

THE CJEU VALIDATES IN C-156/21 AND C-157/21 THE RULE OF LAW CONDITIONALITY REGULATION REGIME TO PROTECT THE EU BUDGET

ANDI HOXHAJ*

This contribution aims to introduce the reader to a judgment from the Court of Justice of the European Union on the rule of law conditionality regulation in the two cases of Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21). The judgment expands our understanding of the legality and application of the regime of conditionality for the protection of the European Union budget provided by the Regulation (EU, Euratom) 2020/2092. On the other hand, the Court of Justice of the European Union in C-156/21 and in C-157/21 has now defined how the European Union can legally cut funds to Member States in the case of an established violation of the rule of law, if this violation endangers the EU budget. Despite having a new tool to sanction violations of the rule of law by its Member States, the European Union still lacks the political will to do so. This contribution discusses the importance of the rule of law conditionality regulation in C-156/21 and C-157/21, and what it means to not only to uphold the rule of law, but also fight against corruption in areas associated with Union's budget and financial interests.

1 INTRODUCTION

On 16 February 2022, the Court of Justice of the European Union (CJEU) delivered a highly anticipated and important judgment on the legality of the rule of law conditionality regime to protect the European Union budget, in the event of breaches of rule of law principles in the two cases of *Hungary v Parliament and Council (C-156/21)*¹ and *Poland v Parliament and Council (C-157/21)*.² The CJEU fully dismissed Hungary's and Poland's legal actions for annulment against the general regime of conditionality for the protection of the European Union (EU) budget provided by the Council Regulation (EU, Euratom) 2020/2092 (Regulation).³ The CJEU ruled that the Regulation allows the EU to cut funds awarded to EU Member States in case of an established violation of the rule of law by those EU Member States, if this violation endangers the EU budget.

Hungary and Poland both strongly opposed the Regulation and argued before the CJEU for its annulment. Both countries argued against the adoption of the Regulation by

* Lecturer in Law, University College London, Faculty of Laws and re:constitute Fellow 2021/22. The author would like to express his sincere gratitude to Professor Xavier Groussot of Lund University for his helpful comments in improving the article. This article is based on Dr Hoxhaj's re:constitute project and the author thanks the re:constitute programme and Forum Transregionale Studien for their kind support. Email: andi.hoxhaj@ucl.ac.uk.

¹ Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97.

² Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

³ Council 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 [2020] OJ L 433I/1.

claiming that there is an absence of appropriate legal basis in the EU Treaties; in particular, the circumvention of the procedure laid down in Article 7 of the TEU according to Hungary and Poland, which provides for the possibility of instituting a procedure against an EU Member State in the event of a serious breach of the EU's values, or where there is a clear risk of such a breach.⁴ Thereby, according to the arguments presented by Hungary and Poland, the EU has exceeded its powers, on a breach of the principle of legal certainty. In preparation for their legal arguments, Hungary and Poland referred to a confidential opinion of the EU Council Legal Service concerning the initial proposal which led to the Regulation, which the CJEU allowed – despite the EU Council's objections, on the basis of the overriding public interest in the transparency of the legislative procedure.⁵

However, in its judgment published on 16 February 2022, the CJEU held that the Regulation was adopted on an appropriate legal basis and is compatible with the procedure laid down in Article 7 TEU.⁶ Moreover, it is consistent with the limits of the EU competences and fully in line with the principle of legal certainty. Thereby, the CJEU dismissed Hungary and Poland's actions against the conditionality regime, which makes the receipt of financing from the EU budget subject to the respect by the EU Member States for the principles of the rule of law.⁷ This contribution first presents a background discussion on the adoption of the Regulation, and examines the reasoning behind the EU's development of new protective measures to suspend payments from the EU budget, in the case of one of the EU Member States' breaches of the principles of the rule of law.

The contribution discusses some of the opposition to the Regulation, in particular Hungary and Poland's legal and political actions to block the Regulation. Secondly, the contribution presents the Opinions of the Advocate General Manuel Campos Sánchez-Bordona, issued on 2 December 2021, and discusses his legal assessment on C-156/21 and C-157/21.⁸ Thirdly, the contribution presents and discusses the CJEU ruling on C-156/21 and C-157/21. The final part of the contribution provides a commentary in regard to the CJEU judgment,⁹ and discusses how the Regulation could be pivotal – not only in sanctioning violations of the rule of law by EU Member States, but also supporting the EU anti-corruption efforts in addressing corruption related to the Union's budget and financial interests.

⁴ Court of Justice of the European Union, Judgments in Cases C-156/21, *Hungary v Parliament and Council* and C-157/21, *Poland v Parliament and Council*, Press Release No 28/22, Luxembourg, 16 February 2022 <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>> accessed 5 June 2021.

⁵ Sarah Progin-Theuerkauf and Melanie Berger, 'ECJ confirms Validity of the Rule of Law Conditionality Regulation' (*European Law Blog*, 11 March 2022) <<https://europeanlawblog.eu/2022/03/11/ecj-confirms-validity-of-the-rule-of-law-conditionality-regulation/>> accessed 5 June 2021.

⁶ Sarah Progin-Theuerkauf and Melanie Berger (n 5).

⁷ Anna Zemskova, 'Analysis: 'Rule of Law Conditionality: a Long-Desired Victory or a Modest Step Forward? *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21)'' (*EU Law Live*, 18 February 2022) <<https://eulawlive.com/analysis-rule-of-law-conditionality-a-long-desired-victory-or-a-modest-step-forward-hungary-v-parliament-and-council-c-156-21-and-poland-v-parliament-and-council-c-157-21-by/>> accessed 5 June 2021.

⁸ Benedikt Gremminger, 'The New Rule of Law Conditionality Mechanism clears its first hurdle – Analysis of AG Campos Sánchez-Bordona Opinions in *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21)' (*European Law Blog*, 14 December 2021) <<https://europeanlawblog.eu/2021/12/14/8043/>> accessed 5 June 2021.

⁹ Court of Justice of the European Union (n 4).

2 BACKGROUND

In 2017, the European Commission presented a ‘proposal for a Council Decision’ to determine if there is a ‘clear risk of a serious breach’ of the rule of law in Poland.¹⁰ In 2018, a similar proposal was presented by the European Parliament for Hungary, calling on the Council to determine the serious breach by Hungary of the values on which the EU is founded and, in particular, the rule of law.¹¹ According to Pech, Wachowiec, and Mazur,¹² the rule of law and the independency of the judiciary has been systematically attacked and violated by the Polish and Hungarian authorities, since Viktor Orbán came into power in Hungary in 2010, and the Law and Justice party, led by Jarosław Kaczyński, came into power in Poland in 2015. Furthermore, the rule of law backsliding has not only threatened the democratic and rule of law system of Poland and Hungary, but the functioning of the EU legal order itself, according to Bárd.¹³

The severity of the situation reached a boiling point on 7 October 2021, when the Polish Constitutional Tribunal issued a judgment that struck at the heart of the primacy of EU law – it ruled that various provisions of the EU Treaties are incompatible with the Polish Constitution, expressly challenging the primacy of EU law.¹⁴ In response, the EU imposed a fine against Poland of 1 million EUR a day, for breaching the general principles of autonomy, primacy, effectiveness and the uniform application of EU law, and the binding effect of CJEU rulings – and in particular, for their refusal to comply with the interim measures of the recent infringement proceedings.¹⁵ This is the first time such a large fine has been imposed by the CJEU on an EU Member State for violating the rule of law and challenging the primacy of EU law.

According to Łacny, EU Member States with a lengthy history of infringements of the rule of law (such as Poland and Hungary) usually receive huge amounts of EU funds, which are significant drivers for their social and economic growth and an important contributor to their GDP.¹⁶ For instance, in the MFF 2014–2020, Poland was allocated 86 billion EUR from a number of the European Structural and Investment Funds (ESIF) and in the MFF 2021–2027, Poland is scheduled to receive 124 billion EUR from the EU budget, and up to 160 billion EUR in loans – this makes Poland the largest overall recipient.¹⁷ Similarly, Hungary is

¹⁰ Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM(2017)0835 final – 2017/0360 (NLE).

¹¹ European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

¹² Laurent Pech, Patryk Wachowiec and Dariusz Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law* 1.

¹³ Petra Bárd, ‘In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law’, (2022) *European Law Journal* 1.

¹⁴ Jakub Jaraczewski, ‘Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal’ (*Verfassungsblog*, 12 October 2021) <<https://verfassungsblog.de/gazing-into-the-abyss/>> accessed 5 June 2021.

¹⁵ Daniel Boffey, ‘Poland fined €1m a day over controversial judicial system changes’ (*The Guardian*, 12 October 2021) <<https://www.theguardian.com/world/2021/oct/27/poland-fined-1m-a-day-over-controversial-judicial-reforms>> accessed 5 June 2021.

¹⁶ Justyna Łacny, ‘The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?’ (2021) 13 *Hague Journal on the Rule of Law* 79.

¹⁷ *ibid.*

the largest recipient of EU funds on a per capita basis, with more than 95 per cent of all public investments in the MFF 2014–2020 co-financed by the EU.¹⁸

Against this backdrop, calls for the establishment of rule of law conditionality instrument to suspend EU funds to EU Member States breaching the rule of law have grown; as a result ‘the rule of law conditionality under Regulation 2020/2092’¹⁹ was adopted at the European Council’s conclusions in July 2020. This gives the EU the necessary tools (under Article 5 of the Regulation) to suspend the approval of one or more programmes financed by the EU budget to any of its EU Member States in the event of breaches of the rule of law.²⁰ According to Łacny, the Regulation has two objectives: to protect the EU budget, and to safeguard the rule of law in EU Member States.²¹ Thus, the EU can now withhold payments (under Articles 4 to 6 of the Regulation) to any EU Member States if the violation of the rule of law directly affects the EU’s budget or its financial interests.²² The underlying objective for this tool is to ensure that the respect for the rule of law is a prerequisite for sound financial management and effective financing of the Union budget.

The limits of the Regulation will be discussed in the commentary part of the contribution – but nevertheless, the EU now has a new tool at its disposal. Poland and Hungary have opposed the Regulation since its proposal, objecting to linking the EU budget 2021–2027 to the respect of the rule of law,²³ even going so far as to block COVID-19 aid (in total 1.8 trillion EUR at the end of 2020).²⁴ Although Poland and Hungary later agreed to linking the EU funds to the respect of the rule of law, they strongly maintained that the Regulation was not lawful, and in March 2021, Hungary and Poland filed their actions for annulment against the Regulation, arguing that neither TEU nor TFEU provide an appropriate legal basis for the Regulation, that the procedure of Article 7 TEU is circumvented, and the competences of the EU are exceeded – thus, there is a violation of the principle of legal certainty.²⁵ This is the backdrop of the C-156/21 and C-157/21, and in the next section, this contribution presents the legal arguments put forward by Poland and Hungary against Regulation 2020/2092 and the Opinions of Advocate General Manuel Campos Sánchez-Bordona.

3 THE ADVOCATE GENERAL’S OPINIONS

On 11 March 2021, Hungary and Poland jointly introduced their actions of annulment against the Regulation. Their case was based on four principal arguments: (1) the Regulation lacks an adequate legal basis in the EU Treaties; (2) the Regulation is incompatible with Article 7 TEU and Article 269 TFEU; (3) the Regulation is incompatible with Article 4(2) TEU; and (4) Hungary and Poland raised objections about the legal certainty of provisions in the Regulation.

¹⁸ *ibid.*

¹⁹ Council Regulation (EU, Euratom) 2020/2092 (n 3).

²⁰ *ibid.*

²¹ Łacny (n 17).

²² Council Regulation (EU, Euratom) 2020/2092 (n 3).

²³ Zemska (n 7).

²⁴ Progin-Theuerkauf and Berger (n 5).

²⁵ Court of Justice of the European Union (n 4).

On 2 December 2021, Advocate General (AG) Manuel Campos Sánchez-Bordona delivered his Opinions on the actions of annulment brought by Hungary and Poland against the Regulation; below is an illustration of some of the main questions assessed by the Advocate General to determine the Regulation's legality.

3.1 THE LEGAL BASIS OF THE RULE OF LAW CONDITIONALITY REGULATION

The Advocate General Manuel Campos Sánchez-Bordona started his legal analysis by looking into the question of the legal basis for the Regulation.²⁶ The EU legislature considered Article 322(1)(a) TFEU as an adequate legal basis for the Regulation, and this provision of the Article gives the EU the competence to set financial rules, i.e., establishing and implementing the budget of the EU. Poland and Hungary challenged this, by arguing that the Regulation did not contain financial rules and by introducing a new sanction instrument for breaches of the rule of law – thus, in their view, the EU had no competence to be able to do this.

However, the Advocate General's Opinions strongly refuted this argument and suggested that the new Regulation establishes a specific conditionality mechanism for the protection of the EU budget from breaches of the rule of law in an EU Member State.²⁷ Furthermore, the Advocate General viewed that the Regulation serves not as an additional rule of law sanction mechanism, but rather as an instrument for the protection of the EU budget from the specific threat of rule of law breaches – thereby withholding any EU funds²⁸ until the risk of the breach of the rule of law is addressed. The Advocate General clarified that the Regulation establishes a conditionality mechanism, which links payments from the EU budget to the observance of rule of law principles. Moreover, the Advocate General extensively emphasised the role of the criterion of a 'sufficiently direct' link of breaches of the rule of law to the sound financial management of the EU's budget, for measurements taken under the Regulation to underline the centrality of the protection of the EU budget.²⁹ The Advocate General's view is further supported by the strict requirement that the measures under the Regulation are proportionate to the impact that breaches have on the EU budget.³⁰

On this point, the Advocate General concluded that the Regulation acts as a financial rule for the implementation of the EU budget, and that Article 322(1)(a) TFEU serves as an appropriate legal basis. Thus, the Advocate General refuted Poland and Hungary's claims that the Regulation lacks an adequate legal basis in the EU Treaties.

3.2 COMPATIBILITY WITH ARTICLES 7 TEU AND 269 TFEU

The second argument presented by Poland and Hungary was that the Regulation is a means to implement the budget; they claimed an infringement of Article 7 TEU and Article 269 TFEU,³¹ arguing that the Regulation introduced a more specific and, in particular, a more

²⁶ Opinion of Advocate General Campos Sánchez-Bordona in Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2021:974, paras 117-201.

²⁷ *ibid* para 131.

²⁸ *ibid* paras 138-139.

²⁹ *ibid* paras 149-169.

³⁰ *ibid* paras 177-182.

³¹ *ibid* paras 202-256.

accessible rule of law sanction instrument, which would undermine the sanction mechanism for systemic breaches of the values of the Union (Article 2 TEU) set out in Article 7 TEU. Furthermore, according to Poland and Hungary, the CJEU's unrestricted review of the Regulation undermines the strict limitation of its jurisdiction in case of an Article 7 procedure, as defined by Article 269 TFEU. This argument was also rejected by the Advocate General.

In his Opinions, the Advocate General understands the interplay between the existing rule of law mechanism in Article 7 TEU and the Regulation to be fundamentally different. He expanded this point by first rejecting the *lex specialis* argument that Article 7 TEU would be bypassed by the Regulation, maintaining that the new conditionality mechanism is significantly different both in its application, as well as in its overall objective. Furthermore, the Advocate General laid out that the Regulation has the objective of protecting the EU budget from serious breaches of the rule of law in EU Member States. Article 7 TEU offers a political procedure which is subject to different conditions and offers for a number of possible sanctions, including the suspension of certain EU membership rights.³²

Furthermore, the Advocate General also clarified the non-exclusivity of Article 7 TEU as an instrument for the protection of the rule of law, explaining that only the introduction of an exact similar mechanism for the protection of the rule of law – but one that carries weaker requirements for its application – would in fact undermine Article 7 TEU.³³ Thus, the Advocate General found that the Regulation does not infringe Articles 7 TEU or 269 TFEU, and considered the Article 7 TEU procedure remarkably distinct from the Regulation.

3.3 COMPATIBILITY WITH ARTICLE 4(2) TEU

Poland and Hungary argued that under the Regulation, the European Commission can neither guarantee nor ensure that is fully objective, impartial and fair when determining the breach of the rule of law, and therefore decisions would be subjective towards some Member States. Furthermore, Poland argued that the Regulation would lead to discrimination against smaller EU Member States, and feared the usage of the qualitative majority voting system (QMV). Poland also argued that the Regulation would be incompatible with the principle of equal treatment of Member States under the Article 4(2) TEU.

However, the Advocate General rejected these arguments on the Regulation being incompatible with Article 4(2) TEU, and argued that the Regulation contains several safeguards, which require the Commission to make a 'thorough qualitative assessment and it should be objective, impartial and fair, and must take into account relevant information from available sources.'³⁴ In regard to the usage of QMV, the Advocate General referred to Article 16(3) TEU, which makes QMV the regular voting procedure of the Council. Lastly, the Advocate General stated that the Regulation does not introduce a new sanction mechanism, dismissing this assertion made by Poland and Hungary.³⁵

³² *ibid* paras 227-229.

³³ *ibid* para 208.

³⁴ Opinion of Advocate General Campos Sánchez-Bordona in Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2021:978, paras 90-93.

³⁵ *ibid* paras 94-98.

3.4 LEGAL CERTAINTY AND DEFINING THE RULE OF LAW

Finally, the Advocate General dismissed Poland and Hungary's objections about the precision and clarity of the Regulation in light of the established principle of legal certainty.³⁶

Poland and Hungary had questioned whether the concept of the rule of law can be defined uniformly for the purpose of EU law. They argued that the rule of law must be specifically concretised for the legal system of each EU Member State, and thus, viewed the descriptions of a breach of the rule of law in Article 4(2) of the Regulation to be too broad and abstract – thereby infringing the principle of legal certainty.

In his Opinions, the Advocate General clarified, and noted that 'there is nothing to prevent the EU legislature from defining the rule of law more precisely. However, the regulation does not sufficiently define the nature and scope of the appropriate measures which may be adopted when the rule of law is breached'.³⁷ In other words, the Advocate General observed that leaving the definition of the rule of law to EU Member States – in regard to how the Regulation should be applied when there is a breach of the rule of law – might threaten the uniform application of the Regulation.³⁸

Whilst accepting that the rule of law is a broad concept, nonetheless the Advocate General found that it can be sufficiently concretised for the purpose of the Regulation,³⁹ and to this effect, the Advocate General referred to the CJEU's case-law, which provides for many of these concretisations.⁴⁰

The Advocate General further clarified that, in its object and overall purpose to protect the EU budget from any future and current breaches of the rule of law by the EU Member States, the Regulation by its very nature includes some level of 'abstraction' – but that does not directly result in a breach of the requirement of legal uncertainty,⁴¹ as claimed by Poland and Hungary.

In closing, the Advocate General's Opinions concluded that Poland and Hungary's call for absolute legal certainty for the Regulation is next to impossible for any legal rule which concerns a future risk or threat.⁴² The section below explains the CJEU's judgment on the Advocate General's Opinions.

4 THE CJEU JUDGEMENT

Since Hungary and Poland rejected the idea of EU funds being tied to the respect of the rule of law and announced an action for annulment of the Regulation – thereby blocking COVID-19 aid and the EU budget framework – the Commission had no choice but to suspend the application of the new rule of law conditionality mechanism, which has officially been in force since 1 January 2021, pending the CJEU's ruling. Following the Opinions of

³⁶ Opinion of Advocate General Campos Sánchez-Bordona in Case C-156/21, *Hungary v Parliament and Council*; ECLI:EU:C:2021:974, paras 271-300.

³⁷ *ibid* para 272.

³⁸ *ibid* para 273.

³⁹ *ibid* paras 272-300.

⁴⁰ *ibid* para 278.

⁴¹ *ibid* paras 279-285.

⁴² *ibid* para 291.

Advocate General Manuel Campos Sánchez-Bordona, the CJEU fully dismissed Hungary's and Poland's actions for annulment of the Regulation.

4.1 THE LEGAL BASIS OF THE RULE OF LAW CONDITIONALITY REGULATION

Hungary and Poland's first main argument was that Article 322(1)(a) TFEU is not a sufficient legal basis for the Regulation – Article 322(1)(a) TFEU covers the competence of the EU to set financial rules establishing and implementing the EU budget. Amongst others, Hungary and Poland pleaded that a condition to cut financial means must be linked to one of the aims of a programme or of an explicit EU action, or to the sound financial management of the EU budget.

The CJEU disagreed with the reasoning presented by Hungary and Poland, and argued that the EU is founded on values such as the rule of law, as stated under Article 2 TEU and under Article 49 TEU; respecting those values is a pre-requisite for joining the EU.⁴³ Therefore, the shared values as stated under Article 2 TEU define and lay out the very identity of the European Union as a common legal order; upholding the rule of law in central to those values. In its reasoning, the CJEU stated that the EU, in case of breach, should be able to defend these values as stated in the EU Treaties.⁴⁴

Furthermore, the CJEU stated that the EU's budget is an important instrument for giving practical effect to the principle of solidarity, as stipulated under Article 2 TEU, and the implementation of the principle of solidarity is based on mutual trust through the EU budget between the EU Member States – in other words, the responsible use of common resources must be protected under the budget, and therefore, be able to fulfil the principle of solidarity.⁴⁵ The CJEU went further, stating that the rule of law forms the basis for a conditionality mechanism which falls under the concept of 'financial regulation' within the meaning of Article 322 (1) (a) TFEU.⁴⁶ The CJEU concluded that the Regulation has a sufficient legal basis,⁴⁷ and therefore dismissed the first main argument made by Hungary and Poland – that the TFEU does not offer a sufficient legal basis for the Regulation.

4.2 THE CIRCUMVENTION OF ARTICLE 7 TEU AND ARTICLE 269 TFEU

Poland and Hungary's second main argument was that the procedure introduced under the Regulation circumvents the procedure under Article 7 TEU, because Article 7 TEU regulates the sanction mechanism in case of a serious violation of the fundamental values stated in Article 2 TEU. Furthermore, Poland and Hungary argued that the procedure under the Regulation limits and restricts the CJEU's jurisdiction in relation to Article 7 TEU proceedings, as defined in Article 269 TFEU, and therefore would overall undermine Article 7 TEU. The CJEU rejected these arguments, and ruled that the rule of law can be protected by other legal instruments, other than Article 7 TEU.⁴⁸

⁴³ Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 124.

⁴⁴ *ibid* para 127.

⁴⁵ *ibid* para 129.

⁴⁶ *ibid* paras 145-146.

⁴⁷ *ibid* para 153.

⁴⁸ *ibid* para 163.

The CJEU clarified that the purpose and objectives of the procedure provided by Article 7 TEU are to enable the Council to sanction serious and persistent breaches of each of the common values of Article 2 TEU. Furthermore, Article 7 TEU seeks to encourage the EU Member State(s) in question to address and terminate violations of the rule of law.⁴⁹ Therefore, the CJEU acknowledged that the main purpose of the Regulation is to safeguard and protect the EU budget, in accordance with the principle of sound financial management, in case of a violation of the rule of law in an EU Member State.⁵⁰ Moreover, the CJEU stated that Article 7 TEU refers to all values of Article 2, which includes the rule of law, while the Regulation relates specifically to the rule of law, whereby there must be reasonable grounds to consider those violations which have a budgetary implication.⁵¹

The CJEU concluded that the procedures of Article 7 TEU and the procedure established by the Regulation pursue different objectives, which each have a distinct subject matter to address and raise with an EU Member States (C-156/21, paras 175 – 179). Furthermore, the CJEU concluded that the allegation of a circumvention of Article 7 TEU and Article 269 TFEU is unfounded (C-156/21, para 197) and thus dismissed Poland and Hungary's second main argument.

4.3 COMPATIBILITY WITH ARTICLE 4(2) TEU

The third argument from Hungary and Poland was that the application of the Regulation resulted in a violation of Article 4(2) TEU – in particular, the Regulation breaches the principle of equality of the EU Member States before the Treaties, and does not respect national identities. Poland and Hungary claimed that decisions concerning Regulation measures adopted by the Council must be made by a qualified majority, as otherwise small and medium-sized EU Member States would be exposed to a risk of discrimination.

The CJEU dismissed this argument as well – the court highlighted that the evaluations and assessments of the Commission and the Council are subject to procedural requirements, specified in the Regulation (Articles 6(1) to (9)). Furthermore, the CJEU stated that the Commission is obliged to follow an evidence-based approach and to respect the principles of objectivity, non-discrimination, and equal treatment of the EU Member States before the Treaties. Therefore, evaluations and assessments under the Regulation should and can be objective, impartial, and fair; compliance with all these obligations is subject to full judicial review by the Court,⁵² and therefore no EU Member States will be treated unfairly. Furthermore, the CJEU affirmed that according to Article 16(3) TEU, the Council votes with a qualified majority – this does not imply a violation of the principle of equality of an EU Member States.⁵³ In concluding, the CJEU stated that the third main argument was unfounded and dismissed Poland and Hungary's allegation that the Regulation breaches the principle of equality of the EU Member States.⁵⁴

⁴⁹ *ibid* paras 169-170.

⁵⁰ *ibid* para 171.

⁵¹ *ibid* paras 173-174.

⁵² *ibid* para 286.

⁵³ Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paras 307–308.

⁵⁴ *ibid* para 310.

4.4 LEGAL CERTAINTY AND EU NOTIONS OF THE RULE OF LAW

Poland and Hungary's fourth argument was that the Regulation does not meet requirements of legislative clarity and legal certainty, and furthermore, that there is no precise definition or uniform interpretation of the rule of law principle, due to national identity of each of the EU Member States. However, the CJEU dismissed these arguments on the definition and interpretation of the rule of law principle.

The CJEU stated that for the conditionality mechanism to apply under the Regulation, it first must establish a 'real link' between violations of the principles of the rule of law and the impact or serious risk of impact on the sound financial management or the protection of the EU's financial interests.⁵⁵ A breach of the principles listed in Article 2(a) of the Regulation must be attributable to a public authority of an EU Member State and be linked to the sound financial management of the EU budget. In particular, this breach must affect, or seriously risk affecting the budget's sound financial management.⁵⁶

Furthermore, the CJEU stated that a sufficient 'direct link' – namely a *genuine link* – should be established between a breach of one of the principles of the rule of law when it is at a serious risk.⁵⁷ The CJEU also emphasised that measures under the Regulation must be proportionate to the impact of the breaches of the rule of law principles on the EU budget⁵⁸ – and especially that these measures may target other EU measures, exclusively within the limits of what is necessary to protect the EU budget.⁵⁹ In closing, the CJEU suggested that the Commission should comply with strict procedural requirements⁶⁰ and thus, the CJEU dismissed the Poland and Hungary's fourth argument.⁶¹

5 COMMENTARY

On 16 February 2022, the Court of Justice delivered the highly anticipated and important ruling on the rule of law conditionality regulation in the two cases of *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21), in which the court fully validated the legality of the general regime of conditionality for the protection of EU budget provided by the Regulation. The CJEU fully dismissed Hungary's and Poland's actions for annulment against the Regulation, and cleared the EU to cut funds awarded to any of its EU Member States in case of an established violation of the rule of law, in the case that this violation endangered the Union budget.

The CJEU followed quite closely the Opinions of Advocate General Manuel Campos Sánchez-Bordona of 2 December 2021. However, it is worth placing the Advocate General's Opinions and the CJEU judgment in context, as well as to consider the political developments within the EU in the aftermath of the Russian invasion of Ukraine⁶² and its

⁵⁵ *ibid* para 244.

⁵⁶ Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 253.

⁵⁷ *ibid* para 267.

⁵⁸ *ibid* para 271.

⁵⁹ *ibid* para 275.

⁶⁰ *ibid* paras 280-288.

⁶¹ *ibid* para 289.

⁶² Zemsikova (n 7).

possible impact in regard to the Regulation's application, and challenges to its implementation.

The Advocate General's Opinions helped to clarify that, in its defence against rule of law violation, the EU has more than one weapon to deploy – the EU is not restricted to utilising only Article 7 TEU in its protection of the rule of law. The Opinions acknowledge that under the Regulation, the EU can offer a broader protection of the rule of law, and also shed light on the limitations of the Regulation in this regard, and on the criteria that it needs to meet in order to be activated. The Advocate General clarified that the Regulation cannot sanction all breaches of the rule of law, but only those specific breaches that have a direct impact on the EU budget. Therefore, for the Regulation to be activated, it must be clearly established that there is a clear link to the protection of the Union budget.⁶³

The Advocate General's interpretation speaks to the broader concerns about the nature of many rule of law breaches, and what the Regulation can cover. In particular, the Regulation only applies insofar as an EU Member State has a direct impact on the EU budget, and not any other breaches, such as the lack of an independent judiciary. Baraggia and Bonelli note that the Regulation was initially proposed to be more comprehensive, to address general problems with the rule of law that started to emerge in 2017 in Poland and Hungary.⁶⁴ However, creating a link between EU funds and the rule of law was seen as the most effective instrument to tackle rule of law backsliding in Poland and Hungary – and any future EU Member States – where EU funding helps sustain the same regimes that are threatening democracy and the rule of law. Therefore, the validation of the CJEU is key to the future application of the Regulation and to the overall EU rule of law arsenal.⁶⁵

As expected, the Court of Justice followed the legal arguments presented by the Advocate General in his Opinions. This judgment represents a very important step towards strengthening the rule of law principle in the EU, and moreover, the EU now has additional instruments to protect its core principles, alongside the procedures of Article 7 TEU. Thus, this judgment has paved the way to introduce further conditionality measures, and certified that the Commission now has at its disposal a new weapon to tackle violations of the rule of law in EU Member States. However, whilst the actions for annulment brought by Hungary and Poland were dismissed in their entirety, and the legality of the Regulation was confirmed by the CJEU, it must be noted that the threshold to apply the Regulation is limited to cases wherein there is a strong link between the breach of the rule of law and a threat to the sound financial management of the EU budget.⁶⁶ Furthermore, measures must be proportionate, thus limiting the scope of the Regulation's application. In future case law, the CJEU may be asked to clarify to what extent the 'direct link' must be made.

The impact of Regulation measures may be significant, if a reduction of financial resources hits an affected EU Member State hard. For example, in the case of Poland, around

⁶³ Progin-Theuerkauf and Berger (n 5).

⁶⁴ Antonia Baraggi and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', (2022) 23(2) German Law Journal 131,

⁶⁵ *ibid.*

⁶⁶ András Jakab and Lando Kirchmair, 'How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?' (*Verfassungsblog*, 22 December 2020) <<https://verfassungsblog.de/how-to-quantify-a-proportionate-financial-punishment-in-the-new-eu-rule-of-law-mechanism/>> accessed 5 June 2021.

140 billion EUR of EU funds are at stake; in Hungary, it is about 40 billion EUR.⁶⁷ Therefore, according to Mavrouli,⁶⁸ it is difficult to make a prediction with regard to the extent the Commission will apply the Regulation after the CJEU judgment. After the judgment was issued in February, Commission President Ursula von der Leyen emphasised that the Commission will analyse the reasoning behind the judgement, and assess the possible consequences for applying the Regulation.⁶⁹ It must be noted that the Regulation will only be applied once the guidelines for its application have been detailed in the light of the judgment, and since this time, the Commission has not been very proactive in enforcing it, even though von der Leyen expressed her Commission's determination to protect the EU budget and funds.

Poland and Hungary's public reactions to the CJEU judgment have been somewhat different from one another. Hungarian Justice Minister Judith Varga called the decision 'politically motivated', stating that the EU was abusing its power.⁷⁰ Meanwhile, Polish Prime Minister Mateusz Morawiecki indicated a rapprochement between Poland and the EU Commission, after meeting with von der Leyen.⁷¹ Since Hungary scheduled its parliamentary elections in April 2022, the Commission did not apply the Regulation, as it was viewed that it might be interpreted as interference in the election campaign.⁷² This delay has led to harsh criticism from the European Parliament; a number of MEPs have threatened to sue the Commission for failing to act on Poland and Hungary, when there has been a clear violation of the rule of law based on the CJEU ruling.⁷³

However, since Russia's invasion of Ukraine, the Commission has not taken proper action in applying the Regulation after the CJEU ruling clarified its legal mandate, as Hungary has used its veto in the Council to block the EU in imposing sanctions against Russia on the oil embargo, unless the payouts from the COVID-19 recovery fund EU are released to Hungary. The EU finds itself in a position where it must negotiate the application of the Regulation in order to have unanimity at the European Council in responding to Russia's invasion of Ukraine with a new round of sanctions – but this contribution would argue it would be counterproductive to reduce or abandon the use of the rule of law conditionality to EU funds,⁷⁴ as it is about upholding EU fundamental values, at the cost of reaching

⁶⁷ Gabriela Baczyńska, 'Top EU court throws out Polish, Hungarian challenge to "money for democracy"' (*Reuters*, 16 February 2022) <<https://www.reuters.com/world/europe/poland-hungary-test-eu-cash-for-democracy-powers-court-2022-02-15/>> accessed 5 June 2021.

⁶⁸ Roila Mavrouli, 'The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation' (2022) 7(1) *European Papers* 252.

⁶⁹ European Commission, 'Statement by European Commission President Ursula von der Leyen on the judgments of the European Court of Justice on the General Conditionality Regulation' (*European Commission*, 16 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1106> accessed 5 June 2021.

⁷⁰ Reuters Staff, 'EU court ruling shows Brussels "abusing its power", Hungary justice minister says' (*Reuters*, 16 February 2022) <<https://www.reuters.com/article/eu-democracy-ruling-hungary-idUSS8N2SG04M>> accessed 5 June 2021.

⁷¹ Euronews Staff, 'ECJ rules in favour of making EU cash handouts conditional on a country's respect for rule of law' (*Euronews*, 16 February 2022) <<https://www.euronews.com/my-europe/2022/02/16/ecj-to-rule-on-whether-eu-cash-handouts-can-be-made-conditional>> accessed 5 June 2021.

⁷² Baraggi and Bonelli (n 67).

⁷³ Bárd (n 14).

⁷⁴ Bea Bakó, 'How Hungary might avoid the suspension of EU funds' (*BalkanInsight*, 31 May 2022) <<https://balkaninsight.com/2022/05/31/how-hungary-might-avoid-the-suspension-of-eu-funds/>> accessed 5 June 2021.

consensuses in the European Council on sanctions. Although the Commission has sent a letter to Hungary outlining its concerns about the use of funds in specific EU-funded projects based on the Regulation, its slow action to date since the CJEU ruling suggests that Hungary will be given more time to compromise the application of the Regulation. Whereas in the case of Poland, on 1 June 2022, the Commission approved 23.9 billion EUR in grants and 11.5 billion EUR billions of the COVID-19 economic recovery⁷⁵ – an approach which has been met with much criticism given the CJEU ruling. Petra Bárd and Dimitry Kochenov observe that the Commission – by approving the COVID-19 economic recovery for Poland, and likely for Hungary in light of the ongoing Russia’s invasion of Ukraine to help these countries’ economies, which are currently hosting millions of refugees from Ukraine – is jeopardising not only the internal discussion about the rule of law in responding to the violation of European values, but also damaging the application of the newly established Regulation and the uniformity of EU law overall.⁷⁶

That said, money will not flow until Poland makes reforms to the judiciary, in particular dismissing the disciplinary chamber for judges. In October 2021, the CJEU ordered a fine of one million EUR per day against Poland, finding the disciplinary chamber for judges to be illegal (because it fails to provide safeguards against political meddling); the state must begin reinstalling judges dismissed by the contested chamber before any money is paid out. In other words, funds are conditions towards dismantling a disciplinary chamber for judges within Poland’s supreme court; changing the judicial disciplinary system; and reinstating judges suspended under current rules.⁷⁷

However, the EU and a number of EU Member States are keen to end the dispute with Poland in particular, as the country is sheltering about 3.6 million Ukrainians who have fled since Russia invaded Ukraine. The EU argues that approving the recovery plan in Poland and Hungary, in light of the ongoing war in Ukraine, would help Ukrainians in the EU labour market.⁷⁸ However, this is at the cost of making concessions about the rule of law in the EU. In closing, after the CJEU verdict, the Regulation has equipped the EU with another important tool in its rule of law toolbox. In Article 3, the Regulation lists corruption amongst the rule of law deficiencies that may trigger a pause in the payment of EU funds. However, in the future, it is important that the EU uses the Regulation rule of law conditionality mechanism; this will strengthen the overall anti-corruption efforts in the EU.

⁷⁵ European Commission, ‘NextGenerationEU: European Commission endorses Poland’s €35.4 billion recovery and resilience plan’ (*European Commission*, 1 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375> accessed 5 June 2021.

⁷⁶ Petra Bárd and Dimitry V Kochenov, ‘War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening’, (2022) *European Law Journal* 1.

⁷⁷ Jakub Jaraczewski, ‘Just a Feint? President Duda’s bill on the Polish Supreme Court and the Brussels-Warsaw deal on the rule of law’ (*Verfassungsblog*, 1 June 2022) <<https://verfassungsblog.de/just-a-feint/>>, DOI: 10.17176/20220602-062115-0> accessed 5 June 2021.

⁷⁸ Jan Strupczewski and Gabriela Baczynska, ‘EU approves Polish recovery plan, but no payouts before judiciary fixed’ (*Reuters*, 1 June 2022) <<https://www.reuters.com/world/europe/eu-commission-likely-unblock-polands-recovery-plan-wednesday-2022-06-01/>> accessed 5 June 2021.

6 CONCLUSION

The CJEU upheld the validity of Regulation 2020/2092 in two judgments on 16 February 2022 by closely following the Opinions of the Advocate General Manuel Campos Sánchez-Bordona delivered on 2 December 2021. The CJEU judgement to annul Poland and Hungary's arguments on the validity of the Regulation serves not only as an excellent opportunity to examine the legality of the individual provisions of the Regulation to establish the conditionality mechanism, but it also provides a strong statement on the instruments and powers of the EU to protect its financial interests, as well as on the meaning of the common values enshrined in Article 2 TEU – in particular, the value related to the rule of law. However, it will not be easy to demonstrate a genuine and direct link between breaches of the rule of law and sound financial management of the EU budget, as emphasised several times by the CJEU in its judgment. However, the validation of the Regulation is welcome, and can only serve to strengthen both the rule of law toolbox in the EU, and also its anti-corruption efforts in cases of EU fund mismanagement. The Commission has taken the position that it must first establish guidelines for the application of the Regulation. The ongoing Russian invasion of Ukraine, and the political challenges for the EU in unanimity for sanctions against Russia have led the EU to delay the application of the Regulation to Poland and Hungary. Thus, in conclusion, much will depend on how the Commission wants to proceed with the Regulation. It is evident that the Commission will now be under immense pressure in light of the CJEU ruling by the European Parliament and some of the EU Member States to make use of the Regulation without further delay.

LIST OF REFERENCES

Bako B, 'How Hungary Might Avoid the Suspension of EU Funds' (Balkaninsight, 31 may 2022) <<https://balkaninsight.com/2022/05/31/how-hungary-might-avoid-the-suspension-of-eu-funds/>> accessed 5 june 2021

Baraggi A, and Bonelli M, 'Linking Money to Values: the New Rule of Law Conditionality Regulation and its Constitutional Challenges', (2022) 23(2) German Law Journal 131-156

Bard P, 'In Courts we Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', (2022) European Law Journal
DOI: <https://doi.org/10.1111/eulj.12425>

Bard P, and Kochenov DV, 'War as a Pretext to Wave the Rule of Law goodbye? The Case for an EU Constitutional Awakening' (2022) European Law Journal 1-11
DOI: <https://doi.org/10.2139/ssrn.4118900>

Boffey D, 'Poland Fined €1m a day Over Controversial Judicial System Changes' (the guardian, 12 october 2021) <<https://www.theguardian.com/world/2021/oct/27/poland-fined-1m-a-day-over-controversial-judicial-reforms>> accessed 5 june 2021

Euronews Staff, 'ECJ Rules in Favour of Making EU Cash Handouts Conditional on a Country's Respect for Rule of Law', (euronews, 16 february 2022)
<<https://www.euronews.com/my-europe/2022/02/16/ecj-to-rule-on-whether-eu-cash-handouts-can-be-made-conditional>> accessed 5 june 2021

European Commission, 'Nextgenerationeu: European Commission Endorses Poland's €35.4 Billion Recovery and Resilience Plan', (European Commission, 1 june 2022)
<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375> accessed 5 june 2021

European Commission, 'Statement by European Commission President Ursula von der Leyen on the Judgments of the European Court of Justice on the General Conditionality Regulation', (European Commission, 16 february 2022)
<https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1106> accessed 5 june 2021

Baczynska G, 'Top EU Court Throws out Polish, Hungarian Challenge to "Money for Democracy"' (Reuters, 16 february 2022)
<<https://www.reuters.com/world/europe/poland-hungary-test-eu-cash-for-democracy-powers-court-2022-02-15/>> accessed 5 june 2021

Gremminger B, 'The New Rule of Law Conditionality Mechanism Clears its first Hurdle – Analysis of AG Campos Sanchez-Bordona Opinions in Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)' (European Law Blog, 14 december 2021) <<https://europeanlawblog.eu/2021/12/14/8043/>> accessed 5 june 2021

Jakab A, Lando Kirchmair L, 'How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?' (Verfassungsblog, 22 december 2020) <<https://verfassungsblog.de/how-to-quantify-a-proportionate-financial-punishment-in-the-new-eu-rule-of-law-mechanism/>> accessed 5 june 2021

Jaraczewski J, 'Gazing Into the Abyss: The K 3/21 Decision of the Polish Constitutional Tribunal' (verfassungsblog, 12 october 2021) <<https://verfassungsblog.de/gazing-into-the-abyss/>> accessed 5 june 2021

Jaraczewski J, 'Just a Feint?: President Duda's Bill on the Polish Supreme Court and the Brussels-Warsaw Deal on the Rule of Law' (Verfassungsblog, 1 june 2022) <<https://verfassungsblog.de/just-a-feint/>> accessed 5 june 2021
DOI: [10.17176/20220602-062115-0](https://doi.org/10.17176/20220602-062115-0)

Łacny J, 'The Rule of Law Conditionality Under Regulation No 2092/2020—Is It all About the Money?' (2021) 13(1) Hague Journal on the Rule of Law 79–105.
DOI: <https://doi.org/10.1007/s40803-021-00154-6>

Mavrouli R, 'The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation', (2022) 7(1) European Papers 275

Pech L, Wachowiec P and Mazur D, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EI's (in)Action', (2021) 13(1) Hague Journal on the Rule of Law 1–43
DOI: <https://doi.org/10.1007/s40803-021-00151-9>

Progin Theuerkauf S, Berger M, 'ECJ Confirms Validity of the Rule of Law Conditionality Regulation' (European Law Blog, 11 march 2022) <<https://europeanlawblog.eu/2022/03/11/ecj-confirms-validity-of-the-rule-of-law-conditionality-regulation/>> accessed 5 june 2021

Reuters Staff, 'EU Court Ruling Shows Brussels 'Abusing its Power', Hungary Justice Minister Says' (reuters, 16 february 2022) <<https://www.reuters.com/article/eu-democracy-ruling-hungary-iduss8n2sg04m>> accessed 5 june 2021

Strupczewski J, Baczyńska G, 'EU Approves Polish Recovery Plan, but no Payouts Before Judiciary Fixed' (Reuters, 1 june 2022) <<https://www.reuters.com/world/europe/eu-commission-likely-unblock-polands-recovery-plan-wednesday-2022-06-01/>> accessed 5 june 2021

Zemskova A, 'Analysis: "Rule of Law Conditionality: A Long-Desired Victory or a Modest Step Forward? Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)"' (EU Law Live, 18 february 2022) <<https://eulawlive.com/analysis-rule-of-law-conditionality-a-long-desired-victory-or-a-modest-step-forward-hungary-v-parliament-and-council-c-156-21-and-poland-v-parliament-and-council-c-157-21-by/>> accessed 5 june 2021