsblog.de).

³⁰ *Hungary v European Parliament and Council* cit.

³¹ *Poland v European Parliament and Council* cit.

³² European Committee of Legal Affairs Meeting of 14 October 2021 JURI_PV(2021)1014_1 *Minutes*, 5.

of the EU budget on a general level. However, after the adoption of the Regulation and the Court of Justice's findings in the relevant cases, said classification has to be reconsidered. That conclusion can already be derived from the text of Regulations, since art. 1 of the Regulation defines the subject matter as follows: "This Regulation establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States". After the Court of Justice's findings, it became clear that the sufficiently direct link between the rule of law violation in question and the sound implementation of the Union budget transformed the rule of law conditionality mechanism to an instrument of budgetary conditionality. The following section will address said finding together with those aspects of the Regulation that have been perceived most criticisable: the legal basis and the relationship of a conditionality mechanism to existing procedures under the Treaties.

III.1. THE CONDITIONALITY MECHANISM IN REGULATION 2020/2092

As mentioned, the Regulation establishes a conditionality mechanism protecting the Union budget. The Regulation consists of ten arts, accompanied by 29 recitals. Art. 2(1)(a) of the Regulation defines the terms "rule of law" as referring to the "Union value in art. 2 TEU (...) [which] shall be understood having regard to the other Union values and principles enshrined in art. 2 TEU".³³ The values of the Union have been derived by the Court of Justice from the constitutional traditions of the Member States. Thus, also the definition includes enlisting a series of principles. In the identical Recital (3) of the Regulation, these principles have been equipped with references to the case law of the Court of Justice: "[...]principles of legality³⁴ implying a transparent, accountable democratic and pluralistic law-making process; legal certainty;³⁵ prohibition of arbitrariness of the executive powers;³⁶ effective judicial protection, including access to justice, by independent and impartial courts;³⁷ and separation of powers".³⁸

Surprisingly, the footnote on the independence of the judiciary does not refer to the Polish CJEU cases.³⁹

³³ Art. 2(1)(a) Regulation 2020/2092 cit.

³⁴ Case C-496/99 P *Commission v CAS Succhi di Frutta* ECLI:EU:C:2004:236 para. 63.

³⁵ Joined cases C-212/80 to C-217/80 *Meridionale Industria Salumi and Others* ECLI:EU:C:1981:270 para. 10.

³⁶ Joined cases C-46/87 and C-227/88 *Hoechst v Commission* ECLI:EU:C:1989:337 para. 19.

³⁷ Case C-64/16 *Associação Sindical dos Juizes Portugueses (ASJP)* ECLI:EU:C:2018:117. paras. 31, 40-1; case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 63-7.

³⁸ Case C-477/16 PPU *Kovalkovas* ECLI:EU:C:2016:861 para. 36; case C-452/16 PPU *Poltorak* ECLI:EU:C:2016:858 para. 35; case C-279/09 *DEB* ECLI:EU:C:2010:811 para. 58.

³⁹ Especially, *Commission v Poland (Independence of Ordinary Courts)* cit.; *Commission v Poland (Independence of the Supreme Court)* cit.

Art. 4(1) of the Regulation specifies the conditions for the adoption of measures, i.e., “breaches of the principles of the rule of law in a Member State 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”.⁴⁰ Niels Kirst described this link to the Union budget as the “Regulation’s big caveat”.⁴¹ Others have criticised that the conditionality mechanism has been “watered down”.⁴²

Art. 3 of the Regulation stipulates three alternatives, which are indicative of breaches of the principles of the rule of law: “a) endangering the independence of the judiciary; b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities (...) c) limiting the availability and effectiveness of legal remedies (...)”.⁴³ Hence, this definition refers to some of the recent shortfalls as regards the respect for the rule of law. Again, an explicit reference to the Polish-centred CJEU case law is missing. Art. 4(2) of the Regulation contains an exhaustive list of potential breaches that are linked to the implementation of the EU budget.⁴⁴

Art. 5(1) of the Regulation enlists the measures for the protection of the Union budget, which can entail a suspension or reduction of existing commitments or the prohibition of new commitment. Measures vary depending on whether the Commission implements the Union budget in direct or indirect management pursuant to points a) and c) of art. 62(1) of the Financial Regulation,⁴⁵ or the where the Commission implements the Union budget under shared management with Member States pursuant to point b) of art. 62(1) of the Financial Regulation.⁴⁶ According to art. 5(2) of the Regulation, the obligations of the Member States’ government entities shall not be affected by the adopted measures. A similar provision can be found in the Common Provisions Regulation.⁴⁷ According to Art. 5(3) of the Regulation: “The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, insofar as possible, target the Union actions affected by the breaches”.⁴⁸

⁴⁰ Art. 4(1) Regulation 2020/2092 cit.

⁴¹ N Kirst, ‘Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?’ (European Forum Insight of 22 April 2021) www.europeanpapers.eu 101, 105.

⁴² S Platon, ‘Bringing a Knife to a Gunfight. The European Parliament, the Rule of Law Conditionality, and the Action for Failure to Act’ (11 June 2021) [Verfassungsblog verfassungsblog.de](http://Verfassungsblog.verfassungsblog.de).

⁴³ Art. 3 Regulation 2020/2092 cit.

⁴⁴ On the importance of this limitation see *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras 154-161.

⁴⁵ Art. 5(1)(a) Regulation 2020/2092 cit.

⁴⁶ *Ibid.* art. 5(1)(b).

⁴⁷ Art. 103 Regulation (EU) 2021/1060 cit.

⁴⁸ Art. 5(3) Regulation 2020/2092 cit.

III.2. ART. 322(1) TFEU AS THE CORRECT LEGAL BASIS

Since the Regulation has been based on art. 322(1)(a) TFEU, it has been disputed (e.g., by Hungary and Poland) that this is the correct legal basis for a rule of law conditionality mechanism. Under art. 322(1)(a) TFEU, the Parliament and the Council can adopt regulations on “the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts”. The most prominent example is the Financial Regulation,⁴⁹ which governs the financial rules applicable to the general budget of the Union. Further requirements on these Regulations can be found in the neighbouring provisions of art. 322 TFEU, which refer to the Financial Regulation.⁵⁰ The principle of sound financial management (arts 310(5) and 317(1) TFEU) has been referred to in the Regulation.⁵¹ Sound financial management is defined in the Financial Regulation as the “implementation of the budget in accordance with the principles of economy, efficiency and effectiveness”.⁵² Therefore, making the disbursement of EU funds conditional on the compliance with the rule of law would contribute to an economic, efficient and effective implementation of the EU budget.

According to the case law of the CJEU, the predominant component of an act of EU secondary legislation defines the correct legal basis.⁵³ Thus, it follows that if the protection of the Union budget (instead of the protection of the rule of law) can be characterized as the predominant component of the Regulation, art. 322(1)(1) TFEU is the correct legal basis. AG Sánchez-Bordona noted that recital 14 of the Regulation was somewhat misleading in that regard, as it stated that “the mechanism provided for in this Regulation complements these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union”.⁵⁴ He added that that nature of the Regulation has changed during the legislative process, since the “Commission’s original proposal focused less on the financial conditionality of the proposed mechanism and more on protecting the rule of law” whereas the “final text of Regulation 2020/2092 became an instrument of financial conditionality under which safeguarding the rule of law operates as a horizontal

⁴⁹ 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, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

⁵⁰ M Niedobitek, ‘AEUV Art. 322 [Haushaltvorschriften; Verfügbarmachung der Eigenmittel]’ in R Streinz, *EUV/AEUV* (CH Beck 2018) para. 2; arts 310(2) and (3), 315(1) and (2), 316(1) and (2), and 317(1) and (3) TFEU.

⁵¹ Recitals (7) and (8), Regulation 2020/2092 cit.

⁵² Art. 2(59) Regulation (EU, Euratom) 2018/1046 cit. Those principles were further defined in art. 33(1) Regulation (EU, Euratom) 2018/1046 cit.

⁵³ Case C-137/12 *Commission v Council* ECLI:EU:2013:675 paras 52 ff and the case law cited.

⁵⁴ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 134.

condition that must be respected by Member States in implementing the budget”.⁵⁵ Hence, “it is necessary to carry out a detailed analysis of the content of Regulation 2020/2092 in order to determine whether the ‘final legislative product’ is genuinely a financial conditionality mechanism, like others in EU law. If it is, art. 322(1)(a) TFEU would provide an appropriate legal basis, because the regulation would be a rule concerning budgetary implementation”.⁵⁶

The Court of Justice thoroughly examined art. 322(1) TFEU as the Regulation’s legal basis and put it in the context of its neighbouring provisions (arts 310 and 315 to 317 TFEU).⁵⁷ The cornerstone of the CJEU’s argument, why the rule of law can be protected via budgetary conditionality is the Regulation’s reference to the principle of sound financial management (art. 317 TFEU):

“Member States can only ensure sound financial management if public authorities act in accordance with the law, if breaches of the law are effectively pursued and if arbitrary or unlawful decisions of public authorities can be subject to effective judicial review, and that the independence and impartiality of the judiciary and investigation and public prosecution services are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union”.⁵⁸

III.3. SUFFICIENTLY DIRECT LINK

Back in 2018, rule of law conditionality has been presented as a mechanism that complements the existing instruments and processes to promote the rule of law, which was also reflected in Recital (14) of the Regulation. Such emphasis on the rule of law (instead of the Union budget) has led to severe criticism regarding the compatibility of the mechanism with EU law. Eventually, the CJEU could only avert this criticism by emphasising the necessity of a sufficiently direct link between the rule of law violation and the alleged rule of law violation, which entailed narrowing down the scope of application of the Regulation to budget-related rule of law violations.

Hungary argued that the Regulation envisaged a three-phase procedure: “a) a breach of the rule of law; b) a serious and sufficiently direct risk to the sound financial management of the Union budget or to the protection of the financial interests of the Union; and c) the need to take proportionate measures to tackle it”.⁵⁹ The term “(serious) breach” is also used in the art. 7 TEU procedure. In that sense, a sufficiently serious breach means that a Member State, through acts or omissions of its organs or subordinated units,

⁵⁵ *Ibid.* para. 135.

⁵⁶ *Ibid.* para. 136.

⁵⁷ *Hungary v Parliament and Council* cit. paras 98 ff; *Poland v Parliament and Council* cit. paras 112 ff.

⁵⁸ *Hungary v Parliament and Council* cit. para. 116; *Poland v Parliament and Council* cit. para. 130.

⁵⁹ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 148.

deviates from the content of the values in art. 2 TEU.⁶⁰ Such breach must be serious and persistent,⁶¹ in other words it must exhibit a certain intensity and systemic density.⁶²

The Parliament and the Council argued that there is only a two-stage procedure, where the stages a) and b) are one step. The AG claims that the latter opinion is the correct one. This seems to be artificial: a sufficiently direct link to the sound financial management of a certain rule of law violation cannot be determined without having identified said violation *beforehand*. The AG then applied the means of interpretation to support his finding. In essence, one can agree with the AG's opinion that the Regulation is an instrument of financial conditionality, *because* it focuses on the existence of a sufficiently direct link between the violation of the rule of law and the implementation of the EU budget.⁶³ Most importantly, art. 2(a) of the Regulation defines the rule of law "for the purpose of this Regulation"⁶⁴ and art. 4(1) in conjunction with arts 3 and 4(2) of the Regulation limit the scope of application of the conditionality mechanism to those violations of the rule of law that have an impact on the sound financial management of the Union budget.

Likewise, the CJEU clarified that the "objective of the contested Regulation is to protect the Union budget from adverse effects on that budget stemming in a sufficiently direct manner from breaches of the rule of law in a Member State, and not to impose penalties, per se, on such breaches".⁶⁵ Consequently, the conditionality mechanism can no longer be shelved in the rule of law section but has to be moved to the budget section of the European Commission's enforcement library.

III.4. ALLEGED INFRINGEMENT OF ART. 7 TEU, CIRCUMVENTION OF ART. 258 TFEU, AND DESTABILISING THE INSTITUTIONAL BALANCE

Violations of the common values of art. 2 TEU are subject to the art. 7 TEU procedure⁶⁶ other infringements of the Treaties (except those of the obligation of unsound budgetary

⁶⁰ F Schorkopf, 'Art. 7 EVU [Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat]' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2020) para 30, referring to case C-112/00 *Schmidberger* ECLI:EU:C:2003:333 para. 42, where the term, sufficiently serious "breach" is defined.

⁶¹ PV van Vormizeele, 'Art. 7 EUV [Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat]' in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015) para. 10.

⁶² M Ruffert, 'Art. 7. EUV [Aussetzung von Rechten]' in C Calliess and M Ruffert (eds), *EUV/AEUV* (CH Beck 2016) 179, referring *inter alia* to A von Bogdandy and M Ioannidis, 'Das systemische Defizit. Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens' (2014) *Heidelberg Journal of International Law* 283, 304 ff. See also, A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) *CMLRev* 59, 76 ff.

⁶³ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras. 157 ff.

⁶⁴ *Ibid.* paras. 151.

⁶⁵ *Hungary v Parliament and Council* cit. para. 119; *Poland v Parliament and Council* cit. para. 137.

⁶⁶ On the procedure see, e.g. W Sadurski, 'Adding a Bite to a Bark: The Story of Article 7, E.U. Enlargement and Jörg Haider' (2010) *Columbia Journal of European Law* 385; L Besselink, 'The Bite, the Bark and the Howl. Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), *The Enforcement of*

policies (art. 126(10) TFEU)) are subject to infringement actions (art. 258 TFEU).⁶⁷ Thus, a major point of criticism of the Regulation has been the alleged overlap with both these procedures.

Art. 6 of Regulation (EU) 2020/2221 details the procedure for adopting appropriate measures. First, the Commission shall send a written notification to the Member State concerned.⁶⁸ Before or after that, the Commission can request additional information from said Member State.⁶⁹ The time-limit for the Member State's submission is to be specified by the Commission but shall be between one and three months after the written notification.⁷⁰ Second, the Commission "shall assess the information received by the Member State within an indicative time limit of one month from the receipt of any information from the Member State concerned or of its observations, or, when no information or observations are received, from the expiry of the time limit set in accordance with paragraph 5, and in any event within a reasonable time frame".⁷¹ If the Commission decides to adopt a proposal for the Council, it shall give the Member State concerned another month to submit a statement.⁷² For assessing the proportionality of measures, the Commission shall take into account relevant information pursuant to art. 6(3) of the Regulation.⁷³ Then, the Commission "shall submit a proposal for an implementing decision on the appropriate measures to the Council", after the reception of additional information.⁷⁴ Third and last, the Council shall adopt the proposed implementing decisions after one month – two months under exceptional circumstances – of receiving the proposal.⁷⁵ To ensure a timely decision, the Commission can decide to summon the Council under art. 237 TFEU. The Council can amend the Commission's proposal acting by qualified majority.⁷⁶ The European Parliament shall be informed of the notification under art. 6(1) of the Regulation and it may be invited to a structured dialogue on its findings.⁷⁷

The procedure under art. 6 of the Regulation is reminiscent of both the infringement procedure under art. 258 TFEU and the art. 7 TEU procedure. At the end of all three

EU Law and Values. Ensuring Member States' Compliance (Oxford University Press 2017) 128, 128 ff; C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity under Article 7 TEU' (2020) *International Political Science Review* 501.

⁶⁷ On the proposal of systemic infringement actions see, KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105.

⁶⁸ Art. 6(1) Regulation 2020/2092 cit.

⁶⁹ *Ibid.* art. 6(4).

⁷⁰ *Ibid.* art. 6(5).

⁷¹ *Ibid.* art. 6(6).

⁷² *Ibid.* art. 6(7).

⁷³ *Ibid.* art. 6(8).

⁷⁴ *Ibid.* art. 6(9).

⁷⁵ *Ibid.* art. 6(10).

⁷⁶ *Ibid.*

⁷⁷ Art. 6(2) Regulation 2020/2092 cit.

procedures, there is a “sanctioning” decision. In two cases this leads to a fine (art. 260 TFEU) or a suspension or reduction of funds (the Regulation), in one case to the suspension of voting rights (art. 7 TEU). The Court of Justice is the dominant actor only in the case of art. 258 TFEU and art. 260 TFEU. In the other two cases, the power lies with the Council or even the European Council (sanctioning mechanism under art. 7 TEU). The Commission’s task in all three cases is characterised by informal conflict resolution, culminating in a referral to another EU institution. The Commission has a large margin of discretion to start the procedure.

According to the AG, art. 7 TEU is not the only procedure available to achieve compliance with the rule of law.⁷⁸ The AG mentioned two other examples (independence of judges and the European arrest warrant) where an assessment of a violation of the rule of law as a common value of art. 2 TEU is carried out.⁷⁹ Hence the art. 7 TEU procedure is non-exclusive. Then, the AG compared the compliance of existing financial conditionality mechanisms with the new conditionality mechanism of the Regulation.⁸⁰ In its case law, the Court of Justice has dealt with the compliance with EU law regarding a similar procedure, the conformity clearance procedure.⁸¹ Accordingly, such procedure of financial corrections is compatible with EU, if its independent from the infringement proceedings, governed by a different set of procedural rules and has different objectives.⁸² In the entire Regulation, there is only one reference to infringement proceedings: Recital (14) mentions it as another one of the “instruments and processes that promote the rule of law and its application”.⁸³ Apart from that, there are no visible links to the infringement proceedings, which is why only the third criterion of different objectives must be analysed in detail. In infringement proceedings the Court of Justice determines if a Member States violates EU law obligations and assesses whether the effects of said violation are persisting.⁸⁴ The objective of the regime of conditionality is the protection of the Union budget. If one believes the logic of the Commission, the protection of the rule of law is only a

⁷⁸ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 209.

⁷⁹ *Ibid.* paras 210 ff.

⁸⁰ *Ibid.* paras 217 ff.

⁸¹ Commission Delegated Regulation (EU) No 640/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance.

⁸² Joined cases 15 and 16/76 *France v Commission* ECLI:EU:C:1979:29 para. 26; case C-325/94 P *An Taisce and WWF UK* ECLI:EU:C:1996:293 para. 25; case C-247/98 *Greece v Commission* ECLI:EU:C:2001:4 para. 13.

⁸³ Recital (14) Regulation (EU) 2020/2092 cit.

⁸⁴ U Karpenstein, ‘Art. 258 [Vertragsverletzungsverfahren]’ in Eberhard Grabitz, Meinhard Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2021) para 1; N Wunderlich, ‘Artikel 258 (ex-Artikel 226 EGV) [Vertragsverletzungsverfahren]’ in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* cit. para. 2. U Ehrlicke, ‘Art. 258 [Anrufung des Gerichtshofs durch die Kommission]’ in R Streinz, *EUV/AEUV* cit. para. 2. See also case C-362/90 *Commission v Italy* ECLI:EU:C:1992:158 paras. 10 ff.; case C-276/99 *Germany v Commission* ECLI:EU:C:2001:576 paras. 24 ff.

means to achieve this end. This logic was questioned by the parties to the dispute.⁸⁵ In the proposal, the rule of law was mentioned both in the beginning and the end in the Commission's proposal.⁸⁶ Without the detour of a connection to the sound financial management (art. 317 TFEU), the difference of objectives would have been harder to believe. Nonetheless, a serious breach of the rule of law seems to be eligible to threaten the Union budget. Again, while some of the findings of the AG are imprecise,⁸⁷ in essence one can agree with the finding that the conditionality mechanism in the Regulation is different from the art. 7 TEU procedure and from the infringement proceedings.

Another aspect addressed by the AG was the institutional balance between the Commission and the Council since the Regulation has conferred implementing powers on the Council.⁸⁸ As a result of a new decision-making process in the Regulation, where the Commission and the Council play major roles instead of the European Council (art. 7 TEU) and the Court of Justice (art. 258 TFEU), the institutional balance might have been affected. New enforcement powers for the Commission in secondary EU legislation potentially threaten the institutional balance. In the initial proposal,⁸⁹ the Council implementing decision would have been adopted by Reverse Qualified Majority Voting (RQMV).⁹⁰ While the automatism of RQMV might have been welcome, it would, however, not have been compatible with the Treaties. Since art. 322(1)(a) TFEU has not specified any deviating decision-making rules, the default case of majority voting in art. 16(3) TEU must apply.⁹¹ The AG examined art. 291(2) TFEU which specifies that "where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases (...) on the Council". After a comparison with other conditionality mechanisms in the Common Provisions

⁸⁵ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 134.

⁸⁶ Recitals (1) and (2) COM(2018) 324 final cit.

⁸⁷ E.g., in *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 224, the AG argues that the threshold of art. 7 TEU is "[...] higher than that in Regulation 2020/2092, since it requires the existence of a serious and persistent breach of any of the values in Article 2 (not just that of the rule of law)". The fact that a violation of other values can also trigger the application of an art. 7 TEU procedure does broaden the scope of application, but it has, however, no impact on the characterisation of the threshold as regards what types of rule of law violations can trigger a procedure. In *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 225, the AG argues that "Article 7 TEU does not require a sufficiently direct link with a specific area of EU law, which is required by [the] Regulation. In that it requires a connection between the breach of the rule of law and implementation of the Union budget. The application of Regulation 2020/2092 is therefore far more limited than that of Article 7 TEU". Hence, the scope of the art. 7 TEU procedure is broader than the one of the Regulation.

⁸⁸ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. paras. 252 ff.

⁸⁹ Art. 5(7) Commission COM(2018) 324 final cit.

⁹⁰ Termed as RQMV also by G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' cit. 184.

⁹¹ For the financial crisis, see in particular R Palmstorfer, 'The Reverse Majority Voting under the "Six Pack": A Bad Turn for the Union?' (2014) ELJ 186, 194 ff. See also, A Kumin, "Reverse Majority Voting" – Auf dem Weg zur Herrschaft der Exekutive über die Legislative? (2013) Zeitschrift für Öffentliches Recht 441, 449 ff.

Regulation 2021-2027⁹² and the Recovery and Resilience Facility,⁹³ the AG concludes that also the mechanism in the Regulation “reflects one of those ‘duly justified specific cases’ in which implementing powers may be conferred on the Council”.⁹⁴

The Court of Justice merely focused on the potential overlap with the art. 7 TEU procedure and did neither dwell on potential the circumvention of art. 258 TFEU nor on the institutional balance. It emphasised that “numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in art. 2 TEU committed in a Member States”.⁹⁵ Furthermore, *Openbaar Ministerie (Indépendance de l'autorité d'émission)*⁹⁶ did not establish the exclusive nature of art. 7 TEU, “but merely determined the situations in which systemic and generalised deficiencies so far as concerns the independence of the judiciary of the Member State which has issued a European arrest warrant may justify the non-execution of a warrant”.⁹⁷

Then, the CJEU clarified that there must not be any procedure established by secondary legislation, that has (i) the same subject matter, (ii) pursues the same objective and (iii) allowing the adoption of identical measures.⁹⁸ By referring to its existing case-law,⁹⁹ the Court of Justice claimed that procedures with different aims and subject matters from art. 7 TEU are compatible with the Treaties.¹⁰⁰ As regards the Regulation, the Court argued that while art. 7 TEU covers violations of all the values enlisted in art. 2 TEU, the Regulation only addresses violations of the rule of law, being one values thereof.¹⁰¹ Art. 7 TEU allows the Council to “penalise serious and persistent breaches of the values contained in art. 2 TEU, in particular with a view to the Member State concerned to put an end to those breaches.¹⁰² By contrast, the purpose of the conditionality mechanism is “the protection of the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise through the Union budget, breaches of the principles of the rule of law.¹⁰³ The measures adopted under art. 7 TEU “relate to any

⁹² Arts. 19(6), (7), (8), (11) and (13) Regulation (EU) 2021/1060 cit.

⁹³ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, arts 10(3) and 20.

⁹⁴ *Hungary v Parliament and Council*, opinion of AG Campos Sánchez-Bordona, cit. para. 256.

⁹⁵ *Hungary v Parliament and Council* cit. para. 159; *Poland v Parliament and Council* cit. para. 195.

⁹⁶ Case C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité d'émission)* ECLI:EU:C:2020:1033.

⁹⁷ *Poland v Parliament and Council* cit. para. 204.

⁹⁸ *Hungary v Parliament and Council* cit. para. 167; *Poland v Parliament and Council* cit. para. 206.

⁹⁹ *France v Commission* cit. para. 26; *An Taisce and WWF UK* cit. para. 25; *Greece v Commission* cit. para. 13.

¹⁰⁰ *Hungary v Parliament and Council* cit. para. 168; *Poland v Parliament and Council* cit. para. 207.

¹⁰¹ *Hungary v Parliament and Council* cit. para. 173; *Poland v Parliament and Council* cit. para. 212.

¹⁰² *Hungary v Parliament and Council* cit. para. 170; *Poland v Parliament and Council* cit. para. 209.

¹⁰³ *Hungary v Parliament and Council* cit. para. 171; *Poland v Parliament and Council* cit. para. 210.

right deriving from the application of the Treaties to the Member State in question”, whereas the measures adopted under the Regulation “are all budgetary in nature”.¹⁰⁴ Thus, according to the Court, budgetary rights and obligations are not to be mistaken as rights and obligations under the Treaties. The Court’s view that the conditionality mechanism does not aim at putting an end to rule of law violations, pushes the Regulation even further in the budget conditionality corner. In turn, other budgetary instruments contain elements of rule of law conditionality.

IV. OTHER TRACES OF RULE OF LAW CONDITIONALITY

The year 2020 was characterised by a cumbersome process¹⁰⁵ on the adoption of the 2021 to 2027 Multiannual Financial Framework (MFF).¹⁰⁶ The MFF was accompanied by the Regulation 2020/2092 and the EUR 750 billion Recovery Instrument,¹⁰⁷ providing for the financial resources for the financial instruments of the European Green Deal. As mentioned, the Regulation has been transformed from a rule of law conditionality mechanism to a budgetary conditionality mechanism. Yet, rule of law conditionality has been applied in the context of the European Green Deal.

IV.1. REFERENCES TO REGULATION 2020/2092

Several instruments breathing life into the European Green Deal (the Recovery and Resilience Facility,¹⁰⁸ REACT-EU,¹⁰⁹ the Just Transition Fund,¹¹⁰ InvestEU¹¹¹ and the public sector loan facility)¹¹² contain links to the “horizontal financial rules” of the newly established regime of conditionality in the Regulation. In this case, the reference can be found both in a recital and in the text of the Regulation: “The Facility shall be implemented by the Commission in direct management in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council”.¹¹³ In all other cases, the

¹⁰⁴ *Hungary v Parliament and Council* cit. para. 177; *Poland v Parliament and Council* cit. para. 216.

¹⁰⁵ See e.g. B de Witte, ‘The European Union’s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ (2021) CMLREv 635, 638 ff.

¹⁰⁶ Regulation (EU, Euratom) 2020/2093 of the Council of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

¹⁰⁷ Regulation (EU) 2020/2094 of the Council of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

¹⁰⁸ Recital (71), art. 8 Regulation (EU) 2021/241 cit.

¹⁰⁹ Recital (7) Regulation (EU) 2020/2221 cit.

¹¹⁰ Recital (9) Regulation (EU) 2021/1056 cit.

¹¹¹ Recital (65) Regulation (EU) 2021/523 cit.

¹¹² Recital (9) Regulation (EU) 2021/1229 of the European Parliament and of the Council of 14 July 2021 on the public sector loan facility under the Just Transition Mechanism.

¹¹³ Art. 8 Regulation (EU) 2021/241 cit.

reference can merely be found in the recitals. First, the recitals state that the “[h]orizontal financial rules adopted by the European Parliament and the Council on the basis of Article 322 [TFEU] [...] apply to this Regulation”.¹¹⁴ Second, they specify these rules by mentioning the Financial Regulation 2018/1046¹¹⁵ and emphasising the general regime of conditionality for the protection of the Union budget, without explicitly referring to Regulation 2020/2092.

IV.2. APPLYING RULE OF LAW CONDITIONALITY UNDER THE RECOVERY AND RESILIENCE FACILITY

As mentioned in recital 7 of the Regulation 2020/2092 the general regime of conditionality applies to all sorts of EU funds, also the Recovery and Resilience Facility (RRF).¹¹⁶ However, the Commission has refrained from applying the Regulation before the Court of Justice has reached a verdict in cases brought by Hungary and Poland. Until then, rule of law conditionality under the headline of a ‘generalised regime of conditionality for the Union budget’ has been put to a deep slumber and, if one takes the AG’s Opinion seriously: the underlying mechanism is a financial conditionality mechanism rather than a rule of law conditionality mechanism.

However, provisions of the RRF also contain conditionality clauses in arts 10 and 20.¹¹⁷ The conditionality in art. 10 of the RRF relates to non-compliance with recommendations in the course of an excessive imbalance procedure under the Six-Pack- Regulation (EU) No 1176/2011,¹¹⁸ assistance in case of balance of payment problems under Regulation (EC) No 332/2002,¹¹⁹ and non-compliance with macro-economic adjustment programmes under Two-Pack-Regulation (EU) No 472/2013.¹²⁰ Art. 20 of the RRF governs the procedure. Therefore, the budget conditionality under the RRF refers to the macroeconomic conditionality that has been created after the financial and sovereign debt crisis.

Nonetheless, the Commission has used the RRF as a tool of rule of law enforcement even without a specific legal basis in the RRF. Funds of the RRF are disbursed only after the MS prepare their respective recovery and resilience plans.¹²¹ These plans must be submitted to the Commission and must cover a series of aspects.¹²² The Commission

¹¹⁴ Recital (7) Regulation (EU) 2020/2221 cit.

¹¹⁵ Regulation (EU, Euratom) 2018/1046 cit.

¹¹⁶ Recital 71 Regulation (EU) 2021/241 cit.

¹¹⁷ Arts. 10(3) and 20. Regulation (EU) 2021/241 cit.

¹¹⁸ Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

¹¹⁹ Regulation (EC) No 332/2002 cit.

¹²⁰ Regulation (EU) No 472/2013 cit.

¹²¹ Art. 17 Regulation (EU) 2021/241 cit.

¹²² *Ibid.* art. 18.

then carries out an assessment of the plans¹²³ and makes a proposal for an implementing decision to the Council.¹²⁴ In the cases of Poland and Hungary the Commission has delayed issuing its opinion the Poland's national recovery and resilience plan. In October 2021, the Economy Commissioner Gentiloni explained to the Parliament that the "reasons for the delay are being related to the rule of law and attacks on the judiciary, primacy of EU law, public procurement, corruption and unequal treatment of minorities".¹²⁵ Since the RRF does not contain specific rules on compliance with the rule of law, the questions arises whether this is already an application of the Regulation without following the procedure in art. 6 of the Regulation.

V. CONCLUSIONS

Rule of law conditionality has had a rather rough start in the EU. First, the content of the Regulation 2020/2092 had been watered-down from a rule of law-centred mechanism where the Commission's proposal would be adopted by RQMV to a mere budgetary conditionality mechanism, where the decision-making power remains within the Council. Second, the Commission made a political compromise not to apply the Regulation until the Court of Justice has decided on its compliance with the Treaties, which has triggered the Parliament to bring an action for failure to act. Finally, the AG has argued that the underlying conditionality mechanism is a financial conditionality mechanism rather than a rule of law conditionality mechanism, in order to make the Regulation compatible with the Treaties (art. 322(1)(a) TFEU functioned as its legal basis): only those rule of law violations that are sufficiently and directly linked to the sound financial management of the Union are being covered. The CJEU confirmed that only procedures established by secondary legislation, that do not concern (i) the same subject matter, (ii) pursue the same objective and (iii) allowing the adoption of identical measures as art. 7 TEU are compatible with the Treaties.¹²⁶

Despite accepting the political compromise, to not enforce the Regulation, the Commission has found another opportunity to "apply" rule of law conditionality: it has delayed its opinions on Hungary's and Poland's national recovery and resilience plans. Since the Regulation is also applicable to the RRF, and the RRF does not contain specific rules on withholding the funds in case of rule of law violations, it is questionable whether the Commission is applying the Regulation's budgetary conditionality mechanism, nonetheless. Or, the Commission added a rule of law rationale to the RRF, and thereby created a new sort of rule of law conditionality. Nonetheless, after the Court's findings in the cases brought by Hungary and Poland the Commission now has to enforce the Regulation, also in order to avert the European Parliament's action for failure to act.

¹²³ *Ibid.* art 19.

¹²⁴ *Ibid.* art 20.

¹²⁵ Extracts of the debate can be found here: European Parliament, *Hungary and Poland Plans should be Approved Only if Concerns are Addressed* www.europarl.europa.eu.

¹²⁶ *Hungary v Parliament and Council* cit. para. 167; *Poland v Parliament and Council* cit. para. 206.

