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# EU Regulatory Polity 3.0 for Compliance with the Rule of Law: When Depoliticising Goals Lead to Uneven Politicisation

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## Abstract

Since limiting judicial independence in Hungary and Poland, the politics of the rule of law crisis have been examined by various scholars discussing conflicts within and between EU and domestic institutions. The rule of law is no longer a purely national affair – it is of high political salience both for the Member States and the EU polity. The question addressed here is: how has the rule of law crisis reshaped the EU's modes of governance? We argue that to safeguard this common value, the EU is evolving into a regulatory polity (3.0). This development marks a shift from Majone's EU regulatory state's focus on regulating markets (1.0) and regulation in core state powers in times of crises (2.0) to regulation on the core values of the polity (3.0). The article shows that in a context of growing dissensus over the rule of law, EU institutional actors have sought to strengthen “rulemaking,” “rule monitoring” and “rule enforcement” through a regulatory approach anchored in a market logic. It also shows that shifting from the traditional regulatory state 1.0 to regulation in core state powers 2.0, the regulatory polity 3.0 strengthens the EU's institutional capacity to act when the rule of law is under strain through depoliticised “rule monitoring” and politicised “rulemaking” and “rule enforcement” as illustrated in the cases of Hungary and Poland discussed in this article.

**Keywords:** Conditionality; Hungary; Poland; regulatory polity; regulatory state; rule of law

## I. Introduction

The year 2024 marks the 20th anniversary of the European Union (EU) enlargement towards Central and Eastern Europe. In the years following the collapse of communism and preceding the EU's largest expansion, Hungary and Poland were at the forefront as successful candidates, cultivating institutional reforms, stimulating vibrant civil societies and, ultimately, consolidating their transition towards liberal democracy. However, only a few years after their accession to the EU, the common values of the Union came under systemic threat in both countries. Following the electoral successes of Fidesz in Hungary since 2010 and the Law and Justice Party (PiS) in Poland from 2015 to 2023, the two countries have embarked on a process of de-Europeanisation. Both governments have amended provisions adopted in order to join the EU and replaced these with numerous new and contested measures, limiting judicial independence and blatantly seeking to dismantle the political order established after the collapse of communism in 1989.<sup>1</sup> The anti-liberal values promoted by Fidesz and PiS have affected not only the domestic

<sup>1</sup> R Coman, *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges* (Palgrave 2022)

institutions meant to be strengthened and democratised prior to EU accession through the diffusion of the Copenhagen criteria. They have also shaped domestic policies and institutional changes, standing in contradiction to the common values enshrined in Article 2 of the Treaty on European Union (TEU).<sup>2</sup> The foundations of the EU as a polity have thus been under threat.

Despite the gradual constitutionalisation of common values,<sup>3</sup> in the face democratic backsliding in Poland and Hungary,<sup>4</sup> the Commission, the Council and the European Parliament (EP) have been divided as to how to respond. Political actors of all persuasions have argued that the EU lacked the formal powers and the institutional capacity needed to establish the appropriate rules and to monitor and enforce their compliance and transposition in the Member States. The narrative about the need for new instruments has prevailed,<sup>5</sup> legitimising the “rhetoric of inaction”<sup>6</sup> and masking a lack of political will to confront the Hungarian Fidesz and Polish PiS governments. Gradually, in response to Hungary and Poland’s de-Europeanisation and paths towards autocratisation,<sup>7</sup> new tools have been established that allow the EU to safeguard the rule of law, by suspending funds in case of breaches that affect the sound management of the EU budget, yet with limited impact on the ground. The establishment of each rule of law policy instrument – ranging from the European Semester and the Rule of Law Framework to the Rule of Law Annual Report and a series of regulations, including 2020/2092 on a general regime of conditionality for the protection of the EU budget – has been a battle between and within EU institutions. While EU institutional actors repeatedly insisted on the lack of appropriate tools prior to 2018, some academics argued that these new policy instruments – hard and soft – were superfluous<sup>8</sup> as the Union already had the necessary tools to act. Others contended that through these tools the EU has established a rule of law policy, seeking to strengthen its legitimacy in a field touching on the core state powers.<sup>9</sup> Various scholars have analysed the politics of the rule of law crisis, explaining the cautious approach of the Commission<sup>10</sup> or its forbearance,<sup>11</sup> the political divisions in the EP, the silence of the ministers in the Council, the prominent role of the European Council<sup>12</sup> and the decisions of the Court of Justice of the European Union (CJEU). Against this backdrop, the question is: how has the rule of law crisis reshaped the EU’s modes of governance to safeguard the rule of law?

Historically, the EU has emerged and developed its main policies in reaction to crises, such as the crises of the welfare state,<sup>13</sup> or in reaction to the rational will of Member States

<sup>2</sup> For an analysis of the post-communist transformations, see D Kosar, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016).

<sup>3</sup> G De Burca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

<sup>4</sup> L Pech and KL Scheppele, “illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19(3) *Cambridge Yearbook of European Legal Studies* 3.

<sup>5</sup> Coman, *supra*, n 1.

<sup>6</sup> C Emmons and T Pavone, “The rhetoric of inaction: failing to fail forward in the EU’s rule of law crisis” (2021) 28(10) *Journal of European Public Policy* 1611.

<sup>7</sup> Pech and Scheppele, *supra*, note 4; D Kelemen, “The European Union’s authoritarian equilibrium” (2020) 27(3) *Journal of European Public Policy* 481.

<sup>8</sup> D Kelemen, “Will the European Union escape its autocracy trap” (2024) *Journal of European Public Policy* (<https://doi.org/10.1080/13501763.2024.2314739>) (last accessed 20 August 2024).

<sup>9</sup> Coman, *supra*, n 1.

<sup>10</sup> C Closa, “The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance” (2019) 26(5) *Journal of European Public Policy* 696.

<sup>11</sup> D Kelemen and T Pavone, “Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union” (2023) 75(4) *World Politics* 779.

<sup>12</sup> D Bohle, B Greskovits and M Naczyk, “The Gramscian Politics of Europe’s Rule of Law Crisis” (2023) *Journal of European Public Policy*, 31(7), 1775–98.

<sup>13</sup> K Yeung “The Regulatory State” in R Baldwin, M Cave and M Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press 2010).

to maximise economic benefits by insulating political decisions from the public sphere, increasing the capacity to attract foreign capital and reducing transaction costs. Without being a classic international organisation, and even less a state, the EU has evolved into something that Majone described as a regulatory state.<sup>14</sup> Not only has the EU expanded its scope in the post-Maastricht era, but also under the impact of the last decade's polycrisis (e.g. sovereign debt, COVID-19 and rule of law crises), the regulatory state has diversified its functions,<sup>15</sup> marking a shift<sup>16</sup> from regulating markets<sup>17</sup> to regulation in the core powers<sup>18</sup> of the polity. While the EU's initial regulatory state focused on the market and policy areas<sup>19</sup> such as EU health, safety and environmental concerns, which we can consider as a first stage – regulatory state 1.0, since 2010 regulation has expanded to new sectors in core powers, responding to challenges such as the financial and economic crisis,<sup>20</sup> migration and cyber security, paving the way towards a new stage – a regulatory state 2.0. The rule of law crisis has marked another shift, with the EU evolving into what we define a regulatory polity 3.0. Regulatory polity 3.0 is a new stage in the integration process in which regulation shapes the relationship between the national and supranational levels (as in 1.0) in new areas of core powers (as in 2.0), yet touching on not only the policies but also the values at the core of the polity (3.0). However, while the traditional regulatory state was based on depoliticisation, the EU's regulatory polity 3.0 opens the way towards uneven politicisation. The aim of regulation is not only to respond to national problems but also to strengthen the EU's capacity to act through rule monitoring and enforcement powers. Put differently, to restore the rule of law undermined by the Hungarian Fidesz and PiS-led governments,<sup>21</sup> EU institutions have followed a regulatory approach that emulates a market logic and strengthens the EU's monitoring and enforcement powers in its relations with Member States – but with a twist. While traditionally the logic of regulation is to depoliticise the issue at stake, we show that the regulatory polity 3.0 leads to uneven politicisation both at the EU and national levels. As an illustration, not only does politicisation occur at the supranational level in the relations between EU institutions and the Member States concerned, but it also occurs at the national level. During the 2023 Polish election, the campaign of the PiS opposition, which subsequently won the election and formed a cabinet, was characterised by “the overarching goal of restoring the rule of law and respect for the democratic procedures of liberal democracy in the country.”<sup>22</sup>

The article is organised as follows: Section II focuses on the EU regulatory state approach, offering a discussion of its evolution from 1.0 to 2.0 and theorising the emergence of a regulatory polity 3.0. Sections III and IV put forward key features of regulatory polity, respectively, “rule production,” “rule monitoring” and “rule enforcement” for the rule of law. Whereas the regulatory approach is meant to depoliticise the issues at stake, Section V illustrates the uneven politicisation at the core of the regulatory

<sup>14</sup> G Majone, “From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance” (1997) 17(2) *Journal of Public Policy* 139, 150.

<sup>15</sup> P Genschel and M Jachtenfuchs, “Introduction: Beyond Market Regulation. Analysing the European Integration of Core State Powers” in P Genschel and M Jachtenfuchs (eds), *Beyond the regulatory polity? The European Integration of Core State Powers* (Oxford University Press 2014).

<sup>16</sup> G Majone, “The Rise of the Regulatory State in Europe” (1994) 17(3) *West European Politics* 77.

<sup>17</sup> Majone, supra n 14.

<sup>18</sup> Genschel and Jachtenfuchs, supra n 15.

<sup>19</sup> E Vos, “Three Decades of EU Risk Regulation Research” (2017) 8(1) *European Journal of Risk Regulation* 47.

<sup>20</sup> JA Caporaso, M-H Ki, WN Durrett and RB Wesley, “Still a Regulatory State? The European Union and the Financial Crisis” (2015) 22(7) *Journal of European Public Policy* 889.

<sup>21</sup> Specifically, we are referring to the challenges against the rule of law and judicial independence by the Fidesz-led cabinets formed after the 2010 election and the PiS-led governments from 2015 until the 2023 election.

<sup>22</sup> R Markowski, “The Polish Election of 2023: Mobilisation in Defence of Liberal Democracy” (2024) 47(7) *West European Politics* 1670, 1681.

polity, with a focus on the relationship between the Commission and the Hungarian and Polish governments.

## II. From Majone's regulatory state approach to the EU as a regulatory polity

The study of the EU has given rise to important normative and theoretical questions about how to analyse this *sui generis* political construction and to a new grammar and concepts, whether borrowed from other disciplines or arising from comparisons with other objects of study. Being neither a state nor an international organisation, the EU has been conceptualised as a community of rights, as a community of norms and values, as a “political order”<sup>23</sup> or a “polity beyond the state.”<sup>24</sup> The comparative perspective has also provided novel insights to understand its development, with scholars pointing out the interest of using the state-building perspective.<sup>25</sup> Against this backdrop, the EU has been analysed as a “legal state” or as a “law state,”<sup>26</sup> that is, “a political order constructed through the progressive expansion of judicial institutions.”<sup>27</sup> Others have studied the EU through the lens of the regulatory state.<sup>28</sup> According to the risk-based regulation doctrine, not only does a regulatory strategy seek to regulate behaviour, but it should also “increase its intensity (using command and control instead of incentives or disclosure regulation) according to the risk-type of the regulates.”<sup>29</sup> The regulatory approach is meant to serve as a non-majoritarian antidote to politicisation<sup>30</sup> because, as Majone put it, “The Union is not, and may never become, a state in the modern sense of the concept. It is, at most, a ‘regulatory state’ since it exhibits some of the features of statehood only in the important but limited area of economic and social regulation.”<sup>31</sup>

### I. The EU regulatory state 1.0

Historically, few regulatory policies were mentioned in the first EU treaties, such as those related to agriculture, transports and energy; agriculture, regional development and social programs are more distributive or redistributive than regulatory in nature.<sup>32</sup> However, it is mainly through regulation that the EU has also intervened in the fields of social and labour market policy. To explain the expansion of the regulatory state, Majone argued that “because the Community budget is too small to allow large-scale initiatives in the core areas of welfare-state activities – redistributive social policy and macroeconomic stabilisation – the EU executive could increase its influence only by expanding the scope of its regulatory programmes: rulemaking puts a good deal of power in the hands of the Brussels authorities, in spite of the tight budgetary constraints imposed by the Member States.”<sup>33</sup> In other words,

<sup>23</sup> JP Olsen, “Democratic Accountability and the Changing European Political Order” (2018), 24(1) *European Law Journal* 77; JE Fossum, “The Institutional Make-Up of Europe's Segmented Political Order” in J Batora and JE Fossum (eds) *Towards A Segmented European Political Order* (Routledge 2019).

<sup>24</sup> N Walker, *Sovereignty in Transition* (Hart Publishing 2003).

<sup>25</sup> S Bartolini, *Restructuring Europe* (Oxford University Press 2007).

<sup>26</sup> D Kelemen and T Pavone, “The Political Geography of Legal Integration. Visualizing Institutional Change in the European Union” (2018) 70(3) *World Politic* 358, 358.

<sup>27</sup> *Ibid* 358.

<sup>28</sup> Majone, *supra* n 14; see also D Levi-Faur, “The Welfare State: A Regulatory Perspective” (2014) 92 *Public Administration* 599.

<sup>29</sup> N Rangone, “Making Law Effective: Behavioural Insights into Compliance” (2018) 9(3) *European Journal of Risk Regulation* 483.

<sup>30</sup> G Majone, *Regulating Europe* (Routledge 1996) 285.

<sup>31</sup> *Ibid*, 287.

<sup>32</sup> Majone, *supra* n 16.

<sup>33</sup> G Majone, “The regulatory State and its Legitimacy Problems” (1999) 22(1) *West European Politics* 1.

without resources the EU had no alternative but to develop as an almost pure type of regulatory state.<sup>34</sup> In this configuration of the regulatory state, the EU was responsible for the creation of the market, while national governments retained their control over core areas such as taxation, internal and external security and redistribution.

Regulation is one of the three forms of intervention in the economy, alongside income redistribution and macroeconomic stabilisation.<sup>35</sup> This does not imply that these forms of intervention exist “in sealed containers with no interactions or overlap among others.”<sup>36</sup> As Genschel and Jactenfuchs put it, in the EU “regulation serves for the lack of positive European capacity building.”<sup>37</sup> The popularity of the regulatory state approach in EU studies can be explained in many ways, either because it allowed for differentiating the actions of the EU from those of the Member States or because of the limited EU resources. Other reasons have also come into play. Regulation is about what, how and at what level of government to regulate,<sup>38</sup> which is essential in the EU as it configures its relationships with Member States. Against this backdrop, Levi-Faure has defined the regulatory state as “an institution that claims a monopoly on the legitimate use of rulemaking, rule monitoring and rule enforcement in a given territory.”<sup>39</sup>

This logic prevailed in the establishment of the market, as Majone demonstrated. Regulation has gained importance in the EU through legislation, governance and control mechanisms that have emerged amid privatisation and deregulation<sup>40</sup> leading to gradual depoliticisation. *Rulemaking* implies “rule-based behaviour; the use of institutions for scrutiny and enforcement; the promotion of specific public objectives, in some cases semi-detached from everyday political pressures; or a strong undertone of the apolitical or depoliticised, even technocratic.”<sup>41</sup> However, regulation is not only about making legislation. *Rule monitoring* implies the creation of agencies entrusted with fact-finding, rulemaking and even enforcement.<sup>42</sup> Empirically, the rise of the regulatory state<sup>43</sup> is particularly associated with the foundation of independent regulatory authorities at the European level and the strengthening of the European Commission’s powers in this area, as the main regulator<sup>44</sup> playing a pro-active role.<sup>45</sup> Regulation is accomplished not only through the adoption of laws but also by establishing other institutions such as specialised agencies. Scholars have examined the EU’s regulatory approach,<sup>46</sup> focusing on the institutionalisation of committees and agencies, as well as standardisation,<sup>47</sup> all designed to infuse scientific knowledge and expertise in addressing uncertainty and decision-making dilemmas. These agencies are responsible for fact-finding to identify non-compliant behaviours and enforcement, including sanctions. Despite these efforts, the EU

<sup>34</sup> *Ibid.*

<sup>35</sup> Majone, *supra* n 14, 140.

<sup>36</sup> Caporaso et al., *supra* n 21, 890.

<sup>37</sup> P Genschel and M Jactenfuchs, “The Security State in Europe: Regulatory or Positive?” (2023) 30(7) *Journal of European Public Policy* 1447, 1450.

<sup>38</sup> Majone, *supra* n 16.

<sup>39</sup> D Levi-Faur, “The Regulatory Security State As a Risk State” (2023) 30(7) *Journal of European Public Policy* 1458, 1461.

<sup>40</sup> Majone, *supra* n 16.

<sup>41</sup> F McGowan and H Wallace, “Towards a European Regulatory State” (1996) 3(4) *Journal of European Public Policy* 560, 562.

<sup>42</sup> Majone, *supra* n 16.

<sup>43</sup> *Ibid.*

<sup>44</sup> Majone, *supra* n 16.

<sup>45</sup> M Lodge, “Regulation, the Regulatory State and European Politics” (2008) 31(1–2) *West European Politics* 280–81.

<sup>46</sup> A Alemanno, “How Much Better is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union” (2015) 6(3) *European Journal of Risk Regulation* 344.

<sup>47</sup> Vos, *supra* n 19.

remains weak in terms of administrative or coercive capacity<sup>48</sup> regarding *rule enforcement*. The capacity to “reward, punish and overpower provides the regulatory state with sticks and carrots to incentivize actors to play by the rules.”<sup>49</sup>

## 2. The expansion and transformation of regulatory state 2.0 in times of crises

The European sovereign debt<sup>50</sup> and COVID-19 crises<sup>51</sup> have exposed the limitations of the EU and the vulnerabilities of its post-Maastricht foundations, both in terms of its Economic and Monetary Union and its political union. Amid the Eurozone crisis, the EU appeared to lack “the formal powers and the institutional capacities needed to establish the appropriate rules and to monitor and enforce their compliance and transposition in the Member States.”<sup>52</sup> While the strength of a state depends on its infrastructural powers and on its institutional capacity to exercise authority and implement policy, the EU developed into a legal *colossus* but remained weak in terms of coercive/enforcement powers.<sup>53</sup> To douse the flames of the Eurozone crisis, the EU regulatory state has moved beyond regulation in traditional policy areas,<sup>54</sup> expanding to “core state powers”<sup>55</sup> while transforming in important ways. On the one hand, Genschel and Jachtenfuchs have argued that the competences of the EU are “migrating from regulation of markets to regulation of fiscal and stabilization policies, to fiscal policies via stealth.”<sup>56</sup> On the other hand, Caporaso et al. showed that the financial crisis pushed the EU to move *beyond* regulation, through stabilisation and fiscal policy.<sup>57</sup> The financial crisis has created pressure for the EU to move into the domain of redistribution as well. In addition, since the successive crises the EU institutions have been monitoring not only markets but also national budgets, expanding the EU’s regulatory power into the area of public finance.<sup>58</sup> As stated by Caporaso et al., “the EU continues to be a regulatory state, though one with much more extensive powers.”<sup>59</sup> Caporaso et al., Genschel and Jachtenfuchs and other scholars have underscored that something is changing in the EU regulatory state, without the concept becoming obsolete. Although the EU is not a positive state, “regulation remains its preferred instrument to enlist, shape and coordinate national core state powers,”<sup>60</sup> such as the capacity for coercive force (military, border or policy control), the ability to tax and the establishment of a centralised administration,<sup>61</sup> areas in which EU institutions are more deeply involved as they pertain to issues of greater salience.

<sup>48</sup> D Kelemen and K McNamara, “State-Building and the European Union: Markets, War, and Europe’s Uneven Political Development” (2022) 55(6) *Comparative Political Studies* 963.

<sup>49</sup> Genschel and Jachtenfuchs, *supra* n 37, 1450.

<sup>50</sup> J Mirò, “Austerity’s Failures and Policy Learning: Mapping European Commission Officials’ Beliefs on Fiscal Governance in the Post-Crisis EU” (2021) 28(5) *Review of International Political Economy* 1224.

<sup>51</sup> M Buti and S Fabbri, “Next Generation EU and the Future of Economic Governance: Towards a Paradigm Change or Just a Big One-Off?” (2023) 30(4) *Journal of European Public Policy* 576.

<sup>52</sup> B Eberlein and E Grande, “Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State” (2005) 12(1) *Journal of European Public Policy* 89, 99.

<sup>53</sup> Kelemen and McNamara, *supra* n 48, 963.

<sup>54</sup> Caporaso et al., *supra* n 20, 890.

<sup>55</sup> Genschel and Jachtenfuchs, *supra* n 15.

<sup>56</sup> Caporaso et al., *supra* n 20, 890.

<sup>57</sup> *Ibid*, 901.

<sup>58</sup> Genschel and Jachtenfuchs, *supra* n 15.

<sup>59</sup> Caporaso et al., *supra* n 20, 901.

<sup>60</sup> Genschel and Jachtenfuchs, *supra* n 37, 1450.

<sup>61</sup> Genschel and Jachtenfuchs, *supra* n 15, p. 2.

### 3. The emergence of EU regulatory polity 3.0 for the rule of law

As the regulatory state is changing without rendering regulation obsolete but, rather, transforming its politics, the concept of “regulatory polity”<sup>62</sup> is used here, tailored to capture both the expansion of regulation beyond the market to core state powers and the multi-level interactions embodied within the EU. In other words, EU regulation transitioning from the market (1.0) towards core state powers (2.0) leads to a conceptual shift from Majone’s regulatory state to regulatory polity (3.0). This evolution has been explained either through a functionalist lens, as an incremental process, or as a response to exogenous crises and shocks. More specifically, as Genschel and Jachtenfuchs hypothesise: the higher the probability of domestic core state powers having repercussions on other Member States, the higher the demand for European regulation of these powers<sup>63</sup>. This process, we argue, occurs through regulation, as an instrument of EU integration,<sup>64</sup> which supports EU capacity building. As discussed in the next sections, in the rule of law crisis, regulation is used to strengthen the EU’s monitoring and enforcement capacity building. The regulatory approach is claim for “the monopoly on the legitimate use of rulemaking, rule monitoring and rule enforcement in a given territory,”<sup>65</sup> being implicitly a vehicle in the political construction of authority. Each dimension of this definition is important and is used to structure the analysis in the next sections to show how, on the one hand, following a market logic, EU institutions use the regulatory approach to strengthen their capacity for “rule monitoring” and “rule enforcement,” anchoring the rule of law in economic logic for both political and legal reasons (Sections III and IV), and how, on the other hand, this gives rise to uneven politicisation despite the traditional use of regulation for depoliticisation. The depoliticisation approach resembles the advertising slogan for Canada Dry ginger ale in 1989: “It looks like alcohol, it’s golden like alcohol . . . But it’s not alcohol.” Applied to the rule of law regulatory approach: it looks like depoliticisation, it is technical like depoliticisation, but it is not depoliticisation. Put differently, the regulatory approach to the rule of law strengthens EU rulemaking, rule monitoring and rule enforcement, empowers the Commission – portrayed in the literature as the main regulator – but also gives rise to politicisation both at the national and supranational level, and in particular in the bilateral relations between the Commission and the Member State concerned. In the regulatory state 3.0, depoliticisation is not about less politics but about politics occurring elsewhere.<sup>66</sup>

### III. Strengthening the rules of EU regulatory polity 3.0 for the rule of law

Regulation has been the EU’s response to crises. During the Eurozone crisis, the future of integration and that of the Economic and Monetary Union (EMU) were under threat. During the COVID-19 pandemic, every aspect of human life was impacted. With each crisis, new rules and conditions have been attached to EU policies. In the crisis of the rule of law, the political and legal foundations of the EU and its credibility as a community of norms and values have been undermined. In response, the EU polity has moved from market regulation to the regulation of values (in this case, the rule of law), not by stealth but by publicity,<sup>67</sup> yet following a market approach. A series of soft (European Semester, EU Justice Scoreboard, Rule of Law Framework, Rule of Law Annual Report) and hard policy instruments (Regulation 2020/2092) have been put in place to strengthen the rules and

<sup>62</sup> Genschel and Jachtenfuchs, *supra* n 15, p. 2.

<sup>63</sup> Genschel and Jachtenfuchs, *supra* n 15, p. 15.

<sup>64</sup> Genschel and Jachtenfuchs, *supra* n 15, p. 11.

<sup>65</sup> Levi-Faur, *supra* n 39, 1461.

<sup>66</sup> Hay, “Depoliticisation as a Process, Governance as Practice” (2014) 42(2) *Policy and Politics*, 293, 311.

<sup>67</sup> Coman, *supra* n 1, 91.

reinforce the monitoring and enforcement powers of the Commission and, by the same token, the EU's regulatory approach following the market logic.

To begin with, when the Hungarian Fidesz-led government adopted its first measures drastically limiting judicial independence in the early 2010s, the Commission initiated a limited number of infringements. In addition, it included the justice systems in the process of coordination of macro-economic policies as part of the European Semester established in 2010. The Semester was one of the first tools created at the onset of the Eurozone crisis for the coordination of the fiscal, budgetary and economic policies of Member States. In this context, the Commission linked the objective of economic growth to the performance of national justice systems, with the aim of supporting the single market.<sup>68</sup> The role of national courts has been underscored as being essential to enforcing EU legislation. From this perspective, the Commission's approach embraced an economic dimension, arguing that ineffective justice systems can impact not only the market but also the EU.<sup>69</sup> As part of the European Semester, the Commission mainly monitors the efficiency and quality of the justice systems. Justice reforms have been subordinated to a belief in the market as a self-regulatory mechanism that creates prosperity and promises growth and efficiency. Against this backdrop, the expression "economisation of the rule of law" has been used<sup>70</sup> to refer to the inclusion of justice reforms at the inception of the rule of law crisis but in a framework devoted to economic, budgetary and fiscal aims designed in response to the Eurozone crisis. Although the focus is on the importance of the courts to support the market, one should note that the economisation approach is balanced by the need – underscored by the Commission – for effective judicial protection.

Second, the Eurozone crisis not only strengthened the macroeconomic conditionality but also generalised it to Cohesion Policy, allowing the suspension of EU funds in the event of excessive deficits in Member States. Gradually, new conditions have been introduced to obtain EU funds. These come with responsibilities and a set of horizontal and thematic conditions<sup>71</sup> that go beyond macroeconomic conditions and counterbalance the purely economic dimension.<sup>72</sup> As part of the horizontal conditions enshrined in Cohesion Policy, Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights (CFR) in the implementation of the funds. Member States must take appropriate steps to prevent any discrimination based on gender, ethnic origin, religion or belief, disability, age or sexual orientation during the implementation, preparation, monitoring and reporting of the programmes. Failure to meet these enabling conditions can lead to sanctions and the suspension of payments is possible at different stages.<sup>73</sup>

Third, as core pillars of liberal democracy in Poland and Hungary were dismantled, EU institutions adopted Regulation 2020/2092,<sup>74</sup> which introduced a general regime of conditionality for the protection of the Union budget. Regulation 2020/2092 underscores that "Respect for the rule of law is essential not only for Union citizens, but also for business initiatives, innovation, investment, economic, social and territorial cohesion, and the proper functioning of the internal market, which will flourish most where a solid legal and institutional framework is in place."<sup>75</sup> Despite the attempts of some members of the

<sup>68</sup> Coman, *supra* n 1, 109.

<sup>69</sup> EU Justice Scoreboard 2013, COM(2013) 160 final, 3.

<sup>70</sup> *ibid.*

<sup>71</sup> Regulation 2021/1060.

<sup>72</sup> M Fiscaro, "Beyond the Rule of Law Conditionality: Exploiting the EU Suspending Power to Foster the Union's Values" (2022) 7(2) *European Papers* 697.

<sup>73</sup> Regulation 2021/1060, Article 15.

<sup>74</sup> A Baraggia and M Bonelli, "Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges" (2021) 23(2) *German Law Journal* 131.

<sup>75</sup> Regulation 2020/2092, paragraph 11 in the recital.



European Parliament to adopt a regulation on the substantive dimension of the rule of law, because of its legal basis the content has been limited to the protection of the EU budget.<sup>76</sup> The regulation underlined that there is “a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.”<sup>77</sup> On this basis, appropriate measures shall be taken “where breaches of the principles of the rule of law in a State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.”<sup>78</sup> Although the recital of the regulation underscores the importance of the rule of law in the EU as a common value, it has been adopted to ensure “sound financial management” in cases of “tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law,”<sup>79</sup> which strengthens the economisation logic of the regulation. On the basis of this regulation, breaches of the principles of the rule of law can lead to the suspension of payments, as well as to a suspension of the disbursement of instalments (in full or in part) or an early repayment of loans guaranteed by the Union budget.<sup>80</sup> The adoption of measures as part of Regulation 2020/2092 should respect the principles of “objectivity, non-discrimination and equal treatment of Member States” and should be “non-partisan” and “evidence-based,”<sup>81</sup> to ensure the depoliticisation of the monitoring and assessment.

Ultimately, the Recovery and Resilience Facility (RRF) born out of the COVID-19 pandemic brings together all the conditionalities enshrined in these regulations, giving rise to a conditionality regime.<sup>82</sup> To mitigate the effects of the global health crisis, in July 2020 the European Council agreed to support the recovery of Member States through the NextGenerationEU Program, an unprecedented fiscal capacity allowing the EU to provide grants (€312.5 billion) and loans (€360 billion). Although the overall EU budget remains limited, considering that the recovery program is not a permanent fiscal tool, these developments highlight that regulatory polity is – at least temporarily – accompanied by increased resources. Yet, more resources come with responsibilities and a wide range of conditions – macroeconomic, rule of law, the respect of the Charter – as summarized in this section. The RRF is implemented in accordance with the previous regulations, including the relevant rules of Regulation 2020/2092 (rule of law conditionality). In addition, in the RRF, milestones and targets are assessed to ensure the disbursement of tranches of payments upon the Commission’s positive assessment of condition fulfilment, meant to strengthen the objective monitoring role of the institution and to depoliticise the issues at stake. This conditionality regime born from different crises has resulted in a complex legal regulatory device<sup>83</sup> where conditions are interdependent<sup>84</sup> and each type of conditionality reinforces the others.<sup>85</sup>

<sup>76</sup> M Blauberger and V van Hüllen, “Conditionality of EU Funds: An Instrument to Enforce Eu Fundamental Values? (2021) 43(1) *Journal of European Integration* 1; L Fromont and A Van Waeyenberge, “Trading Rule of Law for Recovery? The New EU strategy in the Post-Covid era” (2022) 27(1-3) *European Law Journal* 132.

<sup>77</sup> Regulation 2020/2092, paragraph 15 in the recital.

<sup>78</sup> Regulation 2020/2092, Art 4.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, Art 5.

<sup>81</sup> *Ibid.*, Recital 26.

<sup>82</sup> R Coman and A Buzogany, “The European Union’s Response to the Rule of Law Crisis and the Making of the New Conditionality Regime” (2024) *JCMS: Journal of Common Market Studies* (<https://doi.org/10.1111/jcms.13661>) (last accessed 20 August 2024).

<sup>83</sup> V Vita, “The Reinforced Conditionality Approach of the 2021-27 MMF” (2020) in B Laffan and A De Feo (eds) *EU Financing for Next Decade. Beyond the MMF 2021-2027 and the Next Generation EU*, European University Institute.

<sup>84</sup> R Coman, “Increasing the policy effectiveness through renewed conditionality mechanisms”, Report for the 7<sup>th</sup> meeting of the High-Level Group of Specialists for the Future of Cohesion Policy (2023).

<sup>85</sup> C Fasone and M Simoncini, “The Ambiguities of Conditionality as an Instrument of EU Internal Governance” (2023) RED-SPINEL Working Paper, Institut d’études européennes-Université libre de Bruxelles.

#### IV. Rule monitoring and enforcement at work: Poland and Hungary

Amid the rulemaking of the rising conditionality regime, rule monitoring has gained prominence in the EU's regulatory approach to the rule of law, following a rather techno-managerial approach.<sup>86</sup> As stated in Regulation 2020/2092, the identification of breaches of the principles of the rule of law require a “thorough qualitative assessment” by the Commission. Not only should the assessment be “objective, fair and impartial,” but the Commission also draws its evaluation on information collected from various sources including the CJEU, the Court of Auditors and the European Public Prosecutor (EPPO) as well as from the Council of Europe, including bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission. Networks such as the European networks of Supreme Courts, Judicial Councils and agencies, such as the Agency for Fundamental Rights, can also play a role in this monitoring process. The Commission finds itself at the core of this broad network. In addition, to allow the adoption of Regulation 2020/2092, in December 2020 the European Council invited the Commission to adopt guidelines regarding how the conditionality regime will be used to ensure the equal treatment of Member States and non-discrimination. The adopted guidelines detail the steps and the deadlines that the Commission is to follow in the application of Regulation 2020/2092 and the timeline of the process, among other aspects.

While this network plays a role in the monitoring of domestic situations, political actors are also part of the process. The Commission informs both the EP and the Council why it considers that breaches of the principles of the rule of law might be occurring in a Member State. The state concerned is invited to submit its observations to the Commission. The Commission regularly monitors the situation, and the Member State may propose the adoption of remedial measures to address the findings of the Commission. The Council plays a key role in adopting the decision concerning the suspension of EU funds in case of breaches of the principles of the rule of law affecting the Union budget, while the EP and the Court of Auditors play an active role in scrutinising the Commission's action. Not only has the EP been highly critical vis-à-vis the Commission's action, but also the Court of Auditors, in the last report, underscored that, although the implementation of the regulation was appropriate and consistent, the Commission should explain the “sufficiently direct link between the breaches of the principles of the rule of law and the EU's financial interests.”<sup>87</sup> In addition, the Court of Auditors has also highlighted that the Commission “did not systematically assess and document the impact of the EU's financial interests for all EU Member States in which it identified challenges to the rule of law.”<sup>88</sup>

While the monitoring system is strengthened, the enforcement dimension remains open to interpretation. The cases of Poland and Hungary constitute “test cases” for this new regulatory approach. As far as Hungary is concerned, the Commission has applied Regulation 2020/2092 and the disbursement of funds as part of Cohesion Policy, and the RRF is also subject to a wide range of conditions. In the case of Poland, Regulation 2020/2092 has not been applied, but the Commission has taken official action and made a request for information under Article 6(4).

The Hungarian Partnership Agreement in Cohesion Policy for the 2021–2027 period is valued at €22 billion. Additionally, as part of the RRF the Hungarian National Reform Plan has a value of €12,637 million, with €5,810 million in grants and €6,600 million in loans. Hungary's Recovery and Resilience Plan encompasses a significant number of reforms and investments, totalling €5.8 billion, equivalent to 3.8% of its 2021 GDP. The disbursement of

<sup>86</sup> See the introduction to this special issue.

<sup>87</sup> Court of Auditors, *The rule of law in the EU. An improved framework to protect the EU's financial interests, but risks remain* (2024) 6, (<https://www.eca.europa.eu/en/publications?ref=SR-2024-03>) (last accessed 20 August 2024).

<sup>88</sup> *ibid.*

EU funds is tied to the fulfilment of various conditions, including compliance with the Charter of Fundamental Rights (CFR) and the implementation of measures to ensure judicial independence. In December 2022, the Commission pointed out that Hungary has not met the enabling conditions. The Commission considers the horizontal enabling conditions as met “once Hungary has taken the measures on the judiciary to which it has committed under the Recovery and Resilience Plan.”<sup>89</sup> Other points of concern included the Hungary’s child-protection law and risks to academic freedom and the right to asylum, all of which have a direct and concrete impact on compliance with the Charter, as stated by the Commission.<sup>90</sup> In December 2022, €22 billion of Cohesion funds were frozen (see Table 1). Yet, in December 2023 the Commission argued that Hungary had taken a series of measures that allows it to consider that the enabling conditions regarding the Charter are fulfilled and that Hungary can claim reimbursement of €10.2 billion.<sup>91</sup> Critics at both the EU and domestic level contended that the Commission’s decision to unfreeze the funds was not in response to Hungarian domestic change but, rather, in reaction to Viktor Orbán’s threat to block decisions to be taken by unanimity, such as EU financial support to Ukraine.<sup>92</sup>

As part of its RRF, the Hungarian government must implement several milestones and targets,<sup>93</sup> including “Component 9: Government and Public Administration,” which is focused on the “robustness and functioning of the public institutions,” incorporating judicial independence and showing the complementarity and interdependence of the regulations. A total of 110 milestones and targets are listed for Component 9, with 27 of them referred to as super milestones (see Figure 1). These concern the challenges faced by the President of the National Office for the Judiciary, the rules for electing the President of the Supreme Court, discretionary decisions regarding judicial appointments and promotions, the obstacles to references for preliminary rulings to the CJEU, as well as case allocations and the possibility for public authorities to challenge final judicial decisions before the Constitutional Court’s final judicial decisions.<sup>94</sup> These concerns have been part of discussions under Article 7 TEU in the Council since 2018. All these measures must be implemented within a tight time frame, as the RRF regulation requires all milestones and targets to be completed by August 2026. The Hungarian Recovery and Resilience Plan was approved by the Council in December 2022, but no payment under the RRF is possible until Hungary has fully and correctly implemented all measures, and in particular the 27 “super milestones” (see Table 1).<sup>95</sup>

Ultimately, relying on Regulation 2020/2092 activated against Hungary, on 19 October 2022 the Commission<sup>96</sup> proposed to suspend €7.5 billion in Cohesion funds. On 15 December 2022, the Council adopted its implementing decision (EU) 2022/2506 and decided to suspend not the 65% proposed by the Commission but just 55% of the funds.

<sup>89</sup> European Commission, ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7801](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801)) (last accessed 20 August 2024).

<sup>90</sup> European Commission, ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7801](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801)) (last accessed 20 August 2024).

<sup>91</sup> Politico, “Commission unblocks €10.2B for Hungary as EU tries to sway Viktor Orbán on Ukraine” ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6465](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465)) (last accessed 20 August 2024).

<sup>92</sup> R Uitz, “Orbán’s Veto Play – The Subsidiarity Card” (2023) *VerfBlog* (<https://verfassungsblog.de/orbans-ve-to-play-the-subsidiarity-card/>) (last accessed 20 August 2024).

<sup>93</sup> Council of the EU, 15447/22.

<sup>94</sup> *Ibid.*, x.

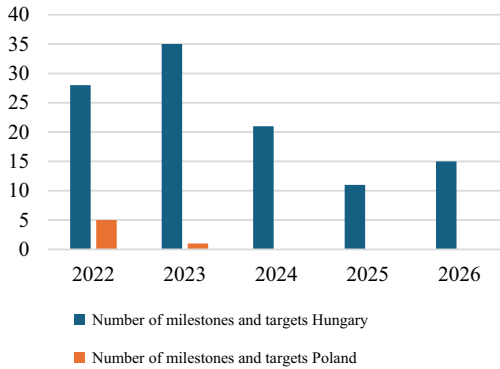
<sup>95</sup> European Commission, ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7273](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273)). (last accessed 20 August 2024)

<sup>96</sup> LL Scheppele, D Kelemen and J Morijn, “The Good, the Bad and the Ugly: The Commission Proposes Freezing Funds to Hungary,” (2022) *VerfBlog*. (<https://verfassungsblog.de/the-good-the-bad-and-the-ugly-2/>) (last accessed 20 August 2024).

**Table 1.** Regulations applied to Hungary and Poland and funds suspension.

The EU's regulatory approach to the rule of law	Country	EU tools	EU conditions <sup>97</sup>	EU funds suspended/frozen
Recovery and Resilience Facility	Hungary	RRF	27 super milestones included in the component "Governance and public administration"; these mostly cover rule of law issues 4 super milestones on judicial independence (enabling conditions on the CFR) 21 super milestones under Regulation 2020/2092	€5.8 billion in grants
	Poland	RRF	2 super milestones	€35.4 billion was not paid out until October 2023. In December 2023, Poland received the first advance payment of €6.3 billion.
Common Provisions Regulation	Hungary	Enabling and thematic conditions	lack of independence of the judiciary, the so-called "child protection law" and "serious risks" to academic freedom and the right to asylum	€22 billion frozen in December 2022 €10.2 billion unblocked in December 2023
	Poland	Respect of the Charter of Fundamental Rights	LGBTQ+	Blocked under the PiS government for non-respect of the CFR. Unblocked in March 2024 under the PO government
Regulation 2020/2092 on a general regime of conditionality for the protection of the EU budget	Hungary		17 remedial measures proposed by the Hungarian government in response to concerns related to public procurement, financial control, monitoring and auditing, as well as transparent financial management 13 remedial measures to be fulfilled by November 2022	€6.3 billion frozen in December 2022 (part of the €22 billion mentioned above)
	Poland	Regulation 2020/2092 not activated	–	–

<sup>97</sup> European Commission, ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_4223](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4223)) (last accessed 20 August 2024).



**Figure 1.** Number of milestones and targets to be implemented by Poland and Hungary between 2022 and 2026.

At the time of writing, the Hungarian RRF is still unblocked and linked to remedial measures under Regulation 2020/2092.

The Polish Partnership Agreement is valued at €76.5 billion in Cohesion funds for the 2021–2027 period. The National Recovery and Resilience Plan is estimated at €35.4 billion, consisting of €22.5 billion in grants and €11.5 billion in loans, representing half the amount of the Cohesion funds. The Polish Partnership Agreement was submitted to the Commission on 15 December 2021,<sup>98</sup> and negotiations with the Commission began in January 2022.

## V. Regulation with uneven politicisation

While the framework in place is meant to depoliticise the monitoring process, the regulation foresees the possibility of discussing the issues at stake at the political level, including in bilateral relations between the Commission and the Member State concerned. In addition, if the Member State considers that there have been serious breaches to these principles, it may request that the President of the European Council refer the matter to the next European Council. The role of the Parliament is rather limited, despite the proactive role that it played between May 2018 and December 2020 when the regulation was adopted as part of the Ordinary Legislative Procedure. The European Parliament may invite the Commission for a structured dialogue.<sup>99</sup> The Commission shall inform the EP of any measures (Article 8) and shall report to both the EP and the Council (Article 9) on the application of the regulation.

It has been argued that depoliticisation and politicisation should be read as multilevel concepts, where it is possible to distinguish between a conceptual and an empirical level.<sup>100</sup> At the conceptual level, depoliticisation is conceived of as a mix of strategies and processes that insulate decision-making from politics, decreasing the potential for collective action and participation (Burnham 2001) and thus repressing the possibility of antagonism.<sup>101</sup> At the empirical level, depoliticisation is measured as the decline of political debate around a specific policy issue.<sup>102</sup> In parallel, depoliticisation might flow among different political

<sup>98</sup> Republic of Poland, Ministry of Development Funds and Regional Policy (<https://www.gov.pl/web/funds-regional-policy/partnership-agreement-is-a-record-eur-76-billion-which-is-about-pln-350-billion-for-poland>) (last accessed 20 August 2024)

<sup>99</sup> Regulation 202/2092, Article 6.1.

<sup>100</sup> M Wood, “Politicisation, Depoliticisation and Anti-Politics: Towards a Multilevel Research Agenda” (2016) 14(4) Political Studies Review 521.

<sup>101</sup> C Mouffe, *On the Political* (Routledge 2005).

<sup>102</sup> S Kettle, “Does Depoliticization Work?” (2008) 3(2) British Journal of Politics & International Relations 127.

spheres and arenas, including the governmental, societal and discursive spheres.<sup>103</sup> Yet, despite this multi-level framework empirical analyses have rarely discussed how attempts at depoliticisation in one arena (for example, at the governmental level) might result in an unintended politicisation in other arenas (for example, at the level of political parties and citizens).<sup>104</sup> Building on these considerations, our argument suggests that despite the attempts to insulate the monitoring of the rule of law from political bargaining, we have witnessed an increase in the politicisation of the issue, not only in the relationship between the Commission and Member States but also in the domestic politics of the concerned countries. Put differently, if the relationship between the Commission and Member States is meant to infuse depoliticisation, as far as the rule of law is concerned this still remains highly politicised. In its bilateral relations with the Member States, the Commission plays a central role, both technical and political.<sup>105</sup> The logic became evident upon observing the political contacts occurring at the elite level between the Commission and the governments of Hungary and Poland, as well as the role played by the rule of law issue in the context of the Polish parliamentary election in 2023. Additionally, the Russian invasion of Ukraine<sup>106</sup> provided a clear setting in which to observe how the development of the rule of law dossier – despite the alleged neutrality of the conditionality mechanisms – revealed a highly political pork-barrel logic. As some have argued, Poland’s initial support for Ukraine and Hungary’s successive vetoes explain the unfreezing of the funds.<sup>107</sup>

The relationship between the Commission and the Hungarian government has been tense over the past decade. The substantial size of the EU Cohesion funds and the RRF promoted a window of opportunity for Hungarian authorities to engage in negotiations with the Commission, rather than solely contesting its authority, legitimacy and *raison d’être*. In April 2023, a “technical agreement” was reached between the two parties,<sup>108</sup> based on the declared willingness of the Hungarian authorities to strengthen the independence of the judiciary. Following these negotiations, the Commissioner for Budget and Administration, Johannes Hahn, announced on 27 April 2023 that “if the case of the independence of the judiciary is settled, the vast majority of cohesion programmes will be unblocked.”<sup>109</sup> Against this backdrop, on 3 May 2023<sup>110</sup> the Hungarian Parliament introduced measures to address four of the many milestones (see Table 1). These measures aim to strengthen the independence of the judiciary and reduce influence over judicial decisions, and “protects judges from arbitrary decisions and strengthens the right of courts to refer preliminary questions to the EU Court of Justice,” as required by the Commission.<sup>111</sup> For the Hungarian authorities, these reforms were intended to boost “the level of mutual political trust,” as declared by Janos Boka, the EU Hungarian negotiator and junior Justice Minister.<sup>112</sup> Despite more dialogue with the Commission, tensions persist.

<sup>103</sup> C Hay, “Depoliticisation as Process, Governance as Practice: What Did the ‘First Wave’ Get Wrong and Do We Need a ‘Second Wave’ to Put It Right?” (2014) 42(2) *Policy and Politics* 293; M Wood and M Flinders, “Rethinking Depoliticisation: Beyond the Governmental” (2014) 42(4) *Policy and Politics* 151.

<sup>104</sup> J Buller, PE Dönmez, A Standring and M Wood “Depoliticisation, Post-Politics and the Problem of Change”, in J Buller, PE Dönmez, A Standring and M Wood (eds) *Comparing Strategies of (De)Politicisation in Europe* (Palgrave 2019) 17.

<sup>105</sup> P Dermine, *Le plan de relance Next Generation EU de l’Union européenne* (Bruylant 2023)

<sup>106</sup> G Hernández and C Closa, “Turning assertive? EU rule of law enforcement in the aftermath of the war in Ukraine” (2024), 47(4) *West European Politics* 967.

<sup>107</sup> *Ibid.*

<sup>108</sup> Agence Europe, Europe Daily Bulletin No. 13171, 28/04/2023, <https://agenceurope.eu/en/bulletin/sommaire/13171> (last accessed 20 August 2024).

<sup>109</sup> *Ibid.*

<sup>110</sup> Act X of 2023 on the Amendment of Certain Laws on Justice related to the RRF plan.

<sup>111</sup> Agence Europe, Europe Daily Bulletin No. 13174, 4/05/2023, <https://agenceurope.eu/en/bulletin/sommaire/13174> (last accessed 20 August 2025).

<sup>112</sup> Financial Times, “Hungary accelerates talks with EU to unlock billions in funding” (23 May 2023) (<https://www.ft.com/content/b15cc542-807b-4dd8-abae-a72ed2ef3fbf>) (last accessed 14 October 2024).

The Hungarian authorities declared their intention to litigate the Commission's concerns related to the Child Protection Act, which led the Commission to freeze Cohesion funds and demand respect of the CFR. The Hungarian authorities have contested the Commission's methodology or approach, often portrayed as being "unfair," as exemplified in this declaration by Peter Szijjarto: "Something always comes up. There is always something more that those commissioners who constantly express doubts about Hungary always make new demands, and they are withholding our EU funds completely unfairly, without any legal basis or good reasons."<sup>113</sup>

Until the 2023 elections in Poland, the relationship between the Commission and the Polish PiS government had also been tense. In July 2021, the Polish Constitutional Tribunal declared as unconstitutional the application of the CJEU's decisions that sanctioned changes in the Polish judiciary. Following this decision, Minister of Justice Ziobro<sup>114</sup> stated that "The Constitution and normality prevailed over attempts of political interference by EU bodies in the Polish legal order". In response, Commissioner Jourová underscored that EU law has primacy over national law and that all decisions by the CJEU are binding on all Member State authorities and national courts, asking the CJEU to impose a penalty.<sup>115</sup> It was not the decision as such that was under debate but rather the lawfulness of the Constitutional Tribunal and its unconstitutional composition. On 22 December 2022, the Commission initiated an infringement procedure against Poland. In an interview with the American Financial Times, the Polish Prime Minister stated that the EU demands regarding the rule of law are like a "gun to our head" and that Poland will use "any weapons which are at our disposal." Commenting on the EU decision to freeze RRF funds, Prime Minister Morawiecki said "We are not going to surrender, we are not going to relinquish our sovereignty because of this pressure [...] We will survive until the moment when we get the [EU] money."<sup>116</sup>

In August 2021, Jarosław Kaczyński, who is the *de facto* leader of PiS, attempted to ease the tensions with the EU by declaring that the government will "abolish the Disciplinary Chamber as it currently stands and therefore the subject of the dispute will disappear." He also provocatively added that "this will also be a test of whether the EU has at least the appearance of showing goodwill." However, in reference to the primacy of EU law and the CJEU judgement, he also stated that he does "not recognize this type of judgments because they definitely go beyond the treaties."<sup>117</sup> Various commissioners have acknowledged the challenging relationship with the Polish authorities. For instance, Commissioner Didier Reynders expressed his concerns in 2021: "We've tried to engage in a dialogue, but the situation is not improving. Fundamentals of the EU legal order, notably the primacy of EU law, must be respected."<sup>118</sup>

At the beginning of Russia's war in Ukraine, the PiS Polish government expressed unconditional support for Ukrainians. In parallel, in February 2022 President Duda

<sup>113</sup> Euronews Budapest says Brussels "biased" for political reasons and "unfairly" withholding EU funds (4 May 2023) (<https://www.euronews.com/my-europe/2023/05/04/budapest-says-brussels-biased-for-political-reasons-and-unfairly-withholding-eu-funds>) (last accessed 20 August 2024).

<sup>114</sup> Zbigniew Ziobro's tweets. Available at: (<https://twitter.com/ZiobroPL/status/1415348024700702728>) (last accessed 20 August 2024).

<sup>115</sup> Politico, "POLITICO Brussels Playbook: Turkey's 2-state solution – Poland's summer showdown" (21 July 2021) (<https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-turkeys-2-state-solution-polands-summer-showdown-commission-under-pressure/>) (last accessed 20 August 2024).

<sup>116</sup> Financial Times, "Poland's prime minister accuses EU of making demands with 'gun to our head'" (24 October 2021) (<https://www.ft.com/content/ac57409d-20c9-4d65-9a5d-6661277cd9af>) (last accessed 20 August 2024).

<sup>117</sup> Polska Agencja Prasowa, "Prezes PiS: wszystkie partie powinny podpisać wspólne porozumienie w sprawie walki z epidemią COVID-19" (7 August 2021) (<https://www.pap.pl/aktualnosci/news%2C925132%2Cprezes-pis-wszystkie-partie-powinny-podpisac-wspolne-porozumienie-w-sprawie>) (last accessed 20 August 2022).

<sup>118</sup> The Guardian, "Brussels launches legal action over Polish rulings against EU law" (22 December 2021) (<https://www.theguardian.com/world/2021/dec/22/brussels-launches-legal-action-over-polish-rulings-against-eu-law>) (last accessed 20 August 2022).

announced the proposal of a bill aimed at addressing the Commission's requests and unblocking the RRF funds. This request was approved on the 26 May 2022, despite the opposition of United Poland, the party of the former Minister of Justice, Ziobro. Commission President von der Leyen highlighted that Poland was taking a positive path, but other commissioners expressed doubts about the adequacy of the Duda-sponsored bill. Despite this, in June the Commission approved the Polish RRF plan.<sup>119</sup> According to Hernandez and Closa, this "cannot be explained by a significant change in the rule of law status," which remains "critical despite the announced reforms, but is arguably the result of the different positions of these two governments on the war against Ukraine."<sup>120</sup>

In August 2022, President von der Leyen declared that despite some positive steps, the Duda-sponsored bill still did not comply with the milestones: "Poland has not complied with the CJEU judgment. Penalties for the Disciplinary Chamber are still in force (...) This issue must be resolved to meet the conditions for granting RRF funds."<sup>121</sup> But Kaczyński contended that the approved bill was already a "big compromise," denying the possibility of further concessions.<sup>122</sup> In January 2023, the Polish parliament approved the disputed bill, which was labelled by United Poland as "a capitulation, and a prelude to more blackmail by the EU."<sup>123</sup> On 11 February 2023, President Duda refused to sign it, sending it to the Constitutional Tribunal for scrutiny. As of now, the tribunal has not yet discussed the law. The delay is the result of an internal struggle within the tribunal, which has been unable to reach a quorum of eleven out of fifteen judges.<sup>124</sup> Thus, in contrast to Hungary where the government majority appears cohesive, on the issue of the rule of law, the half-hearted willingness of some sectors within PiS to negotiate with the Commission had been halted by the resistance of the coalition partner United Poland, controlled by the Justice Minister, Zbigniew Ziobro.<sup>125</sup>

The 2023 parliamentary elections in Poland represent another clear instance of the politicisation of the rule of law, not at the top but at the bottom, with the opposition openly campaigning for the independence of the judiciary and compliance with EU requests.<sup>126</sup> In October 2023, following the electoral defeat of PiS, the newly appointed Civic Platform government led by Donald Tusk announced its commitment to promptly complying with EU demands in order to unfreeze EU Cohesion funds. In a press conference in Warsaw with the newly appointed Minister of Justice, Adam Bodnar, Commissioner Reynders "warmly welcomed" Polish efforts "to restore rule of law in Poland."<sup>127</sup> However,

<sup>119</sup> Politico, "EU gives Poland route to pandemic recovery cash" (1 June 2022) (<https://www.politico.eu/article/eu-ws-deal-to-unlock-poland-pandemic-cash-hinges-recovery-fund-covid-19-on-reforms/>) (last accessed 20 August 2024).

<sup>120</sup> Hernandez and Closa, *supra* n 106, 988.

<sup>121</sup> Gazeta Prawna, "Von der Leyen: Polska nie wypełniła wyroku TSUE. Kary za Izbę Dyscyplinarną wciąż obowiązują" (26 July 2022) (<https://www.gazetaprawna.pl/wiadomosci/artykuly/8498993,von-der-leyen-wywiad-kpo-kary-tsue.html>) (last accessed 20 August 2024).

<sup>122</sup> Wpollyce, "Jarosław Kaczyński w 'Sieci' o relacjach z KE: 'Wykazaliśmy maksimum dobrej woli ale ustępstwa nic nie dały. Czas wyciągnąć wnioski'" (7 August 2022) (<https://wpollyce.pl/polityka/609543-ka-czynski-o-relacjach-z-ke-ustepstwa-nic-nie-daly>) (last accessed 20 August 2024).

<sup>123</sup> Politico, "Poland clears first hurdle to get EU cash" (11 January 2023) (<https://www.politico.eu/article/poland-hurdle-eu-cash-european-union/>) (last accessed 20 August 2024).

<sup>124</sup> Politico, "A civil war in Poland's top court upends efforts to reconcile with Brussels" (19 May 2023) (<https://www.politico.eu/article/andrzal-duda-poland-top-court-upends-efforts-to-reconcile-with-brussels/>) (last accessed 20 August 2024).

<sup>125</sup> Dziennik Gazeta Prawna, "Ziobro: Nie mam wątpliwości kto jest prezesem TK. Pisma kieruję do Julii Przyłębskiej" (10 May 2023) (<https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8713379,zbigniew-ziobro-trybunal-konstytucyjny-julia-przylebska.html>) (last accessed 20 August 2024).

<sup>126</sup> Notes from Poland, "Why does the Polish President's judicial reform law constitutional referral matter so much?" (13 March 2023) (<https://notesfrompoland.com/2023/03/13/why-does-the-polish-presidents-judicial-reform-law-constitutional-referral-matter-so-much/>) (last accessed 20 August 2024).

<sup>127</sup> Notes from Poland "EU 'pleased new Polish government determined to restore rule of law', says visiting commissioner" (19 January 2024) (<https://notesfrompoland.com/2024/01/19/eu-pleased-new-polish-government-determined-to-restore-rule-of-law-says-visiting-commissioner/>) (last accessed 20 August 2024).



to unfreeze the funds Poland must fulfil all the milestones at the core of the Commission's monitoring role. While there is no doubt about the willingness of the new government to restore the rule of law, the potential opposition from Polish President Duda might impede the implementation of the reform plan, giving rise to new debates at both the domestic and EU level.<sup>128</sup> The government's political will has been rewarded, with the Commission releasing the RRF and Cohesion funds in 2024.

## VI. Conclusion

The EU regulatory state has evolved over the past decade, moving beyond the traditional boundary between the state and the market to regulate in the core powers of the polity. Majone's EU regulatory state (1.0) has been expanded to new policy areas in core powers (2.0) and has been transformed to also regulate the core values of the polity (3.0) as discussed in Section II.

To douse the flames of the rule of law crisis and to depoliticise a disputed issue at the core of state power, the EU regulatory polity 3.0 for the rule of law has followed a market logic and been deepened through a process of economisation of the rule of law, confined to quality and efficiency, as illustrated in Section III. Not only is the functioning of the justice system important for the market, but Regulation 2020/2092 also sanctions breaches of the principles of the rule of law that affect the sound management of the EU budget. To balance this economisation logic, it is through Cohesion Policy that compliance with the Charter for Fundamental Rights is linked to the disbursement of EU funds (Regulation (EU) 2021/1060). Through regulation EU institutional actors strengthen the EU's capacity to act, that is the monitoring and enforcement powers of the Commission (Section IV). Yet, while monitoring entails a wide range of conditions, targets, milestones and guidelines following a techno-managerial approach, the EU's enforcement capacity should not be over-estimated.<sup>129</sup> Even if rewards and sanctions have been formally linked to strict conditions, rulemaking and rule enforcement are open to politicisation both at the national and supranational level, as illustrated in Section 5. Indicators and conditions at the core of rule monitoring are no longer taken for granted – they are brought in the realm of contestation and deliberation.

Thus, regulatory polity 3.0 for the rule of law is different from the traditional regulatory approach of the EU, not only in terms of scope – expansion to values – but also in terms of politicisation. Politicisation takes different forms in the bilateral relations of the Commission with the Member States concerned, as well as in domestic elections and debates in national parliaments, as discussed in Section V. Such politicisation results in a scattered geographic diffusion. In the countries targeted by fund freezing, the rule of law may become a powerful issue to be mobilised by opposition parties. Regulatory polity 3.0 is in place in response to crises, but its effectiveness in terms of outcomes depends on the role of domestic actors, as well as the willingness of the EU institutions (the Commission and the Council) to apply the rules of monitoring and enforcement.

<sup>128</sup> Politico, "Poland edges closer to unblocking frozen EU funds" (20 January 2024) (<https://www.politico.eu/article/poland-edges-closer-unblock-frozen-eu-funds-donald-tusk-adam-bodnar-andrej-duda/>) (last accessed 20 August 2024).

<sup>129</sup> S Priebus and LH Anders, "Fundamental Change Beneath the Surface: The Supranationalisation of Rule of Law Protection in the European Union" (2024) 62(1) *Journal of Common Market Studies* 224.