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A NEW CHAPTER IN THE NEVER-ENDING RULE
OF LAW SAGA IN THE EU:
THE JUDGMENT ON THE ANNULMENT
OF THE CONDITIONALITY MECHANISM

ABSTRACT. The present contribution intends to provide a brief analysis of the recent judgments in the annulment proceedings brought before the European Court of Justice by Poland and Hungary concerning the alleged non-compliance with the Treaties of the conditionality mechanism (Regulation (EU) 2020/2092). The judgments may be deemed as a further step in defining the rule of law within the European Union legal order, as they shed new light on this instrument, adopted in order to tackle violations of that Union's fundamental value that bear negative consequences for the EU's budget.

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The European Court of Justice (hereinafter: ECJ) has recently adopted two ‘twin’ rulings, in its full composition and by means of an accelerated procedure, on two actions for annulment brought before the Court by Hungary and Poland¹. Both actions concerned the request for the Court to adjudge on the compliance with the Treaties of the so-called ‘conditionality mechanism’, introduced in the European Union (hereinafter: EU) legal order through Regulation (EU) 2020/2092² with the aim of protecting the EU’s budget from infringements of the rule of law.

In brief, the conditionality mechanism was established in December 2020 on the basis of Art. 322 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)³, in order to contain and sanction those conducts of Member States – e.g., the threats to the independence of the judiciary or the limitation of available and effective remedies against arbitrary or unlawful decision of public authorities – capable

¹ Judgment of 16 February 2022, case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97; judgment of 16 February 2022, case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98. For some early comments on the present judgments, see M. FISICARO, *Protection of the Rule of Law and ‘Competence Creep’ Via the Budget: The Court of Justice on the Legality of the Conditionality Regulation*, in «European Constitutional Law Review», 2022, pp. 1 *et seq.*; R. MAVROULI, *The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation*, in «European Papers», 2022, vol. 7, n. 1, pp. 275 *et seq.*; L. PECH, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, in «Hague Journal on the Rule of Law», 28 June 2022, available online; S. PROGIN-THEUERKAUF, M. BERGER, *ECJ Confirms Validity of the Rule of Law Conditionality Regulation*, in «European Law Blog», 11 March 2022, available online; A. ZEMSKOVA, *Rule of Law Conditionality: a Long-Desired Victory or a Modest Step Forward?: Hungary v. Parliament and Council (C-156/21) and Poland v. Parliament and Council (C-157/21)*, in «EU Law Live», 18 February 2022, available online.

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. For an analysis of the conditionality mechanism, see *ex multis* B. NASCIBENE, *Il rispetto della rule of law e lo strumento finanziario. La “condizionalità”*, in «Eurojus.it», 2021, n. 3, pp. 172 *et seq.*; P. MORI, *Gli strumenti di tutela del rispetto dello Stato di diritto: verso una condizionalità finanziaria*, in Av.Vv., *Temi e questioni di diritto dell’Unione europea. Scritti offerti a Claudia Morviducci*, Cacucci, Bari, 2019, pp. 187 *et seq.*; N. KIRST, *Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, in «European Papers», 2021, vol. 6, n. 1, pp. 101 *et seq.* The present Author also wishes to refer to her own previous work for a wider perspective on the subject, in V. SACHETTI, *Il nuovo meccanismo di condizionalità per la protezione del bilancio dell’Unione europea*, in «Studi sull’integrazione europea», 2021, n. 2, pp. 431 *et seq.*

³ Art. 322, para. 1, 1, TFEU, provides as follows: «[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations: (a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts [...]».

of undermining the sound management of the Union's budget. The sanctions thereby adopted range from the suspension of the disbursement of certain funds, particularly those derived from the Next Generation EU, to the early repayment of loans guaranteed by the Union budget or termination of legal commitments⁴.

However, the Conclusions reached by the European Council in December 2020⁵ have led to a *de facto* delay of the applicability of the conditionality mechanism, as they required the Commission to adopt guidelines concerning the concrete conditions of implementation, in light of the potential action for annulment of the Regulation «so as to incorporate any relevant elements stemming from such judgment»⁶. Unsurprisingly, such conclusion found its way through those adopted by the European Council as the result of a compromise with Poland and Hungary, that had already anticipated their intention of bringing an action under Art. 263 TFEU before the ECJ⁷.

Preliminarily, the Court is requested to evaluate the admissibility for evidentiary purposes of an Opinion of the Council's Legal Service⁸, that the institution itself claimed to be an internal document, as such covered by professional secrecy, the publication and disclosure as evidence of which had not been authorised. In the Council's view, if

⁴ Art. 5, Regulation 2020/2092. On the use of similar mechanisms in the EU context, see G. GIOIA, *La condizionalità nell'esperienza dell'Unione europea. Protezione del bilancio e valori costituzionali*, in «Diritti comparati», 2021, n. 3, pp. 153 *et seq.*; A. BARAGLIA, M. BONELLI, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in «German Law Journal», 2022, vol. 23, n. 2, pp. 131 *et seq.*

⁵ Conclusions of the European Council of 10-11 December 2020.

⁶ *Ibidem*, n. 2, lit. c).

⁷ A. ALEMANNI, M. CHAMON, *To Save the Rule of Law You Must Apparently Break It*, in «Verfassungsblog», 11 December 2020, available online. The Commission indeed adopted its guidelines (Communication of the European 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, 18 March 2022), recalling repeatedly the clarifications provided by the Court of Justice in the cases at hand; for an early comment, see G. GIOIA, *Le linee guida della Commissione europea sul meccanismo di condizionalità a protezione del bilancio UE: effettività della tutela dello Stato di diritto e valorizzazione dello spazio pubblico europeo*, in «Blog Diritti Comparati», 24 March 2022, available online.

⁸ Opinion of the Council's Legal Service n. 13593/18, not published. For a comment on the adoption of such opinion, see K.L. SCHEPPELE, L. PECH, R.D. KELEMEN, *Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law Mechanism*, in «Verfassungsblog», 12 November 2018, available online.

the Court were to recognise the possibility for the applicants to rely on that Opinion during the proceedings, it would entail a violation of the principles of fair trial and of equality of arms among the parties.

While conceding that the use of the Opinion in the absence of an authorisation may constitute an infringement of Regulation (EC) 1049/2001⁹, the Court considered the existence of overriding reasons stemming from the principle of transparency. In particular, the Council had not sufficiently demonstrated the presence of sensitive content, as the effects of the Opinion appear to be limited to those concerning the legislative process of Regulation 2020/2092, the legitimacy of which is precisely the object of the requests of the applicants. It is also interesting to note that the Court, in acknowledging that the principle of transparency «guarantees, inter alia, that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system»¹⁰, refers to a previous order, adopted by the Court itself, which has never been published¹¹.

The grounds for the action brought forward by Hungary and Poland deal primarily with the following six motives: (i) the lack of competence on the part of the Union to adopt the Regulation; (ii) the infringement of the principles of subsidiarity and proportionality; (iii) the failure to illustrate the motivation for the adoption of the Regulation; (iv) the violation of the principle of conferral; (v) the infringement of the States' national identities as set forth in Art. 4, para. 2, Treaty on the European Union (hereinafter: TEU); (vi) the breach of the principle of legal certainty. For the sake of brevity, only the main issues decided by the Court will be analysed, as follows.

As for the first ground, the two Member States claimed that the legal basis of Art. 322 TFEU allows for the creation of mechanisms for the protection of the Union's budget, provided that they aim at safeguarding its sound management, as opposed to

⁹ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. According to Art. 4, para. 2, of the Regulation: «[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice [...] unless there is an overriding public interest in disclosure».

¹⁰ *Hungary v Parliament and Council*, cit., para. 55; *Poland v. Parliament and Council*, cit., para. 52.

¹¹ Order of 14 May 2019, case C-650/18, *Hungary v. Parliament*, not published, ECLI:EU:C:2019:438.

the objective of protecting the rule of law, which appears to be the case with the Regulation at hand. Furthermore, the legislator should not introduce instruments that could circumvent the procedure established under Art. 7 TEU in order to protect the Union's fundamental values as set forth in Art. 2 TEU, including the rule of law. Nor could the Regulation sidestep – and this is a significant concession on the part of the applicants – the judicial remedy of the infringement procedure (Arts. 258 *et seq.* TFEU) in those cases in which the effective judicial protection set forth in Art. 19, para. 1, TFEU is allegedly undermined. Undoubtedly, this constitutes the key issue of the action, brought forward by two Member States that – as known – have for some time been at the centre of political and judicial proceedings¹² as a consequence of several measures adopted at the domestic level, which have repeatedly been deemed a violation of the fundamental value of the rule of law.

Relying on the arguments raised by the applicants themselves, the Court clarified that the conditionality mechanism cannot be considered as an instrument elusive of the essentially political procedure under Art. 7 TEU. Indeed, the arsenal at the disposal of the Union in order to tackle any violation of its fundamental principles includes, as Hungary and Poland have observed, the recourse, for instance, to judicial means. Thus, it follows that other mechanisms may well be introduced to protect the rule of law, albeit through mediated means, as the Regulation requires an actual or potential impact on the sound financial management of the Union's budget¹³, which in any case remains the ultimate subject of protection under the conditionality mechanism.

Therefore, the Court, requested to evaluate whether Art. 322 TFEU is an adequate legal basis¹⁴, affirmed that the purpose of Regulation 2020/2092 is entirely related to the protection of the Union's budget, in light of the types, aims and

¹² A complete overview of which can be found in L. PECH, D. KOCHENOV, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgements since the Portuguese Judges Case*, in *Swedish Institute for European Policy Studies*, 20 May 2021, available online.

¹³ Art. 5, para. 3, Regulation 2020/2092.

¹⁴ A question on which see KELEMEN, SCHEPPELE, *How to Stop Funding Autocracy in the EU*, in *Verfassungsblog*, 10 September 2018, available online.

requirements for the application and the termination of the sanctioning measures therein provided, as well as of the general objective of safeguarding the legitimate interests of the final recipients and beneficiaries of the Union's funds thus guaranteed. In this context, the respect for the rule of law constitutes «an essential precondition for compliance with the principles of sound financial management»¹⁵. To this end, the ECJ recalled that sharing the fundamental values set forth in Art. 2 TEU is one of the «specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law» and, as such, «implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected»¹⁶. It follows that the respect of the rule of law constitutes the precondition for the enjoyment of the rights stemming from the Treaties, and, as a consequence, the mechanism that safeguards the Union's budget is lawful as the latter constitutes the main instrument that gives concrete expression to the EU policies.

The assessment of the compliance with the principle of legal certainty appears instead to be more problematic. The applicant States had indeed raised concerns on the consistency with said principle of Art. 3 of Regulation 2020/2092, that provides a number of cases «indicative of breaches of the principles of the rule of law»¹⁷. As a response, the Court affirmed that «the EU legislature cannot be required to specify, under such a conditionality mechanism, all situations of breach of the constituent principles of the rule of law, such breach being characterised by disregard for requirements known to Member States in a sufficiently specific and precise manner»¹⁸. While this pronouncement is *per se* agreeable, at the same time it fuels doubt over the

¹⁵ *Hungary v Parliament and Council*, cit., para. 116; *Poland v Parliament and Council*, cit., para. 130.

¹⁶ *Hungary v Parliament and Council*, cit., para. 125; *Poland v Parliament and Council*, cit., para. 143.

¹⁷ The three situations therein listed draw clear inspiration from the cases that have already been at the centre of attention of the European institutions, namely: (i) threats to the independence of the judiciary; (ii) the failure to prevent and remedy unlawful or arbitrary decisions adopted by public authorities; (iii) the failure to guarantee available and effective remedies.

¹⁸ *Poland v Parliament and Council*, cit., para. 171.

function held by said Art. 3, even if it were to be read in conjunction with Art. 2 of the Regulation, which provides a definition – again, expressly non exhaustive – of the elements that form the rule of law. Nor more persuasive appears the claim that, notwithstanding the lack of a detailed definition, the «extensive case-law of the Court» would suffice to clarify the meaning of each element¹⁹.

Among the ‘minor’ grounds of the action of annulment, the one concerning the potential violation of the principle of the respect of national identities²⁰ deserves a closer look, not least as the reliance on it constitutes a beloved argument for Hungary and Poland, as both States have repeatedly raised it in the infringement proceedings brought against them by the Commission in the context of the rule of law. The ECJ had thus the chance to clarify that the compliance with such principle, enshrined in Art. 4, para. 2, TEU, implies a margin of appreciation for the Member States in implementing the value of the rule of law, provided that its safeguard is an obligation of result bearing on all parties to the Union, so that no divergences as to that objective can be tolerated²¹.

Lastly, it is worth underlining a reminder by the Court, the echo of which will certainly resonate in its future decisions. In an almost secondary passage of its reasonings, the EU judges recall that «Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] 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 containing legally binding obligations for the Member States»²².

A loud warning for the Member States, in particular the applicants themselves whose reactions will predictably not be long in coming, including through the decisions of their constitutional courts, by reminding them that the respect of the founding principles constitutes a persistent and long-lasting condition that is not exhausted the

¹⁹ *Ibid.*, para. 201.

²⁰ On which see L.S. ROSSI, 2, 4, 6 (TUE)... *L'interpretazione dell'“identity clause” alla luce dei valori fondamentali dell'UE*, in Liber Amicorum Antonio Tizzano. *De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Giappichelli, Torino, 2018, pp. 859 *et seq.*

²¹ *Hungary v Parliament and Council*, cit., para. 233; *Poland v Parliament and Council*, cit., para. 265.

²² *Hungary v Parliament and Council*, cit., para. 232; *Poland v Parliament and Council*, cit., para. 264.

moment that they become members of the Union. An exhortation for the institutions, beginning with the Commission, already prompted by the European Parliament²³ to launch the conditionality mechanism without further ado²⁴, along one more additional road. And once more, on the basis of the decisions of an indefatigable Court that, along the lines of the judgments at hand, appears to urge the institutions to act in order to resolutely protect the Union's fundamental values.

²³ See, most recently, European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF), 2022/2703(RSP); see also European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092, 2021/2711(RSP).

²⁴ PECH, *No More Excuses. The Court of Justice Greenlights the Rule of Law Conditionality Mechanism*, in *Verfassungsblog*, 16 February 2022, available online.
