# Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation

## ECJ Judgments of 16 February 2022, Cases C-156/21, *Hungary* v *Parliament and Council* and C-157/21, *Poland* v *Parliament and Council*

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## INTRODUCTION

On 16 February 2022, the Court of Justice fully dismissed the annulment actions lodged by Hungary and Poland against Regulation 2020/2092,[1] which notoriously established a regime of conditionality for the protection of the Union's budget in case of breaches of the principles of the rule of law.[2]

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[1]ECJ 16 February 2022, Case C-156/21, *Hungary* v *Parliament and Council*; ECJ 16 February 2022, Case C-157/21, *Poland* v *Parliament and Council*.

[2]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. On which *see* T. Tridimas, 'Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?', 16 *Croatian Yearbook of European Law and Policy* (2020) p. VII; J. Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020 – Is it all About the Money?', 13 *Hague Journal on the Rule of Law* (2021) p. 79; N. Kirst, 'Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?, 6

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The judgments were long awaited by those following with concern the process of rule of law backsliding unfolding in some EU member states,[3] and even more so in light of the much-discussed compromise reached at the European Council's meeting of 10-11 December 2020.[4] As is known, in the attempt to overcome the Hungarian and Polish 'veto' threatening the approval of the 2021-2027 Multiannual Financial Framework and of the reform of the Own Resources Decision needed to greenlight the 'Next Generation EU' package, the European Council agreed on a *de facto* suspension of the conditionality mechanism due to be finally approved a few days later, on 16 December 2020. In what is definitely the most controversial part of the Conclusions, the European Council stated that the mechanism should not be enforced before the adoption of guidelines on its application by the Commission and that, should an action of annulment be introduced, such guidelines should be finalised only after the Court of Justice's ruling on the matter.[5] With the Commission faithfully abiding by the indications of the European Council, the delivery of the two judgments – whose *decisum* was actually anything but surprising – became the crucial piece missing for making the enforcement of the Regulation a concrete reality. In the weeks following the judgments, the Commission finalised the guidelines[6] and then activated the conditionality mechanism against Hungary.[7]

The importance of the 'twin' judgments of 16 February 2022 is also evidenced by a number of procedural and contextual elements which is worth remembering. The Court deliberated sitting as a full bench in the context of an expedited procedure

*European Papers* (2021) p. 101; B. Nascimbene, 'Il rispetto della *rule of law* e lo strumento finanziario. La "condizionalità"', 8 *Eurojus* (2021) p. 172.

[3]On the notion of 'rule of law backsliding', *see* L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3.

[4]European Council, Conclusions of 10-11 December 2020, EUCO 22/20. On which *see*, among others, A. Alemanno and M. Chamon, 'To Save the Rule of Law You Must Apparently Break It', *Verfassungsblog*, 11 December 2020, ⟨https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/⟩ visited 30 May 2022; K.L. Scheppele et al., 'Compromising the Rule of Law While Compromising on the Rule of Law', *Verfassungsblog*, 13 December 2020, ⟨https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/⟩ visited 30 May 2022; E. Cannizzaro, 'Editorial: Neither Representation nor Values? Or, "Europe's Moment" – Part II', 5 *European Papers* (2020) p. 1101; A. Hinarejos, 'Editorial: Budget and Recovery Funds Rule of Law and an Unfortunate Standoff', 45 *European Law Review* (2020) p. 775; 'Editorial Comments: Compromising (on) the General Conditionality Mechanism and the Rule of Law', 58 *CMLRev* (2021) p. 267.

[5]European Council, *supra* n. 4, point 2(c).

[6]Commission Communication C(2022) 1382 final of 2 March 2022, Guidelines on the application of the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget.

[7]The start of the procedure against Hungary was announced by Commissioner Johannes Hahn on his Twitter profile on 27 April 2022, ⟨https://twitter.com/JHahnEU/status/1519260302201737218⟩ visited 30 May 2022.

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and, for the very first time, decided to live stream the delivery of the two rulings – as if to speak directly, in their own languages, to the (European) citizens affected by the serious backsliding on values in Hungary and Poland. In a rare 'closing of ranks' in defence of the fundamental values underpinning the European integration process,[8] an extraordinary number of ten member states intervened in support of the Council and the Parliament.[9] The latter, which figures among the most critical voices on the Commission's inaction,[10] held also a rather unusual debate on the implications of the judgments during the plenary session of 16 February and adopted a resolution that, once again, spells out a firm *j'accuse* towards the Commission and the Council.[11] Finally, as a side note, on the very day of the delivery of the two judgments, the (unlawfully composed)[12] Polish Constitutional Tribunal held a public hearing on Case K 1/22, which originates from the application of the Prosecutor General – who is also, by the way, the Polish Minister of Justice – asking whether Article 322(1)(a) TFEU is compatible with the Polish Constitution to the extent that it provides the legal basis of Regulation 2020/2092.[13]

Besides their political significance, the two judgments touch upon a number of extremely salient legal issues, including the nature and content of the values enshrined in Article 2 TEU, the limits of the 'national identity' clause of Article 4(2) TEU, as well as the transparency of the legislative process and the access to opinions of the EU institutions' legal services, whose influence on EU policy-making has become ever more significant in recent years.[14]

[8]J. Morijn, 'A Closing of Ranks', *Verfassungsblog*, 14 October 2021, ⟨https://verfassungsblog.de/a-closing-of-ranks/⟩ visited 30 May 2022.

[9]Belgium, Denmark, Germany, Ireland, Spain, France, Luxembourg, the Netherlands, Finland and Sweden.

[10]It is sufficient to remember that the Parliament sued the Commission before the Court for failure to act under the conditionality regulation: *see* pending case C-657/21, *Parliament* v. *Commission.*

[11]European Parliament resolution P9_TA(2022)0074 of 10 March 2022 on the rule of law and the consequences of the ECJ ruling.

[12]*See*, in particular, ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z o.o.* v. *Poland.* On the reforms affecting the independence of the Polish Constitutional Tribunal, *see* T.T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', 43 *Review of Central and East European Law* (2018) p. 116; W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* (2019) p. 63.

[13]Polish Constitutional Tribunal, Case K 1/22, pending.

[14]On which *see* P. Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021).

Crucially, and this will be the specific focus of this case note, the judgments of 16 February 2022 are the first ones to deal with the competence issues arising from the use of 'spending conditionality'[15] as an alternative enforcement mechanism of EU law. As will be discussed below, the Court was called to assess whether Article 322(1)(a) TFEU could be considered an appropriate legal basis for establishing a spending conditionality clause relating to the principles of the rule of law and, on a different level, whether Regulation 2020/2092 circumvented the key enforcement procedure for the protection of EU values envisaged by the Treaties, i.e. Article 7 TEU. These questions, which were already present in the academic debate before the actual approval of the Regulation,[16] were rendered particularly sensitive by the fact that the mechanism was conceived primarily to reinforce the sanctioning toolbox in defence of Article 2 TEU values, a field where the Union's competence to devise new instruments via secondary law has been a matter of discussion.[17]

This case note reflects on the judgments against the broader theme of competence creep via conditionality. This topic, which has long been neglected in the academic debate concerning the EU, is growing in significance in the most recent period, in parallel with the rapid affirmation of conditionality as a key EU internal governance tool as well as with the increasing centrality of the Union's budget in the trajectories of European integration. To this end, the case note first sketches out the competence issues arising from the use of spending conditionality and briefly retraces the debate accompanying the legislative process concerning Regulation 2020/2092. In the second section, it discusses the judgments of 16 February 2022, focusing on the parts concerning the legal basis of the conditionality mechanism and its relation to Article 7 TEU. Finally, it reflects on the

[15]The expression 'spending conditionality' was first used by V. Vițǎ, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 116.

[16]*See,* albeit with different positions, M.J. Rangel de Mesquita, 'European Union Values, Rule of Law and the Multiannual Financial Framework 2021-2027: The Commission's Proposal to Protect the EU Budget against Threats to the Rule of Law', 19 *ERA Forum* (2018) p. 287; I. Goldner Lang, 'The Rule of Law, the Force of Law and the Power of Money in the EU', 15 *Croatian Yearbook of European Law and Policy* (2019), p. 1; M. Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values', 4 *European Papers* (2019) p. 695; A. Circolo, 'È la rule of law a proteggere il bilancio dell'Unione o viceversa? La nuova proposta di regolamento "sulle carenze generalizzate riguardanti lo Stato di diritto"', 24 *Il Diritto dell'Unione europea* (2019) p. 295; A. von Bogdandy and J. Łacny, 'Suspension of EU Funds for Breaches of the Rule of Law – a Dose of Tough Love Needed?', SIEPS 2020:7epa.

[17]For recent contributions, *see* S. Marinai, 'Considerazioni in merito all'introduzione, "a Trattati invariati", di nuovi meccanismi per il rispetto della rule of law', 15 *Studi sull'integrazione europea* (2020) p. 69; A. von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States', 57 *CMLRev* (2020) p. 705.

broader implications of the judgments on the use of conditionality as an alternative enforcement mechanism of EU law.

## Background

### *Conditionality and the question of competence*

The debate over the creeping expansion of competences through the use of budgetary conditionalities, which is very much present in federal systems, has been almost absent in the EU until very recently. As noticed by Ronald Watts at the end of the 1990s, 'it has been the extensive regulatory activities of the EU rather than its use of its spending power that has been particularly contentious'.[18] The allegations of 'competence creep' were in fact mainly related to the adoption of legislation in fields where the EU had limited – if any – legislative competence,[19] whereas only over the last few years has the 'competence creep' debate begun to consider also alternative methods of intervention, such as soft law or economic policy coordination.[20]

The limited appeal of the conditional spending power as a means to expand the reach of EU law and policies has been due to several factors. First, the Union's budget has long been extremely tight, especially if compared with the increasing number and breadth of EU policies and objectives. Besides, the already limited financial autonomy of the Union has been further constrained by the member states, who, drawing strength from a revenue system mainly pivoted on *de facto* national contributions, have traditionally played a crucial role in the design of EU spending policies.[21] As Richard Crowe bitterly noted, 'in a Union of states and citizens, the Union budget remains principally a budget of, and between, states'.[22] Unsurprisingly, the EU budget has been more often depicted as a bargaining tool for rebalancing the perceived costs and benefits of membership among the

[18]R.L. Watts, *The Spending Power in Federal Systems: A Comparative Study* (Queen's University 1999) p. 47.

[19]S. Weatherill, 'Competence Creep and Competence Control', 23 *Yearbook of European Law* (2004) p. 1.

[20]S. Garben, 'Competence Creep Revisited', 57 *Journal of Common Market Studies* (2019) p. 205.

[21]The main manifestation of this is the key, albeit controversial, role played by the Heads of state or government, sitting in the European Council, in the design of the Multiannual Financial Framework and of the essential elements of EU spending policies: *see* R. Crowe, 'The European Council and the Multiannual Financial Framework', 18 *Cambridge Yearbook of European Legal Studies* (2016) p. 69.

[22]R. Crowe, 'An EU Budget of States and Citizens', 26 *European Law Journal* (2020) p. 331.

member states rather than as an instrument for the Union to pursue its policy agenda.[23]

A second factor is that for a long time the Union's experience with conditionality was almost exclusively confined to the EU's external action, while the employment of such a policy tool in internal affairs was rather sporadic.[24] In particular, until a decade ago the few conditionalities attached to EU internal expenditure were limited to specific budget headings and sufficiently connected with the spending objectives of the relevant funds. For instance, one may think of the 1994 Cohesion Fund's macroeconomic conditionality,[25] which reflected the original link between the establishment of the funding scheme and the Economic and Monetary Union objectives agreed in Maastricht.[26]

The relevance of these factors, though to different extents, has considerably decreased in recent times.

First, the adoption of 'Next Generation EU' opened an era of increasing centrality of the EU budget in the trajectories of European integration, as exemplified by the words of Commission President von der Leyen during the last State of the Union address: 'The European budget is the future of our Union cast in figures'.[27] These words would probably have seemed overly emphatic or even unrealistic if spoken a couple of years ago, but take on an extremely different value today. Not only has the Covid-19 pandemic led to an exceptional increase in EU public expenditure, but it has given an impetus to the process of reform of the revenue system, whose eventual success may have long-lasting implications on the Union's financial autonomy. Against this background, the leverage of the EU spending power has already increased exponentially, as recently shown also by the Commission's attempt to exploit the Recovery and Resilience Facility as an instrument to address rule of law concerns in Hungary and Poland.[28]

[23]On the use of the budget as a bargaining tool, *see* in particular M.A. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community', 14 *Journal of Public Policy* (1994) p. 95. On the dual nature of the Multiannual Financial Framework, and of the EU budget in general, *see* S. Lehner, 'The Dual Nature of the EU Multiannual Financial Framework', in B. Laffan and A. De Feo (eds.), *EU Financing for Next Decade: Beyond the MFF 2021-2027 and the Next Generation EU* (European University Institute 2020) p. 41.

[24]*See*, for instance, the so-called 'safeguard clauses' included in the acts of accession since the 2004 enlargement round: M. Cremona, 'EU Enlargement: Solidarity and Conditionality', 30 *European Law Review* (2005) p. 3.

[25]Council Regulation (EC) 1164/94 of 16 May 1994 establishing a Cohesion Fund, Art. 6.

[26]*See* the Protocol on economic and social cohesion attached to the Maastricht Treaty (OJ C 191/93 of 29 July 1992).

[27]U. von der Leyen, State of the Union Address, 15 September 2021, SPEECH/21/4701.

[28]*See* T. Nguyen, 'How Much Money is a Lot of Money?', *Verfassungsblog*, 17 September 2021, ⟨https://verfassungsblog.de/how-much-money-is-a-lot-of-money/⟩.

Second, even before the outbreak of the pandemic, conditionality was experiencing a remarkable expansion in the EU internal dimension. It is known that 'strict conditionality' was a key – and controversial – element of EU debt crisis management.[29] What is less known is that the use of conditionality has been normalised in EU internal affairs, rapidly becoming an essential component of the daily life of EU spending policies.[30] Since the 2013 Multiannual Financial Framework reform, conditionality arrangements have covered virtually all EU budget headings and are connected with a wide array of policy goals, which are at times 'exogenous' to the specific spending objectives. Crucially, for current purposes, this evolution follows the Commission's call for a 'broader and more timely use of EU budget expenditure as an incentive for compliance'.[31] The 2013 reform indeed marked the start of a trend in EU post-crisis internal governance to use conditionality as an alternative enforcement mechanism of EU law, one that becomes ever more attractive in fields where the EU institutions struggle to enforce compliance through the ordinary enforcement procedures.[32]

Despite the competence issues that have occasionally emerged even with the use of external conditionalities,[33] it was of course the shift to the internal dimension that made the recourse to conditionality particularly controversial as it became an instrument to reinforce the Union's oversight of member states' internal policies – either by inducing the adoption of legislative or regulatory measures at national level ('regulatory' conditionalities) or by enforcing compliance with existing EU law ('enforcement' conditionalities). The question of competence creep via conditionality was already part of the debate during the sovereign debt

[29]*See inter alia* M. Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', 74 *ZaöRV* (2014) p. 61; A. Baraggia, 'Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?', 4 *Cambridge International Law Journal* (2015) p. 268; A. Viterbo, 'Legal and Accountability Issues Arising from the ECB's Conditionality', 1 *European Papers* (2016) p. 501; A. Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?', 54 *CMLRev* (2017) p. 991; C. Pinelli, 'Conditionality and Economic Constitutionalism in the Eurozone', 11 *Italian Journal of Public Law* (2019) p. 22.

[30]On the expansion of spending conditionality, *see* Viță, *supra* n. 15.

[31]Commission Communication COM(2010) 250 of 12 May 2010, 'Reinforcing economic policy coordination', p. 5.

[32]R. Bieber and F. Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?', 51 *CMLRev* (2014) p. 1057.

[33]For instance, this happened with the use of human rights clauses in development cooperation agreements and with pre-accession conditionality in the 2004-2007 enlargement rounds, on which *see*, respectively, E. Cannizzaro, 'The Scope of EU Foreign Power: Is the EC Competent to Conclude Agreements with Third States Including Human Rights Clauses?', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) p. 297; and D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer 2008) p. 80-82.

crisis,[34] but is now set to become an increasingly salient topic in light of the normalisation of conditionality in EU internal governance and of the 'new life' of the EU budget in post-pandemic times.

### *Regulation 2020/2092: legislative process and competence issues*

Regulation 2020/2092 is a paradigmatic example of the use of conditionality as an alternative enforcement mechanism of EU law. It is known that the establishment of such conditionality regime mainly originates from the Commission's attempt to reinforce the sanctioning strand of the rule of law toolbox to counter the constitutional backsliding going on in some EU member states, particularly in Hungary and Poland.[35] Against the difficulties facing the EU institutions in ensuring compliance with the EU common values, the recourse to conditionality seemed a highly appealing option,[36] especially as Hungary and Poland are among the major recipients of EU funding.[37] Though the regulation was carefully construed as a financial instrument to protect the budget, the Commission was definitely more focused on defending the rule of law through the budget than the budget through the rule of law.[38]

This inversion of priorities, which is patent from the very title of the Commission's proposal, was mainly due to legal basis issues. Aware of the limits imposed by the Treaties, the Commission decided to base the proposed regulation on Article 322(1)(a) TFEU, which empowers the Parliament and the Council, acting in accordance with the ordinary legislative procedure, to 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'. The 'price' of such a choice was that, already partly in the Commission's proposal and more clearly in the final text, safeguarding the rule of law became an indirect and accessory objective of the conditionality mechanism, which allows the adoption of financial measures only where 'breaches of

[34]A. Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?', 15 *German Law Journal* (2014) p. 1145; S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union', 13 *EuConst* (2017) p. 23.

[35]Commission, Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324, 2 May 2018.

[36]G. Halmai, 'The Possibility and Desirability of Rule of Law Conditionality', 11 *Hague Journal on the Rule of Law* (2019) p. 171.

[37]A chart showing EU spending and revenue per country is available at ⟨https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/spending-and-revenue_en⟩ visited 30 May 2022.

[38]*See* the references *supra* n. 16.

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the principles of the rule of law' (or 'generalised deficiencies as regards the rule of law' in the Commission's proposal) have actual or potential consequences on the implementation of the Union's budget.

As noted in the academic[39] and institutional[40] debate accompanying the legislative process, however, the Commission's proposal was not devoid of ambiguities, meaning that the formulation of certain provisions suggested a potential use of the mechanism as a genuine sanctioning instrument to penalise rule of law breaches, irrespective of their actual or expected impact on budget implementation.[41] This was also stressed in a highly criticised opinion of the Council Legal Service, according to which the proposed mechanism was not a 'genuine' conditionality instrument falling within the scope of Article 322(1)(a) TFEU and represented a circumvention of the procedures laid down in Article 7 TEU.[42] In essence, according to the Council Legal Service, the EU had no competence to adopt a conditionality mechanism related to the principles of the rule of law such as that proposed by the Commission. For it to be compatible with the Treaties, it would have been necessary to ensure both a sufficiently direct link with budget implementation and that the conditionality mechanism be truly independent from Article 7 TEU.

The opinion exerted some influence on the way the Council[43] and the European Council[44] approached the negotiations. Both institutions indeed pushed for an overall refocusing of the instrument, which in the end is more

[39]Goldner Lang, *supra* n. 16; Fisicaro, *supra* n. 16.

[40]Council Legal Service, Opinion on '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 – Compatibility with the EU Treaties', doc. 13593/18, 25 October 2018.

[41]For instance, according to Art. 4(3) of the proposal (*supra* n. 35), the measures taken should be proportionate to the 'nature, gravity and scope of the generalised deficiency as regards the rule of law', instead of being based on their budgetary implications. Also, as for Art. 6(2), the measures could be lifted only 'once the generalised deficiencies as regards the rule of law [. . . ] cease[d] to exist in full or in part', being insufficient to show that the deficiencies ceased to affect the sound financial management of the EU budget or the financial interests of the Union.

[42]Council Legal Service, *supra* n. 40. The opinion was criticised by K.L. Scheppele et al., 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-related Rule of Law Mechanism', *Verfassungsblog,* 12 November 2018, ⟨https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/⟩ visited 30 May 2022.

[43]*See* the Council Presidency's compromise presented on 29 September 2020 ('Multiannual Financial Framework (MFF) 2021-2027 and Recovery Package – Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget', doc. 11045/1/20 REV1).

[44]This emerged clearly with the Draft Conclusions of President Charles Michel of 14 February 2020 (doc. 5846/20, paras. 22-25) and was later confirmed in the Conclusions of December 2020, *supra* n. 4, paras. 2(a) and (e).

clearly a financial instrument to protect the budget rather than a rule of law instrument.[45] In particular, according to Article 4(1) of the Regulation, appropriate measures could be adopted only where 'breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'.[46] More generally, the specific grounds for adopting and lifting measures, as well as the criteria to be followed in the choice of the relevant measures, have been readapted as to ensure a sufficient connection with the implementation of the budget and the autonomy of the conditionality mechanism from Article 7 TEU.[47] This may be regrettable from the perspective of the protection of EU values, since the potential of the mechanism as a rule of law instrument was certainly downsized.[48] On the other hand, as was convincingly argued by Baraggia and Bonelli, the final text of the Regulation now encloses a 'genuine' conditionality mechanism which, even before the rulings, appeared more in line with the Treaties than did the Commission's initial proposal.[49] As is discussed in more detail below, the importance of such amendments in ensuring the legality of the conditionality instrument was explicitly recognised by Advocate General Campos Sánchez-Bordona in his Opinions of 2 December 2021[50] and, though less explicitly, by the same Court.

## The Court's 'twin' judgments of 16 February 2022

The competence issues arising from the use of spending conditionality as an alternative enforcement mechanism in the field of EU values have been brought before the Court of Justice in the annulment actions filed by Hungary and Poland against Regulation 2020/2092. As anticipated at the very beginning, the two actions contested many aspects of the conditionality mechanism but, for present purposes, the analysis will be limited to the pleas alleging lack of competence by the EU to adopt the contested regulation,[51] which in essence revolve around two main questions.

[45]For an accurate account of the evolution of the mechanism throughout the legislative process, *see* A. Baraggia and M. Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', 23 *German Law Journal* (2022) p. 131, at p. 133-141.

[46]Regulation 2020/2092, *supra* n. 2, Art. 4(1).

[47]*See*, especially, Arts. 4(2), 5(3) and 7.

[48]*See* Cannizzaro, *supra* n. 4.

[49]Baraggia and Bonelli, *supra* n. 45, p. 146-150.

[50]AG Campos Sánchez-Bordona, Opinions of 2 December 2021 on *Hungary* v *Parliament and Council,* Case C-156/21, and *Poland* v *Parliament and Council*, Case C-157/21.

[51]*See* Hungary's first and second pleas, and Poland's first, second, fifth, sixth and eleventh pleas.

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The first concerns the legal basis of Regulation 2020/2092. In a rather similar way, Hungary and Poland argued that Article 322(1)(a) TFEU did not provide an appropriate legal basis for establishing a conditionality mechanism such as that enclosed in the contested regulation, which, in the applicants' view, allows the EU institutions to determine the existence of, and impose sanctions for, breaches of the principles of the rule of law.

The second question concerns the relation between the conditionality regime and Article 7 TEU. The applicants claimed that the contested regulation established by means of secondary law a parallel procedure to Article 7 TEU, which, according to them, represents the only provision allowing the EU institutions to intervene in defence of the values enshrined in Article 2 TEU, including the rule of law. By adopting Regulation 2020/2092, the applicants argue, the EU institutions circumvented the limitations imposed by Article 7 TEU and Article 269 TFEU, surreptitiously extending the powers of the Commission, of the Council and of the same Court in the field of EU values.

The two questions are dealt separately in the following sub-sections.

### *The legal basis*

As regards the legal basis, the Court first sheds light on the scope of Article 322(1)(a) TFEU, concluding that it allows the adoption of rules regulating 'all aspects related to the implementation of the budget', including those intended to ensure the observance of the principle of sound financial management by the member states when implementing the Union's budget.[52] In other words, the provision does not merely refer to the rules determining how the expenditure shown in the budget is to be implemented as such, but – crucially – it enables the EU institutions to establish rules aimed at protecting the Union's budget in its implementation.

At this point, in line with its settled case law, the Court examines whether the aim and content of Regulation 2020/2092 fall within the scope of Article 322(1)(a) TFEU, as identified above. The choice of legal basis should indeed rest on 'objective factors that are amenable to judicial review', including the 'aim' and 'content' of the adopted measure.[53]

Starting from the aim, the Court firmly embraces the view 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 such breaches as such'.[54] Largely following the Advocate General's Opinion, the Court reaches this conclusion at the end of a

[52] *Hungary, supra* n. 1, paras. 98-105; *Poland, supra* n. 1, paras. 112-119.
[53] *See also* ECJ 3 December 2019, Case C-482/17, *Czech Republic* v *Parliament and Council*, para. 31.
[54] *Hungary, supra* n. 1, para. 119. Similarly in *Poland, supra* n. 1, para. 137.

detailed analysis of the key provisions of the Regulation, which confirms the genuine 'financial' nature of the conditionality mechanism. On this point, the Advocate General is also keen to stress the evolution of the legislative process leading to the adoption of Regulation 2020/2092:

> The Commission's proposal focused more on protecting the rule of law and less on the financial conditionality of the mechanism. As a result of the Council's involvement, the final text of Regulation 2020/2092 became more clearly a financial conditionality instrument, in which safeguarding the rule of law operates as a horizontal condition that must be respected by Member States when implementing the budget. [. . .] As finally drafted, the financial conditionality mechanism is strictly linked to implementing the Union budget, so as not to breach Article 7 TEU and in order to ensure that the legislation falls within the legal basis of Article 322 TFEU.[55]

The Court is more cautious on the point, but seems to share the Advocate General's view. Although it did not engage in a historical interpretation of the contested regulation, the Court indeed recalls all the key provisions which have been amended in the legislative process, including those establishing the conditions for adopting and lifting measures and the criteria relating to the choice and scope of the relevant measures.[56] In a rather cynical and revealing passage, the Court for instance stresses that the measures 'must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist'.[57]

The Court is so convinced of the genuine financial nature of the mechanism that the protection of the rule of law is not even mentioned as an incidental or accessory objective of the Regulation, as it actually appears to be. After all, it is in the nature of spending conditionality clauses to pursue *also* a 'horizontal' and conceptually distinct objective, one that goes somewhat beyond the primary spending purpose.[58] Applying by analogy the case law on acts with a twofold purpose or component,[59] the Court could have arguably qualified the protection of the rule

[55]AG Opinion on *Hungary, supra* n. 50, paras. 164-166.

[56]*See*, in particular, *Hungary, supra* n. 1, paras. 111-114; *Poland, supra* n. 1, paras. 125-128.

[57]*Hungary, supra* n. 1, para. 113; *Poland, supra* n. 1, para. 127.

[58]As noticed by Viță, *supra* n. 15, p. 122, the key difference between spending conditionality and any other condition attached to spending (e.g. administrative burdens) is that 'the conduct prescribed by a conditionality must pursue a policy objective which goes beyond the primary purpose of spending'.

[59]*See inter alia Czech Republic* v *Parliament and Council, supra* n. 53, para. 31: 'If examination of the measure concerned reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component'.

of law as an incidental or accessory objective of the Regulation without calling into question the appropriateness of Article 322(1)(a) TFEU as single legal basis. This approach would have also been more in line with the following part of the judgments, where the Court does indeed navigate between arguments relating to the protection of the budget and arguments more directly connected with the protection of the rule of law.

When turning to the analysis of the Regulation's content, in fact, the Court goes a little further than the Advocate General. While the Advocate General's Opinion is exclusively focused on the analysis of the single provisions of Regulation 2020/2092, the Court takes the opportunity to outline the conceptual and legal underpinning of the link between budget and values, relying on three main arguments: membership, identity, and solidarity.

The first argument, which builds upon the case law inaugurated with the *Repubblika* judgment,[60] relies on the connection between continuous respect for the EU common values and the enjoyment of EU membership rights. The Court observes that 'compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of *all* the rights deriving from the application of the Treaties to that Member State',[61] implicitly suggesting that it is also a condition for the enjoyment of the (membership) 'right' to access EU funding. The *liaision* between membership and values and the idea of 'mutual membership' is a recurrent topic throughout the two rulings[62] and is increasingly relied on in the recent case law of the Court as a powerful normative argument supporting the Union's monitoring of rule of law compliance by the member states.[63] As the Court stresses, 'compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession'.[64] In this part, with all due differences, the Court seems to place Regulation 2020/2092 as a sort of post-accession counterpart of the articulated conditionality framework applicable in the pre-accession context, contributing to address what former Commissioner Viviane Reding famously depicted as the EU's 'Copenhagen dilemma'.[65]

[60]ECJ 20 April 2021, Case C-896/19, *Repubblika* v *Il-Prim Ministru.* On which *see* M. Leloup et al., 'Opening the Door to Solving the "Copenhagen Dilemma""? All Eyes on Repubblika v Il-Prim Ministru', 46 *European Law Review* (2021) p. 692.

[61]*Hungary, supra* n. 1, paras. 124-126; *Poland, supra* n. 1, paras. 142-144 (emphasis added).

[62]*See also Hungary, supra* n. 1, para. 231; *Poland*, *supra* n. 1, paras. 169, 201, 282 and 284.

[63]On the concept of 'mutual membership', *see* 'Editorial Comments: Hungary's New Constitutional Order and "European Unity"', 49 *CMLRev* (2012) p. 871. More recently, F. Casolari, 'Lo Stato di diritto preso sul serio', in P. Manzini and M. Vellano (eds.), *Unione europea 2020* (Kluwer-CEDAM 2021) p. 285.

[64]*Hungary, supra* n. 1, para. 127; *Poland, supra* n. 1, para. 144

[65]V. Reding, 'Safeguarding the Rule of Law and Solving the "Copenhagen Dilemma": Towards a New EU-Mechanism', 22 April 2013, SPEECH/13/348.

The second argument is based on the duty to defend the Union's constitutional identity. In an already iconic passage from the two judgments,[66] the Court holds that 'the values contained in Article 2 TEU [. . .] define the very identity of the European Union as a common legal order. Thus, the European Union *must be able to* defend those values',[67] implying that it must be able to do so also through financial means. Even more clearly, and with a rather unusual language for a Court, it adds that:

> the European Union *cannot be criticised* for implementing, in defence of its identity, which includes the values contained in Article 2 TEU, the means necessary to protect [the] sound financial management [of the Union's budget] or [the] financial interests [of the Union].[68]

Although the use of the expression 'must be able to defend [the] values' seemed to pave the way for an expansion of the functional scope of Union's competences in light of Article 2 TEU,[69] the Court soon and carefully scales down its 'militant democracy' tone by adding 'within the limits of its powers as laid down by the Treaties'.[70] In other words, the Union has the right – even a duty ('must') – to defend its own identity, including through the budget, but the 'identity' argument does not provide a base for expanding the Union's competences and powers beyond the limits imposed by the Treaties.

The third argument is developed along the thin line connecting respect for the EU common values and the solidarity dimension of the Union's budget. This link was also suggested by Advocate General Campos Sánchez-Bordona[71] – by the way, the same Advocate General who had previously encouraged the Court to place solidarity among the fundamental principles of EU law in the so-called 'OPAL' case.[72] The Court's reasoning, in the present judgments, winds through

[66]For first comments, *see* P. Faraguna and T. Drinóczi, 'Constitutional Identity in and on EU Terms', *Verfassungsblog*, 21 February 2022, ⟨https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/⟩ visited 30 May 2022; P. Pohjankoski, 'The Unveiling of EU's Constitutional Identity', *EU Law Live*, Weekend Edition No. 91 of 26 February 2022, ⟨https://eulawlive.com/weekend-edition/weekend-edition-no91/⟩; M. Bonelli, 'Has the Court of Justice embraced the language of constitutional identity?', *Diritti Comparati,* 26 April 2022, ⟨https://www.dirittocomparati.it/has-the-court-of-justice-embraced-the-language-of-constitutional-identity/⟩ visited 30 May 2022.

[67]*Hungary, supra* n. 1, para. 128; *Poland, supra* n. 1, para. 145 (emphasis added).

[68]*Poland, supra* n. 1, para. 268 (emphasis added).

[69]As previously suggested in literature by Cannizzaro, supra n. 4, p. 1102–1104.

[70]*Hungary, supra* n. 1, para. 128; *Poland, supra* n. 1, para. 145.

[71]AG Opinion in *Hungary, supra* n. 50, para. 110.

[72]ECJ 15 July 2021, Case C-848/19 P, *Germany* v *Poland,* para. 38. On which *see* P. Mengozzi, 'Le regole comuni per il mercato interno del gas naturale ed il principio di solidarietà energetica', 26 *Il Diritto dell'Unione europea* (2021) p. 285.

three steps: first, 'the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity'; second, 'the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget'; third, 'that mutual trust is itself based [ . . . ] on the commitment of each Member State to comply with its obligations under EU law and to continue to comply [ . . . ] with the values contained in Article 2 TEU, which include the value of the rule of law'.[73] This is not the place to further investigate the complex relation between conditionality and solidarity in this field.[74] For the limited purposes of this case note, it is worth noting the Court's attempt to partly revisit the idea of conditionality as a nexus between solidarity and responsibility, which was the controversial *leitmotiv* during the sovereign debt crisis and which imbued, although not explicitly, the Court's reasoning in *Pringle*.[75] During the crisis, conditionality required budgetary discipline (responsibility) in exchange for financial assistance (solidarity) with a view to mitigating the risks of moral hazard,[76] and arguably punishing recalcitrant member states.[77] In the present judgments, instead, the idea of responsibility evoked by the Court ('*responsible* use of the common resources'), which is arguably necessary for the implementation of the principle of solidarity through the budget, mainly relates to the respect for the values contained in Article 2 TEU. The changing content of the 'responsibility' concept and its relation to the solidarity dimension of the EU budget – which better reflects the spending conditionality constellation[78] and, arguably, even the broader evolution of conditionality in EU post-pandemic economic

[73]*Hungary, supra* n. 1, para. 129; *Poland, supra* n. 1, para. 147.

[74]On which *see*, most recently, J. Bachtler and C. Mendez, 'Cohesion and the EU's Budget: Is Conditionality Undermining Solidarity?', in R. Coman et al. (eds.), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press 2020) p. 121.

[75]ECJ 27 November 2012, Case C-370/12, *Thomas Pringle* v *Government of Ireland,* particularly at paras. 135-137. Contrary to AG Kokott, the Court does not explicitly rely on solidarity, but in the end accepts a restrictive interpretation of Art. 125 TFEU so as to allow the EU to grant financial assistance subject to conditionality. On the point, *see* R. Cisotta, 'Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi', 20 *Il Diritto dell'Unione europea* (2015) p. 57 at p. 82-86.

[76]M. Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis', 53 *CMLRev* (2016) p. 1237.

[77]H. Schepel, 'The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone', 44 *Journal of Law and Society* (2017) p. 79.

[78]Spending conditionality clauses are indeed linked with a wide array of EU policy domains – from state aid rules and antitrust to fundamental rights and social inclusion – and not only with the EU fiscal rules.

governance[79] – is thus exploited by the Court to reinforce the conceptual connection between respect for the rule of law and the management of the Union's budget.

At the end of this digression, one may even wonder whether the Court is really so sure that Regulation 2020/2092 is *merely* a financial tool. In particular, the arguments based on the concepts of membership and identity fit more easily with a discussion on the reinforcement of the rule of law toolbox, rather than on safeguarding the financial interests of the Union and the sound financial management of the EU budget. Yet, after this *tour d'horizon*, the Court retraces its steps and engages in a detailed analysis of the single provisions of Regulation 2020/2092 to check whether their content falls within the scope of Article 322(1)(a) TFEU.[80]

In this part, the Court again implicitly stresses the importance of the amendments adopted at the final stages of the legislative process, which have shaped a sufficiently direct connection with the need to preserve the integrity of EU spending. The existence of such a 'genuine' link with budget implementation appears indeed crucial, in the Court's reasoning, to dismiss the allegation that the contested regulation allows the EU institutions to examine situations in the member states which fall outside the scope of EU law.[81] As the Court explains, the situations covered by the Regulation all 'relate to the implementation of the budget and *thus* fall within the scope of EU law'.[82]

After having rejected the applicants' claims concerning the legal basis of Regulation 2020/2092, the Court moves on to the second main question raised by Hungary and Poland, i.e. whether the adoption of the contested regulation constituted a circumvention of the procedures of Article 7 TEU.

### *The relation to Article 7 TEU*

As a preliminary step, the Court takes the opportunity to explicitly bust yet another myth – after the 'nuclear option' one[83] – surrounding Article 7 TEU, i.e. the idea that it represents the one and only provision enabling the EU institutions to protect Article 2 TEU values and that it even bars the creation or use of different instruments in the field.

This is nothing new for those following the developments of the rule of law crisis unfolding in Europe. Indeed, the 'exclusivity' or '*lex specialis*' myth – which

[79] *See* M. Ioannidis, 'Between Responsibility and Solidarity: COVID-19 and the Future of the European Economic Order', 80 *ZaöRV* (2020) p. 773.

[80] *Hungary*, *supra* n. 1, paras. 134-153; *Poland*, *supra* n. 1, paras. 152-182.

[81] *See*, in particular, *Hungary*, *supra* n. 1, paras. 140-145.

[82] *Poland*, *supra* n. 1, para. 221 (emphasis added). *See also* para. 163 and *Hungary*, *supra* n. 1, para. 145.

[83] D. Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU', EUI Working Paper Law 2017/10.

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had been a matter of debate especially at the first stages of the crisis[84] – has already been dispelled in practice on both the political and judicial front, following the rapid evolution of the rule of law toolbox during the crisis[85] and the Court's bold case law relating to the principles of the rule of law.[86] Yet, even beyond the applicants' instrumental allegations, the 'exclusivity' myth has recently resonated also in EU institutional circles. In yet another controversial passage of the Conclusions of 10-11 December 2020, the European Council indeed was keen to 'recall that Article 7 TEU establishes *the* procedure to address the breaches of the Union's values under Article 2 TEU'.[87]

In this light, the Court's firm stance against this narrative sounds particularly appropriate. While carefully avoiding referring to the plethora of relevant soft law instruments adopted over the past decade,[88] the Court provides several examples of primary law provisions relating to the values of Article 2 TEU, as to conclude that

> '[. . . ] in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State'.[89]

The fact that Article 7 TEU is not the *lex specialis* for the protection of EU values, however, does not offer the EU institutions a *carte blanche* to intervene in the field. Not only does a sound legal basis need to be identified, but 'the EU legislature cannot establish, without infringing Article 7 TEU, a procedure

[84]'Editorial Comments: Safeguarding EU Values in the Member States – Is Something Finally Happening?', 52(3) *CMLRev* (2015) p. 619 at p. 626-627. *See also* AG Tanchev, Opinion of 11 April 2019 in Case C-619/18, *Commission* v *Poland (Indépendance de la Cour suprême)*, paras. 48-51.

[85]On which *see* L. Pech, 'The Rule of Law', in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford University Press 2021) p. 307.

[86]For a recent overview, *see* L. Pech and D. Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case', SIEPS 2021:3.

[87]European Council, *supra* n. 4, point 1 (emphasis added).

[88]Among them, it is worth reminding that the Commission's adoption of the 'Rule of Law Framework' was criticised by the Council Legal Service in a controversial opinion of 27 May 2014 ('Commission's Communication on a new EU Framework to strengthen the Rule of Law', doc. 10296/14). For a sensible critique of the opinion, *see* D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *EuConst* (2015) p. 512; R. Baratta, 'Rule of Law "Dialogues" Within the EU: A Legal Assessment', 8 *Hague Journal on the Rule of Law* (2016) p. 357.

[89]*Hungary*, *supra* n. 1, para. 159; *Poland*, *supra* n. 1, para. 195.

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parallel to that laid down by that provision, having, in essence, 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'.[90] This means, in essence, that the procedures eventually provided in acts of secondary law – as in the case of Regulation 2020/2092 – shall be 'different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU'.[91]

Interestingly, as is expounded in the next section, this 'differentiation' test is construed by the Court starting from a longstanding case law concerning the relation between what can be considered *lato sensu* conditionality mechanisms and the infringement procedure of Articles 258-260 TFEU. In these cases, indeed, the Court was called to assess whether the Commission's recourse to the clearance of account procedure and to financial corrections in response to irregularities in the use of EU funds ought to be considered a circumvention of the key centralised procedure for enforcing EU law provided by the Treaties, i.e. the infringement procedure.[92] The Court has always considered that 'the two procedures are independent of each other as they serve different aims and are subject to different rules'.[93] In particular, as the Court specified, financial corrections cannot be equated to a 'penalty' for failing to fulfil EU law obligations, being rather designed to avoid burdening the EU budget with amounts that have not served to finance the objectives identified in the relevant pieces of EU legislation.[94]

While in the cases above the 'differentiation' test was connected with claims of misuse of powers by the Commission, in the judgments of 16 February 2022 it is instead applied as a benchmark for assessing *ex ante* the compatibility of the newly-established Regulation 2020/2092 with the relevant EU law enforcement procedure laid down in Article 7 TEU.

That said, the Court engages in a close comparison of Article 7 TEU and the contested regulation, concluding that the two procedures are different and

[90] *Hungary*, *supra* n. 1, para. 167; *Poland*, *supra* n. 1, para. 206.

[91] *Hungary*, *supra* n. 1, para. 168; *Poland*, *supra* n. 1, para. 207.

[92] The leading case is ECJ 7 February 1979, Cases 15/76 and 16/76, *France* v *Commission*, which concerned the Commission's clearance of accounts under the European Agricultural Guidance and Guarantee Fund. The approach was later extended to the financial corrections procedure in the management of structural funds: *see* ECJ 11 July 1996, Case C-325/94 P, *An Taisce and WWF UK* v *Commission*; ECJ 11 January 2001, Case C-247/98, *Greece* v *Commission*.

[93] *France* v *Commission*, *supra* n. 92, para. 26.

[94] *Greece* v *Commission*, *supra* n. 92, para. 14.

independent from each other, as regards both the purpose and the subject matter.[95] Here again, the amendments approved during the legislative process have proven crucial for the Court to clearly distinguish the two procedures. In particular, the Court stresses the importance of establishing a 'genuine' link between the breaches of the principles of the rule of law and the actual or expected impact on the sound financial management of the EU budget or on the Union's financial interests. As said above, the importance of ensuring a sufficiently direct link with budget implementation – which became also an explicit condition for adopting measures under Article 4(1) of the Regulation – was one of the key issues at stake during the long negotiations and, under the Council's auspices, framed the debate over the amendments to be adopted on the Commission's initial proposal.

## Concluding remarks: framing a test for 'enforcement' conditionalities

In addition to confirming the legality of Regulation 2020/2092 and (once again) coming to the rescue of EU political institutions in the rule of law battlefield, the Court has developed a rigorous, yet reasonable, test for assessing the legality of 'enforcement' conditionality clauses.

First, the Court has shown a certain rigour in checking whether the aim and content of the conditionality mechanism fall within the scope of the chosen legal basis. In the case of Regulation 2020/2092, this entailed a scrupulous assessment of the provisions of the Regulation to check whether a genuine link between the breaches of the principles of the rule of law and the purpose of safeguarding the EU budget was secured. In this light, a conditionality tool purely aimed at sanctioning rule of law breaches, and arguably even the Commission's initial proposal, would have hardly passed the test as envisaged by the Court in the two judgments. It is worth adding that the sufficiently direct link criterion might also be relevant beyond Regulation 2020/2092. For instance, in the ordinary case of conditionalities included in the regulations governing the functioning of the funds, where the conditionality clause is grounded on the same legal basis of the relevant funding scheme,[96] one may argue that a sufficiently direct connection between the

[95] *See Hungary*, *supra* n. 1, paras. 169-179 and *Poland*, *supra* n. 1, paras. 208-218, where the Court draws a clear line between the two procedures, analysing the respective purpose and scope, the conditions for initiating the procedures and for adopting and lifting measures, as well as the nature of the measures that may be adopted.

[96] This is the case for the vast majority of spending conditionality clauses, which are typically laid down in the Common Provisions Regulation on European Structural and Investment Funds or in the funds-specific regulations.

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'horizontal' objective pursued through conditionality and the specific spending objectives of the funds is necessary for ensuring the legality of the mechanism. Otherwise, the conditionality clause would arguably fall outside the scope of the chosen legal basis.

Second, the Court has required the conditionality mechanism to be truly different and independent from the competing enforcement procedures envisaged by the Treaties, as regards both the purpose and the subject matter. In the cases at hand, this entailed a close comparison between the (rule of law) conditionality regulation and the obvious candidate for sanctioning breaches of EU values provided for by the Treaties, i.e. Article 7 TEU. However, as mentioned above, the Court's differentiation test may also be translated to other enforcement schemes established by the Treaties, including the infringement procedure. To mark a difference from the competing EU law enforcement schemes, it seems necessary that the 'enforcement' conditionality mechanism be sufficiently anchored in the implementation of the budget. In other words, conditionality instruments could not merely be used to penalise breaches of given EU law provisions irrespective of their relevance to the sound management and implementation of the pertinent funding schemes and objectives. Otherwise, the conditionality tool would risk overlapping with the relevant enforcement procedures laid down in the Treaties – be it Article 7 TEU, the infringement procedure or other sector-specific enforcement schemes, such as the Excessive Deficit Procedure.

In sum, in the rigorous test framed by the Court, the existence of a sufficiently direct link with the implementation of the budget seems necessary to ensure that the 'enforcement' conditionality clause be both consistent with the chosen legal basis and independent from the competing Treaty-based enforcement procedures. While limiting the use of conditionality as an alternative EU law enforcement mechanism, this reading appears reasonable on two different levels.

First, it preserves the institutional balance envisaged by the Treaties with regard to the enforcement of EU law. Without a sufficient connection with the implementation of the budget, 'enforcement' conditionality instruments would indeed easily turn into substitutes for the relevant Treaty-based enforcement schemes while allocating powers to different institutional actors and providing for different procedural stipulations. If one thinks of the infringement procedure, for instance, it is the for Court of Justice to assess whether there has been a violation of EU law provisions and to eventually impose a lump sum or penalty payment on the recalcitrant member state under Article 260 or 279 TFEU. Instead, conditionality clauses entrust the Commission – and sometimes the Council – with the task of checking compliance with the relevant conditions and imposing quasi-sanctions in case of non-fulfilment. Here, the Court's scrutiny under Article 263 TFEU is eventually limited to an *ex post* assessment of the decisions taken by the EU institutions in charge of applying the conditionality

mechanism – a scrutiny that, however strict it may be, is very much different from the check on the conduct of member states carried out in infringement proceedings.

Second, the requirement of a genuine link with the implementation of the budget seems appropriate also to safeguard the policy functions served by the various EU funding schemes. Restricting access to EU funding as a means of 'buying' compliance with EU law may appear to be an appealing option, especially when it comes to the pursuit of commendable goals such as the protection of EU values. Yet, when the conditionality objective is entirely 'exogenous' to the spending objectives of the funds, the instrumentalisation of the budget as a sanctioning tool may entail the sacrifice of the medium- and long-term policy strategies pursued by the Union in fields such as education, research, infrastructures, environment and climate action, integration of marginalised communities, etc. Also, it suggests the idea that EU funding is a 'gift' for good behaviour rather than an essential component of key supranational policies.[97]

It should be noted that, by stressing the importance of the sufficiently direct link criterion in the legality test framed by the Court, this case note does not mean to ignore the consequences of such a requirement on the concrete application of the conditionality regime in the ongoing rule of law crisis. There is little doubt that the focus on the budgetary implications of rule of law breaches, which emerges from the final text of the Regulation and from the Court's rulings, weakens the potential of Regulation 2020/2092 as a rule of law instrument and renders the Commission's task much more cumbersome. The Commission is not only called to prove that the breaches of the rule of law concern one or more of the situations identified in Article 4(2) of the Regulation, but also to prove that a 'genuine' or 'real' link could be established between such breaches and the actual or potential impact on the EU budget.[98] The emphasis placed by the Court on the requirement for a 'genuine' or 'real' link suggests that the connection could not be drawn only in abstract or hypothetical terms,[99] but should display a certain degree of concreteness even in the case of potential impact on the budget ('seriously risk affecting'), where the Court requires that the budgetary risks have a 'high probability' of occurring.[100] This requirement may indeed represent a hurdle for the Commission, especially in the Polish case, where the financial spill-overs of the process of constitutional backsliding are less evident than in Hungary.

Before concluding, it is worth underlining that the two judgments are most likely not the end of the story for the Court, either as regards Regulation 2020/2092 or as regards the legality of spending conditionality clauses.

[97]On the risks of using conditionality as a sanctioning tool, *see* V. Vițǎ, 'The Reinforced Conditionality Approach of the 2021-27 MFF', in B. Laffan and A. De Feo (eds.), *EU Financing for Next Decade: Beyond the MFF 2021-2027 and the Next Generation EU* (European University Institute 2020) p. 101; *see also* Baraggia and Bonelli, *supra* n. 45, p. 152-154.

[98]*Hungary*, *supra* n. 1, paras. 147, 176, 244, 267; *Poland*, *supra* n. 1, paras. 165, 179, 215, 288, 299.

[99]*See also* Commission, *supra* n. 6, para. 33.

[100]*Hungary*, *supra* n. 1, para. 262; *Poland*, *supra* n. 1, para. 299.

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First, it is not difficult to anticipate that any future decision restricting access to EU funding under the Regulation will be likely brought before the Court of Justice. In that context, it remains to be seen whether the rigorous stance taken by the Court in the *ex ante* assessment of the legality of Regulation 2020/2092 will be maintained also in the *ex post* scrutiny on the decisions taken by the Commission and the Council.

In the judgments of 16 February, the Court gives some indications in this respect, particularly when dealing with the pleas alleging a breach of the principle of legal certainty. The Court indeed stresses that the two institutions have an 'obligation strictly to respect the proportionality of the measures adopted, in light of the impact of the breach found on the Union budget', and reminds the Commission of the importance of carrying out a 'diligent' and 'evidence-based' assessment, underlining also that the member states concerned 'may challenge the probative value of each piece of evidence relied on, and [that] the merits of the Commission's assessment may, in any event, be subject to review by the EU judicature'.[101] These lines suggest that, within the limits of its powers under Article 263 TFEU, the Court intends to provide a thorough check not only on the respect of the procedural stipulations, but also on the merits of the decisions taken by the institutions in charge of applying the conditionality mechanism.[102] Arguably, whether the daily life of Regulation 2020/2092 will more resemble that of a rule of law instrument or of a financial tool will depend not only on the way the Commission interprets its role under the Regulation, but also on how strict the Court is in its judicial review of the enforcement decisions. In particular, should the Court relax its control over the existence of a sufficiently direct link between breaches of the principles of the rule of law and actual or expected impact on the budget, then the mechanism could become *de facto* a sanctioning instrument to address rule of law violations.

Second, given the nature of Regulation 2020/2092 and the specific pleas raised by the applicants, the Court's test is calibrated on 'enforcement' conditionalities, but it may need some adjustments before it can be applied to other typologies of spending conditionality clauses, such as the so-called 'regulatory' conditionalities. This latter typology indeed raises the further question of whether and to what extent the EU may exploit spending conditionality to induce the member states to adopt legislative or regulatory measures in fields where the EU has limited – if any – legislative competence. In other words, the main question here is whether the scope of the EU conditional spending power is somewhat constrained by the scope of the EU legislative power. This is a well-known and much-discussed topic in federal systems, where

[101] *Hungary*, *supra* n. 1, paras. 278 and 283-287; *Poland*, *supra* n. 1, paras. 285-287 and 339-343.

[102] On the limits of the Court of Justice's scrutiny, *see* J. Alberti, 'Adelante, presto, con juicio. Prime considerazioni sulle sentenze della Corte di giustizia che sanciscono la legittimità del "Regolamento condizionalità"', 9 *Eurojus* (2022) p. 25 at p. 35-36.

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conditional spending has often been exploited as a means of indirect regulation in areas of exclusive state jurisdiction.[103] Although it seems to be commonly accepted that the scope of the federal spending power is not strictly limited by the direct grants of legislative powers,[104] the recourse to conditional spending tends to be subject to a set of constitutional limitations to avoid it being turned into a 'Trojan horse' to encroach upon the reserved rights of the states.[105] The 'enforcement' component is definitely predominant in the EU's experience with spending conditionality, but the Court might be similarly confronted in the future with the need to set limitations on the use of conditionality as an alternative regulatory device.

In this light, the twin judgments of 16 February 2022 are arguably only the first 'bricks' of the Court's case law not only on the rule of law conditionality regime, but also on the competence issues raised by the use of spending conditionality as an alternative enforcement or regulatory tool. As this case note shows, beyond giving a much-needed boost to the EU's political action in defence of the EU values by unlocking Regulation 2020/2092, the Court has set the bases for a sensible test for assessing the legality of spending conditionality clauses: one that reminds the EU institutions of the constitutional limits imposed by the Treaties and, ultimately, reaffirms the importance of respecting the EU rule of law while enforcing the rule of law vis-à-vis the Member States.

[103]For comparative analyses between the use of conditionality in the EU and in federal systems, particularly in the United States, *see* V. Viță, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?', EUI WP LAW 2017/16; A. Baraggia, '*Potestas v. Potentia:* l'utilizzo della condizionalità in ordinamenti compositi', 50 *DPCE Online* (2022) p. 1333.

[104]*See* Watts, *supra* n. 18, p. 49-50.

[105]For instance, the US Supreme Court has spelled out a set of limitations to the use of the spending power by the Congress, most importantly in *South Dakota* v *Dole*, 483 U.S. 203 (1987), and *NFIB* v *Sebelius*, 567 U.S. 519 (2012). *See*, among others, A.J. Rosenthal, 'Conditional Federal Spending and the Constitution', 39 *Stanford Law Review* (1987) p. 1103; D.E. Engdahl, 'The Spending Power', 44 *Duke Law Journal* (1994) p. 1; T. Sky, *To Provide for the General Welfare: A History of the Federal Spending Power* (University of Delaware Press 2008); most recently, *see* the comments on the case *NFIB* v *Sebelius* in 37 *Harvard Journal of Law & Public Policy* (2014) p. 71-99; and D.S. Cohen, 'A Gun to Whose Head? Federalism, Localism and the Spending Clause', 123 *Dickinson Law Review* (2019) p. 421.

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