

## *Respect for the Common Values within Member States and Protection of the EU Financial Interests*

1. The two perspectives. 2. Why a conditionality mechanism has become the sole way of the EU for ensuring respect for common values within Member States. 3. The arguments of the Hungarian and the Polish governments before the CJEU. 4. The Court's ruling. 5. The importance of the Court's position goes beyond its internal inconsistencies.

1. The title of this contribution evokes immediately the decisions no. 156/21 and 157/21 with which, on 16 February 2022, the CJEU has dismissed the actions of Hungary and Poland against Regulation 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". A comment on these rulings is almost inevitable, but in which perspective? Mine will concern the Regulation's political and legal background, namely the EU's 'rule of law crisis', which is usually referred to a series of violations within certain Member States of the common values listed in Article 2 TEU, and of the rule of law in particular. Without that crisis, and the EU institutions' failure in enforcing the provisions of Article 7 TEU aimed at complying with it, no conditionality would have been conceived for the sake of protecting the EU financial interests.

The rule of law crisis can be viewed from two fundamentally different perspectives. In the first, it is the Union's day-to-day functioning as such which is at stake, and the problem consists therefore in how to gradually absorb the crisis' disruptive effects in the procedures and mechanisms governing the EU/Member States relationship. If the focus shifts instead on the values 'common to the Member States' on which the Union 'is founded', the crisis becomes existential and threatens the EU's very foundation, namely democracy and the rule of law both in the EU and in its Member States. The choice between these perspectives plays a role in the assessment of all remedies to the rule of law crisis, including the conditionality mechanism that has been recently introduced for coping with what has been called 'the purposeful destruction of the rule of law inside EU member states', to begin with Hungary and Poland.<sup>1</sup>

A preliminary question is why the values listed in Article 2 TEU are conceived not merely as common to the Member States, but at the same time as foundational for the EU. It is in fact the answer to this question that distinguishes those who take the common values seriously vis-à-vis those who are likely to content themselves with whichever solution of the crisis. The issue is related to the recognition of 'constitutional identity' as laid down in Article 4(2) TEU.

The former position is exemplified by those recalling 'how the conscious political effort to overcome the divisiveness of Member States' idiosyncrasies has matured into the constitutional recognition of Member State identities as an essential part of the European project, within the parameters of liberty, democracy, human rights and the rule of law. These principles have been the beginnings and ends of peaceful European integration, for which its pioneers fought. What

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<sup>1</sup> 1 J.-W. Müller, 'Reflections on Europe's 'Rule of Law Crises'', in: P.F. Kjaer & N. Olson (eds), *Critical Theories of Crisis in Europe. From Weimar to the Euro* (Rowman & Littlefield 2016), 162.

these must mean in practice must, however, remain the object of a constitutional, political and legal debate premised on tolerance, acceptance of otherness and trust.<sup>2</sup>

For those who are attached to the continuity of the EU's day-to-day functioning, the common values enshrined in Article 2 TEU are deprived of substantial effects, and tend to classify the rule of law crisis among the ordinary disputes between some Member State and the EU. This opinion, which is particularly shared, as we will see, in part of the EU legal bureaucracy, renounces however to explain why those values are reputed common to Member States and foundational for the EU. It simply contents itself with the conviction that the political dimension of the issue prevails over whichever legal solution of it. Here comes however the question of how long the EU can resist the destruction of common values exactly on political grounds.

2. In the last decade non-compliance with the common values has become 'a principled ideological choice of several governments'<sup>3</sup>. They have, with 'elegant techniques and tools'<sup>4</sup>, dismantled all kinds of constitutional rule-of-law safeguards, resulting in systemic breaches in the sense of Article 7 TEU. However, the compliance mechanisms contained in that provision have so far turned out to be largely ineffective, due inter alia to the reluctance of the national governments, as represented in the Council and the European Council, to apply them<sup>5</sup>.

Since 2012, when the Commission first acknowledged that measures taken by the new Hungarian government threatened the rule of law, the EU toolbox has been expanded in addition to the instruments laid down in the treaties, such as in Article 7 TEU and in Articles 258 and 259 TFEU (infringement proceedings), including mechanisms for enhancing compliance via dialogue and engagement (the Framework for the Rule of Law; the new Commission Rule of Law reporting cycle; the Council Dialogue on the Rule of Law) have been introduced. And yet, none of these tools proved to guarantee respect for the common values in general and the rule of law in particular. That is why the idea has gradually emerged of cutting EU budget funds, or cohesion funds, in case of systemic violation of the rule of law within a Member State.

A 2017 Commission's document concerning the reform of the EU budget already held that there had been new suggestions to link the disbursement of EU budget funds to the state of the rule of law in Member States, given the subsistence of 'a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget'<sup>6</sup>.

The new suggestions that the Commission seemed to endorse would launch a conditionality mechanism in an unexplored field, that of the rule of law crisis, and with a different objective than

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<sup>2</sup> L.F.M. Besselink, 'National and constitutional identity before and after Lisbon', 6(3) *Utrecht Law Review* (2010), 37.

<sup>3</sup> K.L. Scheppele, D.V. Kochenov, B. Grawoska-Moroz, 'EU values are Law after All. Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', 39 *Yearbook of European Law* (2020).

<sup>4</sup> T. Milojkovich, 'Shilly Shallying and the EU's Dichotomous Response to the Rule of Law Crisis', in T.G. Daly & W. Sadursky (eds.), *IACL-AIDC, Democracy 2020. Assessing Constitutional Decay, Breakdown, and Renewal Worldwide* (Global Roundtable e-book), 222.

<sup>5</sup> See already A. von Bogdandy et al., 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine', in: A. von Bogdandy & P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015), 235.

<sup>6</sup> European Commission, 'Reflection paper on the future of EU finance', 28 June 2017, 22.

that of the macroeconomic conditionality that was deemed crucial for combatting the Eurozone's financial crisis. The use of rule of law conditionality was then deemed 'as probably the last chance for the EU to enforce compliance with EU basic values in these backsliding member states', to the extent that the cutting of EU funds could be used to sanction violations of 'the joint values of the rule of law, democracy and fundamental rights'<sup>7</sup>.

It was immediately clear that the design of such a rule of law conditionality mechanism would be just as important as its introduction. Significantly, the 2018 proposal for a Regulation on the Union's budget limited the possibility of suspending EU funds to deficiencies in the administration of justice that 'affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union.'<sup>8</sup> This approach reflected a perspective on the rule of law crisis adherent to the functionalism that permeated the EC and then the EU for decades, at least until the 1990s.

Two years later, the emergency due to the COVID-19 pandemic forced the EU to adopt a wide-ranging package combining the future Multiannual Financial Framework (MFF) and a specific Recovery effort under Next Generation EU (NGEU). During the negotiations the idea re-emerged of linking disbursement of EU budget funds to respect for the rule of law in the Member States. In its Conclusions of 21 July 2020, the European Council stated that 'The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU. The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law.'<sup>9</sup> Thus, also the European Council approached the rule of law crisis from a functional perspective: the Union's financial interests were put on the same footing as the rule of law, in spite of Article 2 TEU's clear wording.

The proposition appeared too cautious to the European Parliament, whose Resolution of 23 July 2020 'Strongly regrets the fact that the European Council significantly weakened the efforts of the Commission and Parliament to uphold the rule of law, fundamental rights and democracy in the framework of the MFF and the Next Generation EU (NGEU) instrument; reconfirms its demand to complete the co-legislator's work on the Commission's proposed mechanism to protect the EU budget where there is a systemic threat to the values enshrined in Article 2 of the TEU, and where the financial interests of the Union are at stake; stresses that, to be effective, this mechanism should be activated by a reverse qualified majority; underlines that this mechanism must not affect the obligation of government entities or of Member States to make payments to final beneficiaries or recipients; underlines that the Rule of Law Regulation will be adopted by co-decision.'<sup>10</sup>

The Council was forced to negotiate an agreement with the EP. In the meantime, on 30 September 2020, the European Commission published its first annual Rule of Law Report where 'serious

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<sup>7</sup> G. Halmai, 'The Rule of Law Crisis in Europe', 25(1) *Diritto pubblico* (2019), 279, and 'The Possibility and Desirability of Rule of Law Conditionality', 11(1) *Hague Journal on the Rule of Law* (2019), 187.

<sup>8</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council to protect the Union's budget in the case of generalised deficiencies regarding the rule of law in Member States', 2 May 2018, 2018/0136 (COD).

<sup>9</sup> European Council, 'Conclusions', 21 July 2020, EUCO 10/20 CO EUR 8 CONCL 4, para. A24.

<sup>10</sup> European Parliament, 'Resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020', (2020/2732(RSP)).

concern' was raised for judicial independence in Hungary and Poland. The Commission noted that judicial independence was one of the issues raised in the Article 7 procedure initiated by the EP, and that Poland's justice reforms since 2015 led the Commission to launch the same procedure<sup>11</sup>.

Finally, on 16 December 2020, the 2018 proposal for a Regulation was approved<sup>12</sup>. It stated *inter alia* that 'the following may be indicative of breaches of the principles of the rule of law: (a) endangering the independence of the judiciary; (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest; (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law' (Article 3). It subsequently provided that 'appropriate measures' shall be taken whenever '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.' (Article 4).

A few days earlier, the Conclusions of the European Council of 10 and 11 December 2020 complemented the Regulation with a series of procedural devices resulting from an agreement reached with the Hungarian and the Polish governments with a view to avoid their veto on the approval of the EU budget. In particular, the Commission was charged to adopt 'guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment', with the addition that '[s]hould an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment. The Commission President will fully inform the European Council. Until such guidelines are finalised, the Commission will not propose measures under the Regulation.'<sup>13</sup>

The compatibility of these provisions with Article 15 (1) TEU was questioned<sup>14</sup>, together with the European Council's disturbing capacity of forcing the Commission to *not* apply the Regulation until a CJEU judgement has been issued<sup>15</sup>. In addition, by referring to breaches of the rule of law that undermine the Union's financial interest, the scope of the mechanism in the Regulation is too narrow for the rule of law's maintenance. A Member State, it has been argued, could decide to attack civil society groups or discriminate against LGBT people or persecute individual independent judges, without being held responsible for violating the conditionality mechanism<sup>16</sup>. One is even tempted to see proof in the Regulation of Hungary's and Poland's capacity 'to drive EU institutions so far into mocking the rule of law in the spirit of defending it. Then again, this is exactly what

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<sup>11</sup> European Commission, '2020 Rule of Law Report. The rule of law situation in the European Union', 30 September 2020.

<sup>12</sup> European Parliament, 'Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in Member State', 16 December 2020, 09980/1/2020 – C9-0407/2020 – 2018/0136(COD).

<sup>13</sup> European Council, 'Conclusions', 11 December 2020, EUCO 22/20 CO EUR 17 CONCL 8.

<sup>14</sup> A. Alemanno & M. Chamon, 'To Save the Rule of Law you Must Apparently Break It', *Verfassungsblog*, 11 December 2020.

<sup>15</sup> L. Pech, 'The Rule of Law Compromise: The EU's Gift to Autocrats', *Green European Journal* 18 December 2020, [greeneuropeanjournal.eu/the-rule-of-law-compromise-the-eus-gift-to-autocrats](https://greeneuropeanjournal.eu/the-rule-of-law-compromise-the-eus-gift-to-autocrats). For a 'less dire reading' of the Commission's role, see C. Closa Montero, 'Paradoxes and Dilemmas in Compliance and Enforcement. Framing the EUCO Compromise on Rule of Law', *Verfassungsblog* 26 December 2020.

<sup>16</sup> L. Pech, 'The Rule of Law Compromise: The EU's Gift to Autocrats'.

illiberal constitutional engineering is about: using familiar constitutional and legal techniques for ends that subvert constitutionalism and the rule of law'<sup>17</sup>.

This criticism needs now to be viewed in the light of the above mentioned CJEU's decisions.

3. The complaints raised by Poland and Hungary against the Regulation focused on the one hand on the violation of the principle of attribution, and on the other hand on the circumvention of the rules laid down by the Treaties in the event of transgressions of common values by the Member States, and in particular of art. 7 TEU.

As for "the question whether the contested regulation, in the light of its purpose, falls within the scope of the legal basis of Article 322(1)(a) TFEU, the Republic of Poland, supported by Hungary, submits, in essence, that the true objective of that regulation is to enable the imposition, if breaches of the principles of the rule of law are found, of penalties through the Union budget, an objective which is apparent, in particular, from the second subparagraph of Article 7(2) of the said regulation, from recital thereof, but also from the failure to demonstrate a link between the respect for the rule of law and the sound financial management of the Union budget, from the explanatory memorandum accompanying the proposal which led to the adoption of the contested regulation as well as from statistics showing that, during the adoption of that regulation, there was no need to protect the Union budget" (CJEU, C-157/2021, §123)

As regards the exclusive nature of the procedure laid down in Article 7 TEU for the protection of the values contained in Article 2 TEU, "the Republic of Poland, supported by Hungary, submits, in essence, that a breach of the principles of the rule of law can be determined only by the European Council, pursuant to Article 7(2) TEU. Only that institution can, on account of its composition, review respect for the value of the rule of law, which is discretionary in nature and may depend on political considerations. The only exception to that exclusive power of the European Council results from the Member States' obligation under Article 19(1) TEU to ensure effective legal review. That exclusive power is confirmed by the judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraphs 57 to 60), by which the Court held that, where systemic deficiencies are found so far as concerns the independence of the judiciary of a Member State, the European arrest warrant mechanism can be suspended only by the Council pursuant to Article 7(3) TEU." (CJEU, C-157/2021, §191).

Furthermore, the above mentioned governments assume that the Regulation provides mechanisms that avoid those of the TEU: "Article 7(4) TEU and the second subparagraph of Article 7(2) of the contested regulation, relating to the variation and lifting of the measures adopted, indicate that the objective of those mechanisms is to encourage the Member State concerned to respect the value of the rule of law. In not requiring a unanimous decision of the European Council, however, that regulation lays down a much less restrictive procedure for adopting penalties than that laid down in Article 7 TEU, thereby depriving the latter of its effectiveness. In an opinion of 27 May 2014, the Council Legal Service indicated, first, that Article 7 TEU deliberately establishes a precise supervision framework with different phases, a high notional threshold to start the procedures, reinforced majorities within the Council and the European Council and a set of procedural guarantees for the Member State concerned, including

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<sup>17</sup> R. Uitz, 'Towards an EU Cast in the Hungarian and Polish Mould. Why the December 2020 Compromise Matters', *Verfassungsblog*, 14 December 2020.

the possibility of limited judicial review by the Court of Justice and, secondly, that that article does not provide a legal basis for further developing or amending that procedure. That position was expressly reiterated in Legal Opinion No 13593/18, which specifies, moreover, that secondary legislation may not amend or supplement the said procedure or have the effect of depriving it of its effectiveness. Therefore, because the objective, principles and measures applicable are the same, the mechanism established by the contested regulation constitutes a clear and deliberate circumvention of the procedure laid down in Article 7 TEU.” (CJEU, C-157/2021, §§ 105-107).

Among the arguments relating to the illegitimacy of the Regulation, the reference to the aforementioned opinions of the legal service of the Council was the most important, allowing the applicant government to highlight the differences that occurred between the institutional apparatuses of the Union around the interpretation of art. 7 TEU in the long decade of its freezing, and in particular the conviction of the Council offices of the defect in art. 7 TEU of a legal basis aimed at developing or modifying the procedure provided for therein.

4. The Court’s reply is univocal: “The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.” (CJEU, C-157/2021, § 145). “In that regard, it must be borne in mind that Article 2 TEU is not a mere statement of policy guidelines or intentions, but contains values which, as has been set out in paragraph 145 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States.” (CJEU, C-157/2021, §264).

Without this premise, the entire search for the legal foundation of the new conditionality mechanism would have been too precarious. This is not enough, however, to correctly connect such mechanism on the one hand with the financial interest of the Union, and on the other with the common value of the rule of law as recognized by art. 2 TEU.

At this respect, the Court recalls firstly (CJEU, C-157/2021, §16) the Regulation’s Recitals from 12) to 15). After having recalled that, according to Article 19 TEU, which gives concrete expression to the value of the rule of law set out in Article 2 TEU, Member States must provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget, and that “The very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts” [(judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 32 to 36)], Recital 12 adds that “Maintaining the independence of the courts is essential, as confirmed by the second paragraph of Article 47 of the Charter [(judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 40 and 41)]. This is true, in particular, for the judicial review of the validity of

measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures which may also be brought before the courts”.

Given this premise, Recital 13) states that “There is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.” For Recital 14), “The Union has developed a variety of instruments and processes that promote the rule of law and its application, including financial support for civil society organisations, the European Rule of Law Mechanism and the EU Justice Scoreboard, and provide an effective response from Union institutions to breaches of the rule of law through infringement proceedings and the procedure provided for in Article 7 TEU. The mechanism provided for in this Regulation complements these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union.” Finally, Recital 15) provides that “Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.”

The Regulation reflects thus the assumption that the conditionality mechanism “complements” the instruments already provided for promoting the rule of law and its application. However, in replying to the complaint of circumvention of the procedure referred to in art. 7 TEU, the Court denies any analogy between the purposes of the procedure referred to in Article 7 TEU and those provided for by the contested regulation. While the first is intended to allow the Council to sanction serious and persistent violations of the values contained in Article 2 TEU, in order, in particular, to order the Member State concerned to put an end to such violations, by contrast, “it follows from the nature of the measures that may be adopted under the contested regulation and from the conditions for the adoption and lifting of those measures that the purpose of the procedure established by that regulation is to ensure, in accordance with the principle of sound financial management laid down in Article 310(5) and the first paragraph of Article 317 TFEU, the protection of the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise, through the Union budget, breaches of the principles of the rule of law.” (CJEU, C-157/2021, § 210). The Court’s conclusion reaffirms that “the procedure laid down in Article 7 TEU and that established by the contested regulation pursue different aims and that each has a clearly distinct subject matter” (CJEU, C-157/2021, § 218).

The statement contained in the Recital that the conditionality mechanism integrates the instruments put in place by the EU to protect the rule of law is therefore verbatim contradicted by the Court.

The latter’s position was not necessary to reject the objection that the regulation would have circumvented the procedure provided for by art. 7 TEU. It was enough to note for this end that, by proposing to safeguard the rule of law for the sole purpose of observing the financial interest of the Union, the conditionality mechanism introduced by the regulation could not as such circumvent a procedure such as that provided for by art. 7 TEU, aimed at the much broader purpose of repressing a conduct that is seriously damaging the common value of the rule of law.

5. Inconsistencies of the CJEU's ruling can further be found between the standards of the rule of law contained in the Rule of Law Report and in the Rule of Law Checklist of the Venice Commission, implicitly referred to by the Court, and the much smaller cases of violation of the financial interest of the Union that can actually be alleged on the basis of the regulation.

Nonetheless, if we consider the long story of the Union's renunciation of asserting respect for common values, what matters is the Court's intent to legitimize the new mechanism of conditionality with all the tools at its disposal. A Court aware of the obsolescence of the system of political protection of common values prefigured by art. 7 of the TEU, and at the same time of the need to provide a pluralist version of a concept, such as that of constitutional identity, which in recent years has been bent to national policy purposes.

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