

AG: Regulation on Conditionality Mechanism Is Legally Sound and Compatible with EU Treaties



News

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On 2 December 2021, Advocate General (AG) *Manuel Campos Sánchez-Bordona* recommended that the CJEU dismisses the actions brought by [Hungary and Poland](#) against the conditionality mechanism for the protection of the Union budget in the event of breaches of the principles of the rule of law (for the mechanism → [eucrim 3/2020, 174-176](#); for the actions → [eucrim 1/2021, 19](#)). Enshrined in Regulation 2020/2092, the Council and European Parliament created a specific mechanism to ensure proper management of the Union budget where a Member State commits breaches of the rule of law which jeopardise the sound management of the European Union's funds or its financial interests. After having determined that certain rule-of-law conditions to protect the EU budget had not been fulfilled in a specific EU country, payments from the EU budget can be interrupted, reduced, terminated or suspended; new commitments can be prohibited.

The applicability of the conditionality mechanism led to disputes between the EU institutions. In particular, the European Parliament (EP) urged the Commission to apply the mechanism regardless the action by Hungary and Poland and the EP has pursued an action against the Commission for failure to act in this regard (→ [eucrim 3/2021, 152](#)). Hungary and Poland had essentially based their complaints against the mechanism on the inappropriateness of the legal basis for the Regulation, a circumvention of the Article 7 TEU procedure in case of violation of fundamental values of the EU and an infringement of the principle of legal certainty (→ Cases [C-156/21](#) and [C-157/21](#)). The AG rejected all these arguments.

First, the AG concluded that [Regulation 2020/2092](#) could correctly be based on Art. 322(1)(a) TFEU. The Regulation contains “financial rules” within the meaning of this Article and does not resemble the procedure in Art. 7 TEU. The AG mainly argued that the Regulation aims at establishing a financial conditionality instrument to safeguard the value of the rule of law of the European Union. In addition, it requests a sufficiently direct link between the breach of the rule of law and the implementation of the budget. As a result, it does not apply to all breaches of the rule of law, but only those that are directly linked to the implementation of the Union budget. The AG also pointed out that the protection of the beneficiaries of EU funds is a typical and logical measure in the shared management of those funds.

Second, the AG found that Article 7 TEU does not preclude the use of other, different instruments that protect the values enshrined in Art. 7 TEU, as is demonstrated in the CJEU's case law on the European arrest warrant and the independence of the judiciary. The AG highlighted several differences between the requirements included in Article 7 TEU and those in Regulation 2020/2092. In particular, the conditionality mechanism does not apply to all violations of the rule of law, but only to those directly related to the financial

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management of the Union and financial conditionality is not unusual in budgetary instruments in other areas of EU law. Hence, the AG sees no circumvention of the Article 7 TEU procedure.

Third, the AG found that the Regulation satisfies the minimum requirements of clarity, precision and foreseeability required by the principle of legal certainty. The reason is that the Regulation combines an indicative list of breaches of seven legal principles related to the rule of law with an indicative list of areas where breaches of the rule of law may arise. This demonstrated that the legislature made efforts in increasing legal certainty.

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