**Magdalena Matusiak-Frącczak, PhD**

**Assistant Professor**

**University of Lodz (Poland)**

**A general regime of conditionality for the protection of the Union budget and its legality**

*(draft paper)*

Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as enshrined in Article 2 TEU are values common to the EU Member States. The rule of law requires that public authorities, at the EU and at national level, act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the EU and other applicable instruments, and especially under the control of independent and impartial courts. Once a Member State joins the Union, it confirms that it recognizes and shares the very set of values as described above, among which the rule of law is of a particular importance. The respect for these values is a basic obligation of a Member State.

To this respect the EU created a mechanism of determination of a violation of Article 2 TEU values. The first version of this procedure was inserted into the Treaties due to the situation in Austria, after the far-right party of Jörg Haider – *Freiheitliche Partei Österreich* won the election and presented views contrary to the basic democratic principles.

Currently, in the first stage of the procedure, on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the mentioned values. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure (Article 7(1) TEU). If the Member State at stake continues acting contrary to the values of Article 2 TEU, the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations (Article 7(2) TEU). Once this determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons (Article 7(3) TEU).

The procedure of Article 7 TEU was initiated by the European Commission against Poland in 2017[[1]](#footnote-1) raising the following concerns:

1. the lack of an independent and legitimate constitutional review;
2. the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:
	1. the law on the Supreme Court; approved by the Senate on 15 December 2017;
	2. the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017;
	3. the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 December 2017;
	4. the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017.

The European Parliament supported the Commission in these steps in 2018[[2]](#footnote-2). Afterwards, the European Parliament triggered the application of Article 7 TEU procedure also against Hungary[[3]](#footnote-3) pointing at the following issues: the functioning of the constitutional and electoral system, the 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, academic freedom, freedom of religion, freedom of association, the right to equal treatment, 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. Hungary started an action against the Parliament’s resolution before the CJEU, but the Court dismissed the application[[4]](#footnote-4).

However, as it is now obvious, Article 7 TEU mechanism is helpless or even useless[[5]](#footnote-5) when more than one member state violate the rule of law, as at some point it requires unanimity. There is no chances to reach a unanimous decision required by Article 79(2) TEU, as Poland will block a decision regarding Hungary and the reverse.

Another way of achieving compliance of a member state actions with the principles of Article 2 TEU, including the compliance with the rule of law, is the procedure of Article 258 TFEU and then of Article 260 TFEU. In this case if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations, and afterwards the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the CJEU. Then, if the state does not comply with the judgment of the CJEU, the Court may impose a lump sum or penalty payment on the Member State.

Such procedure has been initiated against Poland because of the disciplinary regime for judges that violates the division of powers and does not comply with the rule of law. On 14 July 2021 the Vice-President of the CJEU issued an order[[6]](#footnote-6) obliging Poland to suspend numerous provisions of the Law on the Supreme Court and the Law relating to the organisation of the ordinary courts that provided for jurisdiction of a bogus Disciplinary Chamber of the Supreme Court in judges’ disciplinary cases in Poland. As Poland did not comply with the order, on 27 October 2021 the Vice-President of the Court delivered another order[[7]](#footnote-7) obliging Poland to pay the European Commission a periodic penalty payment of EUR 1 000 000 per day, from the date on which the present order is notified to the Republic of Poland and until such time as that Member State complies with the obligations arising from the order of the Vice-President of the Court of 14 July 2021, or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C‑204/21. By now, the total sum of this penalty in the case of Poland surpasses EUR 500 000 000, however recently on 21 April 2023, due to changes in the Polish legislation, the Vice-President of the Court reduced the periodic penalty payment to EUR 500 000 per day[[8]](#footnote-8).

In another proceedings in case C-619/18 the CJEU declared that by providing that the measure consisting in lowering the retirement age of the judges of the Supreme Court is to apply to judges in post who were appointed to that court before 3 April 2018 and by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU[[9]](#footnote-9). To that regard the CJEU added in case C-192/18 that in establishing, by Article 13(1) to (3) of the Law amending the Law on the system of ordinary courts and certain other laws of 12 July 2017, a different retirement age for men and women who are judges in the ordinary Polish courts and the Supreme Court or are public prosecutors in Poland, Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Moreover, in granting, pursuant to Article 1(26)(b) and (c) of the Law amending the Law on the system of ordinary courts and certain other laws of 12 July 2017, the Minister for Justice the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, as lowered by Article 13(1) of that law, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU[[10]](#footnote-10). Finally, in case C-791/19 the Court declared that by numerous changes in judges’ disciplinary proceedings Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU[[11]](#footnote-11).

The Court of Justice of the EU confirmed also in other decisions the importance of Article 19(1) TEU for the functioning of the entire European Union and clarified the meaning of the right to a fair trial. It emphasized that the Union is based on the assumption of mutual trust existing between the EU Member States that the values enshrined in Article 2 TEU are recognised by them. Due to this assumption, when implementing EU law, the Member States may be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union[[12]](#footnote-12).

The European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act. That is why the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values, so the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. Therefore, every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection. The most basic requirement is the access to an independent tribunal[[13]](#footnote-13).

On numerous occasions it was confirmed by the Court of Justice of the European Union and by the European Court of Human Rights that the current shape of the Polish judiciary raises serious doubts regarding its independence. These doubts concerned the election process of the judges to the Polish Constitutional Tribunal, as well as the procedure of appointing judges in which the bogus National Council of Judiciary takes part[[14]](#footnote-14). Until 2023 Poland did not comply with any of the above mentioned rulings[[15]](#footnote-15) and as it has been mentioned above, it has done so only recently due to periodic penalty payment and lack of access to selected EU funds.

Because of the situation in Hungary and Poland, the EU needed to adopt to the new political and legal reality. As the course of the events proves, the mechanism provided for in art. 7 TEU, due to formal constraints, does not constitute and effective protection for the EU core values and the EU funds. The Council is reluctant to adopt the necessary decisions and as there are two States that disregard Article 2 TEU principles it is doubtful, whether the unanimity within the European Council will be reached.

It has to be reminded that the EU Member States, including Hungary and Poland, are beneficiaries of the EU budget and they participate in the management and allocation of the EU funds. That is why a suspension or deprivation of funds could be presumably an effective motivator for member states to restore the rule of law[[16]](#footnote-16) that is nowadays under attack and in deep crisis in the EU[[17]](#footnote-17) what poses a threat to the entire Union[[18]](#footnote-18). The EU funds should be protected from cases of fraud, tax evasion, corruption, conflict of interest or other breaches of the law. This aim can only be achieved if there exist at national level both independent and effective investigative authorities and independent and impartial courts, what is emphasized by Article 19(1) TEU.

That is why on 16 December 2020 the EU adopted the regulation no. 2020/2092 on a general regime of conditionality for the protection of the Union budget[[19]](#footnote-19). In the legislative process the text of the regulation has been substantially modified, to achieve a consensus between all EU Member States. A new multiannual financial framework for 2021-2027 and related acts were to be adopted until 31 December 2020[[20]](#footnote-20) and the political dialogue within the EU was intense until the legal acts took the form that could be approved by the governments of Hungary and Poland. The elaboration of the regulation on the regime of conditionality lasted for 2 years, as the initial proposal was presented by the Commission on 2May 2018[[21]](#footnote-21) and the opposition of Hungary and Poland to this regulation put on hold legislative works on the EU budget and a recovery package. Finally the regulation no. 2020/2092 was adopted by qualified majority and both mentioned states voted against it[[22]](#footnote-22).

Even the title of the regulation was changed, as the notion “generalised deficiency as regards the rule of law[[23]](#footnote-23)” was replaced with “general regime of conditionality for the protection of the Union budget”. This change was then followed in the entire text of the act, as it served to emphasize the separation of the regulation from the Article 7 TEU regime.

The regulation defined the rule of law as including the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU (Article 2(a)). Article 3 described indicatives of breaches of the principles of the rule of law, whereas Article 4 provided for very strict condition for the adoption of the measures enshrined in the regulation.

Article 5(1) enumerated the measures that can be applied, when the EU budget is endangered. At the same time, according to Article 5 (2), the affected Member State is obliged to implement the programme or fund affected by the measure, especially it should realize its obligations towards final recipients or beneficiaries, including the obligation to make due payments and the applicable sector-specific or financial rules.

The measures shall be proportionate. They shall be determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, insofar as possible, target the Union actions affected by the breaches (Article 5(3)).

In the first stage of the proceedings the Commission enters into a dialogue with the Member State concerned and in its written notification it sets out the factual elements and specific grounds on which it based its findings. If the response of the Member State is not satisfactory the Commission submits the proposal of measures to be applied to the Council. The decision of the Council is taken by a qualified majority, contrary to Article 7(2) TEU decision that requires unanimity. The possibility of voting by a qualified majority causes that the measures of the regulation no. 2020/2092 seem to be more effective and more probable to be adopted than the Article 7(2) TEU measures.

In its conclusions of 11 December 2020[[24]](#footnote-24), the European Council emphasized that the regulation no. 2020/2092 is to be applied in full respect of the national identities of member states inherent in their fundamental political and constitutional structures, of the principle of conferral, of the principles of objectivity, non-discrimination and equal treatment of member states. The Commission should develop and adopt guidelines in close consultation with member states, and if any action for annulment of the regulation no. 2020/2092 would be introduced, the Commission should finalize the guidelines after the judgment of the CJEU.

At the beginning of 2021 the European Commission, due to the conclusions of the European Council, was reluctant in applying the provisions of the regulation no. 2020/2092. That is why the European Parliament reacted and needed to remind the Commission that it should act completely independently and that a general regime of conditionality for the protection of the Union budget shall apply from 1 January 2021. Moreover, the applicability of this regulation cannot be subject to adoption of any guidelines, as the text agreed is sufficiently clear, and no implementing instruments are foreseen. If a member state or states (here: Hungary and Poland) put into question the validity of the regulation no. 2020/2092, they should do so in the relevant proceedings before the CJEU. The Parliament criticized the European Council because of the above mentioned conclusions. It reminded, that the European Council shall not exercise legislative functions (Article 15 (1) TEU), so its political declaration cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice. That is why the conclusions of the European Council cannot be made binding on the Commission in applying legal acts[[25]](#footnote-25). Nevertheless, the European Council conclusions in fact froze the application of the regulation no. 2020/2092[[26]](#footnote-26).

The situation became more tense after the Polish Constitutional Tribunal questioned the principle of primacy of the European Union law[[27]](#footnote-27). Afterwards, the European Parliament reacted immediately with a resolution of 21 October 2021[[28]](#footnote-28). In this resolution the Parliament called the Commission and the Council to take urgent and coordinated action by:

1. launching infringement procedures in relation to the legislation on the illegitimate ‘Constitutional Tribunal’, its unlawful composition and its role in preventing compliance with the judgments of the CJEU, and asking the CJEU to impose interim measures as well as launching infringement proceedings in relation to the Extraordinary Control and Public Affairs Chamber of the Supreme Court, the National Council of the Judiciary and the State Prosecution Services of Poland;
2. triggering the procedure provided for in Article 6(1) of the Rule of Law Conditionality Regulation for Poland, on the part of the Commission, while recalling that Article 5 of the regulation protects access to funding for final recipients and beneficiaries and directing the Commission to do its utmost to ensure that payments are made;
3. refraining from approving the draft recovery and resilience plan of Poland until the Government of Poland implements the judgments of the CJEU and international courts fully and properly, and ensuring that the assessment of the plan guarantees compliance with the relevant country-specific recommendations, in particular on safeguarding judicial independence;
4. adopting unambiguous recommendations, which does not require unanimity, to address breaches of the rule of law by Poland, with a clear timeline, and declaring that there is a clear risk of a serious breach of the rule of law by Poland, in accordance with the procedure laid down in Article 7(1) TEU, on the part of the Council, and expanding the scope of this procedure to cover fundamental rights and democracy;
5. using their powers, including interrupting or suspending payments or making financial corrections where necessary, in accordance with the applicable Common Provisions Regulation, given the risk of serious deficiencies in the effective functioning of the control systems in Poland due to the lack of judicial independence that puts at risk the legality and regularity of expenditure;
6. discussing the rule of law crisis in Poland in the presence of the President of the European Parliament and taking a clear position, issuing a joint declaration in the strongest possible terms on the matter signed by the EU heads of state and government at their upcoming summit on 21-22 October 2021, and having an urgent follow-up at the next General Affairs Council.

As it was mentioned before, despite numerous changes to the text of the regulation no. 2020/2092 during the legislative process, Hungary and Poland were raising doubts about the legality of this regulation. They claimed, i.a. that the regulation lacked a legal basis and that it had been adopted to omit very strict exigencies of art. 7 TEU, but also that the regulation poses a threat to sovereignty and equality of the Member States and violates the principle of legal certainty. In two judgments of 16 February 2022[[29]](#footnote-29) the Court of Justice rejected the Hungarian and Polish arguments.

Regards the argument that the EU lacked the competence to adopt the regulation no. 2020/2092 the Court of Justice referred to the Article 322(1)(a) TFEU, according to which the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts and concluded that these rules cover not only the rules which define how expenditure shown in the budget is to be implemented as such but also, in particular, the rules which determine the control and audit obligations on the Member States when the Commission implements the budget in cooperation with them, and the resulting responsibilities. Moreover, they are intended to ensure observance of the principle of sound financial management, including by the Member States, when implementing the Union budget[[30]](#footnote-30).

The Court emphasized that the purpose of the contested regulation is to protect the Union budget from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not to penalise those breaches as such and this aim is in line with the requirement that the Union budget be implemented in accordance with the principle of sound financial management, laid down in particular in Article 310(5) TFEU[[31]](#footnote-31).

The values of Article 2 TEU define the very identity of the European Union and the EU must be able to defend them. The EU budget itself is one of principal instruments permitting realisation of values enshrined in Article 2 TEU. The Court indicated that there is a clear relationship between respect for the value of the rule of law and the efficient implementation of the Union budget, in accordance with the principles of sound financial management, and the protection of the financial interests of the Union, which are liable to be seriously compromised by breaches of the principles of the rule of law committed in a Member State, since those breaches may result in the lack of guarantees that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure. In particular, the absence of effective judicial review poses a threat to the EU budget[[32]](#footnote-32).

The Court paid attention to the fact that the regulation 2020/2092 allows the EU institutions to examine situations in the Member States only in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union and appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way. Therefore, this regulation does not cover other situations in which the EU law can be applied and can have effects for the Member State concerned[[33]](#footnote-33). On the other hand, a breach does not have to be actual, a mere potential effect is sufficient to trigger the application of the regulation[[34]](#footnote-34).

In addition, the provisions of the regulation 2020/2092 do not circumvent Article 7 TEU. Nevertheless, the rule of law in the European Union can be protected not only by the Article 7 procedure. The EU legislature cannot establish a procedure parallel to that laid down by that provision, having the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision. On the other hand it is permissible to establish other procedures relating to the Article 2 TEU values provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU[[35]](#footnote-35).

The procedures of Article 7 TEU and of the regulation 2020/2092 have different purposes and various scopes of their applicability. The procedure of Article 7 TEU covers all values of Article 2 TEU, whereas the regulation 2020/2092 focuses on the rule of law solely. As a result, each of the procedures provides for its unique measures to be undertaken in case of a violation[[36]](#footnote-36).

Regarding the alleged violation of legal certainty, Hungary and Poland raised that the concept of the ‘rule of law’ is too general, it lacks a precise definition and therefore cannot be given a uniform interpretation. The rules of the EU law should be clear and precise and their application should be foreseeable to those subject to the law. This requirement neither precludes the EU from having recourse to an abstract legal notion, nor as requiring that such an abstract norm refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature. The mere fact that a law confers a discretion on the authorities responsible for implementing it is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference[[37]](#footnote-37).

The text of the regulation 2020/2092 refers to principles, forming part of the rule of law, that have been the subject of extensive case-law of the CJEU. Moreover, these very principles have their source in common values which are also recognised and applied by the Member States in their own legal systems. In application of the provisions of the regulation 2020/2092 the Commission and the Council are subject to procedural requirements and they must adopt an evidence-based approach and respect the principles of objectivity, non-discrimination and equal treatment of Member States. In addition, the regulation does not allow arbitrary penalties to be imposed in uncertain or unproven situations, as the EU institutions are obliged to impose penalties with the full respect of the principle of proportionality. The sources, on which the institutions are to form their decisions, should be objective, impartial and fair, should respect the principles of objectivity, non-discrimination and equality of Member States. It can be therefore concluded, that all aspects of the application of the regulation are completely foreseeable[[38]](#footnote-38).

Poland raised in its application to the CJEU that the contested regulation violates the principle of equality of the EU Member States and it does not respect national identities of the Member States. To this regard the Court once again referred to Article 2 TEU obligations of the Member States and emphasized that obligation to observe those principles constitutes an obligation as to the result to be achieved on the part of the Member States, which flows directly from their membership of the European Union, pursuant to Article 2 TEU, which no Member State may disregard and which the contested regulation merely implements as regards action by the national authorities relating to expenditure covered by the Union budget. As the European Union respects the national identities of Member States, inherent in their fundamental structures, political and constitutional, it is for its institutions to take account of the characteristics of the constitutional and legal systems of those Member States, when they verify whether the Member States satisfy the obligations as to the result to be achieved which arise directly from their membership of the European Union, pursuant to Article 2 TEU. Therefore Poland could not claim that it did not have specific and precise knowledge of the obligations as to the result to be achieved binding on it due to its accession to the European Union, in terms of respect for the value of the rule of law. Those principles of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems. For the very same reasons the contested regulation did not violate the principle of legal certainty[[39]](#footnote-39).

Briefly after the judgments were delivered, the Commission adopted the necessary guidelines on 2 March 2022[[40]](#footnote-40). The European Commission decided that it will carry out a thorough qualitative assessment on a case-by-case basis based on actual facts or evidence. A mere finding that a breach of the principles of the rule of law exists is not sufficient to trigger the application of the regulation no. 2020/2092. In addition to that the Commission will have to confirm that the violation itself affects or seriously risks affecting the sound financial management of the EU budget or the financial interests of the Union. The link between the violation and the risk to the sound management of the Union budget should be direct and real, and not merely hypothetical, too uncertain or too vague. The Commission will initiate the procedure where it has reasonable grounds to consider that **at least one of the rule of law principles referred to in the conditionality regulation has been breached,** the **breach concerns situations or conducts of public authorities or can be attributed to them and** the **breach affects or risks seriously affecting the sound financial management of the EU budget or the protection of the EU's financial interests and there is** a **sufficiently direct relation** between the breach and its effects[[41]](#footnote-41).

The European Commission proposed budget protection measures under the regulation no. 2020/2092 on 18 September 2022 against Hungary. In 2022 the Hungarian authorities presented a set of measures to remedy the breaches of the rule of law, yet the Commission did not found these measures adequate. According to the Commission, adequate measures would need to put an end to the breaches of the principles of rule of law and/or to the risks they create for the EU budget and the Union's financial interests. Due to this fact the Commission proposed that **65% of the commitments for three operational programmes under cohesion policy should be suspended**. Moreover a prohibition to **enter into legal commitments** with the public interest trusts **for programs implemented in direct and indirect management should be adopted**[[42]](#footnote-42)**. By 30 November 2022 r. Hungary implemented merely 17 remedial measures and according to the Commission it had not progressed enough in order to be granted its Recovery and Resilience funds**[[43]](#footnote-43)**.**

**On 15 December 2022 the Council adopted the implementing decision**[[44]](#footnote-44)**. It decided that** 55 % of the budgetary commitments under the following operational programmes in Cohesion Policy, once approved, shall be suspended: Environmental and Energy Efficiency Operational Programme Plus, Integrated Transport Operational Programme Plus and Territorial and Settlement Development Operational Programme Plus (Article 2(1)). Moreover, no legal commitments shall be entered into with any Hungarian public interest trust established on the basis of the Hungarian Act IX of 2021 or any entity maintained by such a public interest trust (Article 2(2)).

By now, no measures on the basis of the regulation no. 2020/2092 have been adopted nor even suggested against Poland. One of the reasons is probably the Polish participation in help to the Ukraine because of the Russian invasion[[45]](#footnote-45).

To sum up, the adopted regulation and its application scheme are considered to be less ambitious than the original proposal, yet it is still a significant step in strengthening the rule of law in the European Union[[46]](#footnote-46). However, taking into consideration a possible collision with Article 7 TEU, the text of the regulation no. 2020/2092 could not be formulated differently, because otherwise it would be quashed by the Court of Justice of the European Union.

On the other hand some authors indicate, that the regulation no. 2020/2092 strengthened the protection in relation to original draft, as the draft required a general deficiency as regards the rule of law to launch the provisions of the regulation whereas in the final text even a single breach of the law of law may be sufficient to this aim[[47]](#footnote-47). This view is supported by the text of the motives of the regulation: (15) Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.

Nevertheless, what is problematic is the application of the regulation no. 2020/2092. Until now it was put into effect once in reference to Hungary. Yet, both Hungary and Poland (and recently even Romania) are reluctant in bringing end to violations of the rule of law. Other EU law instruments seem even more ineffective as the procedure of Article 7 TEU is impossible to finalize and these states do not comply with the CJEU’s judgments delivered under Article 258 TFEU.

1. European Commission, proposal of 20 December 2017 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) 835 final 2017/0360(NLE), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0835>, accessed: 2023-04-22. [↑](#footnote-ref-1)
2. European Parliament, resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP)), <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html>, accessed: 2023-03-04. [↑](#footnote-ref-2)
3. 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)), <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html>, accessed: 2023-03-04. [↑](#footnote-ref-3)
4. CJEU, C-650/18 *Hungary v. European Parliament,* judgment of 3 June 2021, ECLI:EU:C:2021:426. [↑](#footnote-ref-4)
5. Beatrice Monciunskaite, *To Live and to Learn: The EU Commission’s Failure to Recognise Rule of Law Deficiencies in Lithuania,* Hague Journal on the Rule of Law 2022, no. 14, p. 50, 52. [↑](#footnote-ref-5)
6. CJEU, C-204/21 R *European Commission v. Poland,* order of the Vice-President of the Court of 14 July 2021, ECLI:EU:C:2021:593. [↑](#footnote-ref-6)
7. CJEU, C-204/21 R *European Commission v. Poland,* order of the Vice-President of the Court of 27 October 2021, ECLI:EU:C:2021:878 [↑](#footnote-ref-7)
8. Magdalena Gałczyńska, *TSUE obniża karę dzienną dla Polski. „Jestem zaskoczony”,* <https://wiadomosci.onet.pl/tylko-w-onecie/tsue-obniza-kare-dzienna-dla-polski-jestem-zaskoczony/9564kdk>, accessed: 2023-04-22. [↑](#footnote-ref-8)
9. CJEU, C-619/18 *European Commission v. Poland,* judgment of 24 June 2019, ECLI:EU:C:2019:325. [↑](#footnote-ref-9)
10. CJEU, C-192/18 *European Commission v. Poland,* judgment of 5 November 2019, ECLI:EU:C:2019:924. [↑](#footnote-ref-10)
11. CJEU, C-791/19 *European Commission v. Poland,* judgment of 15 July 2021, ECLI:EU:C:2021:596. [↑](#footnote-ref-11)
12. CJEU, 2/13 (*Accession of the European Union to the ECHR*), opinion of 18.12.2014, ECLI:EU:C:2014:2454. [↑](#footnote-ref-12)
13. CJEU, C-64/16 *Associação Sindical dos Juízes Portugueses,* judgment of 27.2.2018, ECLI:EU:C:2018:117; C-216/18 PPU *LM,* judgment of 25.7.2018, ECLI:EU:C:2018:586. [↑](#footnote-ref-13)
14. CJEU, C‑585/18, C‑624/18 and C‑625/18 *Krajowa Rada Sądownictwa i Sąd Najwyższy,* judgment of 19.11.2019, ECLI:EU:C:2019:982; C‑354/20 PPU i C‑412/20 PPU *L and P,* judgment of 17.12.2000, ECLI:EU:C:2020:1033. ECtHR, *Xero Flor sp. z o.o. v. Poland,* app. no. 4907/18, judgment of 7.5.2021; *Reczkowicz v. Poland,* app. no. 43447/19, judgment of 22.7.2021; *Dolińska-Ficek and Ozimek v. Poland,* app. nos. 49868/19, 57511/19, judgment of 8.11.2021; *Juszczyszyn v. Poland,* app. no. 35599/20, judgment of 6.10.2022. [↑](#footnote-ref-14)
15. Eric Maurice, *Rule of law: the uncertain gamble on conditionality,* European Issues 14 March 2023, no. 660, p. 1. [↑](#footnote-ref-15)
16. Justyna Łacny, *The Rule of Law Conditionality Under Regulation No 2020/2092 – is it all About the Money?,* Hague Journal on the Rule of Law 2021, No. 13, p. 82. 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,* Nordic Journal of European Law 2022, no. 1, p. 141. [↑](#footnote-ref-16)
17. Dimitris Liakopoulos, *The rule of law conditionality. Opportunities and challenges,* Revista de Estudios Europeos 2023, no. 81, p. 21. [↑](#footnote-ref-17)
18. Beatrice Monciunskaite, *To Live and to Learn: The EU Commission’s Failure to Recognise Rule of Law Deficiencies in Lithuania,* Hague Journal on the Rule of Law 2022, no. 14, p. 50. [↑](#footnote-ref-18)
19. 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, OJ L 433I, p. 1, 22.12.2020. [↑](#footnote-ref-19)
20. The MFF was eventually adopted on the 17th Dec. 2020: Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I, p. 11, 22.12.2020. [↑](#footnote-ref-20)
21. European Commission, Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, 2.5.2018, COM(2018) 324 final, 2018/0136(COD). [↑](#footnote-ref-21)
22. Takis Tridimas, *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, 16 Croatian Yearbook of European Law and Policy 2020, No. 16, p. VIII, XII. [↑](#footnote-ref-22)
23. This notion was simply too vague and imprecise and risked arbitrariness: Antonia Baraggia, Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges,* German Law Journal 2022, no. 23, p. 149. [↑](#footnote-ref-23)
24. European Council, Conclusions 10 and 11 December, EUCO 22/20 CO EUR 17 CONCL 8. [↑](#footnote-ref-24)
25. European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)), <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0360_EN.html>, accessed: 2023-04-22. Similarly: CJEU, C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen,* judgment of 26 February 1991, ECLI:EU:C:1991:80. [↑](#footnote-ref-25)
26. Antonia Baraggia, Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges,* German Law Journal 2022, no. 23, p. 132. Beatrice Monciunskaite, *To Live and to Learn: The EU Commission’s Failure to Recognise Rule of Law Deficiencies in Lithuania,* Hague Journal on the Rule of Law 2022, no. 14, p. 53-54. [↑](#footnote-ref-26)
27. Constitutional Tribunal (Poland), judgment of 7 October 2021, K 3/21. [↑](#footnote-ref-27)
28. European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law (2021/2935(RSP)), <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0439_EN.html#def_1_20>, accessed: 2023-04-22. [↑](#footnote-ref-28)
29. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. Court of Justice, C-157/21 *Poland v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:98. [↑](#footnote-ref-29)
30. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. [↑](#footnote-ref-30)
31. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. Court of Justice, C-157/21 *Poland v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:98. [↑](#footnote-ref-31)
32. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. Court of Justice, C-157/21 *Poland v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:98. [↑](#footnote-ref-32)
33. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. Court of Justice, C-157/21 *Poland v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:98. [↑](#footnote-ref-33)
34. Takis Tridimas, *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, 16 Croatian Yearbook of European Law and Policy 2020, No. 16, p. XVI. [↑](#footnote-ref-34)
35. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. Court of Justice, C-157/21 *Poland v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:98. [↑](#footnote-ref-35)
36. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. [↑](#footnote-ref-36)
37. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. [↑](#footnote-ref-37)
38. Court of Justice, C-156/21 *Hungary v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:97. [↑](#footnote-ref-38)
39. Court of Justice, C-157/21 *Poland v. European Parliament and Council,* judgment of 16 February 2022, ECLI:EU:C:2022:98. [↑](#footnote-ref-39)
40. 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, C (2022) 1382 final, <https://commission.europa.eu/document/download/0cd06dc0-92be-4802-8637-9b2d4799c3fe_en?filename=c_2022_1382_3_en_act_part1_v7.pdf>, accessed: 2023-04-22. [↑](#footnote-ref-40)
41. European Commission, Questions and answers: Commission guidance on the conditionality mechanism, <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_1471>, accessed: 2023-04-23. [↑](#footnote-ref-41)
42. European Commission, EU budget: Commission proposes measures to the Council under the conditionality regulation, <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5623>, accessed: 2023-04-22. [↑](#footnote-ref-42)
43. European Commission, Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds, <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273>, accessed: 2023-04-22. [↑](#footnote-ref-43)
44. Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022, p. 94. [↑](#footnote-ref-44)
45. 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,* Nordic Journal of European Law 2022, no. 1, p. 143. [↑](#footnote-ref-45)
46. Antonia Baraggia, Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges,* German Law Journal 2022, no. 23, p. 131-132, 146, 155. [↑](#footnote-ref-46)
47. Justyna Łacny, *The Rule of Law Conditionality Under Regulation No 2020/2092 – is it all About the Money?,* Hague Journal on the Rule of Law 2021, No. 13, p. 102. Takis Tridimas, *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, 16 Croatian Yearbook of European Law and Policy 2020, No. 16, p. XIV. [↑](#footnote-ref-47)