

# New Instruments in Cohesion Policy – Implementation Practice by EU Institutions

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## Article

### ABSTRACT

This article is linked with the article by Iwona Jaskolska that introduced the new instruments protecting the cohesion budget against rule-of-law breaches (→ related link). It outlines the practical implementation of the two complementary but independent legal procedures: the Conditionality Regulation and the horizontal enabling conditions under the Common Provisions Regulation (CPR). They have been applied so far in relation to two EU Member States: Hungary and Poland.

The first part of the article analyses the Commission's rule-of-law assessment of both countries and the Council's follow-up with respect to Hungary within the framework of the Conditionality Regulation mechanism. The second part looks at the important restrictions on possible requests for reimbursement under the 2021-2027 cohesion policy programmes that were imposed in parallel against Poland and Hungary in accordance with the CPR horizontal enabling conditions on the implementation of the Charter on Fundamental Human Rights.

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# I. Commission Rule of Law Assessment and Council Measures under the Conditionality Regime

As the Conditionality Regulation explains, respect for the common values on which the Union is founded, is a fundamental premise under the Treaty on European Union (Art. 2 TEU).<sup>1</sup> This implies and justifies mutual trust between Member States. Therefore, whenever Member States implement the Union budget, or use resources allocated on the basis of the Recovery Instrument for Next Generation Europe,<sup>2</sup> the respect for the rule of law is an essential precondition for compliance with the principles of sound financial management as referred to in Art. 317 TFEU.

Recent legislative actions by EU institutions confirm that, for purposes of the financial implementation practice, the principles of the rule of law are recognised as general principles for the implementation of the Union budget.<sup>3</sup> In this context, Member States and the Commission are especially called on to ensure compliance with the Charter of Fundamental Rights of the European Union (CFR), in accordance with Art. 1 of the Charter, and to respect the Union values enshrined in Art. 2 TEU, which are relevant in the implementation of the Union budget.<sup>4</sup>

This fundamental requirement of respect for the rule of law is based on the idea that sound financial management can only be ensured if Member States' authorities act in accordance with the law. This particularly requires that possible cases of fraud, corruption, conflicts of interest, or other breaches affecting the Union's financial interests be pursued independently by investigation and prosecution services; they are subject to effective judicial review by independent courts, acting in close cooperation with the Court of Justice of the European Union (CJEU), if necessary. More specifically, this duty derives from the obligation to respect the guarantees for an independent tribunal as set out in Art. 19 (1) second sub-paragraph TEU read in conjunction with Art. 47 CFR. When implementing the Union budget, any breaches of these guarantees systematically affect and put at serious risk the Union values.

Based on these considerations, and pursuant to Art. 6(4) of the Conditionality Regulation,<sup>5</sup> the Commission sent two requests for information to Poland (on 17 November 2021) and to Hungary (on 24 November 2021) as part of the procedure to establish whether 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.<sup>6</sup>

## 1. The rule-of-law assessment for Poland

In Poland, potential breaches of the rule of law falling within the scope of the Conditionality Regulation are illustrated by a number of respective CJEU orders and judgments on the violated independence of Polish judges and the Supreme Court of Poland.<sup>7</sup> Admittedly, the underlying facts of these cases were not about Union budget implementation. But the risks affecting financial management soon became apparent. On the one hand, there was the systemic undermining of the proper functioning of the Supreme Audit Office of Poland and different measures to politically instrumentalise Poland's criminal investigation and prosecution services. On the other hand, potential breaches pertained particularly to the violation of judicial protection requirements, due to the hampering of effective judicial control by independent courts of the financial managerial action of all relevant authorities responsible for the implementation of the EU budget.<sup>8</sup> The Commission must of course first carry out a thorough qualitative assessment on a case-by-case basis in an objective, impartial, and fair manner in order to identify and assess potential breaches of the rule of law under the Conditionality Regulation. Any assessment of the proportionality of measures under the Conditionality Regulation takes due account of the specific circumstances as well as budgetary and financial contexts.

The Commission appraises the strict necessity of the measures in light of the actual or potential concrete impact of all possible breaches of the rule of law in conjunction with the financial management of the Union budget and the Union's financial interests.<sup>9</sup>

It should be noted that the CJEU interpreted the above-mentioned notions of Art. 4 of the Conditionality Regulation (setting out that 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) as requiring a genuine link between the breaches of the rule of law and their effect – or the serious risk of an effect – on the sound financial management of the EU's financial interests.<sup>10</sup>

By means of these criteria, the Commission undertook a comprehensive assessment of the situation. Against this background and on the basis of the information provided by Poland, the Commission concluded in its assessment based on Art. 6 (3) Conditionality Regulation that there were not sufficient grounds to consider all the conditions for the application of the Conditionality Regulation fulfilled, and it did not initiate a procedure under this Regulation against Poland. It must be borne in mind that one of the key aims of the Conditionality Regulation is that it is to be used as a preventive tool to protect the Union budget and its financial interests. To this end, the Commission endeavours to ensure a sincere dialogue and cooperation with the Member State concerned.<sup>11</sup> A written notification under Art. 6 (1) is sent only as a last resort, should this dialogue prove unproductive and yield no other comparatively effective protective measures.

This context may also explain that, even if the Commission considers the conditions under Art. 4 for activating the measures under the Conditionality Regulation to have been met, under the Conditionality Regulation it is not required to comprehensively document why it chose not to activate the procedure prior to sending a formal written notification under Art. 6 (1) to the Member State. The reason for this is that the Commission may consider "that other procedures set out in Union legislation would allow it to protect the Union budget more effectively." The circumstances can indeed always change. Only in the event that the Commission wants to move ahead with the procedure and considers the conditions for application of the Conditionality Regulation to be fulfilled, must it document its decision (setting out the factual elements and specific grounds on which it has based its findings) in the written notification to the Member State concerned.

## 2. The conditionality measures adopted concerning Hungary

By contrast to Poland, in the case of Hungary, the Commission concluded on 27 April 2022 – following various requests for information and its duly performed assessment under Art. 6(3) – that the conditions for the application of the Conditionality Regulation were fulfilled and initiated a case under this Regulation via a formal Commission notification under the Conditionality Regulation.<sup>12</sup> After several exchanges with Hungary, the Commission proposed on 18 September 2022 that the Council adopt budgetary measures to protect the Union budget.<sup>13</sup> In December 2022, the proposal was followed by an implementing decision of the Council.<sup>14</sup>

Compared to the non-observance and monitoring of the horizontal enabling conditions set out in the CPR, the Conditionality Regulation offers the possibility to address risks linked to widespread and intertwined deficiencies and weaknesses. It offers a broad range of possible measures to protect the EU budget. In its notification to Hungary in April 2022 and in its subsequent proposal to the Council for implementing measures in September 2022, the Commission referred to several issues and their recurrence over time. These issues were indicative of a systemic inability, failure, or unwillingness on the part of the Hungarian authorities to prevent decisions that are in breach of the applicable law as regards public procurement and conflicts of interest and thus to adequately tackle the risks of corruption. The breaches of the rule-of-law principles in Hungary included systemic irregularities, deficiencies, and shortcomings in:<sup>15</sup> (i) public procure-

ment; (ii) detection, prevention, and correction of conflicts of interest as well as “public interest trusts”; and (iii) investigation, prosecution, and the anti-corruption framework.

On this basis, the Commission proposed the suspension of 65% of the commitments for three operational programmes under Cohesion Policy 2021-2027 (or the suspension of one or more of those programmes, in proportion to the risk to the Union’s financial interests, should these programmes not yet have been adopted by the time of the Council decision). It also proposed a prohibition on entering into new legal commitments with public interest trusts and entities maintained by them for programmes implemented in direct and indirect management mode.

On 15 December 2022, the Council took the decision<sup>16</sup> to establish measures to protect the Union budget from breaches of the principles of the rule of law in Hungary. The Council followed the Commission in its findings about deficiencies and weaknesses in the public procurement procedures in Hungary, non-application of conflict-of-interest rules to “public interest trusts”, limitations to the effective investigation and prosecution of alleged criminal activity related to the exercise of public authority, and the absence of a functioning public procurement framework. The Council decided to amend the Commission proposal and reduce the percentage of commitments to be suspended from 65% to 55% for the three operational Cohesion programmes concerned. The measures include a suspension of budgetary commitments from three operational programmes under the Cohesion Policy to an amount of approximately €6,3 billion. As regards implementation of the Union budget in direct and indirect management mode, the Council also prohibited EU bodies from entering into new legal commitments with Hungarian public interest trusts and entities maintained by them.

On 13 December 2023, on the basis of its exchanges with Hungary, the Commission concluded that the situation leading to the adoption of the measures had still not been remedied and that the Union budget remained at the same level of risk.<sup>17</sup> The Commission considers it necessary to maintain the measures under the conditionality mechanism, notably against the background of continued shortcomings in the areas concerning the mandate of the Hungarian Integrity Authority, public asset declarations, and the situation of public interest trusts. Hungary has not yet notified the Commission about any remedies taken. Therefore, the measures against Hungary adopted under the Conditionality Regulation continue to remain in place.

## II. The Commission Cohesion Fund Decisions Linked to the Non-fulfilment of the Horizontal Enabling Conditions

Complementing these Conditionality Regulation-based measures, restrictions under the CPR resulting from the non-fulfilment of the horizontal enabling condition on the Charter of Fundamental Rights<sup>18</sup> have also been considered by the Commission. They can be put in place for reimbursement of possible payment applications to both Hungary and Poland. As a result, the possible reimbursement of funds falling under the CPR were initially nearly completely blocked.

It should be emphasised that the scope of the enabling condition on the Charter of Fundamental rights under the CPR is distinct from the scope of the Conditionality Regulation. The Charter covers rights that go beyond the principles of the rule of law. Conversely, not all the dimensions of the principles of rule of law as listed in Art. 4(2) of the Conditionality Regulation correspond to guarantees under the CFR.

# 1. The 2021 – 2027 cohesion programmes for Hungary

In the case of Hungary, the Commission had raised concerns over four aspects related to judicial independence (see below) affecting all programmes, on the one hand, and, on the other, over Hungary's child-protection law, serious risks to academic freedom, and grave risks to the right to asylum affecting select parts of the respective Cohesion 2021–2027 programmes which pursue related objectives.

In its implementing decisions of 22 December 2022 approving the Hungarian programmes,<sup>19</sup> the Commission listed in detail the legislative changes required to address the deficiencies in judicial independence, which would trigger improvements in legislation in the field of justice and the administration of the judiciary. The Commission noted the commitments made by Hungary in its recovery and resilience plan submitted in accordance with Regulation (EU) 2021/41 to undertake reforms aiming at strengthening judicial independence in order to satisfy the conditions for impartiality of the courts and judges established by law in accordance with Art. 19 TEU. At the time, the Commission believed that these measures to remedy the deficiencies, once taken, would allow the horizontal enabling condition with respect to the CPR to be considered fulfilled. The Commission voiced its openness to further dialogue. However, it specified that the following remained necessary:

- Legislative amendments to strengthen the independent role and powers of the National Judicial Council to effectively counterbalance the powers of the President of the National Office for the Judiciary, in particular to provide a binding opinion on a number of decisions concerning the appointment of judges and to have access to all documentation concerning the administration of the (Hungarian) courts;
- Amendments to the rules on the election of the Kúria (Hungary's Supreme Court) President and on certain aspects of the functioning of the Kúria;
- Removal of the possibility for public authorities to challenge final judicial decisions before the Constitutional Court;
- Amendments of specific sections of the Hungarian Code of Criminal Procedure in order to remove the possibility for the Kúria to review the legality of a judge's decision to make a preliminary reference to the CJEU and in order to remove any obstacle for a court to make a preliminary reference in line with Art. 267 TFEU.

On 13 December 2023, the Commission acknowledged that Hungary had fulfilled the horizontal enabling condition with regard to the deficiencies in judicial independence. This conclusion was drawn after Hungary submitted several pieces of information that it fulfils the enabling conditions (on 18 July 2023 and 19 October 2023, respectively) in response to additional questions from the Commission. Accordingly, Hungary might start receiving reimbursements for a part of its Union funding.<sup>20</sup>

The Commission notably acknowledged that Hungary has committed to taking the necessary measures with respect to increasing the independence of the National Judicial Council and limiting undue influence in order to ensure a more objective and transparent administration of justice. It also took note of Hungary's commitments to reform the functioning of the Hungarian Supreme Court, to limit risks of political influence, to remove the role of the Constitutional Court in reviewing final decisions by judges on request of public authorities, and to remove the possibility for the Supreme Court to review questions that judges intend to refer to the CJEU.

The Commission, however, will continue to monitor the consistent application of the measures put in place by Hungary, notably by means of audits, through engagement with stakeholders and via the monitoring com-

mittees for each of the programmes. Monitoring will particularly concern the effective implementation of legislative reform initiatives in relation to judicial independence. If the Commission at any point in time comes to the conclusion that horizontal enabling condition is no longer fulfilled, it may again decide to block funding and stop reimbursement of payment applications.<sup>21</sup>

As of March 2024, the Commission continues to uphold its concerns about the other areas covered by the horizontal enabling conditions on the CFR (i.e., Hungary's child protection law, academic freedom, and the right to asylum – see above). The corresponding expenditure under the various programmes remains non-reimbursable by the Commission until these concerns are addressed by the country.

## 2. The 2021 – 2027 cohesion programmes for Poland

With respect to the Polish programmes, Poland did not inform the Commission in 2023 that the enabling conditions with respect to the CFR had been fulfilled. According to Art. 15 CPR, this did not hinder the approval of the Polish Cohesion programmes by the Commission in December 2022. But, as a consequence, the Commission did not need to carry out the assessment provided in paragraph 4 of Art. 15 to verify whether it agrees with the Member States' assessment on fulfilment of the enabling conditions.

More recently, after a new government entered office, Commission President *Ursula von der Leyen*, at her visit to Poland (on 23 February 2024) was impressed by the efforts of the new Prime Minister, *Donald Tusk*, and the Polish people to restore the rule of law. She welcomed the action plan the new Polish government presented to the EU Member States as a clear roadmap for Poland. *Von der Leyen* mentioned in particular the immediate steps taken regarding judicial independence. She announced that, based on recent measures taken by the new Polish government, the EU's financial support for Poland would no longer be blocked.<sup>22</sup>

Under the present circumstances, however, legislative measures prepared and voted on by the Polish Parliament on appointment and disciplinary procedures for judges, on the Constitutional Court, and on the Polish Supreme Court can still run the risk of being vetoed by the Polish President of the Republic. Following its updated assessment, the Commission will come forward with two decisions on European funds for Poland. These decisions could free up about €134 billion for Poland, including €74 billion from the 2021–2027 cohesion funds as well as €60 billion from the Next Generation Europe instruments.

## III. Conclusion and Outlook

The guarantees enshrined in Art. 47 CFR about the right to an independent and impartial tribunal are an essential condition for the effective implementation of the Union budget in accordance with the principle of sound financial management. Any breach thereof systematically falls within the scope of application of EU law and directly affects the financial interests of the European taxpayer. Against the background of growing risks of autocracy and anti-liberalism that trigger increasing rule-of-law backsliding in certain Member States, the Commission and the Council have already taken concrete measures for the protection of the Union budget and the Union's financial interests. A consistent approach in defence of the values enshrined in Art. 2 TEU is necessary to deprive backsliding regimes of the EU taxpayers' money and prevent them from using EU funding instruments to finance their autocratic regimes and abusing them to consolidate their power. This approach also sends the unequivocal message to the autocratic governments that their countries stand to lose many billions of euros if they do not comply with the values and principles enshrined in the EU Treaties.<sup>23</sup>

Recent implementation practice shows that the new instruments protecting the EU budget against rule-of-law breaches are being used with the objective of triggering the relevant institutional reforms in the Member



States concerned so as to ensure adequate protection of the EU's financial interests. While their application demonstrates the commitment of the European Commission towards protecting both the EU's values and the EU budget, implementation practice so far indicates that the full engagement and cooperation of the Member States concerned is needed and further considerable effort on their part is required to carry out the necessary institutional and legislative reforms of their domestic frameworks. Both the statutory principles of the rule of law under the Conditionality Regulation and the enabling conditions under Art. 15 CPR in conjunction with its Annex III need to be consistently heeded throughout the financing period and are to be periodically monitored accordingly by the Commission and programme monitoring committees. In cases of backsliding and where the Commission considers enabling conditions to be no longer fulfilled, it informs the Member State by setting out an updated assessment.

The challenges described in this article apply indiscriminately to all EU Member States and are not limited to Poland and Hungary, which have been in the focus of implementation of said instruments so far. In parallel to Commission and Council actions, the implementation of the Conditionality Regulation and of the CPR continues to be closely monitored by the European Parliament<sup>24</sup> and other institutional stakeholders.<sup>25</sup>

Slovakia may be a new case. Although Slovakia had stepped up its efforts to combat high-level corruption and organised crime over the past several years, the European Parliament recently called on the Commission to closely monitor the latest developments in the country with regard to the planned dissolution of key anti-corruption structures by the new populist government.<sup>26</sup> This may have implications on the country's respect for the EU's rule-of-law principles in this Member State. Here again, the Commission is called on to take "the necessary actions to safeguard the rule of law and judicial independence, especially with respect to cases of high-level corruption, and to protect the EU financial interests."<sup>27</sup>

1. See also, in this issue, I. Jaskolska, "New Instruments Protecting the 2021-2027 Cohesion Budget against Rule-of-Law Breaches"; L. Bachmaier, "Compliance with the Rule of Law in the EU and the Protection of the Union's Budget", (2019) *eucrim*, 120.↵
2. See Council Regulation (EU) 2020/2094, 14.12.2020, establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433 I, 22.12.2020, 23. For anti-fraud measures in the RRF Regulation in general, see C. Arwidi and C. Kreith, "Protecting the EU's Financial Interest in the New Recovery and Resilience Facility – The Role of the European Anti-Fraud Office", (2021) *eucrim*, 171-175.↵
3. See Art. 6 (2) of the Commission proposal for a recast of the Financial Regulation, COM(2022) 223 final 16.5.2022.↵
4. The agreed final compromise text of the recast of the Financial Regulation foresees this clarification in Art. 6 Council Doc.16800/23, 15.12.2023.↵
5. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16.12.2020, on a general regime of conditionality for the protection of the Union budget, OJ L 433 I, 22.12.2020, 1.↵
6. Cf. Art. 6(3) in conjunction with Art. 4 of Regulation 2020/2092, *op. cit.* (n. 5).↵
7. See, most recently, ECJ, 5.6.2023, Case C-204/21, *Commission v Poland*, (independence and respect for private life of judges) and ECJ, 13.7.2023, Joined Cases C-615/20, *YP and Others* and C-671/20, *M.M.* (lifting of a judge's immunity and suspension from duties).↵
8. See the Polish country chapters in the Commission annual reports on the Rule of Law, SWD (2022) 521 and SWD (2023) 821, 5.7.2023; for an overview of the Polish implementation of the rule of law requirements relevant under the Conditionality Regulation, see also: L. Pech, A. Wójcik, P. Wachowiec, *The Case for activating the Rule of Law Conditionality Regulation in Respect of Poland*, Study mandated and edited by The Greens/EFA in the European Parliament, 2023, pp. 61ss., available at <<https://extranet.greens-efa.eu/public/media/file/10221/8557>> accessed 25 March 2024.↵
9. See ECJ, 16.2.2022, Case C-157/21, *Poland v Parliament and Council*, para. 361: "...the proportionality of the measures to be adopted is ensured, decisively, by the criterion of the impact of breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union...".↵
10. ECJ, 16.2.2022, Case C-156/21, *Hungary v Parliament and Council*, para.147, and Case C-157/21, *Poland v Parliament and Council*, para. 165.↵
11. Commission Guidelines on the application of the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ C 123, 18.3.2022, p.12, see paragraph 54 ss.↵
12. See Commission Communication on the written notification to Hungary pursuant to Article 6 (1) of Regulation (EU, Euratom) 2020/2092, 27.4.2022, C(2022) 2782.↵
13. Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 485 final, 18.9.2022. See also T. Wahl, "Commission Proposes Budgetary Protection Measures against Hungary – EP Remains Sceptical" (2022) *eucrim*, 183.↵
14. Council Implementing Decision (EU) 2022/2506 of 15.12.2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022, 94.↵

15. COM(2022) 485 final, *op. cit.* (n. 13), Explanatory Memorandum points 2 and 3; these reasons are also reflected in the Council Implementing Decision (EU) 2022/2506, *op. cit.* (n. 14), Explanatory memorandum, point 2.↵
16. Council Implementing Decision (EU) 2022/2506, *op. cit.* (n. 14), 94.↵
17. Commission Decision of 13 December 2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary, C(2023) 8999 final. See also T. Wahl, "Hungary: Rule-of-Law Developments May 2023 - Mid-January 2024", *news of 22 February 2024*.↵
18. Art. 15(1) and Annex III of Regulation (EU) 2021/1060 (CPR), OJ L 231, 30.6.2021, 159: "Effective measures are put in place to ensure compliance with the Charter of Fundamental Rights...which include...(a)rrangements to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter..."↵
19. See, for example, Commission Implementing Decisions of 22.12.2022 approving the programme "Digital Renewal Operational Programme Plus" and the programme "Human Resources Development Operational Programme Plus", for support from the European Regional Development Fund and the European Social Fund Plus under the Investment for jobs and growth goal in Hungary, C(2022)10007 and C(2022) 10010 final,↵
20. Cf. Art. 15(3) CPR (*op. cit.* (n. 18)). Hungary may start claiming reimbursements in payment applications for 2021– 2027 programmes of up to around €10.2 billion. See also *news of 22 February 2024* (*op. cit.* (n. 17)).↵
21. Art. 15(6) sub-paragraph 2 CPR (*op. cit.* (n. 18)).↵
22. European Commission, STATEMENT/24/1023, "Press statement by President von der Leyen with Belgian Prime Minister De Croo and Polish Prime Minister Tusk", Warsaw, 23 February 2024, <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_24\\_1023](https://ec.europa.eu/commission/presscorner/detail/en/statement_24_1023)> accessed 25 March 2024.↵
23. See also D. Kelemen, "Will the European Union escape its Autocracy Trap?" *Journal of European Public Policy*, 14.2.2024, DOI:10.1080/13501763.2024.2314739.↵
24. See, for example, the European Parliament's resolutions on the rule of law in Hungary of 12 September 2018, of 16 January 2020, of 8 July 2021, of 15 September 2022, of 24 November 2022, of 1 June 2023, and of 8 January 2024. See also the regular overviews of the rule-of-law developments in Hungary and Poland in *eucrim*, *news section*.↵
25. European Court of Auditors, *The rule of law in the EU – An improved framework to protect the EU's financial interests, but risks remain*, Special report 03/2024, February 2024.↵
26. European Parliament, Resolution of 17 January 2024 on the planned dissolution of key anti-corruption structures in Slovakia and its implications for the rule of law, P9\_TA(2024)0021.↵
27. *Idem*, para. 5.↵

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## \* Author statement

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