

CJEU Dismisses Actions against Rule-of-Law Conditionality to Safeguard the EU Budget

Thomas Wahl

On 16 February 2022, the CJEU dismissed the actions brought by Hungary and Poland that sought annulment of Regulation 2020/2092 “on a general regime of conditionality for the protection of the Union budget”. The Regulation 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. For a background of the Regulation, the case before the CJEU, and the Advocate General’s opinion → [eucrim 4/2021, 214-215](#) and [eucrim 1/2021, 19](#) and [eucrim 3/2020, 174-176](#).

In their actions, Hungary and Poland mainly put forward three arguments that the Regulation should have made invalid in its entirety. The CJEU, sitting as a full court (i.e. all 27 judges), countered these arguments as follows:

Lack of legal basis?

Hungary and Poland submitted that the TEU and TFEU do not provide an appropriate legal basis for the contested Regulation, in particular it could not be based on Art. 322(1) TFEU. The latter provision allows the European Parliament and Council 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 CJEU first clarified that the wording and context of Art. 322(1) TFEU cover not only the rules which define how expenditure shown in the budget is to be implemented as such but also, in particular, the rules which determine the control and audit obligations on the Member States. Regarding the argument by Hungary and Poland that the real objective of the conditionality mechanism is to penalise EU countries for rule-of-law breaches through the EU budget, the CJEU emphasised second that the Regulation clearly aims at pursuing the legitimate interest in protecting the Union budget. In this context, the CJEU refers to the close link between the effects of rule-of-law infringements with serious risks to the sound financial management of EU finances.

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In addition, the CJEU shared the view that Art. 322 TFEU includes the possibility to establish a “horizontal conditionality” linked to the EU values and is not confined to rules for a specific EU programme or action. The judges in Luxembourg emphasised the importance of the common values on which the EU is founded and which define the very identity of the EU as a legal order common to the Member States. As a result, compliance with these common values (including the rule of law and solidarity) is a condition for the enjoyment of all rights deriving from the EU Treaties, which is why the EU must also be able to defend those values, within the limits of its powers. The sound financial management of the Union budget may seriously be compromised if a Member State commits breaches of the principles of the rule of law.

Considering the genuine link between the establishment of rule-of-law breaches and the protection of the EU’s financial interests, the CJEU ultimately rejected the argument that the content of the Regulation is beyond what is necessary for the proper implementation of the Union budget. In conclusion, Regulation 2020/2092 falls within the scope and concept of Art. 322(1) TFEU.

Circumvention of the procedure laid down in Art. 7 TEU?

According to Hungary and Poland, only Art. 7 TEU allowed the EU to examine, determine the existence of and impose penalties for breaches of the values enshrined in Art. 2 TEU. Furthermore, the countries claimed that the contested Regulation created a parallel procedure with the same consequences as those stipulated in Art. 7 TEU and thus undermined the institutional balance.

First, the CJEU pointed out that numerous provisions in the Treaties protect the EU values and not only Art. 7 TEU, e.g. Art. 19 TEU as far as the value of the rule of law is concerned. Second, the CJEU ruled that the procedure contained in the Regulation pursues a different aim and has a distinct subject matter than the one in Art. 7 TEU. In addition, the scope of Art. 7 TEU is wider since it not only covers the value of rule of law. Third, the CJEU clarified that, since the Regulation allows the Commission and the Council to examine only situations or conduct attributable to the authorities of a Member State and which appear relevant to the sound financial management of the Union budget, the powers granted to those institutions by that Regulation do not transgress the limits of the powers conferred on the EU.

Breach of principles of legal certainty?

In a third plea, Hungary and Poland put forward several allegations that the Regulation is not in line with the EU principle of legal certainty. The countries, *inter alia*, argued that the “rule of law” concept cannot be precisely defined and cannot be given a uniform interpretation, because of “the obligation to protect the national identity of each of the Member States”. Furthermore, a precise assessment is impossible since the Regulation operates with vague terms in the definition of rule-of-law principles in Art. 2(a).

The CJEU opposed this view by stating that, even though the EU respects the national identities of its Member States (as is apparent from Art. 4(2) TEU), the Member States adhere to a concept of “the rule of law” which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times. Accordingly, the principles of the rule of law as listed in Art. 2(a) of the Regulation and developed in the CJEU’s case law on the basis of the EU Treaties, are thus recognised and specified in the legal order of the EU and have their source in common values which are also recognised and applied by the Member States in their own legal systems. Consequently, Member States are in a position to determine with sufficient precision the essential content and the requirements flowing from each of the principles stipulated in Art. 2(a) of the Regulation.

Further arguments by Hungary and Poland related to the concept of “serious risk”. According to the two countries, the provision that requires that the breaches of the principles of the rule of law which have been

found must “seriously risk” affecting the sound financial management of the Union budget or the financial interests of the Union will allow arbitrary penalties to be imposed in uncertain or unproven situations.

The CJEU rejected this argument by pointing to the Regulation that foresees several substantial and procedural requirements to be fulfilled in order to establish the link in question. This includes the condition that a high probability of the occurring risk must be demonstrated and that protective measures must be strictly proportionate to the impact of the breach on the Union budget. In sum, the various provisions of the Regulation meet the requirements of legal certainty.

Put in focus

The importance of the judgment is already formally shown that the CJEU delivered the ruling by sitting as full court where the Court considers that a case is of exceptional importance. The CJEU followed the [conclusions by Advocate General Manuel Campos Sánchez-Bordona](#) delivered on 2 December 2021. The actions for annulment gave the CJEU not only the opportunity to examine the legality of the individual provisions of the Regulation establishing the “conditionality mechanism”, but also to provide fundamental statements on the possibilities and powers of the EU to protect its financial interest as well as on the meaning of the common values enshrined in Art. 2 TEU, in particular the value of the rule of law.

Whether the controversial Regulation will now be implemented by the Commission and whether the procedure will finally lead to sanctions against EU Member States where the rule of law is at stake is written in the stars. The Commission has taken the position that it must first establish guidelines for the application of the Regulation. Moreover, it will not be easy to demonstrate the “genuine link” (as emphasised several times by the CJEU) between breaches of the rule of law and the sound financial management of the Union budget. Lastly, one must consider that the Regulation foresees several procedural steps before measures against countries can have real and final effects.

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