

FINANCIAL TOOLS

A WAY TO APPROACH THE RULE OF LAW?

HANA KOVÁČIKOVÁ*

The rule of law is the hot topic of these days. Especially Poland and Hungary have been for the past eight years proving that they are not afraid to backslide from the values on which the Union is founded, the rule of law among them. The lengthy process on determining whether there exists a ‘clear risk of serious breach’ of the fundamental values by these two Member States, while having a few judgments of the Court of Justice of the EU, proves that the political sanctions envisaged in Article 7 TEU are not an effective tool in dealing with such Member States. Accordingly, this article intends to show the ineffectiveness of political tools and to inquire whether the financial tools contained in the Conditionality Regulation, Common Provision Regulation, and Resilience and Recovery Regulation could be a more effective solution in this regard.

1 INTRODUCTION

‘No man is above the law and no man is below it’.¹ ‘Lady Justice is blind – she will defend the Rule of Law wherever it is attacked’.² ‘The EU cannot survive without the rule of law’.³ ‘The rule of law defines the very identity of the European Union as a common legal order’.⁴

These are just a few quotes. However, they aptly describe the importance of this crucial legal principle. We can see the dramatic transformation it has experienced during the past 30 years. From a simple confirmation of the attachment of the Member States to the principle of the rule of law in the preamble of the Maastricht Treaty on European Union⁵ it has become a value on which the Union is founded, which is common to all of its Member States (MSs), as stipulated in Article 2 of the Lisbon Treaty on European Union⁶ (TEU). The EU is now not just an economic project, but rather a project driven by values,⁷ the rule of law included.

However, understanding its meaning requires a more complex approach. As pointed out by Schroeder, ‘[t]he rule of law constitutes a conceptual puzzle in the Union legal order,

* Associate Professor at the Institute of European Law, Comenius University in Bratislava, Faculty of law. The article is an output within the project Jean Monnet No. 620758-EPP-1-2020-1-SK-EPPJMO-CoE: *Rule of Law in the European Union*.

¹ Gerhard Peters and John T Woolley, ‘Theodore Roosevelt, Third Annual Message Online’ (*The American Presidency Project*) <<https://www.presidency.ucsb.edu/node/206201>> accessed 10 December 2023.

² Ursula von der Leyen, ‘Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission’ (*European Commission press corner*, 16 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/speech_19_4230> accessed 10 December 2023.

³ Helsinki Rule of Law Forum, ‘A Declaration on the Rule of Law in the European Union’ (*Verfassungsblog*, 18 March 2022) <<https://verfassungsblog.de/a-declaration-on-the-rule-of-law-in-the-european-union/>> accessed 16 September 2023.

⁴ Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 para 127.

⁵ Treaty on European Union [1992] OJ C191/1.

⁶ Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

⁷ Stephen Weatherill, *Law and Values in the European Union* (1st edn, Oxford University Press 2016) 393.

since there exist different conceptions of its significance and its content beyond its basic meaning that any form of public power must be subordinated to some kind of primary, unchangeable norms, and therefore this principle cannot be defined conclusively and it may evolve over time'.⁸ Hofmann calls it an 'umbrella principle' with some core content and numerous (sub-principles).⁹

In this regard, the Court of Justice of the European Union (CJEU) has stressed the material scope of the rule of law by saying that '[t]he EU institutions are subject to judicial review of the compatibility of their acts with the Treaty as well as with the general principles of law which include fundamental rights'¹⁰ and that the rule of law contains legal principles, such as effective judicial protection before independent courts,¹¹ principles of legality,¹² legal certainty and protection of legal expectations,¹³ prohibition of arbitrariness or disproportionate intervention of public authorities,¹⁴ and separation of powers.¹⁵ As pointed out by Bárd, 'the effects of rule of law backsliding extend way beyond the borders of the state in which rule of law decline takes place and spill over to the European Union, too'.¹⁶ The rule of law, as an integral part of EU values, co-defines the very identity of the EU as a common legal order. In this regard, the 'EU must be able to defend those values'.¹⁷

The question is whether the EU has done its homework and provides effective tools to ensure respect for the rule of law. In this regard, the CJEU stated that the EU

[h]as developed a variety of instruments and processes that promote the rule of law and its application, including financial support for civil society organisations, the European Rule of Law Mechanism and the EU Justice Scoreboard, and provides an effective response from Union institutions to breaches of the rule of law through infringement proceedings and the procedure provided for in Article 7 TEU.¹⁸

But is this really true? Are these tools provided by the EU really effective? All of them? Or only some of them?

Traditional legal tools - the infringement proceedings (Articles 258, 260 TFEU) - can be activated only when a Member State has failed to fulfil a specific obligation under the treaties. However, neither TEU nor TFEU directly stipulates the obligation to comply with the rule of law. Such obligation is identified indirectly and only subsequently through the interpretations of the CJEU provided in preliminary rulings relating to other obligations.¹⁹

⁸ Werner Schroeder, 'The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in Armin von Bogdandy et al, *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer Link 2021) 122.

⁹ Herwig CH Hofmann, 'General Principles of EU Law and EU Administrative Law' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) 208.

¹⁰ Case C-50/00 *Unión de Pequeños Agricultores* EU:C:2002:462 para 38.

¹¹ Case C-896/19 *Repubblika* EU:C:2021:311 para 51.

¹² Case C-496/99 P *Commission v CAS Succhi di Frutta* EU:C:2004:236 para 63

¹³ Joined Cases 212 to 217/80 *Meridionale Industria Salumi and others* EU:C:1981:270 para 10.

¹⁴ Joined Cases 46/87 and 227/88 *Hoechst v Commission* EU:C:1989:337 para 19.

¹⁵ Case C-477/16 PPU *Kovalkovas* EU:C:2016:861 para 36.

¹⁶ Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2021) 27 *European Law Journal* 185, 187.

¹⁷ Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98 para 145.

¹⁸ *ibid* para 14.

¹⁹ See to that effect case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117 or C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586.

Most cases in this regard relate to the second subparagraph of Article 19(1) TEU, establishing the obligation for MSs to ensure effective legal protection in the fields covered by Union law²⁰ which ‘gives concrete expression to the value of the rule of law affirmed in Article 2 TEU’.²¹ The effectiveness of this tool can be pre-illustrated by the well-known case of Poland (C-204/21).²² As the Commission stated in its Press Release of 29 April 2020,²³ a dialogue on this matter started in January 2016, while the infringement procedure in the form of a Letter of Formal Notice was launched in 2020.²⁴ It was followed by the Reasoned Opinion [30 October 2020], Additional formal notice [3 December 2020] and Additional reasoned opinion [27 January 2021]. As Poland did not comply with the recommendation of the Commission, this institution referred the case to the CJEU in March 2021. From 2021, it took four interim measures²⁵ and one judgment [5 June 2023] just to determine that the MS had failed to fulfil its obligations to ensure effective legal protection in the fields covered by EU law. Information on whether Poland has in fact fulfilled its obligations and complied with obligations specified in the judgment of 5 June 2023 is not yet available. By now, the Commission did not submit an action pursuant the Article 260 TFEU against Poland in this regard. However, seven years of operationalisation of Article 258 TFEU can hardly be considered as an effective tool to protect the rule of law.

Therefore, the author’s attention in this article will focus on the newer political and financial tools. To find out the answers to the questions on their effectiveness, the author formulated the following hypotheses:

- 1) Political tools to ensure compliance with the rule of law principle are not effective.
- 2) Financial tools to ensure compliance with the rule of law are effective.

These presumptions originate from the conclusion that new (financial) tools were developed as a consequence of the insufficient performance of the existing political and legal tools. In this article, the author compares the already existing political and legal rule of law instruments to the new monetary instruments. Attention is given to the threefold conditionality, which developed in the post NGEU legal landscape and relates to EU budget, EU Funds, and Resilience and Recovery Facility.

To verify the presented hypotheses, the author has used the usual scientific research methods, such as doctrinal analysis, case-law study, comparison, deduction, abstraction, and synthesis. The effectiveness of particular tools is demonstrated in the case studies of Poland and/or Hungary.

²⁰ cf. *Associação Sindical dos Juizes Portugueses* (n 19) para 32 and the cases cited therein.

²¹ Case C-192/18 *Commission v of Poland* EU:C:2019:924 para 98, Case C-619/18 *Commission v Poland* EU:C:2019:531 para 47, *Associação Sindical dos Juizes Portugueses* (n 19).

²² Case C-204/21 *Commission v Poland* EU:C:2023:442.

²³ Commission, ‘Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland’ (Press Release) (2023) IP/20/772.

²⁴ Under the No INFR(2020)2182.

²⁵ Case C-204/21: Order of the Vice-president of the Court of 14 July 2021 (EU:C:2021:593), Order of the Vice-president of the Court of 6 October 2021 (EU:C:2021:834), Order of the Vice-president of the Court of 27 October 2021 (EU:C:2021:878), and Order of the Vice-president of the Court of 21 April 2023 (EU:C:2023:334).

2 A POLITICAL TOOLBOX

MSs officially share the same values²⁶ and commit to promote them.²⁷ As pointed out by the CJEU, in its well-known Opinion 2/13, ‘that premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected’.²⁸ However, sometimes it may appear that this premise is valid only during the accession process and for some time after the accession. Such a negative perception was confirmed, for example, by the results of the 2019 Eurobarometer survey on Rule of Law in the EU.²⁹ Out of 27,655 respondents across the EU, i.e. over 80%, thought that the situation in their country regarding the respect of the principles of rule of law³⁰ needs (at least some) improvement.³¹

Therefore, a political toolbox has undergone a scrutiny to find out whether currently designed tools are sufficiently deterring MSs from rule of law backsliding.

2.1 ARTICLE 7 TEU

Article 7 TEU is the essential political tool to ensure MSs compliance with EU values referred to in Article 2 TEU. To this end, it establishes three phases of political pressure. In the first phase, the Council may determine that there is a clear risk of a serious breach of these values by a MS.³² In the second phase, the European Council may determine the existence of a serious and persistent breach of these values by a MS.³³ Finally, in the third phase, the Council may, after adopting the infringement decision by the European Council, decide to suspend certain of the rights deriving from the application of the Treaties to the MS in question.³⁴ Despite the Commission labelling Article 7 TEU as a ‘nuclear button’, academia remains rather sceptic on its real power.

For example, as highlighted by von Bogdandy,³⁵ defending values on the basis of Article 7 TEU is ‘completely under control of the governments of the MSs united in the Union’s institutions’ which might not be willing to bear such a [political] responsibility. Furthermore, a very high threshold for a voting quorum ‘might leave EU values without defence.’³⁶ Kochenov also concludes, as regards the effective enforcement of the rule of law,

²⁶ Art 2 TEU.

²⁷ Art 49 TEU.

²⁸ Opinion 2/13 *Adhésion de l’Union à la CEDH* EU:C:2014:2454 para 168.

²⁹ European Union, ‘Special Eurobarometer 489 “Rule of Law”. Summary’ (2019) <<https://europa.eu/eurobarometer/surveys/detail/2235>> accessed 10 December 2023.

³⁰ Assessment included the perception of 17 factors: equality before the law; clarity and stability of the law; ease in following how parliament adopts law; lawmakers act in the public interest; independent control on laws; clarity of public authorities’ decisions; independent review of public authorities’ decisions; unbiased decisions of public authorities; making decisions in the public interest; acting on corruption; codes of ethics for politicians; access to an independent court; length or cost of court proceedings; the independence of judges; the proper investigation of crimes; respect for and application of court rulings; codes of conduct for politicians.

³¹ *ibid* 9.

³² Art 7(1) TEU.

³³ Art 7(2) TEU.

³⁴ Art 7(3) TEU.

³⁵ Armin von Bogdandy, ‘Towards a Tyranny of Values?’ in Armin von Bogdandy et al, *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer Link 2021).

³⁶ von Bogdandy, ‘Towards a Tyranny of Values?’ (n 35) 83.

that there is no room for Article 7 TEU.³⁷ He refers to the non-binding character of the recommendation presumed in Article 7(1), as well as the lack of political will to achieve the required unanimity prescribed in Article 7(2) or the qualified majority prescribed in Article 7(3). Finally, Theuns correctly reasons that the wording of Article 7 TEU in all 3 sections refers, as regards the action of the Council or European Council, only to the *possibility* but not to the obligation to determine whether there exists a threat or already a breach of the EU values, and the Council *may* decide on the suspension of the rights derived from the application of the Treaties to the MS in question.³⁸

Such a critical approach can be verified in the cases against Poland and Hungary. Both countries are known to have problems with the rule of law, especially in regard to the independence of judges.³⁹ The Commission has already pushed a *nuclear button*, initiating a procedure according to Article 7(1), against Poland⁴⁰ [2017] and Hungary⁴¹ [2018]. Despite the fact that both countries have already had six hearings,⁴² the Council has not yet adopted its decision on whether *there exists a clear risk of a serious breach* by these countries of the rule of law. Be that as it may, the worst scenario for both countries would mean the issuance of another (nonbinding) recommendation.

It is needless to say that the stronger tools presented in Articles 7(2) and 7(3) of the TEU have not yet been activated.

Article 7 TEU therefore provides a decorative rather than an effective tool in terms of compliance with the rule of law. However, these observations are not new. The European Parliament described the situation already ten years ago as without ‘clear and common benchmarks’ and pointed out that ‘in too many instances there is permanent inertia and the Treaties and European values are not observed’.⁴³ Therefore, it was inevitable to develop other tool(s) - effective enough to persuade Member States to follow the rules. The answer of the Commission to this came in the form of the Rule of Law Framework⁴⁴ and the Rule of Law Conditionality Mechanism.

2.2 RULE OF LAW FRAMEWORK

The Rule of Law Framework is meant to work as a complementary tool to the other existing mechanisms. Its purpose is to prevent MS from developing backsliding from the rule of law into the emergence of systemic threats to the rule of law at the level of the ‘clear risk’ or

³⁷ Dimitry Kochenov, ‘Article 7: A Commentary on a Much Talked-About “Dead” Provision’ in Armin von Bogdandy et al, *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer Link 2021).

³⁸ Tom Theuns, ‘The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7’ (2022) 28 Res Publica 693.

³⁹ See to this effect for example cases C-619/18 R *Commission v Poland* (n 21), C-192/18 *Commission v Poland* (n 21), C-204/21 *Commission v Poland* (n 22), C-288/12 *Commission v Hungary* EU:C:2014:237.

⁴⁰ Commission, ‘Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland’ (Proposal) COM (2017) 835 final

⁴¹ European Parliament, ‘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’ P8_TA (2018)0340.

⁴² European Council, ‘Rule of Law’ (Last reviewed on 28 November 2023)

<<https://www.consilium.europa.eu/en/policies/rule-of-law/>> accessed 10 December 2023.

⁴³ European Parliament, ‘Situation of fundamental rights in the EU (2013-14)’ (Resolution) P8_TA (2015) 0286.

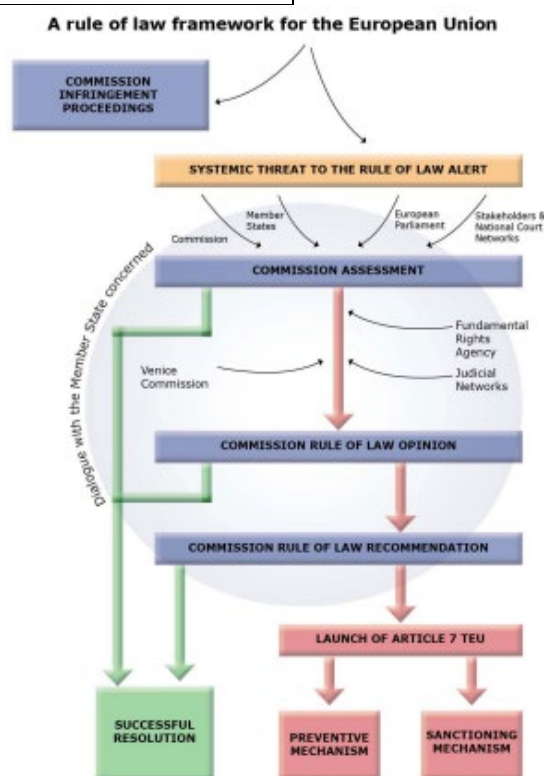
⁴⁴ Commission, ‘A new EU Framework to strengthen the Rule of Law’ COM (2014) 158 final.

‘serious breach’ and to prevent the use of ‘Article 7 nuclear button’. These goals should be reached through the individual dialogue held between the Commission and the MS concerned. As explained by the Commission,

[t]he framework will be activated in situations where authorities of a MS are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.⁴⁵

However, it does not specify the clear criteria for its application, nor when the framework must be activated. Furthermore, the whole procedure ends again with a (non-binding) recommendation. The whole system depends, again, on the goodwill of the MS concerned. If the MS concerned does not comply with the recommendation of the Commission, the only possible (but not obligatory) “sanction” is the triggering of Article 7 TEU (Figure 1).

Figure 1: Scheme of Rule of Law Framework



Source: <https://commission.europa.eu/system/files/2021-08/com_2014_158_annexes_en.pdf> accessed 10 December 2023

The effectiveness of these political tools has already been tested on Hungary and Poland. In 2015, the Hungarian Prime Minister Orbán raised concerns relating to the rule of law by his repeated statements on initiation of a debate on potential re-establishment of the

⁴⁵ Commission, ‘A new EU Framework’ (n 44) 6.

death penalty in Hungary and by launching a nation-wide debate on immigration, whose narrative connected migration with security threats.

The European Parliament (EP) therefore urged the Commission to activate the assessment stage of the Rule of Law Framework and to evaluate the emergence of a systemic threat to the rule of law in Hungary.⁴⁶ Public consultations were followed by the adoption of various laws that ‘rendered access to international protection very difficult and have unjustifiably criminalised refugees, migrants and asylum seekers’.⁴⁷ In December 2015, the EP reiterated its position and blamed the Commission for focusing mainly on ‘marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights’ and repeatedly called for action under the Rule of Law Framework. However, the Commission concluded that the conditions for activating the framework were not met and decided to open an infringement procedure instead.⁴⁸ In 2017, the EP adopted a third Resolution on the situation in Hungary where it criticised both the development leading to a serious deterioration of the rule of law in the MS as well as the Commission for failing to act effectively to protect the rule of law in the EU.⁴⁹ Due to the laws adopted in Hungary, the EP’s increasing concerns related to

[t]he functioning of the constitutional and electoral system, independence of the judiciary and of other institutions and the rights of judges, corruption and conflicts of interest, privacy and data protection, freedom of expression, including media pluralism, academic freedom, freedom of religion, freedom of association, the right to equal treatment, including LGBTIQ rights, the rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities, the fundamental rights of migrants, asylum seekers and refugees, economic and social rights and many worrying allegations of corruption and conflicts of interest. As the Commission still had not reacted, in 2018 the EP initiated the Article 7(1) TEU Procedure itself.⁵⁰

In 2022, the EP reiterated its concerns and deplored ‘the inability of the Council to make meaningful progress in the ongoing Article 7(1) TEU procedure’.⁵¹ At the time of writing, the Council has not adopted a decision yet.

Likewise, Poland raised concerns related to the rule of law in 2015. The Commission’s concerns related to many aspects, such as the composition of the Constitutional Tribunal; the reduction of the mandate of particular judges; the independence of the judges and the effectiveness of the constitutional review of new legislation, which was enacted in 2016. It led to the adoption of the Opinion concerning the rule of law in Poland, adopted by the

⁴⁶ European Parliament ‘Situation in Hungary’ (Resolution) [2015] P8_TA(2015)0227.

⁴⁷ European Parliament, ‘Situation in Hungary: follow up to the European Parliament Resolution of 10 June 2015’ (Resolution) [2015] P8_TA(2015)0461.

⁴⁸ *ibid* [G], [H]. The Commission held the procedure under No INFR(2015)2201. In 2018, the case was referred to the CJEU and decided by its judgment of 17 December 2020, C-808/18 *Commission v Hungary* EU:C:2020:1029. Information whether Hungary has complied with the judgment is not available.

⁴⁹ European Parliament, ‘Situation in Hungary’ (Resolution) [2017] P8_TA(2017)0216.

⁵⁰ European Parliament, ‘The situation in Hungary: 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’ (Resolution) [2018] P8_TA-PROV(2018)0340.

⁵¹ European Parliament, ‘Existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded’ (Resolution) [2022] P9_TA(2022)0324.

Commission in 2016.⁵² This was followed by the Commission Recommendation (EU) 2016/1374 of 27 July 2016,⁵³ Commission Recommendation (EU) 2017/146 of 21 December 2016,⁵⁴ Commission Recommendation (EU) 2017/1520 of 26 July 2017⁵⁵ and Commission Recommendation (EU) 2018/103 of 20 December 2017.⁵⁶ Within these two years, the Commission had held a continuous dialogue with Poland and exchanged more than 25 letters with the Polish authorities on this matter. However, Poland failed to adopt appropriate measures to tackle the identified systemic threats and the Commission considered that the situation of systemic threat to the rule of law even worsened. Therefore, in December 2017, the Commission initiated the Article 7(1) TEU Procedure.⁵⁷ At the time of writing, the Council has not yet adopted the decision.

2.3 RULE OF LAW MECHANISM

The Rule of Law Mechanism presents another political tool. Unlike the Rule of Law Framework, which applies on a case-by-case basis, this one is based on the regular annual dialogue between the EU institutions, MSs, and various relevant stakeholders with the aim of strengthening mutual cooperation, identifying threats, and providing recommendations on a systematic basis. According to the Commission, ‘it focusses on improving understanding and awareness of issues and significant developments in areas with a direct bearing on the respect for the rule of law – justice system, anti-corruption framework, media pluralism and freedom, and other institutional issues linked to checks and balances’.⁵⁸ From 2020, the Commission has been providing annual rule of law reports containing specific country chapters. In these chapters, the Commission evaluates the state-of-the-art of the monitored benchmarks and compliance with the recommendations obtained in earlier reports and, if necessary, addresses the new ones. Moreover, from 2022, the Commission also provides specific country recommendations. Again, not complying with the Commission’s recommendations may result in the activation of Article 7 TEU.

As regards Poland and Hungary, it could be concluded that both countries ignored the recommendations from the 2022 Rule of Law Report. In fact, Poland has not made any progress regarding the adoption of the recommended measures, while Hungary has made very limited progress.

Political tools, due to an evident lack of political will of the main players to act as well as the (mere) soft power nature of the recommendations, do not provide an effective solution to the problem of Member States backsliding from the rule of law. The cases of Hungary or Poland have clearly proven that MSs, which wilfully disregard the rule of law, have neither fear to be shamed nor to be politically sanctioned.

⁵² Commission, ‘Commission adopts Rule of Law Opinion on the situation in Poland’ (Press Release) [2016] IP/16/2015.

⁵³ [2016] OJ L217/53.

⁵⁴ [2017] OJ L22/65.

⁵⁵ [2017] OJ L228/19.

⁵⁶ [2018] OJ L17/50.

⁵⁷ Commission, ‘Reasoned proposal’ (n 40).

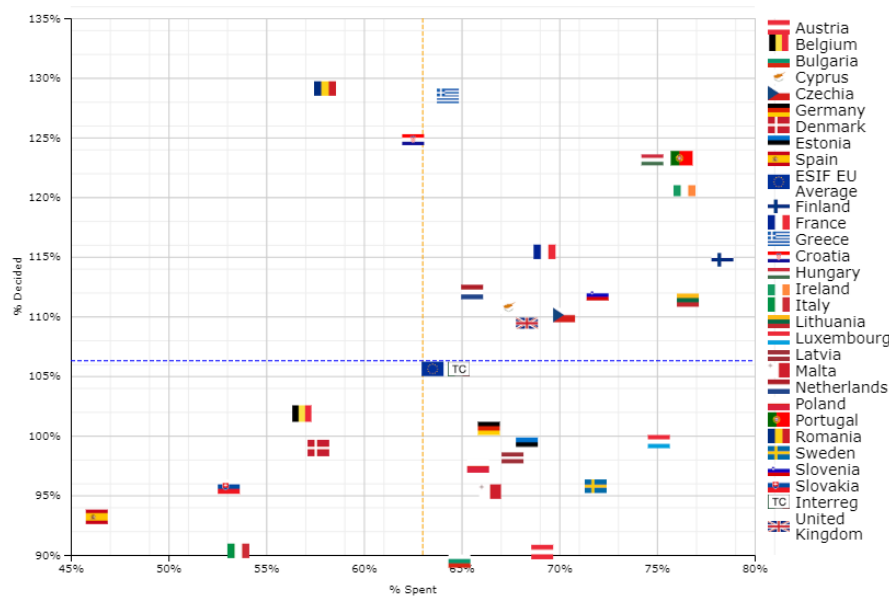
⁵⁸ Commission, ‘2020 Rule of Law Report: The rule of law situation in the European Union’ COM (2020) 580 final.

3 FINANCIAL TOOLS

Why can financial tools be better? Generally, a limitation or suspension of access to the financial sources proved to be a very persuasive argument in many negotiations of any kind (either public, private, national, or international). Indeed, the idea of conditionalizing money with a discipline is not new. Already in 2012, the CJEU explained that the purpose of conditionality, while withdrawing the financial assistance from EU budget, is to ensure the compliance with EU law.⁵⁹ As most of the Member States benefit from the EU budget,⁶⁰ usually through grants of the European Structural and Investment Funds (ESIF) (Figure 2), the EU has been trying to find a better way to conditionalize its drawing.

Figure 2: Overview of 2014-2020 ESIF implementation by MSs

ESIF 2014-2020: EU overview of implementation by country – total cost of selection and spending as % of planned (scatter plot)



Period Covered: up to 30/06/2023

Refresh Date: 28/09/2023

Source: <<https://cohesiondata.ec.europa.eu/overview/14-20>> accessed 28 September 2023

Linking conditions to the budget became a more visible trend in the programming period 2014-2020. This was characterised by *ex ante* conditionalities, which included, in particular, the requirements of arrangements for an effective application of EU public procurement law, anti-discrimination law, or gender equality law.⁶¹ As noticed by Vițar, *ex*

⁵⁹ See Case C-370/12 *Pringle* EU:C:2012:756 para 69

⁶⁰ According to a platform Statista, net contributors to the 2021 EU budget were just Germany, France, The Netherlands, Italy, Sweden, Denmark, Austria, Finland, and Ireland.

<<https://www.statista.com/chart/18794/net-contributors-to-eu-budget/>> accessed 17 September 2023.

⁶¹ Annex XI, Part II of the European Parliament and Council Regulation (EU) No 1303/2013 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 [2013] OJ L347/320.

ante conditionalities positively stimulated MS to start ‘important legislative, institutional and policy reforms in an incredibly short amount of time’.⁶²

However, the good ideas of legislators collided with the requirement that the assessment of compliance with those horizontal principles should be conducted by the MS itself and only during the initial phase (when approving the strategic document and operational programs takes place). The Commission only confirmed the results of the self-assessment provided by the MS. If the Commission did not confirm the assessment due to concerns of compliance with the conditionalities, the MS was given the chance to adopt an Action Plan, which should contain the appropriate measures on how to fix it. However, not complying with the Action Plan did not in fact disqualify the MS from drawing the budget through the ESIF, as the Commission was not consistent in controlling its fulfilment. This was criticised also by the European Court of Auditors (ECA) in its 2021 Special Report.⁶³ ECA pointed out that the ESIF 2013 Common Provision Regulation ‘[d]id not require MS and Commission to monitor whether ex ante conditionalities remained fulfilled through the programme’s lifetime and that is thus unclear, whether the achievements reported in this process had been sustained throughout the entire 2014-2020 period’.⁶⁴ Furthermore, ‘non-fulfilment of ex ante conditionalities rarely had financial consequences’.⁶⁵

Trying to remedy this deficiency, the EU legislators introduced, within 2021-2027 the Multiannual Financial Framework (MFF) and the Next Generation EU (NGEU) programme, three new financial instruments: the Conditionality Regulation,⁶⁶ the European structural and investment funds (ESIF) and the Resilience and Recovery Facility (RRF),⁶⁷ containing a brand-new package of conditionalities regulating the expenditures from the EU budget. Budgetary conditionalities present a toolbox for the protection of the rule of law, different to those from the political or the legal toolboxes. The former can be applied independently from them, as political and legal tools pursue different goals and are subject to different rules.⁶⁸ However, factors, such as ‘strong justice systems, a robust anti-corruption framework, and clear and consistent system of law-making, the protection of the EU’s financial interest, and sustainable growth’,⁶⁹ are common to every tool at stake. Moreover, rule of law factors are key drivers for financial instruments which promote structural reforms in MSs. As noticed by Fisticaro, each of these financial instruments ‘contributes to shape the

⁶² Viorica Vișar, ‘Research for REGI Committee – Conditionalities in Cohesion Policy’ (2018) 11 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/617498/IPOL_STU\(2018\)617498_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/617498/IPOL_STU(2018)617498_EN.pdf)> accessed 10 December 2023.

⁶³ European Court of Auditors, ‘Performance-Based Financing in Cohesion Policy: Worthy Ambitions, but Obstacles Remained in the 2014-2020 Period’ (2022) <<https://www.eca.europa.eu/en/publications?did=59899>> accessed 10 December 2023.

⁶⁴ *ibid* 16.

⁶⁵ *ibid* 17.

⁶⁶ European Parliament and Council Regulation (EU, EURATOM) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L1433/1 (Conditionality Regulation).

⁶⁷ To see the differences between ESIF and RRF, see the comparative analysis of the ECA, available at <https://www.eca.europa.eu/Lists/ECADocuments/RW23_01/RW_RFF_and_Cohesion_funds_EN.pdf> accessed 10 December 2023.

⁶⁸ cf Case C-157/21 *Poland v Parliament and Council* (n 17) para 207; Joined cases 15 and 16/76 *France v Commission* EU:C:1979:29 para 26.

⁶⁹ Commission, ‘2021 Rule of Law Report: The rule of law situation in the European Union’ COM (2021) 700 final.

EU budget as a more values-oriented policy instrument for the coming years'.⁷⁰ Respect for the rule of law within MSs therefore presents an inevitably horizontal conditionality.⁷¹

The research question in this part is focused on whether the new financial tools at the Union's disposal present the effective tools for the protection of rule of law? The case law of the CJEU relating to the application of the tools from the current financial toolbox is rather modest at the time. The author's conclusions are therefore based on her own analysis as well as on analyses by other authors.

3.1 CONDITIONALITY REGULATION

The painful process of operationalization of the Conditionality Regulation already indicated that its application would not be easy.⁷² The European Council's questionable interference with the Commission's independence or the CJEU's exclusive power to interpret EU law⁷³) and a lengthy process (more than a year to the adoption of guidelines⁷⁴ on the application of the Conditionality Regulation by the Commission) raise concerns on whether and how the Commission intends to use this new tool.

To raise the expectations of further Commission's action, the statement of Commissioner Hahn (responsible for the budget and administration) should be recalled:

[W]e cannot make concessions when it comes to protecting the Union's financial interests and its founding values. With conditionality regulation, we have another tool in our toolbox, at a time when we are managing the largest EU budget in history. Where the conditions of the regulation are fulfilled, we will act with determination.⁷⁵

Despite the ultimate effort of Poland and Hungary to sever the linkage between the rule of law and EU money, the CJEU confirmed that the rule of law 'is capable of constituting the basis of a conditionality mechanism covered by the concept of financial rules'⁷⁶ governing the establishment and implementation of a budget as well as the procedure for presenting and auditing accounts.⁷⁷ Sound financial management of the EU budget and the EU's financial interests could be compromised if a MS backslides from the rule of law, as it may result to 'no guarantee that expenditure covered by the EU budget satisfies all the financing

⁷⁰ Marco Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values' (2022) 7 European Papers 697, 719.

⁷¹ cf Case C-157/21 *Poland v Parliament and Council* (n 17) para 154.

⁷² cf Petra Jeney, 'The EU Conditionality Regulation – Variations on Procrastination' (EIPA Briefing 2021/4, 2021) <<https://aei.pitt.edu/103700/>> accessed 10 December 2023; Laurent Pech, 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism' (*Verfassungsblog*, 16 February 2023) <<https://verfassungsblog.de/no-more-excuses/>> accessed 10 December 2023; Izabel Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) 7(2) European Papers 721.

⁷³ Conclusions from European Council meeting (10 and 11 December 2020), EUCO 22/20.

⁷⁴ Communication from the Commission - Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget [2022] OJ C123/12.

⁷⁵ Commission, 'EU budget: Commission publishes guidance on the conditionality mechanism' (Press release, 2 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1468> accessed 10 December 2023.

⁷⁶ Case C-157/21 *Poland v Parliament and Council* (n 17) para 146.

⁷⁷ Art 322(1)(a) TFEU.

conditions laid down by EU law and therefore meets the objectives pursued by the EU when it finances its expenditure'.⁷⁸

However, the Conditionality Regulation 'does not apply to a generalised deficiency of the rule of law'⁷⁹ in a MS and may be used only if other, more suitable tools could not be used more effectively. However, it may 'protect the EU budget in situations where the EU's financial interest may be at risk due to generalised deficiencies of the rule of law in a MS',⁸⁰ i.e., 'in cases of breaches of the rule of law principles that affect or seriously risk affecting the sound financial management of the EU budget or the EU's financial interests in a sufficiently direct way'.⁸¹ Therefore, if the MS implements the EU budget, respect for the rule of law is an essential prerequisite for compliance with the principles of sound financial management.⁸² This is the crucial point, as 70% of the EU budget is spent under a shared management between the Commission and the MSs, with the MSs distributing funds and managing expenditures.⁸³

[S]ound financial management can only be ensured by MSs if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution authorities, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the CJEU.⁸⁴

Under the Conditionality Regulation, a MS, which backslides with the sound financial management of the EU budget by not respecting the rule of law and other fundamental values enshrined in Article 2 TEU, can face the consequences in the form of suspension, reduction, or interruption of payments or budgetary commitments, while its obligation to fulfil financial commitments towards final beneficiaries remains preserved. Any assessment in this regard requires a thorough double consideration (firstly by the Commission and later by the Council) on whether (i) a breach of the rule of law exists, (ii) whether such a breach affects or seriously risks affecting the sound financial management of the EU budget or the EU financial interests in a sufficiently direct way, (iii) whether more suitable measures are not available to protect the EU budget more effectively (negative confirmation is required), and (iv) whether the measure to be taken is proportionate and adequate to remedy the identified deficiency.

⁷⁸ Case C-157/21 *Poland v Parliament and Council* (n 17) para 149.

⁷⁹ European Parliament, 'Economic and Budgetary Outlook for the European Union 2023' [2023] <[https://www.europarl.europa.eu/RegData/etudes/STUD/2023/739313/EPRS_STU\(2023\)739313_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/739313/EPRS_STU(2023)739313_EN.pdf)> accessed 17 September 2023.

⁸⁰ Commission, '2020 Rule of Law Report' (n 58) 26.

⁸¹ European Parliament, 'The Tools for Protecting the EU Budget from Breaches of the Rule of Law: The Conditionality Regulation in Context' (2023) accessed 28 September 2023.

⁸² Conditionality Regulation (n 66) preamble recital 7.


⁸³ European Parliament, 'Implementation of the budget' (*Fact Sheets of the European Union*, 2023) <<https://www.europarl.europa.eu/factsheets/en/sheet/30/implementation-of-the-budget>> accessed 10 December 2023. To the explanation on how the shared financial management see, for example, Viorica Vițăr, 'Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014-2020 Financial Framework' (2017) 18(4) *German Law Journal* 993, 997.

⁸⁴ Conditionality Regulation (n 66) preamble recital 8

The new tool has already been tested and applied in Hungary. Since 2018, Hungary has been facing the procedure under Article 7(1) TEU⁸⁵ and the Commission in its annual Rule of Law Report 2022, 2023 repeatedly declared that the improvement regarding the rule of law was not sufficient. Nevertheless, it took 24 months for the Council, upon a Commission's proposal, to adopt a decision⁸⁶ on the suspension of 55% of the budgetary commitments (i.e. approximately €6.3 billion) in the three programs of Cohesion Policies. In this decision, the Council forbids the Commission, when implementing the EU budget in direct or indirect management, to enter into legal commitments with any public interest trust established on the basis of the Hungarian Act XI of 2021 or any entity maintained by such a public interest trust. Concerns were related to the public procurement, the effectiveness of prosecutorial action, and the fight against the corruption.⁸⁷ As information on the implementation of sufficient remedial measures by Hungary, as well as a Commission proposal on lifting the adopted financial measure are not yet available, it can be concluded that, within 10 months of its application, financial tools were not effective enough to persuade Hungary to respect the rule of law. However, Hungary still has some time left for solving the situation of being sanctioned (suspensions of commitments in implementing decision are just of a 'temporary nature and can be lifted without loss of Union funding) if the situation is fully remedied within two years'.⁸⁸

Poland is in a similar situation as Hungary regarding the rule of law. However, the Commission has not triggered a financial conditionality mechanism against Poland, yet. The fact that the Commission, in its Annex to the 2023 Rule of Law Report,⁸⁹ clearly stated 'no progress' on any of the recommendations formulated in the report from 2022, seems to be irrelevant.

In this regard, Hoxhaj points out that such a benevolent approach of the Commission can be caused by Russia's invasion of Ukraine and that the rule of law compliance was outperformed by the political need to reach consensus in the Council regarding the voting on sanctions against Russia or by other factors relating to providing support for Ukraine.⁹⁰

Similarly to Poland and Hungary, the Commission stated in its 2022, 2023 Rule of Law reports 'no progress' relating to anti-corruption specific recommendations also in Bulgaria, Czechia, Spain, and Austria. However, any determined action regarding the application of relevant measures under the Conditionality Regulation, as announced by Commissioner Hahn, has been adopted yet.  In this regard, one might wonder whether there really is equal treatment of the Member States, and whether, by failing to act, the Commission did not breach its duties as guardian of the treaties? Affirmative answers to these questions could

⁸⁵ Cf n 51.

⁸⁶ Council implementing decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principle of rule of law in Hungary [2022] OJ L325/94.

⁸⁷ Council of the EU, 'Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary' (Press release, 12 December 2020) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>> accessed 10 December 2023.

⁸⁸ *ibid.*

⁸⁹ Commission, '2023 Rule of Law Report: The rule of law situation in the European Union' COM (2023) 800 final.

⁹⁰ Andi Hoxhaj, 'The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5 *Nordic Journal of European Law* 131, 143.

raise doubts, whether the rule of law, the value on which the EU is established, is not jeopardized by the EU institutions themselves.

3.2 ESIF ENABLING CONDITIONALITIES

The ESIF presents the traditional financial tool through which, by receiving grants, MSs achieve cohesion goals. The 2021 Common Provision Regulation⁹¹ complements the enabling conditionality mechanism established by the Conditionality Regulation. It follows up on the conditionalities introduced in the programming period 2014-2020 (gender equality, non-discrimination, sustainable development including climate change mitigation), improves them, and introduces a new one – respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union (Charter) while implementing EU Funds.⁹²

These horizontally enabling conditions can impose an interruption⁹³ (up to six months) of the payment deadline or suspension of all or part payments⁹⁴ and shall impose financial corrections by reducing support from ESIF⁹⁵ on the MS, if it does not comply with the applicable law and does not protect the financial interests of the EU, when it implements EU budget under the shared management. Improvements, compared to the previous Common Provision Regulation [2013] could be seen particularly in the formulation of Charter-related conditionality, which shall apply during all phases of the ESIF implementation and relates not only to the preparatory phase.

New ESIF enabling conditions were already being applied against Hungary. In December 2022, the Commission considered that Hungary was not fulfilling the horizontal enabling condition of the Charter, as Hungarian legislation on ‘child-protection law, and the serious risks to academic freedom and right to asylum have a concrete and direct impact on the compliance with the Charter in the implementation of certain specific objectives of the three cohesion programmes and of the Asylum Migration and Integration Fund respectively’.⁹⁶ This resulted in the Commission’s duty not to reimburse the related expenditures, with a reservation to technical assistance and those expenditures, which leads to fulfilling the enabling conditions. Again, information whether Hungary has remedied the identified deficiencies, remains unavailable.

One might also recall the Polish case of creating ‘LGBT ideology-free zones’ in 2019. The Commission even started an infringement procedure in this regard,⁹⁷ however, not due to the breach of the principle of non-discrimination and equal treatment, but due to the

⁹¹ European Parliament and Council Regulation (EU) 2021/1060 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 [2021] OJ L231/159.

⁹² *ibid* Art 9.

⁹³ *ibid* Art 96.

⁹⁴ *ibid* Art 97.

⁹⁵ *ibid* Art 104.

⁹⁶ Commission, ‘EU Cohesion Policy 2021-2027: Investing in a fair climate and digital transition while strengthening Hungary’s administrative capacity, transparency and prevention of corruption’ (Press release, 22 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801> accessed 10 December 2023.

⁹⁷ No. INFR(2021)2115.

breach of the principle of sincere cooperation stipulated in Article 4(3) TEU, as the ‘Polish authorities have failed to provide the requested information, manifestly omitting to answer most of the Commission’s requests’⁹⁸ relating to their investigation regarding the nature and impact of the resolutions of ‘LGBT-ideology free zones’ adopted by several Polish regions and municipalities. The case is no longer active. Despite the EP’s call for the Commission to monitor the use of ESIF and to take measures to ‘address clear and direct breaches of anti-discrimination rules’,⁹⁹ and published second-hand information on the Commission’s intention to suspend ESIF financing until enabling conditionality on Charter will be fulfilled by Poland,¹⁰⁰ no relevant measures adopted by the Commission in this regard have been officially published so far.

Relevant conclusions on whether this tool works effectively could therefore not be adopted yet. However, as pointed out by Łacny, the problem might be ‘not the lack of adequate legal tools, but the lack of political will on the part of the Commission to use the tools that already exist’.¹⁰¹

3.3 RECOVERY AND RESILIENCE FACILITY

The Recovery and Resilience Facility (RRF) is an important part of the NGEU programme, which was set up to mitigate the socio-economic impact of the Covid-19 pandemic. The RRF, which was introduced by RRF Regulation,¹⁰² is the mechanism within the NGEU programme, under which MSs can apply for grants and loans. The RRF runs concurrently with the ESIF. As explained by the ECA,

[t]his allows MSs to choose to finance investments using either the RRF or the ESIF. The RRF is implemented under direct management, while cohesion policy funds are implemented under shared management. This means that EU and MS authorities have different responsibilities in connection with each source of funding. Regardless of the management mode, the Commission is ultimately responsible for implementing the EU budget. The multi-level governance structure and the partnership principle applicable to cohesion policy funds do not apply to the RRF.¹⁰³

⁹⁸ Commission, ‘EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people’ (Press release, 15 July 2021)

<https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668> accessed 10 December 2023.

⁹⁹ European Parliament, ‘Public discrimination and hate speech against LGBTI people, including LGBTI free zones’ (Resolution) [2019] P9_Ta (2019) 0101.

¹⁰⁰ Alexandra Krysztoszek, ‘Polish LGBT-Free Zones Won’t Get EU Funding, Says French MEP’ (EURACTIV, 18 May 2023) <<https://www.euractiv.com/section/politics/news/polish-lgbt-free-zones-wont-get-eu-funding-says-french-mep/>> accessed 10 December 2023.

¹⁰¹ Justyna Łacny, ‘Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission’s Proposal Legal?’ in Armin von Bogdandy et al, *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer Link 2021).

¹⁰² European Parliament and Council Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L57/17 (RRF Regulation).

¹⁰³ European Court of Auditors, ‘EU Financing through Cohesion Policy and the Recovery and Resilience Facility: A Comparative Analysis’ (2023) 6 <https://www.eca.europa.eu/en/publications/RW23_01> accessed 10 December 2023.

By its nature, the RRF is a temporary tool dedicated to strengthen MSs in the key six pillars pursued by the EU: green transition; digital transformation; smart, sustainable and inclusive growth; social and territorial cohesion; health, economic, social and institutional resilience; and policies for the next generation, children and the youth, such as education and skills.¹⁰⁴ A MS is eligible to receive grants from RRF upon the basis of the Recovery and Resilience Plan (RRP), which must include a detailed plan, explanation and milestones, on how it will contribute to these six pillars; effectively address challenges identified in the relevant country-specific recommendations; how it strengthens the growth potential, job creation and economic, social and institutional resilience of the MS concerned; how it contributes to addressing energy poverty; how the principle of do-not-harm will be applied; and whether it comprises cross-border or multi-country projects.¹⁰⁵ The crucial point is that, even if the MS obtains a Council implementing decision on the approval of the assessment of the recovery and resilience plan, the release of funds is conditional to satisfactory fulfilment of the relevant milestones and targets defined in its RRP.

Regarding our topic, especially the pillar on economic and institutional resilience provides a sufficient place to require adopting relevant measures and reforms to comply with the rule of law. Hungary might serve as an example again. In December 2022, the Council approved its RRP,¹⁰⁶ however, it has also defined a number of enabling conditions including those which relate to the rule of law (for instance, the setting up of an Anti-Corruption Task Force, due implementation of National Anti-Corruption strategy and action plan, measures on strengthening the judicial independence, measures to increase the competition in public procurement, among others).

The performance-based nature of the RRF can then guarantee that funds are disbursed when qualitative (achievement of milestones) and quantitative (achievement of targets) implementation steps will be realised. By November 2023, zero-performance (i.e., any of the milestones and targets were achieved) showed Belgium, Finland, Germany, Hungary, Ireland, and Poland.¹⁰⁷ Despite this, Belgium, Finland and Germany have already disbursed RRF grants.¹⁰⁸ This leads to the conclusion that the performance-based approach to the RRF has the potential to be an effective tool to protect the rule of law. At the same time, concern remain on how the Commission ensures the rule of law and protects the EU budget.

4 CONCLUSION

Does the EU provide effective tools to ensure respect for preserving the rule of law? The answer to this question is not as easy as to say yes or no. It is clear that the EU focus is on prevention rather than to take action against the MS backsliding on the rule of law.

¹⁰⁴ RRF Regulation (n 102) Art 3.

¹⁰⁵ *ibid* Art 18(1).

¹⁰⁶ Council implementing decision on the approval of the assessment of the recovery and resilience plan for Hungary 1544/22 [2022] 0414 (NLE).

¹⁰⁷ Commission, 'Recovery and Resilience Scoreboard – Milestones and Targets' <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/milestones_and_targets.html?lang=en> accessed 2 October 2023.

¹⁰⁸ Commission, 'Recovery and Resilience Scoreboard – Disbursements' <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/disbursements.html?lang=en> accessed 23 November 2023.

The aim of the article was to verify a number of hypotheses on the effectiveness of a particular set of tools, which aim to ensure compliance with the rule of law. Poland and Hungary were used as case-studies to test the capacity of the EU and its political willingness to react to threats and breaches of its own founding values by a MS.

Analysis shows that whenever the application of enforcement tools is left only to the Commission, it seems that political factors outweigh the legal ones. Moreover, the Commission is not keen to go into direct confrontation with the MS concerned.

Poland and Hungary have begun to backslide on the rule of law in 2015. However, after eight years, the Commission was not able to ease the problem. In fact, the situation has worsened.

Infringement proceedings, due to their length, and the apparent Polish and Hungarian disregard to the final judgments on infringements, proved to be an ineffective tool in protecting the rule of law.

A lack of political will to invoke Article 7 TEU (not just on the part of the Commission) paralysed this tool and deprived it from any deterrent effect. Neither soft political tools, such as the Rule of Law Framework, nor the Rule of Law Mechanism have successfully deterred Poland and Hungary from disrespecting EU values. The first hypothesis is therefore considered to be verified.

Likewise, financial tools have not yet proved their potential. However, given the recent application of conditionality in Hungary, there is still some time for MSs to adopt the relevant conclusions in this matter. A great expectation is given to the RRF due to its innovation in the form of performance-based assessment towards the conditionalities, which is rather neutralised with the finding that some MSs were allowed to RRF grants despite not fulfilling the milestones. A solid toolbox of financial measures, which have the potential to ensure a comeback onto the path towards fundamental EU values is therefore relativized by its user. The second hypothesis could therefore not be verified at the moment.

However, the desired effect could be reached if the political and financial system discussed, as well as the legal proceedings under Articles 258-260 TFEU, are applied in tandem. It is upon the Commission to stand to its word and guard the treaties with due care.

The final conclusion is that the EU institutions must not undermine the perception of the rule of law by weak enforcement (if not un-enforcement), undue delays in procedures and unequal treatment of Member States. Precisely such (in)action by the EU may have contributed to such developments as can be seen in Poland and Hungary.

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