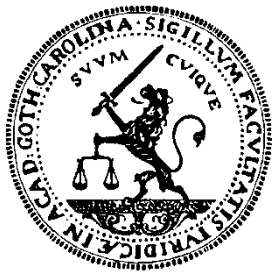

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Money Talks

The potential of an EU financial conditionality mechanism linked to the rule of law

JURM02 Graduate Thesis

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Contents

Summary

Over the last decade, the status of the rule of law as a foundational value of the EU legal order has been questioned by the political developments in certain EU member states. Particularly Poland and Hungary have seen a rapid dismantling of central state institutions, in a process which has become known as rule of law backsliding. In 2021, the EU legislator introduced a new mechanism to counter the troubling trend: a financial conditionality mechanism linked to the rule of law. This mechanism empowers the EU institutions to withhold EU funds from member states that do not respect fundamental principles of the rule of law.

The purpose of this thesis is to investigate what effects a rule of law-based financial conditionality mechanism may have upon the EU legal framework for the protection of the rule of law. Firstly, I depict different theoretical and comparative approaches to the rule of law, to explain the EU's conception of the notion. Secondly, I assess the EU legal framework for protection of the rule of law and developing CJEU case law on the rule of law. Thirdly, I analyse the new rule of law-based conditionality mechanism and the CJEU's verdicts in Case 156/21 and Case C-157/21, regarding the mechanism's compatibility with central provisions of the treaties.

In my analysis, I find that the financial conditionality mechanism has a two-fold purpose – to protect the EU budget against breaches of the rule of law and to uphold respect for the rule of law *per se* – and that there is a direct link between the rule of law and corruption. Moreover, I argue that the financial conditionality mechanism will be applied when a member state's illiberal actions threaten the solidarity within the Union. However, to ensure efficient EU level protection of the rule of law, I believe that the mechanism ought to be combined with other measures.

Sammanfattning

Under det senaste decenniet har rättsstatens ställning som ett värde av grundläggande vikt för EU-rätten ifrågasatts genom den politiska utvecklingen i vissa medlemsstater. Särskilt i Polen och Ungern går det att se hur centrala delar av statsmakten har nedmonterats. År 2021 införde EU en villkorlighetsmekanism, som ger EU:s institutioner befogenhet att hålla inne budgetåtaganden till medlemsländer som inte respekterar rättsstatens principer.

Syftet med detta examensarbete är att undersöka vilka effekter en sådan finansiell villkorlighetsmekanism kan ha för det EU-rättsliga regelverket till skydd för rättsstatens principer. Först går jag igenom olika rättsfilosofiska och komparativa uppfattningar av rättsstatens principer, för att skapa mig en bild av EU:s definition av begreppet. Därefter granskar jag skyddet för rättsstatens principer på EU-nivå, inklusive rättspraxis från EU-domstolen på detta tema. Slutligen analyserar jag den nya villkorlighetsmekanismen samt två avgöranden från EU-domstolen, mål C-156/21 och mål C-157/21, som handlar om mekanismens förenlighet med centrala bestämmelser i fördragen.

I min analys konstaterar jag att villkorlighetsmekanismen har dubbla syften – att skydda EU:s budget mot överträdelser av rättsstatens principer samt att skydda rättsstaten *i sig* – och att det föreligger ett direkt samband mellan rättsstatens principer och korruption. Därtill argumenterar jag för att villkorlighetsmekanismen kommer att tillämpas först när en medlemsstats rättsstridiga agerande hotar solidariteten inom Unionen. För att garantera ett fullvärdigt skydd av rättsstatens principer på EU-nivå anser jag emellertid att mekanismen bör kombineras med andra åtgärder.

Preface

Having finalized this thesis, and thereby also my studies at the Faculty of Law at Lund University, there are several people who I would like to thank.

Firstly, I would like to thank my supervisor, Xavier Groussot, for valuable insights and for steering me in the right direction whenever I felt lost in the intricate web of EU constitutional law.

Secondly, I would like to thank my colleagues at the Swedish Ministry of Justice, Division of EU Affairs, for providing me with an internship and for inspiring me to pursue a career in EU law. I would especially like to thank my supervisor, Kristina Holmgren, who was the first person who pointed out to me that there currently exists no uniform definition of 'the rule of law'.

Thirdly, I would like to thank my family and friends, who have stood by me throughout all these many years of studies.

Finally, I would like to thank you Tobias, for holding my hand and reassuring me throughout the writing process, and for lending me your copy of Tom Bingham's *The Rule of Law*.

Tusen tack till er alla.

Malmö, 22nd of May 2022
Katarina Bungerfeldt

Abbreviations

CJEU	Court of Justice of the European Union
The Charter	The Charter of Fundamental Rights of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
GNI	Gross National Income
MFF	Multi-annual Financial Framework
NGEU	'Next Generation EU' funds
PiS	Polish 'Law and Justice' Party
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

Since the fall of the Berlin Wall in 1989, there has seemed to be a consensus within Europe that the rule of law is to be respected. The rule of law is a value of fundamental importance to European lawyers, and due to the 'strong legal drive of European integration' it became a foundational value of the European Union (EU).[1] However, this consensus is now being questioned from within.[2]

It began in 2010, when *Fidesz* came into power and Victor Orbán was elected prime minister of Hungary. What followed was a rapid dismantling of democratic institutions. *Fidesz* managed to take control over the national judiciary, eliminate constitutional checks and balances, and supress independent media and civil society organisations.[3] In 2020, the Orbán regime prohibited funding of oppositional political parties, and during the Covid-19 pandemic, the government was empowered to impose a state-wide 'state of emergency' that may be prolonged indefinitely.[4]

In 2015, the Polish *Law and Justice Party* (*PiS*), led by Jarosław Kaczyński, came into power in Poland.[5] *PiS* have gained control over the Constitutional Court and the Supreme Court, forced judges into early retirement to replace them with party-loyal 'neo judges' and prohibited national courts from reviewing the independence and impartiality of courts and tribunals. In 2021,

[1] Leonard Besselink, 'Rule of Law Problems as Problems of Democracy' in Antonina Bakardjieva Engelbrekt, Andreas Moberg & Joakim Nergelius (eds.) *Rule of Law in the EU: 30 years after the Berlin Wall* (New York: Hart Publishing, 2021), 39–50, 39–40.
[2] See e.g., Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU', Cambridge Yearbook of European Legal Studies 19 (2017), 3–47.
[3] Daniel R. Kelemen, 'The European Union's Authoritarian Equilibrium' (2020), Journal of European Public Policy 27:3, 481–499, 482.
[4] Oliver Mader, 'Polexit? Hungarexit? Quo vadis EU? Reflexions on the latest solutions provided by EU constitutional law in the face of a persistent rule of law misery' (2022), Austrian Law Journal 9:1, 47–69, 52.
[5] Pech and Scheppele, 8–9.

the Constitutional Court declared that the principle of supremacy of EU law[6] violated the Polish constitution.[7]

The developments in Hungary and Poland have been described as 'rule of law backsliding', a term which Laurent Pech and Kim Lane Scheppele define as 'the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate and capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.'[8] States that undergo such a process may be called 'illiberal'. Illiberal regimes base their power on populism and legalism. They appeal to the people in democratic elections, and then use their democratic mandate to consolidate their power by destructing central state functions.[9]

In order to monitor respect for the rule of law within the Union, the EU has developed a set of legal instruments (or 'tools') which together make up the EU's *Rule of Law Toolbox*[10]. As part of the negotiations of the *Multi-annual Financial Framework* (MFF) 2021–2027, a proposal was made for a new tool in the toolbox: a financial conditionality mechanism linked to the rule of law. Such a mechanism was introduced by Regulation no 2020/2092 ('the Conditionality Regulation'),[11] which entered into force on the 1st of January 2021.

[6] I.e., the principle that in a conflict between EU law and national law in a member state, EU law prevails. The principle has been developed in CJEU case law, starting with Case 26/62 *Van Gend en Loos* [1963] 1963/00003 and Case 6/64 *Costa v ENEL* [1964] 1964/01141. See 'Primacy of EU Law' (EUR-Lex), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:primacy_of_eu_law, accessed 2022-04-08.
[7] Mader, 50–51.
[8] Pech and Scheppele, 10–11.
[9] Xavier Groussot and Anna Zemskova 'The Manifestations of the EU Rule of Law and its Contest: Historical and Normative Foundations' (2022), Journal of Constitutional History 43:2 (forthcoming), 12–14.
[10] 'The EU's Rule of Law Toolbox: Factsheet' (Commission, 2020-09-30), https://ec.europa.eu/info/sites/default/files/rule_of_law_mechanism_factsheet_en.pdf, accessed 2022-03-01.
[11] 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, OJ L 433I, 22.12.2020, 1–10.

Quickly after the regulation was adopted, Hungary and Poland launched actions with the CJEU for annulment of the regulation. The actions were dismissed in Case C-156/21[12] and Case C-157/21[13] of the 16th of February 2022.

1.2 Purpose and research question

The overall purpose with this thesis is to analyse how the EU may counter the ongoing trend of rule of law backsliding, by strengthening the EU legal framework for protection of the rule of law. More specifically, I aim to investigate what effects a rule of law-based financial conditionality mechanism may have upon the framework. By analysing the conditions and legal rationales for applying the Conditionality Regulation, and the potential effects of enforcing financial sanctions on the basis of the regulation, I seek to answer the following research question:

To what extent may the financial conditionality mechanism implemented by the Conditionality Regulation contribute to upholding respect for fundamental principles of the rule of law within the EU?

1.3 Disposition

In order to answer my research question, I divide my analysis into four parts.

In Chapter 3, I use different theoretical approaches to investigate the EU's conception of the rule of law. Firstly, I look at the jurisprudence of the concept. Secondly, I make a comparative outlook on the concept of the rule of law within English, French and German legal traditions. Lastly, I present the EU's conception of the rule of law and attempt to link this conception to the theoretical and comparative approaches described previously in the chapter.

In Chapter 4, I describe the EU legal framework for the protection of the rule of law. I start by critically assessing the different legal instruments available

[12] Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97.
[13] Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98.

to the EU institutions to ensure the member states' compliance with fundamental principles of the rule of law. I then account for developing CJEU case law on the topic of the rule of law.

In Chapter 5, I focus on the Conditionality Regulation. Firstly, I give a theoretical overview of the use of financial conditionality mechanisms within EU law. Secondly, I provide an overview of the Conditionality Regulation. Thirdly, I describe the legislative procedure which led to the regulation being adopted. Fourthly, I analyse Case C-156/21 and Case C-157/21.

In my analysis (Chapter 6), I attempt to answer my research question. Firstly, I discuss whether the true purpose of the Conditionality Regulation is to protect the Union budget, via the rule of law, or to protect the rule of law, via the Union budget. Secondly, I link these two purposes together, by proposing that there is a connection between the rule of law and corruption. Thirdly, I analyse the political realities of implementing financial sanctions based on the regulation upon illiberal EU member states. Finally, I discuss whether such sanctions – if they are indeed imposed – may contribute to protecting the rule of law within the Union.

2. Method

2.1 Normative assumptions

In order to explain my choice of method, I first must disclose three normative assumptions that underlie my thesis.

Firstly, I believe that law and politics belong together. The two concepts are intertwined, to the extent that a piece of legislation cannot fully be understood without one also understanding the political context which led to the legislation being adopted. I consider this to be especially true on European level, where legal considerations often have to be balanced against political opportunities and diplomatic necessities.

Secondly, and consequently, I believe that all actors involved in the legislative process are political actors. This includes the courts. Different actors have different standpoints, and the political power of a particular actor may determine its influence over legislative negotiations. It is necessary to analyse what role an actor plays in the negotiations, and what interests they have, to understand the outcome of their negotiations, i.e., what the law is and how it may be applied. Hence, there is a need for a contextual approach to the law.

Thirdly, I have a 'rule of law'-perspective on my research subject. I believe that the rule of law is a core tenet of a modern and democratic society. This perspective has influenced the overall purpose of my thesis and has constituted the starting point for my investigation and subsequent analysis.

2.2 Methodology

The method I use to answer my research question is in the tradition of what Ulla Neergaard and Marlene Wind calls 'EU Law in Context'[14]. This method has its roots in American legal debate, where a general contextual approach to the law began developing in the late 1960's, as a reaction to traditional

[14] Ulla Neergaard and Marlene Wind 'Studying the EU in Legal and Political Sciences Scholarship' in Ulla Neergaard and Ruth Nielsen (eds.) *European Legal Method in a Multi-level EU Legal Order* (Copenhagen: DJØF Publishing, 2012), 263–292, 265.

doctrinal methods of law. This new approach was essentially interdisciplinary and took an external view of the law.[15]

The idea of a more contextual approach to the law quickly gained traction in Europe.[16] In 1980, Martin Shapiro criticized EU constitutional lawyers' reliance on traditional legal dogmatism. He described their reluctance to take the politics of constitutional law into account as 'fundamentally arid'[17]. Francis Snyder wrote in 1987 that 'European Community law represents, more evidently perhaps than most other subjects an intricate web of politics, economics and law. It virtually calls out to be understood by means of a political economy of law or an interdisciplinary, contextual or critical approach.'[18] In 1991, Joseph Weiler claimed that a strict legal dogmatic approach, combined with an evident neglect of politics, would lead to 'a flawed analysis' of EU law. He argued that '(l)egal and constitutional structural change have been crucial, but only in their interaction with the Community political process.'[19]

The *EU law in Context* method may be seen as juxtaposed to traditional legal dogmatism, which traditionally has dominated EU legal research. From a critical standpoint, legal dogmatism is a method which perceives the law as wholly autonomous and guided only by the law itself, i.e., by established legal doctrines and methods of interpretation. The law is perceived as neutral and disconnected from policymaking and politics. By contrast, the *EU Law in Context* approach has a critical and external perspective on the law and constitutes a 'bridge' to other social sciences.[20] Law is used as a 'point of departure' or 'centre of interest', but findings from other fields of academia – for instance political science, economics, history, and sociology – are used to strengthen the contextual understanding of the law.[21] While traditional legal

[15] Richard A. Posner, 'Legal Scholarship Today' (2002), Harvard Law Review 115:5, 1314–1326, 1316.
[16] Neergaard and Wind, 270–277.
[17] Martin Shapiro 'Comparative Law and Comparative Politics' (1980), Southern California Law Review, 537–542, 538.
[18] Francis Snyder 'New Directions in European Community Law' (1987), Journal of Law and Society 14:1, 167–182, 167.
[19] Joseph Weiler, 'The Transformation of Europe' (1991), Yale Law Journal, 2403–2483, 2407.
[20] Neergaard and Wind, 266–267, 278–279.
[21] Neergaard and Wind, 275.

methods tend to focus on positive research questions, contextual approaches focus more on the normative ones.[22]

As explained above, I consider that my thesis subject requires a contextual approach to the law. This approach has influenced my thesis both with regard to my choice of research question, and the sources I use to answer it.

My research question has a distinct normative character, as it requires me to analyse how the Conditionality Regulation could – and should – be applied. Yet to answer this question, I first have to gain understanding of how the Conditionality Regulation is constructed (i.e., of positive law). Thus, I start off from a standpoint of EU legal dogmatism. I use commonly accepted sources of EU law: primary and secondary law, CJEU case law, 'soft law' from EU institutions (e.g., communications and opinions) and general principles of EU law;[23] to gain understanding of how the regulation fits into the EU legal framework and how it is meant to be applied. I also rely upon academic writings by EU law scholars. A notable difference between the EU legal dogmatic method and its Swedish counterpart is that unwritten sources of law – i.e., case law and general principles of law – are more important within EU law.[24] For this reason, I give much attention to CJEU case law and principal arguments in my thesis.

However, in line with my contextual approach, I use sources from other fields of social science to strengthen my understanding of the political and regulatory context. For this purpose, I rely upon academic writings from scholars within the fields of political science, philosophy, economics, international relations and sociology. Many of the sources have been written with an interdisciplinary perspective.[25]

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[22] Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009), European Law Journal 15:1, 20–45, 28–29.
[23] John Fairhurst, *Law of the European Union* (8th ed., Harlow: Pearsons, 2010), 56.
[24] Jörgen Hettne and Ida Otken Eriksson (eds.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd ed., Stockholm: Nordstedts Juridik, 2011), 40–41.
[25] See section 2.4.

I also use works of *other* international organisations (e.g., the Council of Europe's Venice Commission[26]) and non-academic sources (e.g., news articles and speeches), to further my contextual understanding. Still, EU law is both the point of departure and the centre of interest for my thesis.

2.3 Central limitations

With regard to the theoretical outlook, I focus on modern and European legal theories on the rule of law, as I consider it likely that these theories have been more influential in shaping the EU's conception of the rule of law. Since 'the rule of law' is a contested notion, I do not attempt to make an exhaustive presentation of *all* theories available,[27] but I choose some interesting theories to create a conceptual understanding of the notion. The distinction between formal and substantive theories is made mainly for pedagogical purposes. When it comes to the comparative outlook, I focus on English, French and German legal tradition, as I consider that these three traditions have substantially influenced the EU's conception of the rule of law.[28]

With regard to the chapter on the EU legal framework for the protection of the rule of law, my overview centres around the different tools in the EU's *Rule of law Toolbox*. When it comes to soft law mechanisms, I focus on those which have been initiated and are applied by the Commission, as it is the Commission who is primarily responsible for safeguarding the rule of law within the Union.[29]

One of the more substantial limitations of this thesis is made in relation to the growing body of CJEU case law on the topic of the rule of law. Over the last few years, the Court have ruled on an extensive number of cases concerning

[26] See section 3.3.
[27] For an overview, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).
[28] For an overview, see Laurent Pech and Joelle Grogan (eds.) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' (2020), RECONNECT Deliverables 7.1, https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf, accessed 2022-05-05.
[29] See section 4.1.1.

a vast array of issues.[30] This body of case law is characterized by repetition, as the same precedent has been reiterated over and over again in different cases. Considering the scope of this thesis, it would be impossible for me to account for all of the cases. I consider Case C-156/21 and Case C-157/21 to be of particular importance for this thesis, as they directly concern the application of the Conditionality Regulation. Apart from these two cases, I have carefully selected four other cases where the Court developed the EU's conception of the rule of law. The selection was made by tracing the references made in Case C-156/21 and Case C-157/21 to the original cases, where the Court established what was to become central precedent. For the sake of transparency, I include the full chain of references in the footnotes of section 5.4.

With regard to the chapter on financial conditionality, I maintain a strict focus on the relationship between the Union and its member states. On the one hand, this means that I do not attempt to estimate the potential effects of the Conditionality Regulation at national level in particular member states. For instance, I do not consider the impact of financial sanctions on individual beneficiaries,[31] nor what effects sanctions may have on the internal political setting of the member state concerned.[32] On the other hand, it means that I refrain from analysing what effects the regulation may have on the EU institutions. For instance, I do not assess what impact the legislative negotiations may have had for the institutional balance within the Union,[33] or to what extent the regulation may constitute a 'federalizing force' within EU law[34].

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[30] For an overview, see Dimitry Kochenov and Laurent Pech 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (2021), SIEPS 2021:3, https://www.sieps.se/publikationer/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/, accessed 2022-01-17.

[31] See e.g., Justyna Łacny 'The Rule of Law Conditionality Under Regulation No 2092/2020: Is it all About the Money?' (2021), Hague Journal on the Rule of Law 13, 79–105, 99–100.

[32] See e.g., Michael Blauberger and Vera van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' (2021), Journal of European Integration 43:1, 1–16.

[33] See e.g., Alberto Alemanno and Merjin Chamon, 'To Save the Rule of Law you Must Apparently Break It' (*Verfassungsblog,* 2020-12-11), https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/, accessed 2022-03-24.

[34] See e.g., Antonia Baraggia and Matteo Bonelli 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022), German Law Journal 23:2, 131–156, 154–155.

While these are all fascinating questions, they will have to be the subject for other theses.

Moreover, as noted initially in the chapter, I approach the Conditionality Regulation from a rule of law-perspective, not from a financial law perspective. Thus, I use constitutional EU law, and the value of the rule of law, as a starting point for my analysis. Financial facts and terms and case law and research on financial conditionality mechanisms are used in a complementary manner, to further my understanding of the economic context.

For the sake of clarity, I want to mention that the issue of rule of law backsliding is not contained to Hungary and Poland. Similar concerns have also been raised in relation to other EU member states.[35] Yet, I focus on Hungary and Poland, which means that I mention illiberal tendencies in other EU member states only in comparison to these two countries.

2.4 Contribution to the field of research

Finally, something should be said regarding this thesis' contribution to the wider field of research, namely, to EU constitutional law.

Over the last decade, there has been a surge of academic articles written on the topic of rule of law backsliding. Many aspects of the EU legal framework for the protection of the rule of law have been discussed and dissected by academics from various fields of academia, such as EU law, political science, international relations, economics, and sociology. Influential scholars include, *inter alia,* Laurent Pech and Dimitry Kochenov (EU law), Carlos Closa and Daniel R. Kelemen (political science) and Kim Lane Scheppele (socio-

[35] For example, Croatia, Cyprus, Italy, Malta, Portugal and Slovakia, Romania, and Bulgaria. See e.g., Pech and Scheppele, 46–47; Anna Perego, 'European Commission and EU Rule of Law Policy', in Bakardjieva Engelbrekt, Moberg, and Nergelius, J. (eds.), 291–312, 308; Milada Anna Vachudova 'Why Improve EU Oversight of Rule of Law? The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption' in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016), 270–289, 275; Jan-Werner Müller 'Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states' (Eurozine, 2014-03-21), https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/?pdf, accessed 2022-05-12.

logy and international affairs). Important contributions within this field of research have often been written by scholars from different fields of academia. Prominent examples include Closa and Kochenov's *Reinforcing Rule of Law Oversight in the European Union*[36] from 2016 (which includes a chapter written by Kim Lane Scheppele), Jakab and Kochenov's *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*[37] from 2017, and Pech and Scheppele's article 'Illiberalism within: Rule of Law Backsliding in the EU'[38], also from 2017.

When it comes to the Conditionality Regulation, this has been a hot topic within scholarly debate ever since the original legislative proposal was introduced in 2018.[39] Academics have written about the regulation from different angles and at different stages of the legislation process. Important contributions include, *inter alia,* Iris Goldner Lang's 'The Rule of Law, the Force of Law and the Power of Money in the EU'[40] from 2019, Takis Tridimas 'Recovery Plan and Rule of Law Conditionality: A New Era Beckons?'[41] from 2020 and Antonia Baraggia and Matteo Bonelli's 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges'[42] from 2021. Most contributions have been written after the regulation was adopted, but some, including Goldner Lang's, were written before. Moreover, academics have written about the general use of financial conditionality mechanisms, mainly before the regulation was adopted. Prominent examples include Viorica Viță,[43] and Roland Bieber and Francesco Maiani.[44]

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[36] Closa and Kochenov (supra note 35).
[37] András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (1st ed., Oxford: Oxford University Press, 2017).
[38] Pech and Scheppele (supra note 2).
[39] See section 5.3.
[40] Iris Goldner Lang, 'The Rule of Law, the Force of Law and the Power of Money in the EU', Croatian Yearbook of European Law and Policy 16:1 (2019), 1–26.
[41] Takis Tridimas, 'Recovery Plan and Rule of Law Conditionality: A New Era Beckons?', Croatian Yearbook of European Law and Policy 16 (2020), 7–21.
[42] Baraggia and Bonelli (supra note 34).
[43] See e.g., Viorica Viță., 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' in Cambridge Yearbook of European Legal Studies 19 (2017), 116–143.
[44] Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014), Common Market Law Review 51:4, 1057–1092.

In line with my contextual method, I aim to connect previous research related either to the rule of law or to financial conditionality to the specific case where the two schools of thought meet, i.e., the Conditionality Regulation. By describing theoretical approaches to the rule of law, the effectiveness of various measures in the EU's *Rule of Law Toolbox,* the use of financial conditionality mechanisms in general and the application of the Conditionality Regulation in particular, I hope that my thesis may contribute to EU constitutional law.

Furthermore, my contribution to the relevant field of law partially comes down to timing. Although many academics have written about the Conditionality Regulation, the CJEU's verdicts in Case C-156/21 and Case C-157/21 constitutes an important legal development that EU lawyers have not yet had time to analyse in depth.[45] On a more general level, taking the political context into account, this is a quickly developing field of EU law. Since I began working on my thesis, the Conditionality Regulation has been imposed for the first time against Hungary, and a war has broken out in Ukraine.[46] So far, few academics have assessed what impact these developments – which has happened on a weekly if not daily basis – may have on the EU legal order.[47] Here, I believe my thesis can fill a gap, as I include up-to-date references and reflect on current events in my analysis.

[45] Although, for a brief but illuminating overview, see e.g., Anna 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)' (EU Law Live, 2022-02-18), https://eulawlive.com/analysis-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-by/, accessed 2022-05-05.
[46] See section 6.3.
[47] For a notable exception, see Jakub Jaraczewski, 'Op-Ed: The Rule of Law Conditionality in the Shadow of a War' (EU Law Live, 2022-04-20), https://eulawlive-com.ludwig.lub.lu.se/op-ed-the-rule-of-law-conditionality-in-the-shadow-of-a-war-by-jakub-jaraczewski/, accessed 2022-04-25.

3. Theoretical Approaches

The purpose with this chapter is to investigate the EU's conception of the rule of law. In section 3.1, I attempt to explain the philosophical origins of the concept, by describing some influential philosophical theories about the rule of law. I focus on modern and European theories, developed over the course of the 20th Century. In section 3.2, I make a comparative and historical outlook on different European conceptions of the rule of law. I focus on the English *Rule of Law*, the French *État de droit* and the German *Rechtsstaaat*. In section 3.3, I present the EU's conception of the rule of law and link this conception to different approaches described in the previous sections.

3.1 Legal philosophical approaches

Arguably, 'the rule of law' is one of the most discussed concepts within jurisprudence. The origins of the notion can be traced back to Plato and Aristotle.[48] John Locke famously wrote that '(w)herever law ends, tyranny begins'.[49] Jean-Jacques Rousseau's conception of an ideal government was one where the law was superior to the people.[50] Montesquieu saw the rule of law as a method to 'protect the ruled against the aggression of those who rule.' This served as the basis for his well-known idea of checks and balances.[51]

In modern jurisprudence, the rule of law has been defined in many ways. Brian Tamanaha describes how governments across the world express commitment to respecting – or at least, not openly defying – fundamental principles of the rule of law.[52] Yet, there seems to be no consensus as to what the concept entails. This has led Judith N. Shklar to claim that '(i)t would not be

[48] Tamanaha, 8–9; Judith N. Shklar 'Political Theory and the Rule of Law' in Allan Hutchinson & Patrick J. Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), 1–16, 1–4.
[49] John Locke, *Two Treaties of Government* (2nd ed., London: Printed for Awnsham and John Churchill, 1694), Chapter XVIII, para. 202 (at 323).
[50] Erik Wennerström, *The Rule of Law and the European Union* (Uppsala: lustus Förlag, 2007), 53.
[51] Shklar, 4.
[52] Tamanaha, 1–3.

very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use.'[53]

A generally accepted method to organize the different theories available is to distinguish between formal and substantive conceptions of the rule of law. According to Paul Craig, formal conceptions of the rule of law tend to focus on due process, legal clarity, and the absence of retroactivity, whereas substantive conceptions also focus on the material content of the law.[54]

Proponents of formal conceptions of the rule of law generally agree that the rule of law promotes individual autonomy, as it creates foreseeability and allows people to lead their lives in accordance with the law. This assumption can be traced back to Montesquieu's idea of 'liberty under law'.[55] A contested point among them, however, is whether the rule of law is something inherently good.[56] Lon Fuller argues the rule of law has an 'affinity with the good', since legal systems which respect the rule of law also tend have material laws which are just and fair.[57] Joseph Raz, on the other hand, claims that the rule of law is morally neutral. He believes that the rule of law is 'essentially a negative value' which prevents arbitrariness created by the law itself, but has no other value, except for its neutrality towards the aims pursued.[58] In principle, Raz argues, a non-democratic state which persecutes and discriminates its citizens and denies them their fundamental rights may respect the rule of law better than any democratic state.[59]

Proponents of substantive conceptions of the rule of law strongly disagree with Raz's idea of moral neutrality. They believe that certain 'substantive rights' can be derived from the rule of law and that the quality of the law is

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[53] Shklar, 1.
[54] Paul Craig, 'Formal and Substantive Conceptions of Rule of Law: An Analytical Framework' in Richard Bellamy (ed.) *The Rule of Law and the Separation of Powers* (Ashgate: Dartmouth, 2005), 467–487, 467.
[55] Tamanaha, 94.
[56] Tamanaha, 95.
[57] Lon Fuller, *The Morality of Law* (2nd rev. ed., New Haven: Yale University Press, 1969), 209–10 (referenced in Tamanaha, 95).
[58] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Claredon Press, 1979), 225–226.
[59] Raz, 211.

determined by its compliance with such rights.[60] They measure the validity of a legal system by the content of its laws, rather than its legal procedures. According to the substantive approach, the rule of law is indeed something inherently good.[61]

A common understanding among proponents of the substantive approach is that the rule of law is directly linked to democracy and fundamental rights.[62] The idea of a link between rule of law and democracy is not new, nor distinctively substantive. Historically, it has been a subject of interest for Kant and Locke, and within modern jurisprudence, the idea exists also among proponents for the formal approach.[63] Jurgen Habermas, for instance, claims that for a legal system to be legitimate, it must be based on 'self-determination' (i.e., the citizens' democratic consent).[64] Consequently, the substantive approach is mainly characterized by its focus on fundamental rights protection. As an example, Ronald Dworkin describes the substantive approach as 'rights-based' (as opposed to 'rule-book'). He considers that a key demand of substantive conceptions of the rule of law must be that fundamental rights are recognized by law and enforceable in court. Fundamental rights are not granted – they are already part of the law.[65]

Recently however, academics have begun to question the distinction between formal and substantive conceptions of the rule of law. Proponents of 'the pragmatic approach'[66] point out that formal conceptions of the rule of law usually entails some substantive components.[67] Erik Wennerström notes that 'when a state truly tries to meet rule of law criteria, it fulfils both the formal

[60] Craig, 467.
[61] Wennerström, 81.
[62] Tamanaha, 110.
[63] Tamanaha, 99–100.
[64] Jürgen Habermas, *Beyond Facts and Norms* (William Rehg trs., Cambridge, MA: MIT Press, 1996), 449 ff.
[65] Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 11 ff.
[66] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009), Jean Monnet Working Paper 04/09, https://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf, accessed 2022-05-16, 28; Tamanaha, 92; Wennerström, 77.
[67] Tamanaha, 92.

and the substantive aspects of it, whereas a state that needs to clarify which of the two it is striving to meet is most probably failing to meet either.'[68]

Tamanaha defines both formal and substantive conceptions of the rule of law as 'thin' or 'thick'. Thinner conceptions stake out the very basics of each conception, while thicker conceptions include more ambitious goals. Thus, a thin formal conception of the rule of law is nothing more than rule *by* law, while a thick substantial conception may include even social welfare goals in the definition of the concept.[69]

Another proponent of the pragmatic approach is Tom Bingham. He argues that the core meaning of the rule of law is that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'[70] Moreover, Bingham specifies eight core principles of rule of law. Some of the principles are distinctively formal (e.g., the principles of accessibility and equality and the right to a fair trial) while others are more substantive (e.g., the duty of a state to respect human rights and comply with its international obligations).[71]

3.2 Comparative approaches

The English conception of the rule of law is attributed to Albert V. Dicey's *Introduction to the Study of the Law of the Constitution* from 1885.[72] He had a distinctively formal understanding of the concept.[73] Inspired by Locke, Dicey identified three central parts of rule of law. For a law to be valid and enforceable it must be established in accordance with formal procedures (*legality*), equally applicable to all citizens (*equality*), and individual rights must be protected by the courts, not merely declared in constitutions.[74]

[68] Wennerström, 77.
[69] Tamanaha, 91.
[70] Tom Bingham, *The Rule of Law* (2nd ed., London: Penguin Books, 2011), 8.
[71] Bingham, 37 ff., 55 ff., 66 ff., 90 ff., 110 ff.
[72] See e.g., Pech (2009), 22–24; Wennerström, 61.
[73] Craig, 470–474.
[74] Bingham, 4–5; Craig, 473–474; Pech (2009), 23–24; Wennerström, 61–62.

Contrary to the English conception of the rule of law, the French notion of *État de droit* ('state of right') is firmly grounded in the constitution. The meaning of the concept is that the state should protect fundamental constitutional rights from infringements made by law.[75] *État de droit* did not appear in French legal culture until the beginning of the 20th Century. Before that, France was perceived as an *État legal* ('state of law').[76]

État legal was developed in the aftermath of the French Revolution as the opposite to *État de police*. Strongly influenced by Rousseau, *État legal* centred around the idea that the parliament – and only the parliament – reflected *la volonté general*. The concept was based on the joint principles of parliamentary sovereignty and the supremacy of law.[77] However, a key flaw in the *État legal* was the absence of judicial review.[78] Before the establishment of the *Conseil Constitutionel* in 1958, the *Conseil d'État* (the Supreme Administrative Court) had to rely upon unwritten general principles of law to safeguard individual rights against infringements made by law. This eventually led to a break-through for *État de droit*. Yet, the idea was not fully constitutionalized in France until the 1970's, and for that reason, the normative impact of *État de droit* has been more limited than that of its German counterpart, *der Rechtsstaat*.[79]

Similar to the French *État legal,* the German concept of *der Rechtsstaat* was originally established in opposition of *der Polizeistaat*.[80] Contrary to the English rule of law, which promotes a separation of executing and legislative powers, and the French *État de droit,* which is firmly based on the principle of parliamentary sovereignty, *der Rechtsstaat* presumes an 'organic relationship' between the state and the law.[81] The origins of *der Rechtsstaat* can be traced back to Immanuel Kant, who believed in 'a state governed through

[75] Wennerström, 76.
[76] Pech (2009), 37.
[77] Wennerström, 73–74.
[78] Wennerström, 73–74.
[79] Pech (2009), 36–39.
[80] Pech (2009), 18.
[81] Wennerström, 68.

laws, including laws to protect the rights of individuals, made operative through an independent judiciary.'[82]

During the first part of the 20th Century, largely due to the influence of legal positivism,[83] emphasis was put only on the first part of the Kantian definition, i.e., the principle of legality. The law was seen as superior to the state and there was no limitation to the power of the legislature, other than the law itself.[84] The second part of the Kantian *Rechtsstaat* was revisited after World War II, when a new constitution (*Grundgesetz*) was adopted in 1948. Its aim was to combine predictability with fundamental rights protection, by introducing an ambitious catalogue of formal and substantive rights and granting the national judiciary a wide mandate to review fundamental rights.[85]

3.3 The EU's conception of the rule of law

The EU has for a long time been a firm advocate for the rule of law. In 1986, the CJEU stated that the Union was 'a community based on the rule of law'[86]. This statement was institutionalised in primary law trough the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty and the 2009 Lisbon Treaty.[87]

In modern EU law, the rule of law is enshrined in article 2 TEU as one of the foundational values upon which the Union is built.

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the

[82] Wennerström, 69.
[83] Pech (2009), 32.
[84] Wennerström, 68–70.
[85] Pech (2009), 34; Wennerström, 71.
[86] Case C-294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23. However, it should be noted that the Union was defined as a *Rechtsgemeinschaft* in the German version of the judgment, and a *Communaute de droit* in the French version. That is, the CJEU did *not* refer to the traditional concepts of *der Rechtsstaat* or *État de droit,* as described above. See Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010), European Constitutional Law Review 6:3, 359–396, 364.
[87] Pech (2010), 360–362; Groussot and Zemskova, 2–3.

> rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[88]

Although provisions in primary and secondary law are linked to article 2 TEU,[89] the concept of the rule of law lacks a clear definition in the treaties.[90] This has led critics to argue that the EU institutions have opted for an '*à la carte* definition' of the rule of law. [91]

In 2014, the Commission issued a communication relating to their *Rule of Law Framework*[92]*,* where an attempt was made to define a common EU understanding of the rule of law.[93] According to the Commission, the rule of law 'makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.'[94] To specify the meaning of the concept, the Commission defined a non-exhaustive list of principles derived from the rule of law.

> Those principles include *legality*, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; *legal certainty*; *prohibition of arbitrariness* of the executive powers; *independent and impartial courts*; *effective judicial review* including respect for fundamental rights; and *equality before the law*.[95]

[88] Consolidated version of the Treaty of the European Union (2016), OJ C 202, 7.6.2016, 13–45, article 2. Emphasis added.
[89] See e.g., articles 7, 21 and 49 TEU and articles 41 and 47 of the Consolidated version of the Charter of Fundamental Rights of the European Union (2016), OJ C 202, 7.6.2016, 391–405. For an overview, see Laurent Pech and Joelle Grogan (eds.), 'Meaning and Scope of the EU Rule of Law' (2020), RECONNECT Deliverables 7:2, https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf, accessed 2022-02-11, 6 ff.
[90] Pech (2010), 369.
[91] Pech and Grogan (2020, 7:2), 21.
[92] See section 4.2.
[93] Commission, 'A new EU Framework to strengthen the Rule of Law' (Brussels 19.3.2014), COM(2014) 158 final/2, 2–3.
[94] COM(2014) 158 final/2, 4
[95] COM(2014) 158 final/2, 4.

The list was amended in 2019 to also include the principle of *effective judicial protection* by independent and impartial courts and the principle of *separation of powers*.[96]

The Commission's list of principles is based on CJEU case law[97], ECtHR case law and soft law from the Council of Europe.[98] In particular, the Commission was inspired by the Venice Commission, an advisory body to the Council of Europe that focus on constitutional matters including democracy and the rule of law.[99] In 2011, the Venice Commission produced a 'Rule of Law Checklist'[100], with striking similarities to the list subsequently made by the Commission.[101]

When presenting the original definition, the Commission underlined that it defined the rule of law as 'a common value of the EU in accordance with article 2 TEU'[102]. The principles set out in the communication was meant to reflect a common European understanding of the rule of law.[103] Still, the Commission noted that 'the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system.'[104]

From this follows that the EU's conception of the rule of law has both formal and substantive components. According to the Commission, the rule of law is 'intrinsically linked' to democracy and respect for fundamental rights, as the latter two are reliant on the independence of the judiciary.[105] Furthermore, the

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[96] Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Brussels 3.4.2019), COM(2019) 163 final, 2.
[97] Commission, '*Un nouveau cadre de l'UE pour renforcer l'état droit'* (Annexes) (Brussels 19.3.2014) COM(2014) 158 final (French version), 1–2.
[98] COM(2014) 158 final/2, 4.
[99] 'For Democracy through Law' (Council of Europe, 2014), https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN, accessed 2022-02-15.
[100] Venice Commission, 'Report on the Rule of Law' (2011-04-04), CDL-AD(2011)003rev, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e, accessed 2022-02-15, 15–16.
[101] For an overview, see Pech and Grogan (2020, 7:2), 38.
[102] COM(2014) 158 final/2, 4.
[103] This conclusion may be reached by comparing the Commission's principles, expressed in COM(2014) 158 final/2, 4, with the Venice Commission's, expressed in CDL-AD(2011)003rev, para. 44. See also Pech and Grogan (2020, 7:2), 38.
[104] COM(2014) 158 final/2, p. 4.
[105] COM(2014) 158 final/2, 4.

Commission argues that respect for fundamental principles of the rule of law is a prerequisite for the EU member states' fulfilment of international obligations,[106] as well as the principle of mutual trust[107] and the full capacity of the internal market.[108] Consequently, the EU have a thick substantive conception of the rule of law.[109] Still, Laurent Pech and Dimitry Kochenov criticize both the EU's and the Venice Commission's definitions of the rule of law of ignoring important principles, namely, accessibility to the law, protection of legitimate expectations and proportionality.[110]

The EU's conception of the rule of law has been strongly inspired by the modern German *Rechtsstaat.* The EU perceives the rule of law to be a constitutional 'meta-principle', which consists of a number of invokable sub-principles, with the fundamental goal to safeguard 'the primacy of the individual' (i.e., fundamental rights) against arbitrary state power.[111] Moreover, *der Rechtsstaat* has influenced the EU to create a strong constitutional framework and a mechanism for judicial review by a constitutional court (i.e., the CJEU). The French *État de droit* has had more of an indirect influence on EU law, for instance through introducing general principles of law as a central legal interpretation method.[112]

The EU has even been influenced, albeit indirectly, by English legal tradition. As noted above, the EU's conception of the rule of law was to a large extent inspired by the Venice Commission's 'Rule of Law Checklist' from 2011.[113] The Venice Commission based their conception of the rule of law on Bingham's definition of the concept,[114] and Bingham uses Dicey's understanding

[106] COM(2014) 158 final/2, 4–5.
[107] I.e., the principle that the EU member states are generally required 'to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.' See Opinion 2/13 *Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, para. 191.
[108] COM(2019) 163 final, 2.
[109] Pech and Grogan (2020, 7:2), 41.
[110] Dimitry Kochenov and Laurent Pech 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015), European Constitutional Law Review 11:3, 512–540, 523.
[111] Pech (2010), 373–374.
[112] Wennerström, 76.
[113] COM(2014) 158 final/2, 4.
[114] CDL-AD(2011)003rev, para. 36–37.

of the rule of law as a starting point for his modern approach.[115] In my opinion, this strengthens the conclusion that different conceptions of the rule of law are interlinked, and that the EU conception of the rule of law is firmly rooted in the constitutional traditions of most European countries.[116]

3.4 Summary

In spite of an extensive philosophical debate spanning over centuries, there is no uniform definition of the concept of 'the rule of law'. Yet, most academics seem to agree that it is a concept different but linked to the ideas of democracy and fundamental rights, and moreover, that it is a value inherently good and sound for a democratic society to strive towards.

Within EU law, the rule of law has for a long time been perceived as a value of fundamental importance, but one which lacks any clear definition in primary or secondary law. Instead, the concept has been defined and developed in CJEU case law and in the soft law of various international bodies. In 2014, the Commission tried to define the concept in clear terms, essentially by summarizing previous efforts.

However, as noted by the Commission, even though the rule of law is perceived as a common value for the Union, discrepancies exist between different EU member states. [117] This may result in divergence as regards the member states' compliance with fundamental principles of the rule of law, and a general hesitancy as regards the precise meaning of the concept.

[115] Bingham, 3–5.
[116] See e.g., Pech (2010), 362; Pech and Grogan (2020, 7:2), 38.
[117] Commission (supra note 104).

4. The Rule of Law within the EU

In this chapter, I make an overview of different enforcement mechanisms available to the EU institutions to ensure the member states' compliance with fundamental principles of the rule of law. Simultaneously, I critically assess these tools, to explain why none of them have been sufficient in responding to rule of law backsliding within the Union.

In section 4.1, I focus on primary law mechanisms, i.e., article 7 TEU and the infringement procedure. In section 4.2, I present a selection of soft law mechanisms which have been designed to prevent rule of law backsliding within the EU. In section 4.3, I give an overview of developing CJEU case law on the topic of the rule of law.

4.1 Primary law mechanisms

4.1.1 Article 7 TEU

Article 7 TEU has famously been described as 'the EU's nuclear option'[118]. The overall purpose with the provision is to empower the EU to monitor and potentially sanction a member state that infringes on the Union's fundamental values, as expressed in article 2 TEU.[119] Article 7 TEU consists of two interlinked procedures, which may be called 'the preventive arm' and 'the sanctioning arm' of the provision.[120]

Article 7(1) TEU sets out the procedure through which the *Council,* acting upon an initiative made by one third of the EU member states, the European Parliament or the Commission, may determine that there is 'a clear risk of a serious breach' by a member state of the values contained in article 2 TEU.

[118] State of the Union 2012 by President of the Commission José Manuel Durão Barroso (Strasbourg 2012.09.11), SPEECH/12/596.
[119] Pech and Scheppele, 4.
[120] 'The preventive arm' refers to article 7(1) TEU and 'the sanctioning arm' to articles 7(2) and 7(3) TEU. See Pech and Scheppele, 4–5.

The decision requires support by 80 per cent of the member states in the Council, and the consent of two thirds of the European Parliament.[121]

Article 7(2) TEU sets out the procedure though which the *European Council*, acting upon an initiative made by one third of the EU member states or the Commission, may determine the existence of 'a serious and persistent breach' of article 2 values. The decision requires unanimity in the European Council. After such a determination, the *Council* may – as a measure of last resort – decide to withhold certain treaty rights of the member state in question, including its voting rights in the Council.[122] A sanctioning decision requires a reinforced qualified majority in the Council (i.e., 72 per cent of the votes in the Council, representing at least 65 per cent of EU citizens).[123] The member state concerned does not participate in any of the decisions.[124]

The material scope of article 7 TEU is not confined to areas covered by EU law. The procedure may therefore be imposed in response to any action taken by a member state, even where the issue falls within the member state's exclusive competence.[125] The provision thus covers, *inter alia*, central state functions such as law and order and national security.[126] The Commission has justified this by asserting that a serious and persistent breach of article 2 values poses a threat to the foundations of the EU legal order and the principle of mutual trust between the EU member states, regardless of within which field the breach occurs.[127]

However, despite its prospects, article 7 TEU has proved insufficient in addressing the ongoing rule of law backsliding within the EU. Article 7(1) TEU

[121] That two thirds of the European Parliament must support the decision follows from a joint reading of article 7(5) TEU and the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, 47–390, article 354.
[122] Article 7(3) TEU.
[123] This follows from a joint reading of articles 7(5) TEU and 238(3)(b) and 354 TFEU.
[124] This follows from a joint reading of articles 7(5) TEU and article 354 TFEU.
[125] Leonard Besselink 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives' in Jakab and Kochenov, 128–144, 141–143.
[126] These are examples of functions which traditionally falls within the EU member states' exclusive competence, which follows from article 4(2) TEU.
[127] Commission, '(O)n Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based' (Brussels, 15.10.2003), COM(2003) 606 final, 5.

was initiated against Poland in 2017[128] and Hungary in 2018[129], but so far, none of these procedures has resulted in sanctions. The EU institutions' reluctance to impose sanctions may partially be explained by diffusion of responsibility. Article 7 TEU presupposes a shared responsibility among all EU institutions to invoke the procedure against a deterring member state, but this also means that no EU institution bears the primary responsibility to invoke or follow through with the procedure.[130]

The Commission, who is commonly considered to be 'Guardian of the Treaties'[131], could be expected to assume that responsibility. Carlos Closa identifies two reasons to explain the Commission's inaction when it comes to invoking and pursuing the article 7 procedure. Firstly, the Commission considers that the member states' compliance with EU law depends on their active participation in the implementation of EU law. For this reason, the Commission prefers 'a structured dialogue'[132] with the member states, and dialogue-based enforcement mechanisms over coercion through sanctions. Punitive measures, such as article 7 TEU, are considered measures of last resort.[133]

Secondly, the Commission is afraid of not gaining enough support for a sanctioning proposal in the Council and the European Council.[134] As noted above, a sanctioning decision requires support from *all* the member states in the European Council, except for the member state concerned, which is exempted from the vote. The governments of Hungary and Poland have made clear that they would vote against any sanctioning proposal targeting the other country.[135] This has led Laurent Pech and Kim Lane Scheppele to claim that 'the

[128] 'Rule of Law: European Commission acts to defend judicial independence in Poland' (Commission, 2017-12-20), https://ec.europa.eu/commission/presscorner/detail/en/ip_17_5367, accessed 2022-05-16.
[129] European Parliament, 'Situation in Hungary' (Strasbourg, 2018.09.12), 2017/2131(INL), dec. T8-0340/2018.
[130] Pech and Scheppele, 26.
[131] *Encyclopedia Britannica*, 'European Commission' (aut. Clifford A. Jones, 2021-08-21), https://www.britannica.com/topic/European-Commission, accessed 2022-05-02.
[132] Carlos Closa, 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance' (2019), Journal of European Public Policy 26:5, 696–716, 702.
[133] Closa, 702–703.
[134] Closa, 710–711.
[135] Joakim Nergelius, 'Why the Rule of Law Can Never be Part of an 'Illiberal' Democracy' in Bakardjieva Engelbrekt, Moberg and Nergelius (eds.), 75–85, 81.

sanctioning arm of article 7 TEU have been effectively neutralised by the need for unanimity in the European Council.'[136]

There may also be a principal explanation for the sensitivity of the article 7 procedure. Dimitry Kochenov and Petra Bárd consider that its application could be considered to go against 'the very rationale' of the EU legal order. The EU was founded on premise that economic interdependency would lead to peace in Europe, since any remaining hostilities between the member states would simply cost too much. Thus, the application of article 7 TEU – especially its sanctioning arm – could be perceived to undermine the internal market and the overarching goal of European integration.[137]

One last thing should be said regarding the design of article 7 TEU. From a legal standpoint, it is somewhat unclear which sanctions could be imposed upon a rogue member state, except for the withdrawal of voting rights in the Council, which is expressively mentioned in article 7(3) TEU[138]. Leonard Besselink believes that the Council could hypothetically choose to impose *other* sanctions upon a member state, for instance the suspension of funds.[139]

4.1.2 The infringement procedure

The possibility to invoke infringement procedures in front of the CJEU has traditionally been one of the most important tools to ensure the principle of primacy of EU law.[140] Article 258 TFEU empowers the Commission to bring a member state in front of the CJEU for non-compliance with a specific obligation under EU law. It is the Commission that has the burden of proof for an

[136] Pech and Scheppele, 35.
[137] Petra Bárd and Dimitry Kochenov, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' in *European Yearbook of Constitutional Law* I (2019), 243–287, 248, 261.
[138] Article 7(3) TEU reads 'the Council, acting by a qualified majority, may decide to suspend *certain of the rights* deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.' Emphasis added.
[139] Besselink (2017), 129–131.
[140] Laurence W. Gormley, 'Infringement Proceedings' in Jakab and Kochenov (eds.), 65–78, 78.

alleged infringement, and in doing so, it may not rest on any presumption.[141] Article 258 TFEU is linked to article 260 TFEU, which creates an obligation for the EU member state concerned to comply with the CJEU's ruling in an infringement proceeding, or it may be subject to financial repercussions.

An infringement procedure usually consists of a 'pre-litigation phase' and a 'litigation phase'. The Commission first holds a dialogue with the member state concerned, purposing to persuade the government to comply voluntarily with EU law.[142] If the dialogue is unsuccessful, the Commission *may* bring the matter in front of the CJEU.[143] This means that the infringement procedure grants the Commission a high degree of discretion.[144]

The infringement procedure holds a prominent role in the Union's constitutional framework. Over the last decade, the Commission has initiated rule of law-related infringement procedures against both Hungary and Poland. While the Polish cases have centred around the independence of the judiciary, the Hungarian cases have been more focused on economic freedoms. Xavier Groussout and Anna Zemskova considers that the Commission's different strategies reflect a difference between Poland and Hungary's approaches to illiberalism. They consider that Poland is more 'ideologically inclined' while Hungary's ongoing process of rule of law backsliding is mainly driven by corruption and clientelism.[145]

Noneteheless, infringement procedures have been criticized for being an ineffective tool to counter rule of law backsliding. Kim Lane Scheppele argues that the Commission ought to initiate infringement proceedings based on sys-

[141]Case 96/81 *Commission v Netherlands* [1982] ECR 1791, para 6; Case C-404/00 *Commission v Spain* [2003] ECR I-6695, para 26; Case C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, para 21. See also Stine Andersen, 'Failure to Comply with EU Law: Article 258 TFEU' in Paul Craig and Graáinne de Búrca (eds.), *The Enforcement of EU Law: The Role of the European Commission* (1st ed., Oxford: Oxford University Press, 2012), 44–95, 58–59.
[142] Case C-159/94 *Commission v France* [1997] ECR I-5815, para 103. See also Andersen, 46.
[143] This follows from the 2nd subpara. of Article 258 TFEU.
[144] Gormley, 66; Andersen, 52.
[145] Groussout and Zemskova, 10–11.

tematic deficiencies in illiberal member states as regards their general disrespect for fundamental values of the EU legal order and the supremacy of EU law. According to Scheppele, the Commission relies on a premise, based on the principle of sincere cooperation in article 4(3) TEU[146], that the member states are generally compliant with EU law, and that a particular infringement of a specific EU law obligation is nothing more than a temporary lapse of judgement. However, when it comes to illiberal member states such as Poland and Hungary, this premise can no longer be taken for granted.[147]

4.2 Soft law mechanisms

Since 2012, the EU have developed various EU soft law mechanisms to strengthen the protection of the rule of law within the Union.[148] 'Soft law' can be defined as rules of conduct which are devoid of legally binding force, but which nonetheless may have both practical and legal effects.[149] Below, I give a summary of three important soft law mechanisms: The *Rule of Law Framework*, the *European Rule of Law Mechanism*, and the *Justice Scoreboard*.

Firstly, the Commission's *Rule of Law Framework* ('the Framework')[150] from 2014 was introduced as a complementary measure to the primary law procedures described in section 4.1.[151] Its purpose is to resolve situations amounting to 'a systematic threat'[152] to the rule of law in a member state *before* the conditions for invoking article 7 TEU are met.[153] The Framework sets out an approach to tackle systematic threats to the rule of law in an EU member state.

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[146] I.e., the principle that the EU institutions and the member states shall cooperate in the implementation of EU law. The 1st subpara. of article 4(3) TEU reads '(p)ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.' The principle is further specified in the 2nd and 3rd subpara. of article 4(3) TEU.
[147] Kim L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Closa and Kochenov (eds.), 105–132, 108–112.
[148] Commission (supra note 10).
[149] Oana Stefan, 'Soft Law and the Enforcement of EU Law' in Jakab and Kochenov (eds.), 200–217, 200.
[150] COM(2014) 158 final/2.
[151] COM(2014) 158 final/2, 5–6; Besselink (2017), 136.
[152] I.e., 'cases where the mechanisms established at national level to secure the rule of law cease to operate effectively.' See COM(2014) 158 final/2, 5.
[153]COM(2014) 158 final/2, 3. For this reason, the Framework has informally been described as the 'pre-article 7 procedure'. See Pech and Scheppele, 14.

First, the Commission initiates 'a structured exchange' with the member state concerned and provides recommendations on how the member state should promote fundamental principles of the rule of law. If the recommendations are not observed, the Commission will consider triggering article 7 TEU.[154]

Secondly, the *European Rule of Law Mechanism* ('the Mechanism')[155] from 2020 is an annual review cycle of the member states' compliance with fundamental principles of the rule of law. It results in a report by the Commission, which contains country-specific recommendations for all EU member states. The purpose with the mechanism is to set up a dialogue between the member states, the EU institutions, and domestic stakeholders. This dialogue is centred around four main themes: 'the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances.'[156]

Finally, *Justice Scoreboard* from 2013 is a Commission soft law mechanism which aims to collect comparable data on 'the functioning of the justice systems of all Member States.'[157] Justice Scoreboard was originally developed for a different purpose than the other two mechanisms. It has its foundations in budgetary reforms that were implemented in the aftermath to the EU financial crisis. Through these reforms, the Commission observed a correlation between 'an effective justice system' and financial stability, and furthermore, between judiciary effectiveness, the principle of mutual trust and the proper functioning of the internal market.[158] Justice Scoreboard is linked to the *European Semester*, a macroeconomic soft law instrument aiming to further economic growth by targeting structural and macro-economic issues, such as corruption.[159]

Although the three instruments described above are distinct from each other, they share some common features. The instruments have been initiated by the

[154] COM(2014) 158 final/2, 7–8. For a detailed assessment, see Besselink (2017), 136.
[155] Commission, '2020 Rule of Law Report: The rule of law situation in the European Union' (Brussels, 30.9.2020), COM(2020) 580 final.
[156] COM(2020) 580 final, 3–4.
[157] Commission, 'The EU Justice Scoreboard A tool to promote effective justice and growth' (Brussels, 27.3.2013), COM(2013) 160 final, 2.
[158] COM(2013) 160 final, 1–2.
[159] Commission (supra note 10).

Commission, are based on the concept of dialogue between the EU institutions and the member states, and finally, they are not legally binding.[160]

Among academics, it has been suggested that when it comes to illiberal EU member states, soft law instruments that are characterized by a reliance upon 'constructive dialogue' have a rather limited potential to result in any real change. As is grimly noted by Laurent Pech and Kim Lane Scheppele, 'when a government is bent on deliberately undermining constitutional checks on power, dialogue only gives that government time to consolidate gains.'[161] Particularly with regard to the Framework, they argue that this mechanism only postpones the possibility for constructive action (notably, triggering article 7 TEU) until it is too late, and the EU member state concerned has already gone too far down the road of illiberalism.[162]

Generally, Leonard Besselink argues that the trend of increased reliance on soft law mechanisms may be considered a 'backward shift' within EU law. From public debate focusing on the possibility of enforcing sanctions, regulated by primary law, attention has shifted to preventive mechanisms, then to monitoring, and finally to 'a mere conversation within the Council'.[163]

4.3 CJEU case law

Over the last decade, parallel to the political and legislative developments explained above, there has been a rapid development of CJEU case law on the topic of the rule of law.[164] Dimitry Kochenov and Petra Bárd describe that in light of the other EU institutions' inaction and the insufficiency of the legal mechanisms provided for by EU law, the CJEU has effectively acted as 'the last soldier standing'[165] in the fight against rule of law backsliding.[166]

[160] This follows from the 4th subpara. of article 288 TFEU.
[161] Pech and Scheppele, 27.
[162] Pech and Scheppele, 27–28.
[163] Besselink (2017), 128.
[164] Kochenov and Pech (2021), 12.
[165] Bárd and Kochenov, 249.
[166] Bárd and Kochenov, 247–249.

The developing CJEU case law has a distinct focus on the importance of maintaining the independence of national judiciaries. This value is intimately linked to the principle of effective judicial protection, an established principle of CJEU case law,[167] enshrined in the second subparagraph of article 19(1) TEU[168]. The CJEU has used this provision as a 'jurisdictional trigger', to ensure its competence to review the developments in illiberal member states.[169]

Apart from the principle of effective judicial protection, I consider that the independence of the judiciary is also linked to the prohibition of arbitrariness of the executive powers[170], and the principle of separation of powers[171]. In the following, I use the term 'the principle of judiciary independence' to refer to the value of maintaining the independence of national judiciaries. This notion is to be understood as a meta-principle, connecting the principles mentioned above, which are all part of the EU's conception of the rule of law.[172]

In this section, I provide an overview of CJEU case law on the topic of the rule of law, and especially on the principle of judicial independence. I focus on four ground-breaking cases that have developed the EU's understanding

[167] I.e., the principle that all EU legal acts must be subject to review so that their compatibility with over-arching EU law norms – the treaties as well as general principles of EU law and fundamental rights – can be reviewed and the fundamental individual right to effective judicial protection can be secured. See Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, para. 91; Case C-550/09 *E and F* [2010] ECLI:EU:C:2010:382, para. 44; Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECLI:EU:C:2002:462, para. 38-39; Joint cases C-174/98 P and C-189/98 P, *Netherlands and Van der Wal v Commission* [2000] ECLI:EU:C:2000:1, para. 17.
[168] The 2nd subpara. of article 19(1) TEU reads 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'
[169] Kochenov and Pech (2021), 210–211.
[170] I.e., the principle that exercise of power by public authorities against a private person must have a sufficient legal basis and be proportionate and non-arbitrary. See Joined cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECLI:EU:C:1989:337, para. 19.
[171] I.e., the principle that the legislative, administrative, and judicial branches of government shall exercise their powers 'in compliance with the principle of the separation of powers which characterises the operation of the rule of law.' See Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811, para. 58.
[172] COM(2014) 158 final, Annexes, 1–2.

of the rule of law: the *Portuguese Judges* case[173], the *Minister for Justice and Equality* case[174], the *Repubblika* case[175], and the *Romanian Judges* case[176].

4.3.1 The Portuguese Judges case

The *Portuguese Judges* case of the 28th of February 2018 is the CJEU's first major ruling on the principle of judicial independence. The main question in this case is whether a salary-reducing measure implemented on Portuguese Judges infringes on the principle of judicial independence.[177]

Initially, the CJEU observes that article 19(1) TEU is applicable on all matters that fall within the field of EU law, regardless of whether a domestic court is applying EU law provisions in the case at hand.[178] The values enshrined in article 2 TEU – including the rule of law – constitute fundamental values of the EU legal order, common to all the member states, which are preconditions for the principle of mutual trust.[179] Moreover, the Court claims that the principle of effective judicial review is a common EU law principle. Article 19(1) TEU thus obliges not only the CJEU, but also domestic courts in the EU member states, to ensure effective judicial review of EU law.[180]

In light of the principle of sincere cooperation in article 4(3) TEU, the CJEU considers that the EU member states are obliged to ensure the application of EU law and the fundamental right to effective judicial protection within their national legal orders. Thus, the EU member states must ensure legal remedies and procedures that enable effective judicial review in all fields covered by EU law.[181] Compliance with EU law, and the fundamental right of effective

[173] Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP)* [2018] ECLI:EU:C:2018:117.
[174] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] ECLI:EU:C:2018:586.
[175] Case C-896/19 *Repubblika* [2021] ECLI:EU:C:2021:311.
[176] Joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor din România"* [2021] ECLI:EU:C:2021:393 (cit. 'C-83/19 to C-397/19').
[177] C-64/16, para. 27.
[178] C-64/16, para. 29.
[179] C-64/16, para. 30.
[180] C-64/16, para. 32, 35.
[181] C-64/16, para. 34.

judicial protection, is contingent upon the existence of an independent judiciary, competent to carry out effective judicial review. [182]

4.3.2 The Minister for Justice and Equality case

The main issue in the *Minister for Justice and Equality* case of the 25th of July 2018 is whether concerns raised by Irish authorities regarding the independence of the Polish judiciary may constitute a reason not to execute European arrest warrants issued by Polish courts.[183] The CJEU affirms that 'the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial'[184], and that this right is of key importance to ensuring the protection of individual rights and the respect for article 2 values.[185] With reference to the *Portugese Judges* case*,* the Court reaffirms that there is a connection between article 2 TEU and article 19(1) TEU, which creates an obligation for national courts to ensure the full application of EU law within their jurisdictions.[186] Importantly, the Court also states that the principle of judiciary independence requires that national courts be free to exercise their functions entirely autonomously and without external influence from any other actor or organ of state.[187]

4.3.3 The Repubblika case

The *Repubblika* case of the 20th of April 2021 concerns the Maltese procedure for appointing judges (a procedure which was amended in 2016). [188] According to the CJEU, it follows from a joint reading of article 2 TEU and article 49 TEU[189] that membership to the Union is conditional upon the member state's respect for foundational values of EU law, including the rule of law. Compliance with the values expressed in article 2 TEU constitutes a prere-

[182] C-64/16, para. 36–37 and 41.
[183] C-216/18 PPU, para. 22 and 25.
[184] C-216/18 PPU, para. 48.
[185] C-216/18 PPU, para. 48.
[186] C-216/18 PPU, para. 50.
[187] C-216/18 PPU, para. 63.
[188] C-896/19, para. 9 and 59.
[189] The 1st sentence of article 49 TEU reads '(a)ny European State which respects the values referred to in Article 2 [TEU] and is committed to promoting them may apply to become a member of the Union.'

quisite for the principle of mutual trust and for a member state's enjoyment of rights deriving from the treaties.[190] The CJEU claims that the EU member states cannot 'amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law.'[191] In other words, the EU member states are obliged, post-accession, to refrain from adopting laws which would risk undermining the independence of the judiciary.[192] This has become known as the 'principle of non-regression'[193].

4.3.4 The Romanian Judges case

The *Romanian Judges* case of the 18th of May 2021 concerns certain judicial reforms implemented in relation to Romania's accession to the EU.[194] In light of the context of their implementation, the CJEU considers that the judicial reforms forms part of Romania's treaty of accession.[195] With reference to the *Repubblika* case,[196] the CJEU finds that Romania cannot adopt laws that undermine the pre-accession standards for the protection of the rule of law.[197]

Interestingly, the Court links the principle of judicial independence to the principle of mutual trust and the proper functioning of the internal market, and claims that respect for the rule of law 'requires the existence in all Member States of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption.'[198]

4.4 Summary

Clearly, none of the existing tools in the EU's *Rule of Law Toolbox* are sufficient to counter the threat of rule of law backsliding. Primary law enforcement mechanisms – i.e., article 7 TEU and infringement procedures – are rarely and slowly enforced, while soft law instruments lack binding legal force,

[190] C-896/19, para. 61–63.
[191] C-896/19, para. 63.
[192] C-896/19, para. 63–64.
[193] Kochenov and Pech (2021), 16.
[194] C-83/19 to C-397/19, para. 47–48 and 146.
[195] C-83/19 to C-397/19, para. 153–155.
[196] C-83/19 to C-397/19, para. 162, which refers to C-896/19, para. 63–64.
[197] C-83/19 to C-397/19, para. 162–165.
[198] C-83/19 to C-397/19, para. 159.

wherefore enforcement is unlikely to result in any measurable effects. Also, the Commission has consistently shown a preference for 'constructive dialogue' over legal action and measurable sanctions.

In lieu of other EU institutions taking action against illiberal member states, the CJEU has rapidly expanded its body of rule of law-related case law. This case law centres around the importance of maintaining the independence of national judiciaries. Through this case law it has been confirmed, *inter alia*, that in order to guarantee the principle of primacy and the fundamental right to effective judicial protection, the EU member states must be able to ensure effective judicial review, also in areas not related to the application of EU law; that effective judicial review requires an independent national judiciary; that EU member states are not allowed to regress on rule of law-related commitments after acceding the Union; and that the value of the rule of law is linked to the principle of mutual trust, the proper functioning of the internal market and to anti-corruption.

5. Financial Conditionality within the EU

The aim with this chapter is to assess the purpose, scope, and application of the Conditionality Regulation. In section 5.1, I give a brief explanation of the use of conditionality mechanisms within EU law. In section 5.2, I provide an overview of the Conditionality Regulation. In section 5.3, I assess the legislative procedure that led to the regulation being adopted. In section 5.4, I analyse Case C-156/21 and Case C-157/21, two actions for annulment brought by Poland and Hungary against the Conditionality Regulation, which were settled by the CJEU on the 16th of February 2022.

However, before moving on to financial conditionality mechanisms, I briefly want to explain the connection between EU funds and rule of law backsliding.

Approximately 75 per cent of the EU budget is distributed under 'shared management'. This means that funds are distributed at national level by the EU member states' governments, while the Commission oversee the process.[199] Poland and Hungary are net recipients of EU funds.[200] In the MFF 2014–2020, Poland received approximately 104 million EUR in EU funds, which amounts to 3,31 per cent of the country's gross national income (GNI). Hungary received approximately 39,5 million EUR, which amounts to 4,75 per cent of the country's GNI.[201] It is estimated that the two countries will be major net recipients of EU funds in the MFF 2021–2027 as well.[202]

Focusing on Hungary, Daniel Kelemen argues that as *Fidesz* control the influx of EU funds, the party can use the funds as leverage to create loyalist client networks, fuelling corruption and strengthening its grasp for power.

[199] Viță, 121.
[200] See e.g., Friedrich Heinemann, 'Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework' (2018), Intereconomics 53, 297–301, 297; Łacny, 80–81.
[201] 'EU Spending and Revenue' (Commission), https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/spending-and-revenue_en, accessed 2022-03-21.
[202] 'Editorial comments: Compromising (on) the general conditionality mechanism and the rule of law' (2021), Common Market Law Review 58:2, 267–284 (cit. 'Eds. CMLR'), 267.

Consequently, in the context of rule of law backsliding, the distribution of EU funds may help sustain illiberal regimes. [203]

5.1 Financial conditionality mechanisms in EU law

Conditionality has been an established concept in EU external relations for several decades. More than that, conditionality determines the very accession to the EU, since all prospective member states must fulfil the so called 'Copenhagen Criteria'[204] to become members of the Union.[205] However, over the last decade, financial conditionality mechanisms have increasingly been used as internal governance mechanisms within the EU.[206] According to Roland Bieber and Francesco Maiani, 'the institutions are starting to make systematic use of conditionality to promote compliance with EU law.'[207] In other words, the EU have started to condition the distribution of funds to the fulfilment of broader policy goals at Union level.[208]

Internal conditionality mechanisms are generally enforced by the EU institutions upon the EU member states. The purpose is to alter the conduct of the recipient parties, i.e., the member states. An internal conditionality mechanism has two defining features. Firstly, it aims to pursue a policy goal different from that which determines the distribution of funds. Secondly, it may give rise to financial consequences. Compliance may result in financial incentives ('positive conditionality') while non-compliance may result in financial sanctions ('negative conditionality').[209]

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[203] Kelemen, 485, 490–491.
[204] European Council, 'Conclusions of the Presidency' (Copenhagen, 21-22.06.1993), DOC/93/3. The 2nd subpara. of point 7(a)(iii) reads '(m)embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, *the rule of law*, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.' Emphasis added.
[205] Viță, 117–118; Heinemann, 298.
[206] See e.g., Viță, 117–118; Mario Kölling, 'Policy conditionality – a new instrument in the EU budget post-2020?' (2017), SIEPS 2017:10epa, https://www.sieps.se/publikationer/2017/policy-conditionality--a-new-instrument-in-the-eu-budget-post-2020/, accessed 2022-03-17, 2–3.
[207] Bieber and Maiani, 1074.
[208] Viță, 119.
[209] Viță, 119, 122–123.

An important facet of the modern internal conditionality mechanisms is that the mechanisms are binding legal norms, regulated in secondary law.[210] This means that the enforcing of internal conditionality mechanisms is determined by the full scope of EU law, including general principles,[211] and that the mechanisms must be subject to judicial review.[212] Importantly, the CJEU has established that the enforcing of sanctions due to non-compliance with an internal conditionality mechanism requires 'a sufficiently direct link' between the measures financed by EU funds and the alleged act of non-compliance.[213]

Internal conditionality mechanisms are imposed in relation to the MFF. The mechanisms may apply to different funds and introduce different conditions on the member states. Mechanisms that require a member state to comply with general obligations under EU law may be described as 'general'[214]. The Conditionality Regulation requires the EU member states to respect the full scope of EU law, and in particular, the rule of law as a value enshrined in article 2 TEU. Thus, it constitutes a general conditionality mechanism.

5.2 Outline of the Conditionality Regulation

The Conditionality Regulation is based on article 322(1)(a) TFEU[215]. It consists of ten articles, which set up a procedure for withholding EU funds from an EU member state. The regulation is directly linked to the MFF 2021–2027 and applies until the end of year 2027.[216] Its purpose is to protect the Union budget 'in case of breaches of the principles of the rule of law.'[217]

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[210] Before ca 2007, internal conditionality was voluntary, self-imposed by the member states, and based on soft law instruments developed by the Council. See Kölling, 3.
[211] Viță, 137–139.
[212] Viță, 138.
[213] Case C-385/13 P *Italy v Commission* [2014] EU:C:2014:2350*,* para. 84.
[214] Bieber and Maiani, 1078–1079.
[215] Article 322(1)(a) TFEU reads '(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 […] the *financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget* and for presenting and auditing accounts.' Emphasis added.
[216] This follows from Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027*,* OJ L 433I, 22.12.2020, 11–22, in a joint reading of articles 1 and 6.
[217] Article 1 of the Conditionality Regulation.

Article 2(a) of the regulation defines the rule of law. According to this provision, 'the rule of law' reflects the value in article 2 TEU and is to be interpreted in relation to other values in that provision. Furthermore, it is confirmed in article 2(a) of the regulation that the rule of law includes 'the principles of *legality* implying a transparent, accountable, democratic and pluralistic law-making process; *legal certainty*; *prohibition of arbitrariness* of the executive powers; *effective judicial protection*, including *access to justice*, by independent and impartial courts, also as regards fundamental rights; *separation of powers*; and *non-discrimination and equality* before the law.'[218] This is the first binding EU law definition of the rule of law.[219] It largely reflects the previous soft law definition,[220] but there are some minor differences worth highlighting: article 2(a) of the regulation puts stronger emphasis on access to justice to independent and impartial courts, and the principle of non-discrimination.

Article 3 of the regulation contains a non-exhaustive list of indicators of breaches of the rule of law. From this list follows that if a member state for instance endangers the independence of the judiciary, or fails to prevent, correct, or sanction unlawful decisions by public authorities, by withholding resources or not ensuring the absence of conflicts of interests, or limits effective legal remedies or the proper functioning of the prosecuting authorities, this *may* amount to a breach of the principles of the rule of law.

However, according to article 4(1) of the regulation, a precondition for adopting financial sanctions on account of such breaches, is that the breaches 'affect or seriously risk affecting the management of the Union budget or the protection of the financial interests of the Union in *a sufficiently direct way.*'[221]

[218] Emphasis added.
[219] Groussot and Zemskova, 8.
[220] See chapter 3.3.
[221] Emphasis added.

Article 4(1) of the regulation highlights two concepts of major importance to the distribution of EU funds: 'the principles of sound financial management'[222] and 'the financial interests of the Union'[223]. In short, the first concept defines the method for implementation of the Union budget,[224] and the second describes which assets are covered by that budget. Both concepts are related to the Union budget and are covered by the regulation's scope of application.[225] Below, I use the term 'the Union budget' to refer to both concepts.

Article 4(2) of the regulation is of key importance to the application of the regulation since it clarifies within which fields of government a sufficiently direct link may be established.[226] The provision contains a list of eight areas of government which must be affected by the breach of the principles of the rule of law, in order for the regulation to apply. The list entails governmental authorities responsible for, *inter alia*, implementing the Union budget, performing financial auditing and control, investigating and prosecuting financial crimes (e.g., corruption and fraud) related to the implementation of the Union budget, and courts carrying out judicial review of the abovementioned institutions[227]. It is further clarified in recitals 8–10 of the preamble to the regulation that the sound implementation of the Union budget requires prosecutorial authorities to be free to investigate, *inter alia*, allegations of fraud and corruption, and that an independent judiciary must be 'protected against external interventions or pressure liable to impair the independent judgment

[222] This notion is defined in secondary law as the principles of 'economy, efficiency and effectiveness.' See Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union […], OJ 2018 L 193, 1–222, article 2(59).
[223] This notion is mentioned in article 310(6) and article 325 TFEU, and defined in secondary law as 'all revenues, expenditures and assets acquired through or due to [the Union budget or the budgets of the EU institutions].' See Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, 29–41, article 2(1)(a) and (b). See also Łacny, 86.
[224] This follows from article 310(5) and article 317 TFEU.
[225] Niels Kirst, 'Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (2021) European Papers 6:1, 101–110, 105.
[226] Kirst, 106.
[227] Article 4(2)(a) to (d) of the Conditionality Regulation.

of its members and to influence their decisions'. Evidently, the EU legislator has also here chosen to emphasise the principle of judicial independence.[228]

Upon a proposal submitted by the Commission, the Council may decide on measures to protect the Union budget. A sanctioning decision requires support from a qualified majority of the Council.[229] Article 5 of the regulation sets out the measures which are at the EU institutions' disposal. The Council may decide, *inter alia*, to suspend the approval of programmes or other commitments financed by EU funds, to suspend commitments altogether, or to suspend the payment of EU funds.[230] However, all measures must be proportionate to 'the actual or potential impact of the breaches of the principles of the rule of law' on the Union budget and shall as far as possible only apply to the EU actions affected by the breaches in question.[231]

The proportionality assessment shall be carried out with regard to both the breach (e.g., its seriousness, duration and recurrence) and the reaction of the member state concerned (e.g., the member state's intentions and degree of cooperation).[232] The member state in question must be consulted and receive an opportunity to submit its observations, in particular with regard to the proportionality of the proposed measures.[233]

Exceptionally, if the EU member targeted by prospective measures considers that the implementation of the regulation threatens the principles of 'objectivity, non-discrimination and equal treatment', recital 26 of the preamble states that the country may refer the matter to the European Council for a discussion, which effectively would result in a delay of maximum three months on the implementation of measures. This 'light break emergency mechanism'[234] have been criticized by academics.[235]

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[228] Łacny, 88.
[229] Article 6(9) to (11) of the Conditionality Regulation.
[230] Article 5(1)(b)(i), (ii) and (vi) of the Conditionality Regulation.
[231] Article 5(3) of the Conditionality Regulation.
[232] This follows from recital 18 of the Conditionality Regulation. See also Łacny, 92.
[233] Article 6(5) and (7) of the Conditionality Regulation.
[234] Baraggia and Bonelli, 139.
[235] See e.g., Eds. CMLR, 271; Baraggia and Bonelli, 139.

If sanctioning measures are imposed, the Commission must reassess the measures at the latest one year after their implementation. At that point, if the breaches of the principles of the rule of law have been remedied in full, the sanctioning measures shall be lifted, and if the breaches have been remedied in part, the measures shall be adapted.[236] If the situation is remedied, the EU funds allocated to the member state in question shall be returned to that state. However, this opportunity disappears after two years.[237] Hence, sanctions imposed in accordance with the Conditionality Regulation initially result in a temporary freeze of EU funds, but if the situation in a member state does not improve, that member state will lose its ear-marked EU funds altogether.[238]

5.3 Legislative procedure

The Conditionality Regulation was adopted on the 16th of December 2020, after a polarizing debate involving actors from all levels within the Union.[239] The negotiations caused friction between EU member states,[240] as well as between different EU institutions.[241]

When it comes to the member states involved in the negotiations, a rule of law-based conditionality mechanism was proposed by old member states (Germany and Italy) in 2017,[242] and received support among Western member states (Austria, Denmark, Finland, the Netherlands, Sweden) in the budget negotiations.[243] On the other side, some Eastern member states (most notably, Poland and Hungary) were firmly opposed to the proposal.[244]

[236] 2nd and 3rd subpara. of article 7(2) of the Conditionality Regulation.
[237] Article 7(3) TEU.
[238] Łacny, 97–98.
[239] For an overview, see Baraggia and Bonelli, 131–156.
[240] Caroline de Gruyter, 'A fundamental fight: The frugal four and the rule of law' (European Council on Foreign Relations, 2020-11-30) https://ecfr.eu/article/a-fundamental-fight-the-frugal-four-and-the-rule-of-law/, accessed 2022-03-21.
[241] See e.g., Baraggia and Bonelli, 135–138; Aleksejs Dimitrovs and Hubertus Droste 'Conditionality Mechanism: What's In It?' (*Verfassungsblog*, 2020-12-30), https://verfassungsblog.de/conditionality-mechanism-whats-in-it/, accessed 2022-03-23.
[242] Baraggia and Bonelli, 134.
[243] de Gruyter (supra note 240).
[244] Eds. CMLR, 268–269.

Among the EU institutions, difference of opinion was most noticeable between the European Parliament and the Council. The European Parliament wanted the proposed regulation to have a broad scope of application, while the Council favoured a limited approach.[245] Antonia Baraggia and Matteo Bonelli explain that 'the two institutions started from different perspectives: Protecting the rule of law via the budget – the [European Parliament]'s view – or protecting the budget via the rule of law – the Council's view.'[246]

These different opinions influenced the legislative negotiations, and distinct changes had to be made to the original legislative proposal[247], in order for the final version of the Conditionality Regulation to be adopted. For example, the purpose with the original proposal was to protect the Union budget in case of '*generalised deficiencies* as regard the rule of law',[248] and not – as in the final version – in case of a clear *breach* of the principles of rule of law.[249] Furthermore, the original proposal claimed that the measures should be proportionate to the general deficiencies as regards the rule of law, and not to the *effects* that a breach of the principles of rule of law may have on the Union budget.[250] Moreover, the Commission stated only briefly that the measures adopted should have a 'sufficient connection' with the aim of the funding.[251] This was elaborated throughout the legislation process into becoming the sufficiently direct link-criterion found in article 4(1) of the regulation.

Arguably, the Commission's original legislative proposal mirrored the European Parliament's view on the purpose of the conditionality mechanism – to protect the rule of law via the Union budget. In comparison, the final version

[245] Baraggia and Bonelli, 137–138.
[246] Baraggia and Bonelli, 137.
[247] Commission, 'Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' (Brussels 2.5.2018), COM(2018) 324 final.
[248] COM(2018) 324 final, article 1 (at 8). Emphasis added. The Commission defined a 'generalised deficiency as regards the rule of law' as 'a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law.' See COM(2018) 324 final, article 2(b) (at 8).
[249] Article 1 of the Conditionality Regulation.
[250] COM(2018) 324 final, article 5(3) (at 9).
[251] COM(2018) 324 final, 2.

of the regulation is more similar to the Council's view of said purpose – to protect the Union budget via the rule of law.

In July 2020, the European Council decided that the proposed rule of law-based conditionality mechanism should apply both to the MFF 2021-2027 and to the distribution of 'Next Generation EU' (NGEU) funds – i.e., recovery funds aimed at bolstering the member states' economies after the Covid-19 pandemic.[252] This was an important incentive for the member states' governments to adopt the Conditionality Regulation. All actors were under time pressure to secure the implementation of the MFF before the end of 2020.[253]

By November 2020, the European Parliament and the Council could finally agree on an amended version of the legislative proposal. As described above, the amendments changed the conditions as well as the procedure for adopting measures, resulting in a 're-focusing' [254] of the original proposal. Yet, the changes did not satisfy the member states opposed to a rule of law-based conditionality mechanism. Instead, Hungary and Poland joined forces and threatened to veto the MFF 2021–2027 if the proposal was adopted.[255] As a reaction to the Hungarian-Polish veto, a compromise agreement ('the Compromise') was reached at the European Council meeting in December 2020.[256] Essentially, the European Council brokered a deal with Hungary and Poland to persuade them to lift their veto over the budget negotiations.[257]

In the Compromise, the European Council agreed upon eleven contested points regarding the application of the regulation.[258] They claimed, *inter alia*, that the application of the regulation should be informed by article 4(2) TEU

[252] European Council, 'Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions' (Brussels, 2020.07.21), EUCO 10/20, para. 22–23.
[253] Kirst, 103; Baraggia and Bonelli, 138; Eds. CMLR, 269, 273–274.
[254] For an overview, see Baraggia and Bonelli, 138–139.
[255] Eds. CMLR, 269. The EU member states' decision to adopt the MFF requires unanimity in the Council, according to article 312(2) TFEU. The Conditionality Regulation, on the other hand, is based on article 322(1) TFEU, wherefore adopting the regulation 'only' required a qualified majority of the votes in the Council. Accordingly, Hungary and Poland's veto power applied to the MFF as a whole, but not to the regulation *per se*.
[256] European Council, 'European Council meeting (10 and 11 December 2020) – Conclusions' (Brussels 2020.12.11), EUCO 22/20.
[257] Eds. CMLR, 270.
[258] For an overview, see Eds CMLR, 270–273.

and the principles of conferral and equality between the member states, that the regulation should be considered to be subsidiary to other enforcement mechanisms in the treaties (e.g., infringement procedures), and that merely the existence of a breach of fundamental principles of the rule of law was not sufficient to trigger the mechanism; the Commission would first have to hold a 'thorough dialogue' with the member state concerned. The Compromise also stated that the Commission should adopt 'guidelines' on the application of the regulation – but only after the CJEU had ruled on a potential action for annulment – and that the Commission should postpone implementation of measures until the guidelines were finalised.[259]

The Compromise received scathing criticism by several legal academics.[260] Nonetheless, it was welcomed by the Council,[261] the Commission,[262] and the European Parliament,[263] because of the need to secure the implementation of the MFF 2021-2027 and the distribution of NGEU Funds.[264]

5.4 C-156/21 and C-157/21

In Case C-156/21 and Case C-157/21 of the 16th of February 2022, the CJEU confirms that the Conditionality Regulation is founded on a correct legal

[259] EUCO 22/20, para. 2(c) to (e) and (g).
[260] See e.g., Alemanno and Chamon; Laurent Pech, Sébastien Platon and Kim L. Scheppele, 'Compromising the Rule of Law while Compromising on the Rule of Law' (*Verfassungsblog,* 2020-12-13), https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/, accessed 2022-03-24.
[261] Council, 'Draft Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget – Adoption of the Council's position at first reading and of the statement of the Council's reasons – Outcome of the written procedure completed on 14 December 2020' (Brussels, 2020.12.14), doc. 14018/20.
[262] The Commission included a statement in support of the Compromise in the Council's Conclusions. See doc. 14018/20, 3.
[263] European Parliament, 'Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' (Brussels 2020.12.16), 2018/0136(COD), dec. T9-0356/2020. However, when adopting the MFF, the European Parliament underlined that the Compromise should not affect the implementation of the Conditionality Regulation. See European Parliament, 'Resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation' (Brussels 2020.12.17), 2020/2923(RSP), dec. T9-0360/2020.
[264] Eds. CMLR, 273–274.

basis;[265] that the conditionality mechanism does not constitute a parallel procedure to article 7 TEU;[266] and that the regulation is consistent with central principles of EU law, such as the principle of legal certainty.[267]

My overview of the two cases is structured as follows:

In section 5.4.1, I analyse the Court's assessment of what constitutes the proper legal basis for introducing a rule of law-based conditionality mechanism. In section 5.4.2, I focus on the Court's definition of the sufficiently direct link-criterion. I then proceed to account for two important principles that are highlighted in the rulings: the principle of legal certainty (section 5.4.3) and the principle of solidarity (section 5.4.4).

5.4.1 Legal basis

Initially, the CJEU underlines that the financial conditionality mechanism introduced by the Conditionality Regulation is *complementary* to the other instruments in the EU's *Rule of Law Toolbox*, but that the mechanism is only to be applied for the protection of the Union budget.[268]

Referencing the precedence set by, *inter alia*, the *Portuguese Judges Case*, the CJEU reiterates that the rule of law is a foundational value of the EU and a common value to all the member states.[269] When acceding the Union, the member states join 'a legal structure that is based on the *fundamental premiss* that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded.'[270] This premiss

[265] See e.g., C-156/21, para. 153 and C-157/21, para. 151.
[266] C-156/21, para. 197 and C-157/21, para. 229.
[267] C-156/21, para. 238–240 and C-157/21, para. 286, 292–293, 303, 345.
[268] C-156/21, para. 117 and C-157/21, para. 131, with reference to Recital 14 of the Conditionality Regulation.
[269] C-156/21, para. 124 and C-157/21, para 142; with reference to Joined cases C-357/19, C-379/19, C-547/19, C-811/19 and *Euro Box Promotion and Others* [2021] EU:C:2021:1034, para. 160–161 (cit. 'C-357/19 to C-840/19'), which refers to C-83/19 to C-397/19*,* para. 160–161, which refers to C-896/19, para. 61–62, which refers to C-64/16, para. 30.
[270] C-156/21, para. 125 and C-157/21, para 143; with reference to Opinion 2/13, para. 166–168, C-64/16*,* para. 30 and C-896/19, para. 62. C-896/19, para. 62 refers to the other cases.

constitutes the basis for the principle of mutual trust between the EU member states.[271] Furthermore, referencing the precedence set by the *Repubblika* case, the Court confirms that respect for the rule of law is a prerequisite for a member state's enjoyment of treaty rights, and that a member state cannot disregard this duty after acceding the Union.[272]

Since the values in article 2 TEU are defining features of the EU legal order, the CJEU argues that the EU must be allowed to defend those values, albeit within the limits set by the treaties.[273]

> It follows that, *in accordance with* the principle of conferral of powers enshrined in Article 5(2) TEU and the principle of consistency of the European Union's policies laid down in Article 7 TFEU, the rule of law […] is capable of constituting the basis of a conditionality mechanism covered by the concept of 'financial rules' within the meaning of Article 322(1)(a) TFEU.[274]

This paragraph may be interpreted in two ways: either it follows directly from the principles of conferral and consistency with the Union's policies that a rule of law-based conditionality mechanism may be founded upon article 322(1)(a) TFEU; or article 322(1)(a) TFEU may only serve as sufficient legal basis for a rule of law-based conditionality mechanism if the mechanism is consistent with said principles.

In order to find out which interpretation is correct one must consider the meaning of the two principles. The principle of conferral sets the outer limits for the EU legislator's competence. It means that the Union's competence is derived from the treaties and decided by the EU member states, and if the member states do not confer competence upon the EU, said competence rests

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[271] C-156/21, para. 125 and C-157/21, para 143; with reference to Opinion 2/13, para. 166–168, C-64/16, para. 30 and C-896/19, para. 62. C-896/19.
[272] C-156/21, para 126 and C-157/21, para. 144; with reference to C-896/19, para. 63, C-83/19 to C-397/19, para. 162 and C-357/19 to C-840/19, para. 162. C-83/19 to C-397/19, para. 162 refers to C-896/19, para. 63 and C-397/19, para. 162, while C-357/19 to C-840/19 refers to C-83/19 to C-397/19, para. 162 and Case C-791/19 *Commission v Poland (Disciplinary regime for judges)* [2021] EU:C:2021:596, para. 51. Case C-791/19, para 51 refers to C-83/19 to C-397/19, para. 162 and C-896/19, para. 63.
[273] C-156/21, para. 127 and C-157/21, para. 145.
[274] C-156/21, para. 128 and C-157/21, para. 146. Emphasis added.

with the member states.[275] The principle of consistency with the Union's policies means that an EU legal act must be consistent with other EU legal acts pursuing the same objective. It may be equated with a requirement for coherence of EU law and policy.[276]

It does not follow from any of the two principles that article 322(1)(a) TFEU *automatically* constitutes a sufficient legal basis for a rule of law-related conditionality mechanism. Consequently, the CJEU must mean that compatibility with said principles is *necessary* for article 322(1)(a) TFEU to constitute a sufficient legal basis for the conditionality mechanism.

5.4.1.1 The principle of conferral

With regard to the principle of conferral, the CJEU points out that the Conditionality Regulation allows the EU institutions to review a member state's respect for fundamental principles of the rule of law *only* with regard to the sound implementation of the Union budget, wherefore measures undertaken with that purpose falls within the scope of EU law.[277]

However, the statement above presupposes that article 322(1)(a) TFEU is the correct legal basis of the regulation. The Court rest on a presumption – that article 322(1)(a) TFEU is the correct legal basis for the Conditionality Regulation – to claim that one of its prerequisites – i.e., consistency with the principle of conferral – is fulfilled, in order to prove that the original presumption is correct. In my view, this is a circular argument.

In Case C-157/21, the CJEU goes further and links the principle of conferral to the duty to respect the member states' essential state functions, found in

[275] This follows from a joint reading of articles 4(1), 5(1) and 5(2) TEU. Article 5(2) TEU reads '(u)nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'
[276] Jurian Langer and Wolf Sauter, 'The Consistency Requirement in EU Law' (2017), Columbia Journal of European Law 24:1, 39–74, 42.
[277] C-156/21, para. 164 and C-157/21, para. 267.

article 4(2) TEU.[278] The Court acknowledges that a situation of concern to the Union budget may be attributable to state institutions carrying out essential state functions. Nonetheless, a member state cannot ignore its obligations arising from EU law when carrying out said competence. This is not the same thing as the Union claiming that exclusive competence for itself.[279] For this reason, the Court finds that the regulation does not violate the duty to respect the member states' essential state functions, nor the principle of conferral.[280]

5.4.1.2 Compatibility with article 7 TEU

According to the Court, a second prerequisite for article 322(1)(a) TFEU constituting a sufficient legal basis for the Conditionality Regulation, is that the regulation must not infringe upon article 7 TEU.[281]

The CJEU rejects the arguments put forward by Poland and Hungary that only article 7 TEU authorizes the EU institutions to act against alleged breaches of the values contained in article 2 TEU. On the contrary, many provisions in primary as well as secondary law grant such competence to the Union.[282] The Court specifically points out that article 19 TEU, when interpreted together with article 2 TEU, has served as a basis for the expansion of CJEU case law on the topic of judicial independence.[283]

Nonetheless, the CJEU acknowledges that 'the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down

[278] C-157/21, para. 253. That the CJEU included this argumentation in Case C-157/21 but not in Case C-156/21 is likely because Poland, unlike Hungary, challenged the regulation's compatibility with the principle of conferral. Still, Hungary intervened in support of Poland.
[279] C-157/21, para. 269–270; with reference to Case C-370/12 *Pringle* [2012] EU:C:2012:756, para. 69, Case C-552/15 *Commission v Ireland* [2017] EU:C:2017:698, para.71 and 86, C-791/19, para. 56 and C-896/19*,* para. 68. Case C-791/19, para. 56 refers to C-619/18 *Commission* v *Poland (Independence of the Supreme Court)* [2019] EU:C:2019:531, para. 52 and C-192/18 *Commission* v *Poland (Independence of the ordinary courts)* [2019] EU:C:2019:924, para. 102, both of which refers to C-64/16, para. 40.
[280] C-157/21, para. 271.
[281] C-156/21, para. 128 and C-157/21, para. 146.
[282] C-156/21, para. 154–159 and C-157/21, para. 191–195.
[283] C-156/21 para. 160–163 and C-157/21, para. 196–199; with reference to C-824/18 *A.B. and Others* [2021] EU:C:2021:153, para. 108–109 and 142–146. C-824/18, para. 108–109 refers to C-192/18, para. 98–99, which refers to C-216/18 PPU, para. 50, C-619/18, para. 47–48 (which refers to C-64/16, para. 32), and C-64/16, para. 34. C-824/18, para. 142–146 refers to Case C-585/18 *A.K.* [2019] ECLI:EU:C:2019:982, para. 168, which refers to C-619/18, para. 49–54, which refers, *inter alia,* to C-64/16, para. 29, 34–35 and 40.

by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision.'[284]

The CJEU states that the Conditionality Regulation is aimed at protecting the Union budget against breaches of the principles of the rule of law, not at promoting compliance with fundamental principles of the rule of law via the Union budget.[285] While the purpose of article 7 TEU is to punish a member state for 'serious and persistent breaches' of article 2 values, and to compel that member state to seize its wrongful conduct, the purpose of the regulation is to protect the Union budget in the event of such breaches.[286] Moreover, the Court considers that the two procedures differ in regard to their scope[287] and nature,[288] and with regard to the conditions for initiating, adopting and revoking measures.[289] Consequently, the financial conditionality mechanism imposed by the Conditionality Regulation does not constitute a parallel procedure to article 7 TEU.[290]

5.4.2 A sufficiently direct link

Initially, the CJEU states that in order for the contested conditionality mechanism to be imposed against a member state, there must be reasonable grounds to consider firstly, that a breach of the principles of rule of law have occurred within the member state, and secondly, that the breach may affect or seriously risk affecting the Union budget in a sufficiently direct way.[291]

[284] C-156/21, para. 167 and C-157/21, para. 206.
[285] C-156/21, para. 119 and C-157/21, para. 137.
[286] C-156/21, para. 170–171 and C-157/21, para. 209–210.
[287] C-156/21, para. 173–174 and C-157/21, para. 212–213.
[288] C-156/21, para. 177 and C-157/21, para. 216.
[289] C-156/21, para. 175–176, 178 and C-157/21, para. 214–215, 217.
[290] C-156/21, para. 179–180 and C-157/21, para. 218–219.
[291] C-156/21, para. 111 and C-157/21, para. 125.

The CJEU confirms that the Union budget is meant to be implemented in accordance with the principles of sound financial management, and that the goal of protecting the Union budget is linked to respect for the rule of law.[292]

> That sound financial management and those financial interests are *liable to be seriously compromised* by breaches of the principles of the rule of law committed in a Member State, since those breaches may result, inter alia, in there being *no guarantee* that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure.[293]

In particular, the CJEU considers that the sound implementation of the Union budget is contingent upon the existence of an independent judiciary, competent to ensure compliance with EU law. With reference to precedence set by the *Portuguese Judges* case and the *Minister for Justice and Equality* case, the Court reiterates that without any independent courts, competent to carry out effective judicial review of the implementation of the Union budget and to take due consideration of applicable EU law in the execution of said review, a member state cannot guarantee that the Union budget will be implemented in accordance with EU law. This is also why the rule of law can serve as the basis for an internal conditionality mechanism.[294]

The CJEU clarifies that for sanctions to be imposed, a breach of the principles of the rule of law must concern the situations listed in article 4(2) of the Conditionality Regulation. The Court seem to tentatively establish a presumption that the conduct of governmental authorities responsible for implementing

[292] C-156/21, para. 130 and C-157/21, para. 148.
[293] C-156/21, para. 131 and C-157/21, para. 149. Emphasis added.
[294] C-156/21, para. 132–133 and C-157/21, para. 150–151; with reference to C-357/19 to C-840/19*,* para. 219 and 222, which refers to C-83/19 to C-397/19*,* para. 189–190 and C-824/18, para. 116. C-83/19 to C-397/19*,* para. 189–190 refers to C-64/16, para. 36, C-216/18 PPU*,* para. 51 (which refers to C-64/16*,* para. 36) and C-824/18, para. 109–110, the latter of which refers to C-192/18*,* para. 99–100 and C-619/18, para. 48 (both of which refers to C-64/16*,* para. 34). C-824/18, para. 116 refers to C-192/18, para. 106, which refers to C-216/18 PPU, para. 48 and 63 and C-619/18, para. 58 (which refers to C-216/18 PPU, para. 48 and 63).

and auditing the Union budget[295] is *always* relevant for the sound implementation of the Union budget, while the conduct of other branches of government listed in article 4(2) of the regulation (e.g., prosecuting authorities and domestic courts)[296] is relevant *only* insofar as it relates to the implementation of the Union budget. Consequently, the Court does not consider that article 4(2) of the regulation extends the scope of EU law beyond what is necessary to secure the implementation of the Union budget.[297]

However, the CJEU underlines that the sufficiently direct link-criterion 'requires that *a genuine link* be established'[298] between breaches of the principles of the rule of law and such an adverse effect – or serious risk of an adverse effect – on the Union budget.[299] The Commission is obliged, when assessing the need to implement measures under the regulation, 'to use an evidence-based approach and to respect the principles of objectivity, non-discrimination and equality.'[300] Moreover, the assessment should be 'objective, impartial and fair.'[301]

In C-156/21, the CJEU clarifies that the sufficiently direct link-criterion effectively prohibits application of the Conditionality Regulation in situations unrelated to the implementation the Union budget.[302] Moreover, with regard to the hypothetical component of article 4(1) of the regulation (i.e., the assertion that measures may be imposed due to a breach of the principles of the rule of law which 'affect or *seriously risk* affecting' the Union budget), the Court argues that if the regulation could only be applied in situations where a breach of the principles of the rule of law had already adversely affected the Union budget, but not in situations where such an effect is highly likely and

[295] Articles 4(2)(a) and (b) of the Conditionality Regulation.
[296] Articles 4(2)(c) to (e) of the Conditionality Regulation.
[297] C-156/21, para. 142–146 and C-157/21, para. 160–164.
[298] C-156/21, para. 147 and C-157/21, para. 165. Emphasis added.
[299] C-156/21, para. 147 and C-157/21, para. 165.
[300] C-156/21, para. 148 and C-157/21, para. 166, with reference to recital 26 of the Conditionality Regulation.
[301] C-156/21, para. 149 and C-157/21, para. 167.
[302] C-156/21, para. 142–144.

can be reasonably foreseen, this would likely compromise the purpose of the regulation.[303]

In C-157/21 the Court clarifies that while all the situations in article 4(2) of the Conditionality Regulation may potentially be *relevant* to the sound implementation of the Union budget, this does not mean that the EU institutions may invoke the conditionality mechanism *automatically*, whenever a breach of the principles of the rule of law occurs. The Commission still have to prove that the link is sufficiently direct, with due regard to the procedural requirements described above.[304]

5.4.3 The principle of legal certainty

Hungary and Poland claim that the Conditionality Regulation is inconsistent with the principle of legal certainty[305]. The countries state two reasons for this claim. Firstly, they argue that the rule of law as a concept cannot be precisely defined, since no uniform definition exists. Secondly, they claim that the Union must observe the duty to respect the member states' national identity found in article 4(2) TEU, when determining what the rule of law entails for each EU member state.[306]

The CJEU acknowledges that the rule of law is 'an abstract legal notion' but considers that the abstractedness does not preclude the EU legislator from adopting laws related to the rule of law.[307] The list of principles defined in article 2(a) of the Conditionality Regulation is not meant to constitute an exhaustive definition of the concept of the rule of law, but to pinpoint the principles which are most important when implementing the Union budget.[308]

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[303] C-156/21, para. 262.
[304] C-157/21, para. 178–180.
[305] I.e., the principle that the effect of a certain rule must be clear and predictable to those who are subjected to it. The principle has been defined in CJEU case law and is related to the principle of legitimate expectations and the general prohibition of retroactivity. See e.g., Joined cases 212/80 to 217/80 *Srl Meridionale Industria Salumi and others* [1981] ECLI:EU:C:1981:270, para. 10.
[306] C-156/21, para. 222 and C-157/21, para. 318.
[307] C-156/21, para. 224 and C-157/21, para. 320, with reference to Case C-206/16 *Marco Tronchetti Provera and Others* [2017] EU:C:2017:572, para. 39–40 (by analogy).
[308] C-156/21, para. 227 and C-157/21, para. 323.

The notion itself should be viewed as synonymous with the value expressed in article 2 TEU.[309] Considering that all the principles in article 2(a) of the regulation are based on CJEU case law, and that the preamble to the regulation provides clear examples of potential breaches of the rule of law, the provision does not violate the principle of legal certainty.[310]

The CJEU reiterates that the duty to respect fundamental principles of the rule of law is a prerequisite for membership to the Union and for the principle of mutual trust between the EU member states. Although the member states enjoy a degree of discretion when implementing the principles in their domestic constitutional orders, the results which are to be achieved cannot be allowed to differ between them.[311] The duty to respect the member states' national identities, found in article 4(2) TEU, does not lead to another conclusion, as the rule of law is a *common* value to all EU member states.[312]

5.4.4 The principle of solidarity

The principle of solidarity is a debated notion within EU law. The concept is mentioned throughout the treaties,[313] but lacks any clear definition. Moreover, although solidarity is enshrined in article 2 TEU as a foundational value of the Union,[314] its legal status remains uncertain. Early CJEU case law[315] mentions the principle of solidarity and links it to the principle of loyalty – which later became the principle of sincere cooperation found in article 4(3) TEU – but solidarity is never used as a basis to create any legal effects.[316] Instead, solidarity is generally considered to be a political concept, which

[309] C-156/21, para. 228.
[310] C-156/21, para. 236–240 and C-157/21, para. 286, 290–293 and 303. The CJEU refers to recitals 3, 8–10 and 12 of the Conditionality Regulation.
[311] C-156/21, para. 232–233 and C-157/21, para. 264–265.
[312] C-156/21, para. 234 and C-157/21, para. 266.
[313] See e.g., article 3(3) TEU and articles 67(2), 80, 122(1) and 222(1) TFEU. Solidarity is also mentioned in the preambles to the TEU and the Charter.
[314] See chapter 3.3.
[315] See e.g., Case 6 & 11/69 *Commission v France* [1969] ECR 523, para 16; Case 39/72 *Commission v Italy* [1973] ECR 101, para 24, para 25. For a modern example, see Case C-105/03 *Pupino* [2005] ECR I-5285, para 41.
[316] Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016), Maastricht Journal of European & Comparative Law 23:6, 965–983, 966–967 and 974–975.

guides 'the horizontal relationship' between the EU member states, not 'the vertical relationship' between the member states and the Union.[317]

Hence, an important aspect of Case C-156/21 and Case C-157/21 is that the CJEU expressively links the rule of law to the principle of solidarity.

> [I]t should be noted, first, that the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to *the principle of solidarity*, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law […] and, secondly, that the implementation of that principle, through the Union budget, is based on *mutual trust* between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based […] on the commitment of each Member State to comply with its obligations under EU law and to continue to comply […] with the values contained in Article 2 TEU, which include the value of the rule of law.[318]

In essence, the CJEU claims that without sufficient respect for the rule of law, there can be no mutual trust among the EU member states, and no solidarity in the implementation of the EU budget. In other words, the Court attempts to base one article 2 value (solidarity) upon another (the rule of law), via the principle of mutual trust. A logical consequence of this line of reasoning is that the two values ought to be perceived as mutually reinforcing: without respect of the rule of law, there is no solidarity among the EU member states, and vice versa. This line of reasoning will be further explored in chapter 6.

5.5 Summary

The introduction of a financial conditionality mechanism linked to the rule of law constitutes an important development of the EU legal framework for protection of the rule of law. By linking rule of law-compliance to the MFF 2021-2027 and the distribution of NGEU funds, the Union enhance its leverage

[317] Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014), 40.
[318] C-156/21, para. 129 and C-157/21, para. 147.

over illiberal EU member states. The Conditionality Regulation could potentially become an important tool in the EU's *Rule of Law Toolbox*.

Yet, this is exactly what makes the Conditionality Regulation contentious. Member states that are opposed to stronger EU legal mechanisms to protect the rule of law claim that the regulation infringes on their prerogatives and is inconsistent with central EU law principles and provisions of the treaties, such as the duty to respect the member states' national identities and article 7 TEU.

In Case C-156/21 and Case C-157/21, the CJEU insists that the primary purpose of the Conditionality Regulation is to protect the Union budget, rather than the rule of law *per ce*. The CJEU finds no infringement of article 7 TEU, nor of the principles of conferral, legal certainty, or the duty to respect the member states' national identities. Instead, the Court makes a direct link between the rule of law and solidarity, another value enshrined in article 2 TEU. Important is also that the Court emphasises that the application of the regulation requires a 'sufficiently direct link' between the breach of the principles of the rule of law and the effect that breach may have upon the Union budget.

6. Analysis

In this chapter, I attempt to answer my research question:

To what extent may the financial conditionality mechanism implemented by the Conditionality Regulation contribute to upholding respect for fundamental principles of the rule of law within the EU?

In section 6.1, I argue that the Conditionality Regulation should be considered to have two interconnected purposes – to protect the Union budget and to protect the rule of law *per se*. In section 6.2, I claim that the Conditionality Regulation establishes a clear relationship between the rule of law and corruption and analyse what potential impact this connection may have for the application of the regulation. In section 6.3, I discuss the political realities of implementing financial sanctions on the basis of the regulation. I believe that a decision to implement sanctions will above all be determined by the principle of solidarity. In section 6.4, I note some practical obstacles to financial sanctions – if they are indeed imposed – having their aspired effect of upholding respect for fundamental principles of the rule of law within the EU.

6.1 True purpose of the regulation

A financial conditionality mechanism linked to the rule of law evidently constitutes a dilemma for the EU legal order. From a legal perspective, the Conditionality Regulation could either be perceived as a tool in the EU's *Rule of Law Toolbox*, or a financial conditionality mechanism to be implemented in relation to the Union budget.

A central tenet of the CJEU's verdicts in Case C-156/21 and Case C-157/21 is that the contested conditionality mechanism is a *genuine* conditionality mechanism, aimed at protecting the Union budget against breaches of the principles of the rule of law, not at promoting compliance with fundamental principles of the rule of law via the Union budget.[319] However, in the key

[319] See section 5.4.1.2.

paragraph cited in section 5.4.1,[320] the Court apparently equates the principle of consistency with the regulation not infringing upon article 7 TEU, and states that the regulation is 'based on' the rule of law. This paragraph suggests an overlap between the regulation and article 7 TEU.

Later in the rulings, the CJEU reiterates that while the purpose of article 7 TEU is to safeguard the Union against breaches of article 2 values, including the rule of law, and compel member states to stop breaching those values, the purpose of the Conditionality Regulation is to protect the EU budget in case of such a breach.[321] The main difference, then, between article 7 TEU and the Conditionality Regulation is that the latter *also* has a budgetary focus.[322]

Taking the political context into account, I believe that the CJEU wants the contested conditionality mechanism to be perceived as a genuine conditionality mechanism, aimed *only* at protecting the Union budget against breaches of fundamental principles of the rule of law, and not as a disguised rule of law enforcement mechanism, aimed *also* at protecting the rule of law via the Union budget. This could be seen as a concession by the Court to the amendments made in the legislative process,[323] but also as a strategic choice, i.e., an attempt to de-politicize the application of the regulation. Realistically, some member states of the Council might find it easier to invoke sanctions against one of their peers if they can say it is for the protection of the Union budget, than for the protection of lofty values such as the rule of law.

From a political perspective, it is apparent that the proposal for a new conditionality mechanism linked to the rule of law was presented and adopted within the context of rule of law backsliding. Iris Goldner Lang suggests that the Conditionality Regulation was framed as a financial conditionality mechanism mainly for pragmatic reasons, as the Commission saw the need for a more efficient rule of law enforcement mechanism but lacked a sufficient

[320] C-156/21, para. 128 and C-157/21, para. 146.
[321] See section 5.4.1.2.
[322] For a similar opinion, but with regard to the Commission's original legislative proposal, see Perego, 311.
[323] See section 5.3.

basis in the treaties. In other words, the Commission considered it necessary to disguise the procedure proposed by the original legislative proposal as a financial conditionality mechanism, based on article 322(1)(a) TFEU, as to not risk infringing upon article 7 TEU.[324] As noted by Leonard Besselink,[325] it is not impossible that article 7(3) TEU would allow for a decision to withhold EU funds from an illiberal member state. Yet, as has been proven in practice, there is little chance of the article 7 procedure ever resulting in financial sanctions. In light of this, the CJEU's assertion that the *only* purpose of the Conditionality Regulation is to safeguard the Union budget, should be seen as an effort to safeguard the regulation's compatibility with article 7 TEU, and in extension, to ensure the possibility to withhold EU funds from an illiberal EU member state.

Nonetheless, in the key paragraph referenced in section 5.4.1, the CJEU implicitly acknowledges that the Conditionality Regulation aims *both* to safeguard the rule of law within the EU *and* the Union budget. Justyna Łacny argues that the regulation has a purpose which is 'twofold and interconnected'[326]. In my opinion, the Court's assessment must be seen as a concession to this duality.

While it could be feared that this would undermine the Conditionality Regulation's validity, a duality of purpose would not necessarily mean an infringement of article 7 TEU. According to settled CJEU case law, when a legislative act has a twofold purpose, it is the 'main or predominant purpose' that determines what is the correct legal basis.[327] Exceptionally, if the purposes are interconnected and inseparable, the act may have several legal bases.[328] It may well be that the CJEU considers that the main purpose of the regulation is to protect the Union budget, and that protecting the rule of law comes in

[324] Goldner Lang, 9–11.
[325] Besselink (supra note 139).
[326] Łacny, 84.
[327] See e.g., Case C-155/07 *European Parliament v Council* [2008] ECLI:EU:C:2008:605, para. 35; Case C-411/06 *Commission v European Parliament* [2009] ECLI:EU:C:2009:518, para. 46.
[328] See e.g., Case 165/87 *Commission v Council* [1988] ECLI:EU:C:1988:458, para. 11; Case C-300/89 *Titanium Dioxide* [1991] ECLI:EU:C:1991:244, para. 17.

second place. Alternatively, the Court may consider the two purposes to be interconnected, but that this still does not mean that the regulation infringes on article 7 TEU. Nonetheless, I believe that it would have been preferable if the CJEU had taken the abovementioned case law into account and confirmed beyond doubt what is the true purpose – or purposes – of the regulation, as this will certainly influence its application.

6.2 Corruption and the rule of law

The requirement of a sufficiently direct link between a breach of the rule of law and the Union budget may potentially have far-reaching consequences for the EU legal framework for the protection of the rule of law. So far, when defining the concept of the rule of law and justifying its importance for the EU legal order, the EU institutions have had a strong focus on the independence of the judiciary. By creating a secondary law instrument which links respect for the rule of law to the proper management of EU funds, the EU legislator acknowledges that there is a causal relationship between disregard for the rule of law (which is to be understood, in this context, as disregard for the principle of judicial independence) and corruption.

As described in section 5.2, the Conditionality Regulation links the principle of judicial independence to the effects it may have on the implementation of the Union budget. It follows from a joint reading of article 2(a) and 3 of the Conditionality Regulation, in light of recitals 8–10 of the preamble, that a breach of breach of the principles of the rule of law is likely to arise within the field of the judiciary (for instance, if prosecutors are not allowed to investigate allegations of fraud and corruption, or national judges are subjected to external pressure aimed at influencing their decision-making). However, for such a breach to result in financial sanctions based on the Conditionality Regulation, it must concern an area of government involved in implementing the Union budget, and it must risk adversely affecting the Union budget in a sufficiently direct way.[329] The EU legislator apparently fears that a breach of

[329] This follows from article 4(2) of the Conditionality Regulation and was reiterated by the CJEU in C-156/21, para. 111 and C-157/21, para. 125. See section 5.4.2.

the rule of law will result in EU funds disappearing and has designed a secondary law instrument to reduce that risk.

What is not specified in the Conditionality Regulation, nor in the subsequent verdicts by the CJEU, is the *intent* behind a punishable breach. Accordingly, a breach of the principles of the rule of law which is targeted by the Conditionality Regulation – i.e., a breach which arises within the context of the implementation of the Union budget and results in EU funds disappearing – may just as easily be due to corruption, as ideological conviction on behalf of individual judges and public officials.

At first glance, it may seem as though this is a new development in European law. Anti-corruption is not a common feature of theoretical definitions of the rule of law. Even thick substantive definitions of the notion are limited to linking the rule of law to democracy and fundamental rights.[330] Have the Conditionality Regulation resulted in an expansion of the concept, i.e., an even thicker European understanding of the rule of law?

My answer to this question is no. I believe anti-corruption has always been an implicit feature of the EU's conception of the rule of law. It is not unreasonable to contend that a country which is failing to respect fundamental principles of the rule of law may also be corrupt. In light of the different conceptions of the rule of law described in chapter 3, I consider that the core purpose of the concept is to restrict the power of a government over its citizens and prevent uncertainty and arbitrariness in the decision-making process. In this sense, corruption is a direct threat to the rule of law, as it makes the outcome of a decision-making process dependent on bribes, not laws. If there is no balance of powers within a state, and no possibility for impartial judicial review of unlawful decisions, there are no guarantees that public power cannot be persuaded by monetary means to divert from the letter of the law. Corruption may therefore threaten the principles of legal certainty, separation of powers and non-discrimination and equality, which are all defined in EU

[330] See section 3.1.

law as fundamental principles of the rule of law.[331] Consequently, combatting corruption is a logical consequence of a state respecting fundamental principles of the rule of law.[332]

It may be noted that over the last couple of years, corruption has increasingly become integrated with the EU's conception of the rule of law. Both the *Rule of Law Mechanism* and the *Justice Scoreboard* relates to the concept.[333] In the *Minister for Justice and Equality* case, the CJEU confirms that national courts must be free to exercise their functions without any external influence, and that this autonomy is a precondition for judiciary independence.[334] Moreover, anti-corruption is explicitly mentioned in the *Romanian Judges* case, where the CJEU considers that the rule of law requires judicial independence, so that domestic courts may effectively counter, *inter alia*, corruption.[335] Evidently, anti-corruption has become part of the EU's conception of the rule of law. The Conditionality Regulation's sufficiently direct link-criterion makes the connection between the rule of law and corruption explicit and unavoidable.

Yet, if anti-corruption is now to be considered an inextricable component of the EU's conception of the rule of law, the question remains what consequences this may have for the Union. Hungary and Poland are viewed as two weak links in the European integration project, but when it comes to corruption, other EU member states may be equally bad. Milada A. Vachduova points out that several other EU member states (Romania, Bulgaria, the Czech Republic, Greece and Italy) suffer from 'high-level corruption'[336]. It is not impossible to imagine that corruption could risk affecting the sound implementation of the Union budget in those member states. For instance, if an

[331] See section 3.3.
[332] For a similar view, with regard to the distribution of Cohesion Policy funds, see Heinemann, 300.
[333] See section 4.2.
[334] C-216/18 PPU, para. 63.
[335] C-83/19 to C-397/19, para. 159.
[336] Vachudova, 287.

individual judge was bribed to alter the outcome of an Italian public procurement case, that could potentially result in the displacement of EU funds.

However, on a principal level, if corruption *per se* may be considered a breach of the principles of the rule of law, that breach could in most cases at least *hypothetically* also be considered a risk against the sound implementation of the Union budget, which would mean that the sufficiently direct link-criterion would be fulfilled. By this logic, should the Conditionality Regulation not be imposed against any EU member state as soon as there were any indications of corruption within that state?

Again, my answer is no. This is not how the Conditionality Regulation is meant to work. Merely the *existence* of a breach of the principles of the rule of law is not enough to trigger the conditionality mechanism: the Commission have to prove 'a genuine link' between the breach and its adverse effects on the Union budget.[337] According to Takis Tridimas, '(t)he key consideration here is the degree of proximity required.'[338] Tridimas argues that while a *single* breach of the principles of the rule of law may hypothetically be sufficient to trigger the mechanism, '(t)he more fundamental or systemic the breach is, the easier it is to satisfy the requirement of directness.'[339] The reason is the connection between respect for the rule of law and solidarity, affirmed by the CJEU in Case C-156/21 and Case C-157/21.[340] Tridimas considers that only when a breach of the rule of law threatens the principle of mutual trust and, most importantly, the *solidarity* between EU member states, will sanctions be imposed against the responsible state.[341]

In light of the political context, I agree with Tridimas. Over the last decade, the Commission have consistently preferred dialogue-based soft law mechanisms over sanctions-based enforcement mechanisms.[342] I believe that the Conditionality Regulation is meant to be imposed carefully, and only against

[337] See section 5.4.2.
[338] Tridimas, 14; Łacny, 84–85.
[339] Tridimas, 14–16.
[340] C-156/21, para. 129 and C-157/21, para. 147.
[341] Tridimas, 16.
[342] See chapter 4.

member states which exhibit a systemic disregard for the principles of the rule of law. The regulation will not be imposed against every EU member state, even if relevant breaches (such as high-level cases of corruption) sometimes do occur, as this would go against regulation's purpose. The regulation is meant to be imposed against a member state suffering from rule of law backsliding which *results* in corruption within the judiciary, but not a member state where corruption may arise *unrelated* to rule of law backsliding. Within the context of the Conditionality Regulation, corruption is merely a symptom of the disease that is rule of law backsliding.

6.3 Political realities of implementation

On the 5th of April 2022, only days after Victor Orbán was re-elected president of Hungary, President of the Commission Ursula von der Leyen confirmed that the Commission would 'move on to the next step' and invoke the Conditionality Regulation against Hungary.[343] In 2021, the Commission requested information from both Poland and Hungary concerning the state of the rule of law, and held off on distributing NGEU funds to the two countries.[344] The Commission now seem to have overcome its hesitancy to invoke the Conditionality Regulation – at least against Hungary.

However, questions remain whether the Conditionality Regulation will actually result in any financial sanctions, and if so, what potential impact such sanctions may have for the state of the rule of law within the Union. The answers to these questions depend on both legal and political considerations.

[343] Agnese Krivade and John Schranz 'Question time with Commission President Ursula von der Leyen' (European Parliament, 2022-04-05), https://www.europarl.europa.eu/pdfs/news/expert/2022/4/press_release/20220401IPR26529/20220401IPR26529_en.pdf, accessed 2022-05-10.
[344] Eszter Zalan, 'EU finally launches rule-of-law probe against Hungary' *EU Observer* (Brussels, 2022-04-05), https://euobserver.com/rule-of-law/154672, accessed 2022-04-26; Lili Bayer, 'EU launches process to slash Hungary's funds over rule-of-law breaches' *POLITICO* (2022-04-05), https://www.politico.eu/article/eu-commission-to-trigger-rule-of-law-budget-tool-against-hungary/, accessed 2022-04-26.

From a legal standpoint, it follows from settled CJEU case law that the rule of law is a fundamental value of the EU legal order, and that respect for fundamental principles of the rule of law is a non-negotiable aspect of membership to the Union.[345] In Case C-156/21 and Case C-157/21, the Court clarifies that the duty to respect the member states' national identities and constitutional characters does not excuse an EU member state from its responsibility to respect the rule of law, and that different levels of rule of law-compliance cannot be accepted, since it is a *common* value to all EU member states.[346] From this perspective, respect for the rule of law should not be a matter of political negotiations.[347]

However, even though the Conditionality Regulation has been adopted and now also invoked against Hungary, there are no guarantees that the procedure will result in any real financial sanctions. As explained in section 5.2, it is the Commission who is responsible for implementing the regulation, but a decision to impose financial sanctions against an illiberal EU member state still requires the support of a qualified majority of the Council. Furthermore, the member state concerned must be given the opportunity to express its opinion regarding potential sanctions and may stall the application of the regulation for up to three months by supplementing the matter to the European Council. Thus, implementation of the regulation inevitably lies at the crossroads between politics and law.

The Conditionality Regulation was introduced as an alternative to other tools in the EU's *Rule of Law Toolbox*, which were either too soft to result in any real sanctions, or too difficult to implement. For this reason, there is likely a strong will among many actors – the Commission, the European Parliament and the governments of many EU member states – to see the regulation result in real financial sanctions against illiberal member states.[348]

[345] See e.g., C-64/16, para. 30; C-896/19, para. 61–63.
[346] See section 5.4.3.
[347] For a similar opinion, with regard to the European Council's compromise agreement, see Mader, 56.
[348] For a similar opinion, see Goldner Lang, 15.

Nonetheless, the emphasis previously put on constructive dialogue is likely to live on in the implementation process. In fact, by establishing substantial procedural requirements to be fulfilled by the Commission when assessing whether the sufficiently direct link-criterion is fulfilled,[349] the CJEU have practically guaranteed that it will. While these requirements are legally sound, it may be expected that constructive dialogue will strengthen the bargaining power of a member state targeted by potential sanctions, while amounting to little of substance. As noted by Laurent Pech and Kim Lane Scheppele, constructive dialogue is bound to fail when the Commission is dealing with illiberal member states.[350]

An additional risk is that the member states of the Council will show excessive consideration for the duty to respect the member states' national identities in article 4(2) TEU, and vote against financial sanctions. It is conceivable that some EU member states may be hesitant to apply the Conditionality Regulation – perhaps because they do not want to sanction their peers in the Council, or maybe they genuinely consider the organisation of the state to be a matter of national sovereignty – and these member states could use the principle as an argument to obstruct the procedure for implementing sanctions.

Legally, reliance upon the duty to respect the member states' national identities would be an unsuccessful approach, given the CJEU's affirmation that article 4(2) TEU does not excuse the EU member states' from respecting the rule of law within their domestic legal orders.[351] Politically, however, the argument could still gain traction within the Council and the European Council. Take for instance the European Council's Compromise of December 2020, which has been described as a political trade-off between the rule of law and the duty to respect the member states' national identities.[352] Considering how much influence it gives to the EU member states – including member states

[349] See section 5.4.2.
[350] Pech and Scheppele (supra note 161).
[351] See section 5.4.3.
[352] Giacinto della Cananea, 'On Law and Politics in the EU: The Rule of Law Conditionality' (2021), Italian Journal of Public Law 13:1, 1–5, 3–4.

targeted by prospective sanctions – over the design and application of financial sanctions, I believe that the Compromise is to be considered a precautionary example in this regard.

To summarize, I believe there is a considerable risk that excessive reliance upon constructive dialogue, on behalf of the Commission, combined with excessive consideration for the member states' national identities, on behalf of the Council and the European Council, may result in a political gridlock and the absence of sought-after legal effects. The Conditionality Regulation may in the end amount to nothing more than a 'typical European compromise' – a legislative act with seemingly strict provisions, which are never enforced, because of the absence of political will.[353]

Yet, I believe that there is one factor which above all will determine whether financial sanctions will be imposed: the principle of solidarity. In the key paragraph cited in section 5.4.4, [354] the CJEU affirms that the rule of law and solidarity are two mutually enforcing values, linked together via the principle of mutual trust. The Court establishes a causal link between the values: if an EU member state does not respect fundamental principles of the rule of law, the mutual trust among the EU member states is undercut, and the solidarity among them is eroded. However, this also means that a lack of mutual trust due to a breach of the rule of law may persuade the Commission and a qualified majority of the EU members states to impose financial sanctions against the responsible member state. They will be obliged to do so in order to restore solidarity to the system.

The geo-political developments of Spring 2022 have demonstrated how prevalent the principle of solidarity is within EU political debate. In my opinion, it is not unlikely that the application of the Conditionality Regulation will be directly affected by the war in Ukraine, and in particular, by the EU member states' response to it. This claim may be raised in particular with regard to

[353] Łacny, 103.
[354] C-156/21, para. 129 and C-157/21, para. 147.

Poland. As of the 6th of May 2022, Poland has received over 3 million Ukrainian refugees.[355] The influx of migrants has put the Commission in a rather awkward position. As Guardian of the Treaties, the Commission is obliged to investigate the conditions for applying the Conditionality Regulation against Poland, but it is also being pressured to provide financial assistance to EU member states receiving Ukrainian refugees.[356] Thus, when it comes to Poland, the Commission may have to choose between enforcing respect for the rule of law within the Union and the need for 'wartime unity'[357].

If comparing Poland to Hungary, it seems as though the two countries are in opposite camps when it comes to the war. Hungary has received less Ukrainian refugees than Poland (approximately 540 000 people, as of the 6th of May 2022)[358], and the Hungarian government have been criticized for its amical relationship with Russia.[359] Victor Orbán has even attempted to undermine the EU's proposed oil-embargo against Russia, by requiring that Hungary be exempted from it.[360] As far as solidarity goes, Hungary is currently exhibiting none. Since the principle of solidarity is the main factor that determines the application of the Conditionality Regulation, I believe that Hungary – if the government continue down its chosen path – is bound to receive considerable financial sanctions. For example, I consider it unlikely that Hungary will ever receive the pending pay-outs of NGEU funds, especially considering that the funds disappear after two years.[361] Hence, the principle of solidarity is likely to be what guarantees the Conditionality Regulation's potential effectiveness.

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[355] 'Ukraine Displacement: More than 13 Million Displaced and Growing Concern over Vulnerable Groups, Situation in Border States Increasingly Dire' (ECRE, 2022-05-06), https://ecre.org/ukraine-displacement-more-than-13-million-displaced-and-growing-concern-over-vulnerable-groups-situation-in-border-states-increasingly-dire/, accessed 2022-05-11.
[356] Jaraczewski (supra note 47).
[357] Lili Bayer, 'War in Ukraine envelops EU rule-of-law fight at home' *POLITICO* (2022-03-17), https://www.politico.eu/article/war-risks-pushing-aside-eu-rule-of-law-concerns/, accessed 2022-04-25.
[358] ECRE (supra note 355).
[359] Jaraczewski (supra note 47).
[360] Jacopo Barigazzi and Leonie Kijewski, 'EU's Russian oil ban stalls as Hungary holds up sanctions' *POLITICO* (2022-05-08), https://www.politico.eu/article/eus-russian-oil-ban-stalls-as-hungary-holds-up-sanctions/, accessed 2022-05-11.
[361] See section 5.2.

It has been suggested that the increased use of internal conditionality mechanisms to guarantee compliance with fundamental EU norms may have far-reaching consequences for the Union's constitutional structure: from being a Union based on the idea of 'pure solidarity' among the member states, the EU is increasingly becoming a Union based on '*de facto* conditional solidarity.'[362] In order for the EU member states to benefit from certain membership rights (e.g., the allocation of EU funds) they have to guarantee that they respect fundamental values of the EU legal order (e.g., the rule of law).[363]

In Case C-156/21 and Case C-157/21, the CJEU takes this development one step further. By proposing a causal link between the rule of law and solidarity, the Court effectively elevates the status of the latter, so that the principle of solidarity becomes *en par* with the rule of law. The CJEU affirms that solidarity is a foundational principle with distinct judicial enforceability, which may be invoked when the principles of the rule of law and mutual trust are at stake. This constitutes a radical shift in in EU constitutional law.[364]

6.4 Potential effects of implementation

With regard to practical effects of implementation, it is not certain that sanctions imposed on the basis of the Conditionality Regulation will *automatically* restore rule of law compliance within the EU. In this section, I highlight some obstacles to potential financial sanctions having the aspired impact of promoting respect for fundamental principles of the rule of law.

A particular concern with a rule of law-based conditionality mechanism is that it may result in 'mercantile trade-off', i.e., an illiberal member state weighing the costs of non-compliance with fundamental principles of the rule of law against the political benefits of sustained illiberalism.[365] For example, the Hungarian government may consider that the loss of EU funds is a price

[362] Viță, 136–137.
[363] Baraggia and Bonelli, 153–154. However, for a more optimistic view, where the reliance upon financial conditionality is framed as a 'maturing' of the EU legal order, see Bieber and Maiani, 1091–1092.
[364] Compare with Küçük (supra note 316); Klamert (supra note 317).
[365] Mader, 59.

worth paying for maintaining its grip on power and its amicable relationship with Russia. If so, a decision to withhold EU funds on the basis the Conditionality Regulation might safeguard the proper implementation of the Union budget, but it will not convince Hungary to respect the rule of law. Consequently, only one of the regulation's dual purposes will be achieved.

More generally, even if the threat of financial sanctions does convince an illiberal member state to undertake legislative reforms, it is still uncertain whether the aspired end-result – enhanced respect for the rule of law – will be achieved. Iris Goldner Lang considers that as both Poland and Hungary are net recipients of EU funds, a decision to withhold EU funds on the basis of the Conditionality Regulation may result in legislative change, but that it is far less certain whether the sanctions may alter the legal culture and the political behaviour of the governing elites. In order to achieve long-lasting change, she claims that financial sanctions must be supported by political opposition from within.[366]

As mentioned in section 2.3, I will not estimate the potential effects of the Conditionality Regulation at national level in particular member states. Thus, I refrain from assessing whether it would be politically beneficial for Hungary or Poland to renounce EU funds, or if there exist any internal political oppositions in the two countries that may support financial sanctions. My point is that even *if* financial sanctions on the basis of the Conditionality Regulation are imposed against Hungary or – albeit more unlikely – Poland, those sanctions may not automatically restore compliance with fundamental principles of the rule of law.

Moreover, it is important to realize that the Conditionality Regulation does not cover *all* potential breaches of the rule of law within an illiberal EU member state.[367] In some cases, an evident breach of the principles of the rule of law may have no clear connection to the implementation of the Union budget, and in those cases, it will be difficult for the Commission to prove that the

[366] Goldner Lang, 6–7.
[367] Goldner Lang, 16.

sufficiently direct link-criterion is fulfilled. For instance, this could be the case when it comes to political interference in the prosecution of crimes other than fraud and corruption.[368] Another caveat lies in the very definition of 'breaches of the rule of law' in article 2(a) of the Conditionality Regulation. Although the EU's conception of the rule of law is intimately connected with both democracy and fundamental rights' protection,[369] the concept as defined in article 2(a) of the regulation has a more limited scope. Niels Kirst points out that *fundamental rights* are targeted by the conditionality mechanism only if related to at least one the principles of the rule of law.[370] Of course, on a principal level, is possible to ask whether fundamental rights are not *always* covered by the principles of the rule of law – this question goes to the very heart of the jurisprudential debate accounted for in section 3.1. Nonetheless, the EU's conception of the rule of law centres around the principle of judiciary independence,[371] and has been criticized for being incomplete.[372] Thus, I consider it possible that certain fundamental rights violations may fall outside the scope of article 2(a) of the regulation. For instance, I find it hard to see how the Hungarian government's crack-down on media and silencing of political opponents would be covered by this provision.

To conclude, many situations which are highly questionable from a rule of law-perspective may not be amended by financial sanctions imposed on the basis of the Conditionality Regulation. Accordingly, when it comes to a member state undergoing rule of law backsliding at the hands of an illiberal government, the Commission ought to use all tools available to ensure that fundamental principles of the rule of law are respected.

Contrary to the European Council's assertion[373], the CJEU confirms that the Conditionality Regulation is complementary – not subsidiary – to the other tools in the EU's *Rule of Law Toolbox.*[374] It follows from settled CJEU case

[368] Tridimas, 16.
[369] See section 3.3.
[370] Kirst, 106.
[371] See section 4.3.
[372] Kochenov and Pech (supra note 109).
[373] EUCO 22/20, para. 2 (d).
[374] See section 5.4.1.

law that conditionality-based withdrawal of funds cannot be equated with financial penalties: the latter is imposed as a result of a successful infringement action, and as the procedures have different aims and are governed by different rules, they are independent from each other. [375] Based on this, I see no reason why the Commission could not withhold EU funds from illiberal member states on the basis of the Conditionality Regulation, while simultaneously pursuing other options; most importantly, infringement procedures.

In my opinion, such a combined approach would be the best option to ensure efficient protection of the rule of law within the Union. As noted by Xavier Groussot and Anna Zemskova, there are differences in Poland and Hungary's approaches to illiberalism: while *PiS* has directly targeted the independence of the judiciaries, *Fidesz* has rather consolidated its power by means of corruption and clientelism.[376] Since the Conditionality Regulation establishes a causal link between corruption and the rule of law, and requires a sufficiently direct link between a breach of the principles of the rule of law and an adverse effect on the Union budget, I believe it is particularly appropriate to implement the regulation in relation to Hungary. The developments in Poland, on the other hand, could perhaps be countered more effectively by a continued and increased use of infringement procedures.

[375] See e.g., Case C-235/94 P *An Taisce and WWF UK* [1996] EU:C:1996:293, para 25; Case C-332/01 *Greece v Commission* [2004] ECRI-7699, para 63.
[376] Groussot and Zemskova (supra note 145).

7. Concluding remarks

All the tools in the EU's *Rule of Law Toolbox* have so far proved insufficient in meeting the challenge of rule of law backsliding. For this reason, the Conditionality Regulation constitutes a welcome expansion of the EU framework for the protection of the rule of law.

In my opinion, it is clear that the Conditionality Regulation has two purposes: to protect the Union budget *and* to protect the rule of law within the Union. In Case C-156/21 and Case C-157/21, the CJEU highlights the first purpose, presumably as to not undermine the argumentation regarding the Conditionality Regulation's compatibility with article 7 TEU. However, a two-fold purpose would not have to mean that the regulation infringes upon article 7 TEU, since established CJEU case law allows for a legal act to have more than one purpose. I believe that it would have been preferable if the Court had taken this case law into account and clarified beyond doubt if the goal to protect the Union budget holds precedence over the goal to protect the rule of law, and if not, what consequences this may have for the regulation's compatibility with article 7 TEU.

The Conditionality Regulation establishes a clear relationship between the rule of law and corruption. This connection could hypothetically be interpreted as though the regulation is applicable whenever there are sufficient indications of corruption within an EU member state. Yet, this is likely not how the regulation will apply in practice. I believe that the regulation will be applied only where the level of corruption in a member state threatens to undermine the solidarity within the Union. From a legal perspective, it is mainly in these cases that the Commission will be able to prove that the sufficiently direct link-criterion is fulfilled. From a political perspective, a clear violation of the principle of solidarity could be expected to persuade the Commission and the EU member states to withhold funds from the member state responsible. The principle of solidarity has already been put to the test during Spring 2022. In light of the EU member states' response to the war in Ukraine, I

consider it likely that Hungary will face a withdrawal of EU funds. It is far less certain what will happen to Poland – when or *if* the regulation is enforced.

However, even if the EU decide to impose financial sanctions on the basis of the Conditionality Regulation, there are no guarantees that such sanctions will achieve the aspired effect of promoting respect for the rule of law. An illiberal government may prefer to maintain its grip on power, and thus forfeit the allocated EU funds. If legislative reforms are introduced, it is still uncertain whether such reforms will alter the legislative culture and the political behaviour in the country. It is also important to note that the scope of the regulation does not cover all potential rule of law-deficiencies in an EU member state, but only those with a clear enough connection to the Union budget.

By establishing a direct connection between the rule of law, mutual trust and solidarity, the CJEU have pinpointed an important truth, namely, that rule of law backsliding constitutes a direct threat to the future of the Union. It is therefore important that the EU institutions use all the tools at their disposal to combat this threat. The Conditionality Regulation may enhance the EU's possibilities to counter rule of law backsliding, especially with regard to Hungary. Yet, to ensure efficient protection of the rule of law within the Union, the Conditionality Regulation ought to be combined with other measures – most importantly, infringement procedures.

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