

# Unleashing the Power of EU Law: Assessing Innovative Solutions and Areas for Improvement in Safeguarding the Rule of Law

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The Wiktor Osiatyński Archive  
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## INTRODUCTION



# Unleashing the power of EU Law: Assessing innovative solutions and areas for improvement in safeguarding the rule of law

Anna Wójcik

In this second special report from the Wiktor Osiatyński Archive, the authors reflect on the innovative applications of EU law since the outbreak of the war in Ukraine – a moment that also proved to be a turning point in terms of the approach of EU institutions and governments of Member States to the rule of law crisis, especially in Hungary, but also in Poland.

They highlight the mechanisms for protecting the EU budget through the conditionality principle, which permeates EU law, making the receipt of European funds conditional on respect for EU values. They also show that EU law applies in the inflammatory area of the rule of law crisis, namely attacks on prosecutors who criticize negative developments in the judiciary. They also point to areas where EU law needs to be rethought, such as in the case of the regulation of the participation of civil society organizations and initiatives in procedures to protect the rule of law.

**Daniel Hegedüs**, senior fellow at the German Marshall Fund of the United States, a non-partisan American public policy think tank that seeks to promote cooperation and understanding between North America and the EU, points out that geopolitical factors and the Hungarian government's policies with respect to Ukraine and Russia have played a key role in the European Union's response to Hungary's 13-year-long progressive autocratization.

In April 2022, the Fidesz party won the elections for the fourth successive time. Prime

Minister Viktor Orbán's party, during the election campaign and after the parliamentary elections, saw Hungary's geopolitical position and interests quite differently from the rest of the European Union countries mobilized to help Ukraine. The Fidesz government obstructed work in the EU, blackmailing governments of other Member States and the European Commission to loosen the rule of law procedures that had been taking place for years. However, the effect was the opposite of what was intended.

The price for disloyalty and blackmail was the use by the EU of financial mechanisms to protect the EU budget, a tool to put pressure on the Hungarian government to desist from breaching the rule of law and from systemic corruption. Hegedüs explains how the gigantic EU funds for Hungary were frozen in three steps. It is not only the funds from the Resilience and Recovery Facility (RFF) that are conditional on the transfer of funds to meet the 'milestones' regarding the judiciary and the battle against corruption. A new conditionality mechanism was triggered against Hungary for the first time in EU history, leading to the withholding of more than half the funds from the three funds constituting the cohesion policy. The real blow to the Orbán government, especially in the context of Hungary's rampant inflation and economic crisis, is the withholding of cohesion funds because of Hungary's non-compliance with the EU Charter of Fundamental Rights. Hungary and Poland committed to this in their partnership agreements with the EU in connection with the Union's new budget perspective.

**John Morijn**, an endowed professor of law and politics in international relations at the University of Groningen (the Netherlands) and an expert on EU law distinguishes two major processes regarding the protection of the rule of law in the EU today. Firstly, the constantly developing case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). And secondly, action based on the principle of conditionality, which includes not only the activation of the conditionality mechanism but also the freezing of cohesion funds. However, he cautions that we may be in for a surprise, as the EU could withdraw from blocking EU funds on the basis of so-called horizontal criteria in the partnership agreements. Innovative interpretations and applications of EU law show the role that politics plays in the rule of law crisis.

Hungarian political scientist and sociologist **Edit Zgut-Przybylska**, who conducts research at the Polish Academy of Sciences, among others, reminds us that the reforms introduced by the Hungarian government to meet the milestones, despite satisfying the formal expectations of the European Union, do not affect the everyday life of the system built by Fidesz. According to Zgut-Przybylska, the decline of democracy in Hungary cannot be described solely by formal and legal criteria. The nature of this system is determined by the way in which informal power is exercised. The Orbán government has pledged to reduce the percentage of tenders in which a single entity competes to 15%. However, this will not reduce systemic corruption. Hostile takeovers and

intimidation of business entities by the authorities have been on the increase in recent years. Sectors of the economy, such as retail, construction, banking and telecommunications and, of course, the media are most vulnerable. On top of this, the erosion of human rights is progressing, especially the rights of gay, lesbian, bisexual and transgender people (LGBT), as well as reproductive rights. The Hungarian government is becoming less pragmatic, more ideological and less flexible in its negotiations with the EU over 'identity' issues. It is also already preparing for the next elections: local and European Parliament elections to be held at the same time in 2024.

What if the withholding of European funds from Hungary and Poland proves to be not a temporary, but a permanent solution, because their governments are unwilling to stop breaching EU values? After all, the beneficiaries of the funds are ultimately the citizens of the European Union. Article 2 of the EU Treaty talks about EU values, which, in addition to the rule of law, include solidarity. **Maciej Krogel**, lecturer at the University of Amsterdam and doctoral candidate at the European University Institute, encourages looking at the conditionality mechanism, or more broadly the freezing of EU funds, from the point of view of protecting the value of solidarity. He reiterates that it is in the interest of the potential beneficiaries of the European funds to safeguard them from being stolen and misspent. Krogel also points out that it is a matter of loyalty that the state which receives these funds protects them by upholding the standards of the rule of law. But will the reduction of the EU's principles of solidarity to its formal aspect and the protection of the EU budget not lead to a threat to the Union itself in the long run? The funds from the RFF were supposed to be used for healthcare, education or green technologies. Countries that do not receive them will not develop faster in these areas, which can increase the gap between EU countries. The public reaction to this could jeopardize the European project.

Civil society organizations and initiatives are often the defenders of this project. **Barbara Grabowska-Moroz**, research fellow at the Institute for Democracy at the Central European University, emphasizes how civil society organizations and initiatives play an important role in the process of protecting the rule of law in the EU. However, she shows that EU rules and procedures do not facilitate this at all. Indeed, most of the political and legal mechanisms for the protection of the rule of law in the EU are based on the bodies of the EU institutions and the governments of the Member States. Civil society organizations are the most involved in the procedures for monitoring the rule of law.

**Patryk Wachowiec**, legal analyst at the Civil Development Forum (FOR), recalls that the rule of law crisis includes not only attacks on independent judges, but also on prosecutors defending the rule of law. In recent years, the CJEU and the ECtHR have further developed and clarified the standards for the protection of judges in European

law. Much less attention has so far been paid to the obligations to protect prosecutors under EU law. Wachowiec shows that this obligation of Union states can be deduced from three regulations: Article 325(1) of the Treaty on the Functioning of the European Union, which requires Member States to combat fraud and illegal activities affecting the Union's financial interests; Directive 2014/41 establishing a European Investigation Order; and Article 19(1)(2) of the Treaty on European Union, expressing the principle of effective judicial protection. The courts of the Member States could verify this claim by referring questions to the CJEU for a preliminary ruling.

In the thirteenth year of the rule of law crisis in Hungary and the eighth in Poland, it is clear that European law has great potential to protect EU values. However, this requires not only courage of thought and a flair for interpretation, but also political determination.



# The (geo)politics of sanctioning corruption and autocratization in Hungary

Daniel Hegedüs

**The frustration stemming from Hungary's disruptive behaviour within the European Union, its adoption of a multivectoral foreign policy, and its perceived geopolitical disloyalty have all contributed to the resolute stance of EU institutions and Member States in sanctioning Hungary for its rule of law shortcomings.**

Hungary's relationship with the European Union institutions and its EU and NATO allies reached a historic low in the first half of 2023. This relationship has always been strained since Hungary's domestic autocratization and multivectoral foreign policy matured to a noticeable challenge for Western partners in the early 2010s.

However, in 2022–2023, Russia's war of aggression against Ukraine and its geopolitical ramifications coincided with both Hungary's ever worsening rule of law and track record of corruption and the government's inability to reform its multivectoral foreign policy and demonstrate geopolitical loyalty to the West.

The coincidence of these three factors was the key driver behind the Council's decision in December 2022 to suspend Hungary's cohesion funding worth €6.3bn, the first time in EU history that Member States stood-up and sanctioned one of their fellows because of fundamental rule of law shortcomings.

Two distinct conclusions can be drawn from these developments. First, there has never been greater political readiness among EU institutions and Member States to impose sanctions on Hungarian Prime Minister Viktor Orbán's regime because of the breach of the rule of law and the level of organized, high-level corruption in the country.

Second, for Hungary's fellow EU Member States, the primary driver behind that political readiness and political will is not necessarily the quality of the rule of law in the country, but rather the frustration with Hungary's disruptive behaviour in the European Union, its multivectoral foreign policy, and geopolitical disloyalty.

### **Political dynamics and the enforcement of EU values: understanding the interplay**

The second conclusion clearly underlines the existential role of politics in both enforcing European values and sanctioning any breached that can arise. As R. Daniel Kelemen convincingly argued,<sup>1</sup> the lack of political will was a key obstacle in the 2010s that hampered European responses to Hungary's autocratization.

There has been an undeniable surge since February 2022 in the political determination to sanction Hungary for its breach of the rule of law and pervasive political corruption. This shift in the political position of the Member States created an important window of opportunity for the European Commission to effectively deploy its available toolkit in the protection of the rule of law and the EU's financial interest in Hungary.

While the rule of law and geopolitics might be two distant and unrelated areas in the eyes of the European Commission, in the context of the war in Europe, they are interrelated in terms of the political support of the Member States for the Commission's actions. The mounting criticism of EU Member States with respect to Hungary is further intensified by the frustration arising from Hungary's geopolitical alignment with the Kremlin and its reluctance to provide meaningful support to Ukraine.

Nonetheless, regardless of the obviously positive impact of these political dynamics in the particular case of Hungary, recent trends also emphasize that compliance with European values, such as democracy, the rule of law and fundamental rights remains a secondary concern for the EU Member States.

Autocratizing EU Member States can only expect substantial peer pressure if they also challenge the common European security and geopolitical interest clearly shared by an overwhelming majority of their EU peers.

While the pressure on Hungary increased for geopolitical reasons, it was slightly eased on Poland, without any substantial positive change in the quality of the rule of law in the country. Poland is a key country supporting Ukraine within the EU and NATO.

<sup>1</sup> R.D. Kelemen, 'Europe's other democratic deficit: National authoritarianism in Europe's Democratic Union' *Government and opposition*, 52(2), (2017), pp. 211–238.

## Prelude

Following twelve years of autocratization in Hungary and the constant challenges the country's regime posed to European values, in 2022 the fight of the EU institutions against the demise of the rule of law and misuse of EU funds was elevated to a new level.

After the suspension of Hungary's access to the €5.8bn worth European Recovery and Resilience Facility (RRF) in 2021,<sup>2</sup> in April 2022, the European Commission triggered the procedure established by the Conditionality Regulation, the much discussed legal tool introduced with the EU's new 2021–2027 budget package.<sup>3</sup> Within this legal framework, the Commission ultimately recommended the suspension of €7.5 bn in the autumn of 2022, which officially represents 65% of the allocations in the three most corruption-prone operational programmes. This amounts to approximately one-third of Hungary's total allocation of cohesion funds.<sup>4</sup> In parallel with that, the European Parliament also declared Hungary a 'non-democracy'.<sup>5</sup>

In a political drama unfolding over 2022, the Hungarian government invested heavily in both symbolic compliance<sup>6</sup> with EU anti-corruption conditions and in the creation of a threat posture through blackmailing in order to shape the voting behaviour of the Member States in the Council.

During the autumn of 2022, Prime Minister Viktor Orbán's government initiated a controversial anti-corruption reform package in response to the 17 conditions jointly adopted with the European Commission, insisting that the disbursement of EU funds to Hungary would not pose any threat to the EU's financial interests because of these reform measures.

In parallel, the Hungarian regime kept several joint EU and NATO decisions as political hostages, including the EU's accession to the global minimum corporate tax rate, the €18bn EU financial aid to Ukraine and accession of Finland and Sweden to NATO, to extort a favourable political decision in the Council on EU funding.

2 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

3 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget.

4 'EU budget: Commission proposes measures to the Council under the conditionality regulation', EC press release of 18/09/22, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5623](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623), accessed on 21/03/2023.

5 European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE))

6 A. Batory, 'Defying the Commission: Creative compliance and respect for the rule of law in the EU' *Public Administration*, 94(3), (2016), pp. 685–699.

On 30 November 2022 the European Commission upheld its previous position and officially proposed the suspension of nearly one-third of Hungary's cohesion funding of €7.5 bn to the Council. It simultaneously proposed that the Member States accept Hungary's Recovery and Resilience Plan, tying the release of the already suspended €5.8 bn RFF to the achievement of 27 'super milestones', four of which address issues of judicial independence in Hungary.<sup>7</sup>

### Sanctions in three stages

In early December 2022, the Council initially requested the Commission to reassess its proposal to suspend €7.5 billion through the **Conditionality Regulation**, taking into account the reform measures already implemented by the Hungarian government. However, the Commission demonstrated notable resilience in its stance.

Following two weeks of intense, behind closed doors coordination between the European Commission, the French Council Presidency and important Member States, such as Germany, the Commission ultimately accepted that the Hungarian anti-corruption package resulted in certain positive developments. However, it found its overall results unsatisfactory.

In that light, the Commission proposed the suspension of 55% of the three **cohesion policy programmes** in Hungary that are susceptible to political corruption at a value of €6.3 bn.

At the level of the Committee of Permanent Representatives in the European Union (COREPER), all 26 Member States first supported the application of the EU conditionality regulation against Hungary and the proposed suspension of funds. During the Council's formal written decision-making procedure, Poland changed its position and voted against the motion, although it was comfortably passed with a qualified majority despite Poland's opposition.

Nonetheless, the suspension of €6.3bn cohesion funding through the Conditionality Regulation<sup>8</sup> and the tying of the disbursement of the €5.8bn Recovery and Resilience Facility to the compliance with the 27 'super milestones' were degraded to secondary issues of concern for the Hungarian authorities. The respective Council decisions of 15 December demonstrated the overwhelming political support of the Member States to block the access to EU funding for Hungary's corrupt semi-authoritarian regime.

<sup>7</sup> 'Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds', EC press release of 30/11/2022, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7273](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273).

<sup>8</sup> 'Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary', EC press release of 12 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>

The European Commission, emboldened by these developments, suspended almost all payments to Hungary encompassed by the country's Cohesion Policy Partnership Agreement with the EU. This move was enabled by the EU's new Common Provision Regulation (CPR) and a fundamental change in the Commission's legal interpretation and approach to the powers and competences vested in the CPR.<sup>9</sup>

As Israel Butler,<sup>10</sup> R. Daniel Kelemen and Kim Lane Scheppele<sup>11</sup> convincingly already argued back in 2018, even the CPR of the 2014–2020 Multiannual Financial Framework (MFF) allowed the suspension of EU funding for Member States which were breaching the rule of law. However, back then, the European Commission refrained from taking advantage of the opportunities offered by the CPR and sought straightforward legal authorization to suspend funds, a process that led to the birth of the Conditionality Regulation.

However, while attention was focused on the conflicts around the adoption of the Conditionality Regulation during the negotiations of the legislative package related to the MFF 2021–2027, the Commission silently also upgraded the toolkit of the new CPR. Article 9 of the Regulation now defines the 'Horizontal Principles' that guide the implementation of the Funds, including 'respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union', gender equality, non-discrimination and the principle of sustainable development, while Annex III of the CPR establishes the methodology for measuring compliance with the 'horizontal enabling conditions'.

Using this legal background, while approving the Partnership Agreement with Hungary on 22 December 2022,<sup>12</sup> the European Commission **practically refused to pay the invoices presented by the Hungarian government** until it meets the horizontal enabling conditions set by the CPR.

The Commission identified concerns related to the Horizontal Principles at four different levels. The most serious concern applies to the question of judicial independence. This issue actually blocks all of Hungary's cohesion policy allocations worth €22bn. The fact that the €6.3bn suspended through the Conditionality Regulation is part of this sum demonstrates why that piece of the frozen funds is not the primary issue of concern for the Hungarian regime.

9 REGULATION (EU) 2021/1060 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

10 I. Butler, 'New Policy Paper: Using the EU's budget to protect democracy, the rule of law and fundamental rights', *Liberties.eu* (7/03/2018), <https://www.liberties.eu/en/stories/european-values-fund-two-proposals-mff/14388>, accessed on 1/07/2023.

11 R.D. Kelemen & K. Scheppele, 'How to stop funding autocracy in the EU. *Verfassungsblog: On Matters Constitutional* (10/09/2018).

12 COMMISSION IMPLEMENTING DECISION approving the Partnership Agreement with Hungary CCI 2021HU16FFPA001.

In order to unfreeze this €22bn, the Hungarian government has to comply with the **four milestones related to judicial independence**.

These include:

- strengthening the National Judicial Council with respect to the powers of the President of the National Office for the Judiciary;
- strengthening the judicial independence of the supreme court, Kúria;
- removing obstacles to references for preliminary rulings to the Court of Justice of the European Union;
- removing the possibility for public authorities to challenge final judicial decisions before the Constitutional Court.

While media reports suggested that the fulfilment of the above four conditions related to judicial independence are low hanging fruits for the Hungarian government which passed a law (Act X of 2023) with respective content in May 2023, no breakthrough was actually achieved<sup>13</sup> and the European Commission remained cautious with its evaluation of the Hungarian reforms.

Compared to the question of judicial independence which is blocking Hungary's access to all cohesion funding, the budget impact of the further three outstanding issues is significantly smaller, totalling up to €2.5bn. These include the questions of:

- academic freedom;
- the annulment of the 'child protection law' introduced in June 2021, which breaches the rights of LGBTQI people;
- compliance with CJEU's rulings on the rights of asylum.

The concerns related to academic freedom and, most specifically, to the political influence over universities exerted through the board of trustees of the public trust foundations that oversee the operations of newly privatized universities, resulted in the suspension of Erasmus+ and Horizon Europe funding for 21 such universities in January 2023. As this has a paralyzing impact on student mobility and the issue

<sup>13</sup> Hungarian Helsinki Committee. *ASSESSMENT of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan in light of the super milestones set out in the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary*, 22 May 2023.

received considerable public attention in Hungary, Prime Minister Orbán's government was eager to sort out the issue and avoid negative repercussions in public support. However, as with the question of judicial independence, no breakthrough was achieved until June 2023.

In contrast, it is difficult to imagine that the Hungarian government will be ready to make concessions regarding the 'child protection law' or the country's repressive asylum legislation any time soon. In such cases, the political costs of a legislative U-turn would clearly surpass the economic benefits of accessing a further amount of approximately €1bn. From a political perspective it is convenient for the Hungarian government to perpetuate its conflict with the European Union on the fields of asylum and LGBTQI-rights and to claim in its domestic discourse that ultimately EU financial sanctions are measures of the 'culture war'.

Despite being the inflation record holder in the EU, the Hungarian government was rather successful in mitigating the short-term impacts of the lack of availability of EU funding. Nonetheless, the longer-term negative impact on investment, and especially public investment, is difficult to foresee.

It appears to be a political consensus within the European Commission that the release of the €5.8bn ERRF funding for Hungary and the reassessment of the €6.3 bn cohesion funding suspended through the Conditionality Regulation requires the fulfilment of all 27 'supermilestones', with the 19 anti-corruption and transparency related milestones. This will not happen anytime soon, as the Hungarian government has not demonstrated any advance on the anti-corruption file since the autumn of 2022, while its achievements were deemed unsatisfactory by the 30 November evaluation of the European Commission. In that light, it is fair to conclude that the €6.3 bn cohesion funding and the €5.8bn ERRF resource will remain unavailable to the Hungarian government for the time being.

The only question that is relevant in the short run is whether the Hungarian regime will be able to unlock at least €13.2bn (22bn – 6.3bn – 2.5bn) through compliance with the horizontal enabling condition on judicial independence. In this regard, the leeway of the European Commission might be limited, although it can delay the decision with administrative measures. From a legal perspective, the 'horizontal enabling conditions' and the 'supermilestones' are unrelated. While budget commissioner Johannes Hanh might be right that, most likely, only the next European Commission will be in a position to close the Conditionality Regulation procedure with Hungary, it is highly unlikely that the freezing of all funding under the Cooperation Agreement can be maintained as long, including in the light of the Hungarian government's delivery on the four items related to judicial independence.

## The geopolitics of the protection of the rule of law in the EU

The changing attitudes of the Member States to sanctioning Hungary's non-compliance with EU law and values also had a fundamental, encouraging impact on the behaviour of the European Commission. While the lack of political support of the Member States previously had a paralyzing effect on the 'Guardian of the Treaties', as was clearly demonstrated, for example, by the suspension of the implementation of the Conditionality Regulation between January 2021 and April 2022, the emboldening effect on the Commission is now clearly recognizable. As a further remarkable example of support of the Member States, in April 2023, 15 EU Member States joined the European Commission before the Court of Justice of the EU (CJEU) against the Hungarian government in the case launched as a result of the country's controversial anti-LGBTQI law.<sup>14</sup>

Have the culminating impacts of thirteen years of autocratization finally convinced the EU Member States about the threats posed by the Hungarian regime and the need for joint action? Hardly. The straw that broke that camel's back in the political sense was primarily not the rule of law and corruption track record of Prime Minister Orbán's regime, but the country's geopolitical stance in the context of Russia's full-scale war against Ukraine.

Hungary's critical stance on EU sanctions against Russia and its repeated actions to delay or weaken the measures of the sanctions, the lack of military support for Ukraine, the country's still cordial diplomatic relations with Russia and taking aid packages to Ukraine, as well as the Sweden's accession to NATO (and previously also Finland's) hostage created the perception that is increasingly being shared by EU Member States that the state of affairs with the Hungarian regime is becoming unsustainable.

On the one hand, the widespread dissatisfaction with Hungary's pro-Russian stance and multivectoral foreign policy created the proper political will to address the country's grave rule of law track record in the European Union and the threats posed by the regime's methods of operating to the EU's financial interests. On the other hand, it was only made possible by Viktor Orbán's inability to readjust Hungary's foreign policy and geopolitical strategy to the new realities created by Russia's full-scale invasion against Ukraine in February 2022.

While the demonstrated political will to deploy measures of financial conditionality to better protect the EU's financial interests and the rule of law in the EU Member States

<sup>14</sup> Commission refers HUNGARY to the Court of Justice of the EU over violation of LGBTQI rights. European Commission. Press release (15 July 2022)

is obviously an important positive development, one should not be misguided by the underlying reasons. As demonstrated by the decreasing criticism of Poland because of the country's enormous support for Ukraine and its role of security provider on NATO's Eastern Flank, the main reason behind the changing approach of the Member States to Hungary is also not primarily rule of law related, but geopolitical.

It remains a hypothetical question as to whether a U-turn in Hungarian foreign policy on Ukraine could be rewarded by a less stringent approach to the regime's rule of law breaches by other EU Member States, as the Hungarian government appears to be fundamentally stuck in its old multivectoral foreign policy strategy. Nonetheless, while the increasing political will to address certain aspects of Hungary's autocratization at the level of the European Union should be welcomed, reflection is needed on the political dynamics that enabled this change.

As long as the positions of the Member States as to whether or not to protect the rule of law in the EU are determined by issues which are external to European values, such as geopolitics, the autocratization of such EU Member States as Hungary or Poland will also continue to pose a threat to the integrity of the EU's institutional and legal order.

# Orbán's Informal Power: The EU's growing assertiveness and overlooking of media capture



Edit Zgut-Przybylska

**Despite the EU's increased assertiveness in suspending EU funds to Hungary in response to Russia's invasion of Ukraine, it continues to show reluctance in addressing the issue of informal media capture through its legal and political instruments. Meanwhile, Viktor Orbán's regime has become more ideologically driven in negotiations with the EU.**

One of the absolute conditions of any type of democracy is that political power is not possessed and monopolized by one individual or a group. It has been 25 years since Viktor Orbán was first elected Prime Minister of Hungary and, although his party, Fidesz, spent eight years in opposition, it managed to monopolize the state and the market by 2023.

Orbán's name will go down in history as Hungary's longest-serving leader under whom democracy deteriorated the most within the European Union. Orbán's government is maintaining a conflict with the EU over the rule of law, which is delaying the disbursement of much-needed cohesion funds, despite the recent compromise. This is happening at a time of serious economic crisis, when fiscal and external deficits have widened substantially and inflation was skyrocketing in Hungary. Annual inflation rate hit 25%.<sup>15</sup>

<sup>15</sup> 'Hungary's inflation may peak at 25%-27% in first quarter, minister says', *Reuters* (15/12/2022), <https://www.reuters.com/markets/europe/hungarian-inflation-could-peak-jan-feb-25-27-yy-says-minister-2022-12-15/>, accessed on 1/07/2023.

Despite more than a decade of autocratization in Hungary, the EU decided to shift from dialogue to more enforcement-based action only after Fidesz won its 4th consecutive elections in April 2022. Triggering the Conditionality Regulation and withholding multiple financial transfers from Hungary marked a turning point in the rule of law dispute within the EU. It even pushed the Hungarian government to amend the judicial system in May 2023.

Fidesz now claims to have met all four of the so-called 27 super milestones intended to restore the independence of the judiciary set by the EU Council as a precondition for accessing frozen EU funds under the Recovery and Resilience Facility (RFF). While compliance with the super milestones under the reform is still a shortcoming, Orbán is not taking a risk domestically with the amendment of the judicial system. These reforms might formally meet the EU's expectations, but they do not interfere with the day-to-day operation of the regime.

### Informality cuts into the flesh of the legal system

The reason is that democratic backsliding in Hungary cannot be primarily defined by formal, legal means. Informal power is the linchpin of the regime where the government has frequently tilted the playing field in an uncoded manner. Therefore, Mr Orbán's family members, business and political alliances are taking advantage of companies, public procurements and investment opportunities for the benefit of the ruling elite. While the Council and the Commission are putting further pressure on Hungary to achieve the super milestones, the wealth of the companies run by the Prime Minister's father and son-in-law are about to exceed 100 billion HUF this year.<sup>16</sup>

This is not going to be solved by half-hearted judicial reform, or with formal amendments to the procurement system. The government promised to reduce the proportion of single-bidder tenders to below 15%. While this was taken as a significant step towards compliance, it will not reduce systemic corruption in Hungary. Mr Orbán's allies can still circumvent the authorities informally: fake bidders can simply show up to imitate 'competition' on the market and public procurement can once again end up with Lőrinc Mészáros, Orbán's childhood friend and billionaire.

Furthermore, forced buyouts and intimidations of business players have become even more prominent.<sup>17</sup> The most vulnerable are the retail and construction sectors, the banking and telecommunication sectors and, obviously, the media. Despite the fact that the Orbán's government has been traditionally generous to German investors, it

16 J. Zoltán, 'Hamarosan beléphet a százmilliárdos vagyonú klubba Orbán Viktor családja', *g7.hu* (2/06/2023), <https://g7.hu/kozelet/20230602/hamarosan-belephet-a-szazmilliardos-vagyonu-klubba-orban-viktor-csaladja/>, accessed on 1/07/2023.

17 J. Puhl, M. Sauna, 'Viktor Orbán Ups the Pressure on German Companies to Leave Hungary', *Spiegel* (31/03/2023)

started to put pressure on medium-size investors, such as Lidl and Aldi. There are also reports of hostile takeover attempts with respect to German investors in the construction sector, which has a seriously adverse impact on the functioning of the market and the rule of law. They employ extensive mafia methods, including intimidation tactics with Pegasus spyware, to dominate entire sectors by expropriating private property. However, the largest investors that contribute to 60% of Hungary's exports, such as Audi and Mercedes are still untouchable.

## Rewriting the rules has not gone out of fashion

Informal power is not the only way in which the Orbán regime is consolidating control of the state and society. The Orbán regime has put a great deal of emphasis on what Kim Lane Scheppele called authoritarian legalism: undermining constitutionalism while claiming the legitimacy of a democratic mandate to rewrite the rules. One of the latest was that the government changed the electoral rules once again.<sup>18</sup>

Firstly, Fidesz bundled the European Parliament elections together with the local elections in 2024. It put the opposition in a very difficult position, as they were supposed to employ two different strategies for the European Parliament and local elections – now they are forced to run together, which could undermine their chances of building an efficient election campaign.

Furthermore, they prohibited interim elections in the year before the election, and have stopped the dissolution of the local representative bodies during this period. The changes are especially bad for smaller, less entrenched, local civil platforms to compete because it will also be more difficult to collect enough signatures for nomination.

## Human rights restrictions

The scope of the Conditionality Regulation does not cover several political and human rights that have further deteriorated since the last elections. Driven by the worsening economic crisis, thousands of students, teachers and supporters have been marching for better working conditions for educators.

Political mobilization and bottom-up protest activity present the most dangerous threats to non-democratic regimes. Therefore, the Orbán government used repression to prevent certain social groups from participating in protest actions. It ran an intimidation campaign against teachers, many of whom have been dismissed from

18 'Megszavazta a választási törvény módosítását az Országgyűlés, Novák Katalin vétója is átment', *Infostart* (23/05/2023), <https://infostart.hu/belfold/2023/05/23/megszavazta-a-valasztasi-torveny-modositast-az-orszaggyules-novak-katalin-vetoja-is-atment>, accessed on 1/07/2023.

their jobs for being outspoken on this matter. Students have been tear-gassed in front of the prime minister's office while protesting against a draft law changing the employment status of teachers.

Another field where restriction prevailed is reproductive rights. In response to the far-right Mi Hazánk's demands to restrict abortion for years, the government passed a new decree to promote ultraconservative social values. Pregnant women seeking abortions in Hungary will now be required to listen to the foetal heartbeat before going ahead with an abortion. Doctors must also issue a report that records that the pregnant woman was presented 'with the factor indicating the functioning of foetal vital functions in a clearly identifiable manner.'

Issues related to the rights of refugees and asylum-seekers, academic freedom and the rights of LGBTQI+ people remain unresolved, while remedial measures taken to date remain unsatisfactory. Therefore, the fact that the Commission triggered an infringement procedure against the Hungarian anti-LGBTQI+ bill, claiming that it breaches fundamental rights by equating homosexuality with paedophilia is a significant development. This is an important precedent-setting case in which the Commission, supported by 15 Member States and the European Parliament is also basing its claim on Article 2, arguing that core EU values are being undermined by the discriminatory nature of Hungarian law.<sup>19</sup>

Since there is talk of the key ideological feature of the regime, the government will most probably not implement the three horizontal enabling conditions linked to academic freedom, the rights of migrants and the anti-LGBTIQ law. Orbán would rather challenge them in the EU court and separate them from the rest of the milestones than to give up on the ideological underpinning of his regime.

This also suggests that the Hungarian government is becoming increasingly ideological, less pragmatic and far less adaptive than it used to be during previous EU negotiations. This is prevailing at a time when the war has markedly changed the dynamics and balance of power in the EU Council; the Hungarian government was openly pushing a pro-Russian foreign policy and slowed down EU measures intended to support Ukraine. Furthermore, Hungary is the only EU Member State that, as at the end of June 2023, has still not ratified the Sweden's accession to NATO. This strategic behaviour, underpinned by threats of vetoes in the Council, has obviously played a key role in alienating the country's Central European allies.

19 See Jakub Jaraczewski's analysis in the Wiktor Osiatyński Archive's previous report *European Mechanisms for Safeguarding the Rule of Law and National Responses*.

## Media capture: the EU is still inactive

Although the Commission and the EU Council have become more assertive in withholding EU funds after Russia invaded Ukraine, they are still not taking any risks to confront informal media capture through their legal and political toolkit. Although the EU institutions were aware that the media freedom and pluralism crisis constitute a part of a broader rule-of-law backsliding in Europe, this has not contained or reversed the negative changes either in Hungary, or in other problematic countries such as Poland, Bulgaria or Greece.

Therefore, the Hungarian government, operating with informal power, is still benefiting from the *modus operandi* of integration. Public funds and state aid are being weaponized to boost the pro-Fidesz media empire centred around the Chancellery of the Prime Minister. Mouthpieces such as Megafon Center spend more public funds than the government on social media to copy Fidesz's narratives and attack the opposition.

Low-intensity coercion on various scales has also been applied to media stakeholders, who are independent of the government. One of the most notorious examples is Zoltán Varga, the owner of Central Media, the country's last remaining media empire that is independent of Fidesz. Not only was he under surveillance with Pegasus spyware in 2019, but he was also targeted by Hungary's tax authorities as a suspect in a criminal case. He also claimed that he has been facing various intimidation tactics from the Hungarian government to sell his business to oligarchs close to the prime minister.<sup>20</sup> According to the European Parliament's report, the overarching objective of the Hungarian government's abuse of Pegasus software was to gain further political and financial control over the public sphere and the media market as a whole.<sup>21</sup>

While this has been happening for a decade, the EU Commission launched only one EU law infringement procedure regarding media freedom and pluralism in June 2021. It addresses the Orbán government's action over the Media Council's decision to deny Klubrádió an extension of its licence, arguing that the decision was non-transparent, disproportionate and breached the European Electronic Communications Code. This was too little too late because the radio already lost its licence. The EU Commission – which has clear jurisdiction on competition law and state aid, two fields that were clearly breached by the Hungarian government – should have stepped up earlier and with more infringement procedures on this.

20 A. Nardelli, Z. Simon, 'Media Mogul Says He Faces Intimidation Tactics By Orban's Government, Bloomberg', 22 September 2020, <https://www.bloomberg.com/news/articles/2020-09-22/media-mogul-fears-the-squeeze-of-orban-s-grip?leadSource=uverify%20wall>.

21 Spyware: MEPs sound alarm on threat to democracy and demand reforms, European Parliament. Press release (8/05/2023), <https://www.europarl.europa.eu/news/en/press-room/20230505IPR84901/spyware-meps-sound-alarm-on-threat-to-democracy-and-demand-reforms>, accessed on 1/07/2023.

Furthermore, the EU should establish how to measure the democratic functionality of state authorities related to the media. For example, the Audiovisual Media Services Directive which regulates the functioning of media authority bodies in the Member States only focuses on formal requirements which are easy to meet despite media capture. The functioning of the Hungarian Media Council formally complies with the EU requirements, but it is seriously biased in practice. It always favours pro-government players in tendering for radio frequencies and the approval of media acquisitions. In April 2022, the National Media and Communication Authority announced that due to recurring irregularities, it would not extend the broadcasting licence for Tilos Rádió, an alternative independent radio station, which was to expire in early September. Although the radio indeed went off air in September, it reapplied in an open tender in the same month and managed to regain its frequency as the sole applicant.

The move from a previously cautious approach towards a more enforcement-based approach is insufficient if the EU is not addressing media capture. As the Hungarian prime minister's political director, Balázs Orbán, put it: 'Media is a strategic sector and a matter of sovereignty because, whoever controls the media of a country controls the mindset of that country and, through that, the country itself.'<sup>22</sup>

22 B. Barnóczki, 'Balázs Orbán: Whoever controls the media of a country controls the mindset of that country', *telex.hu*, 25/01/2023, <https://telex.hu/english/2023/01/25/balazs-orban-whoever-controls-the-media-of-a-country-controls-the-thinking-of-that-country>, accessed on 1/07/2023.

# The EU budget conditionality mechanisms have emphasized the areas Hungary and Poland must address



John Morijn

Unblocking of funds to Hungary and Poland could be as much of a surprise as the initial blockage under the mechanisms recently deployed by the EU.

**Anna Wójcik:** The procedure of political dialogue provided for in Article 7 of the Treaty on European Union started in 2017 against Poland and in 2018 against Hungary. Six hearings had taken place for those Member States by the end of May 2023. How do you envisage the potential outcomes for the ongoing Article 7 procedure against Poland and Hungary, considering the statements made by European Commission Vice-President Vera Jourova regarding the dialogue with both countries?

**John Morijn:** Change will not come out of the Article 7 TEU procedure alone.<sup>23</sup> The continuation of this procedure for Hungary and Poland is now mainly political and symbolic. Still, because of other developments, light is being shed on the extent and nature of the rule of law issues within both Member States.

Firstly, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) are developing their jurisprudence, shedding light on the extent and nature of violations of the rule of law in EU Member States.<sup>24</sup>

<sup>23</sup> See A. Södersten (2023), The Swedish Presidency in the Council of the European Union and the Article 7 Procedure of the Treaty on the European Union in: A. Wójcik (ed.) European mechanisms for safeguarding the rule of law and national responses, Warsaw: Osiatyński's Archive, p. 9.

<sup>24</sup> See M. Szwed (2023), The European Court of Human Rights and Cases Related to the Rule of Law Crisis in Poland in: A. Wójcik (ed.) European mechanisms for safeguarding the rule of law and national responses, Warsaw: Osiatyński's Archive, p. 31.

Secondly, it is crucial that the EU applies sanctions in accordance with the principle of conditionality and protection of the EU budget. This includes the activation of the conditionality mechanism against Hungary and the possibility to freeze cohesion funds for Hungary and Poland due to their failure to meet the horizontal fundamental criteria under the Charter of Fundamental Rights. The latter was made possible by the partnership agreements concluded between the EU and Hungary and Poland. It is clear what specific areas Hungary and Poland need to address with regard to the rule of law.

**The EU aims to protect its budget more effectively. You and Professor Kim Lane Scheppelle already argued in 2022 that the new conditionality regulation should be applied against Hungary. Indeed, €6.3bn has been frozen and later the entire funds, €22 billion. What should Hungary do to unlock this money and how is it progressing?**

Under this specific decision, Hungary needs to do two things: comply with a number of anti-corruption criteria and ensure reform of the governance of the so-called public trusts (essentially public assets placed under a type of control to avoid proper scrutiny). These foundations manage public assets but are effectively out of control.<sup>25</sup> There is very little progress on those aspects.

The Hungarian government has prioritised reforms to improve the independence of the judiciary, as more money can be unlocked than has been suspended under the conditionality mechanism once the four judicial milestones are met.

Funding from the Horizon and Erasmus+ programmes for 21 Hungarian universities has been frozen under the conditionality mechanism, due to the management of the universities in an opaque manner through public interest foundations. The six universities announced in May that they would challenge the decision to freeze these funds at the CJEU. This will lead to a very important ruling by the CJEU on the conditionality regulation.

Due to threats to academic freedom, 9% of cohesion funds were suspended for Hungary. This happened due to the non-fulfilment of the 'horizontal fundamental criteria' listed in the EU-Hungarian Partnership Agreement.

**Hungary adopted judicial reforms in May. How to assess them?**

My initial reaction would be to treat whatever is now being put forward by the Hungar-

<sup>25</sup> Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary', EC press release of 12 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>, accessed 1.07.2023.

ian government with the utmost caution. None of this has been put up for prior consultations as it should have been. Proposals were added about judicial independence at the last minute to an entirely unrelated bill. Furthermore, whenever new institutions are created or their functions amended, history has taught us to ask: who can control the membership of these institutions, who can amend these functions?

**Hungary does not participate in the European Public Prosecutor's Office (EPPO). OLAF is the only EU body that has the competence to investigate alleged fraud or corruption. Hungary promised to cooperate better with OLAF. Has this promise been fulfilled?**

The short answer here is 'no'.

**Furthermore, the EU has actually withheld all European funds for Hungary from the EU budget for 2021–2027 – at least an additional €16.2bn as a result of Hungary breaching the Charter of Fundamental Rights. Can these funds unblocked in the short to medium term?**

In fact, the governance of the Charter conditionality under the Common Provision Regulation<sup>26</sup> is very unclear. Its triggering, assessment, as well as the assessment of compliance all seem pretty bureaucratic and technocratic, without, for example, the European Parliament having much of a say. As far as we are aware, things are now still completely blocked. But with the current governance of this instrument, the unblocking of funds could be as much of a surprise as the initial blockage under this route.

**How much progress has the Hungarian government made in fulfilling the 27 'super milestones' required to unlock the frozen €5.8bn in grants from the Recovery and Resilience Facility, which can be requested until 2026?**

The milestones, as 'super' milestones, means they all need to be met first before any money flows. They apply to judicial independence and anticorruption measures. 17 of these conditions are listed in the conditionality mechanism.

The commission has not made any final decisions on what Hungary has put forward on both fronts. There is every reason to be sceptical about their true nature and intention. So far, the impression is that they are attempts to unlock cash without changing the underlying problems that cause a direct threat to the EU's sound financial management

26 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and the financial rules for these Funds and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Financial Support Facility for Border Management and Visa Policy.

**Hungary will hold the rotating presidency in the Council of the EU in the second half of 2024, succeeded by Poland in 2025. The Meijer's Committee, an independent group of experts that researches and advises on European law, proposed that the order of presidency should be changed.<sup>27</sup> How realistic could that be?**

It is really too early to tell. There is now a widely-supported resolution of the European Parliament, which puts pressure on both the Commission and the Member States.<sup>28</sup> In my opinion, it is likely that at least guarantees will need to be made so that the Hungarian and Polish governments, if the latter still consists of PiS in 2025, cannot undermine the way the Council is run as it should in accordance with the Council's own guidelines. Now that it has been put on the agenda, I don't see how things can be put into motion presidency-wise without any change at all.

27 Meijer's Committee, 'Comment on the exercise and order of the Presidency of the Council of the EU', May 2023, <https://www.commissie-meijers.nl/wp-content/uploads/2023/05/230519-Meijers-Committee-comment-on-the-EU-Presidency-.pdf>, accessed on 1/07/2023.

28 European Parliament resolution on the breaches of the Rule of Law and fundamental rights in Hungary and frozen EU funds (2023/2691(RSP)).



# The rule of law conditionality mechanism and the challenges of vulnerable solidarity

Maciej Krogel

**The conditionality mechanism applies to both the rule of law and the European Union principle of solidarity. However, it exposes the latter to the (ir)responsibility of the Member States.**

Transfers from the European Union budget are meant to serve beneficiaries within the Member States: individuals, companies, organizations, regions and groups of people. Resources, such as the Cohesion Fund or the post-Covid Recovery and Resilience Facility, contribute to fair and equal development throughout the Union. The Regulation introducing the rule of law conditionality mechanism<sup>29</sup> makes the transfers dependent on whether national authorities respect the rule of law. Article 2 of the Treaty on European Union (TEU) enshrines both the rule of law and the principle of solidarity. The case of conditionality shows that the relationship between the two is quite complex and multifaceted.

This contribution first explains how the conditionality mechanism implements the content of Article 2 TEU. Next, it critically examines how the Regulation aims to protect beneficiaries. The final part relies on the notion of solidarity in the EU legal order and scrutinizes the requirement of the conditionality regarding the responsible use of Union funds.

## The rule of law and solidarity in the conditionality mechanism

<sup>29</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget.

In its preamble, the Regulation declares that Member States must respect the rule of law in order to uphold sound management of the EU budget. They must therefore uphold, among other things, the principle of legality, effective review by an independent and impartial judiciary, as well as effective prosecution, investigation and sanctioning of breaches of the law (recitals 7–10 of the preamble, Article 3 of the Regulation).

Even though the Regulation states that there is no hierarchy of common values, it also adds that ‘respect for the rule of law is essential for the protection’ of the other values (recital 6 of the preamble). Taking also account of the Regulation’s broad definition of the rule of law, which encompasses some aspects of the other values and principles from Article 2, the Regulation actually gives us a kind of ‘soft’ hierarchy of values, with the rule of law being in a prime position.

In the decisions following Hungary’s and Poland’s actions against the Regulation, the Court declared that the EU budget gives practical effect to the principle of solidarity as contained in Article 2 TEU.<sup>30</sup> The consequence of this statement is that the EU budget may itself be regarded as a substantive concretization of Article 2, instead of just being protected by the common value of the rule of law. We would then have two different aspects of the common EU axiology in play, and perhaps even in tension. On the one hand, the EU budget which implements the principle of solidarity and, on the other, the rules protecting the budget and therefore implementing the rule of law.

The Court further referred to the mutual trust nexus between these two aspects of values. Cooperation between Member States builds on presumption and trust that each of them complies with the rule of law. In the same vein, according to the Court, the implementation of solidarity through the EU budget builds ‘on mutual trust between the Member States in the responsible use of the common resources contained in that budget.’<sup>31</sup> It is therefore clear that, as both Advocate General Campos Sánchez-Bordona and the commentators noted, EU budgetary conditionality ties the principle of solidarity to responsibility of the Member States.<sup>32</sup>

## The conditionality mechanism and rights of the beneficiaries of EU funds

The adoption of the conditionality measures entails financial consequences for the na-

30 CJEU, judgment of 16 February 2022, Case C-56/21, *Hungary v European Parliament and Council of the European Union*, paragraph 129; CJEU, judgment of 16 February 2022, Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, paragraph 147.

31 Ibid.

32 Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21 *Hungary v European Parliament and Council of the European Union*, paragraph 110; Alberto de Gregorio Merino, ‘The Recovery Plan: Solidarity and the living constitution’, *EULawLive Weekend Edition*, 6 March 2021, No. 50, 2–12.

tionals of the given Member State. People and entities who should benefit from the EU budget are vulnerable to the withholding of funds. In response to this pivotal problem of conditionality, the regulation contains some rules on the protection of the legitimate interests of beneficiaries against the effects of the measures imposed on their Member State. The Commission's guidelines to the regulation specify that, in principle, the mechanism shall protect 'the pre-existing obligations' of a legal nature of the Member States with respect to the beneficiaries.<sup>33</sup>

The preamble of the regulation states that, at the stage of considering the adoption of measures against a Member State, the Commission should take account of their potential impact on beneficiaries (recital 19). From the point of view of transparency and communication with citizens, it is desirable that the Commission discloses and explains how it estimates this impact.

However, in its proposal to the Council regarding the measures addressing Hungary, the Commission did not explicitly communicate such estimation.<sup>34</sup> In turn, the Council stated that the selected measures satisfy the principle of proportionality, as they do not prevent Hungary from launching due payments, they leave time for adjusting to the conditionality requirements and keep the interests of the beneficiaries intact.<sup>35</sup> This conclusion, however, remains controversial because of the complexity and sensitivity of the areas benefitting from the withheld EU funds.<sup>36</sup>

It seems somewhat paradoxical to entrust the Member States with the protection of beneficiaries, if the same Member States are being sanctioned for failing to protect the funds through the rule of law. Yet the Regulation explicitly prohibits national authorities from justifying their failure to transfer funds to beneficiaries by relying on the measures adopted under the mechanism. In this sense, conditionality is not a legitimate reason for a Member State to discontinue making payments to its nationals.

To secure the interests of beneficiaries, 'the Commission shall do its utmost to ensure' that a Member State makes due payments, even potentially launching an infringe-

33 Communication from the Commission: Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget 2022/C 123/02, paragraphs 87, 89–90.

34 Commission Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 485 final.

35 Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, recital 61.

36 Olga Ceran, Ylenia Guerra, 'The Council's Conditionality Decision as a Violation of Academic Freedom?', *Verfassungsblog* 28/03/2023.

ment procedure.<sup>37</sup> Furthermore, the Regulation explicitly makes the Member States accountable to the Commission on this, through regular and detailed reporting, verification and necessary measures.

However, according to the guidelines, individuals should first file a complaint with their national authorities, and only then rely on the Commission's intervention. If individuals want to complain to the Commission about non-payment by their Member States, they should specify the basis for their right to payment, the breach of this right and their prior legal actions before the national authorities.

In addition, the Regulation grants beneficiaries the right to receive information from the Commission on the obligations of the Member States and on the ways in which people can report the direct breaches. An official website contains information on the conditionality mechanism for citizens, as well as a complaint form through which people can confidentially report on given issues.<sup>38</sup>

## Responsibility and the many dimensions of solidarity

In many cases, failure to protect EU funds with the shield of the rule of law makes budget solidarity ineffective. The gains of many potential beneficiaries will actually be affected if their national authorities defraud, misuse or put public EU money at risk. Responsible management is therefore to some extent always necessary to make sense of solidarity through the budget.

But solidarity itself is a multidimensional principle of EU law. It is applicable 'between Member States, between institutions, between peoples or generations and between Member States and third countries', as well as between the EU supranational level and Member States.<sup>39</sup> In this regard, as Marco Fisicaro notes, rule of law conditionality may result in a reductive application of solidarity, i.e. mainly in its inter-institutional aspect.<sup>40</sup> At the same time EU funds – in particular the Recovery Fund – affect multiple types of relations. Money for healthcare, childcare, education and green technologies, apply to intergenerational solidarity.<sup>41</sup> Financial aid for competition and for the just transformation actually implements solidarity outside the remit of state governance, namely solidarity between peoples, between individuals and between their groups and organizations. Even solidarity between Member States and third countries is relevant

37 Communication from the Commission: Guidelines on the application of the Regulation, paragraph 97.

38 Ibid., paragraph 92. See: [https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en](https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en)

39 Opinion of Advocate General Campos Sánchez-Bordona delivered on 18 March 2021 in Case C-848/19 P, *Federal Republic of Germany v Republic of Poland*, European Commission, paragraph 60.

40 Marco Fisicaro, *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, European Papers Vol. 4, 2019, No 3, p. 719.

41 Marco Fisicaro provides another example of intergenerational green solidarity through EU funds in: Ibid.

when talking about the Recovery Fund. This is the case, for instance, with regard to the Ukrainian refugees who are benefiting from resources, aid and opportunities in the host Member States.

The demand for symmetry of responsibility and solidarity is obvious when in present-day relations between Hungary or Poland on the one hand and the other Member States and EU institutions on the other. It does not seem controversial to argue that transferring EU funds to a recipient state, and protecting them by upholding the rule of law in that very state, represent the two sides of mutual loyalty. Nonetheless, the notion of responsibility becomes troublesome when thinking of solidarity in terms of its long-term effects, multiplicity of the players involved, and relationships which are not directly related to a state. According to the principles of the EU legal order, Union peoples, citizens and their groups are fully-fledged agents of solidarity. But their agency still remains disabled, and their loyalties are ineffective if they depend on whether or not the Member States satisfy the criteria or responsibility.

# What can non-governmental organizations do within EU procedures for safeguarding the rule of law?



Barbara Grabowska-Moroz

**In addition to the governments of the Member States and the European Union institutions, the most important players in the ‘rule of law field’ include civil society organizations and initiatives. But what real opportunities do they have to participate in EU rule of law procedures?**

The process of erosion of democracy and the rule of law which is in progress in many European Union (EU) Member States has led to the involvement of the EU institutions in the process of protecting the values on which the EU – in the light of the Treaties – is built. Various procedures have been created, initiated and pursued to respond to threats to the rule of law taking place at national level.

Although the main decisions are made by the EU institutions, such as the European Commission or the Court of Justice of the EU, with the participation of the Member States (acting individually or in the EU Council and the European Council), the number of stakeholders in the process is much larger.

The rule of law crisis has highlighted that the rule of law is a value of practical importance,<sup>42</sup> and is not just a theoretical concept. Important players in the ‘rule of law field’ are NGOs. How they can participate in the decision-making process at EU level is determined by EU procedures. They do not necessarily create an environment that is conducive to the participation of civil society organizations and

42 See L. Pech, ‘The Rule of Law as a well-established and well-defined principle of EU law’ *Hague Journal on the Rule of Law*, 14(2-3) (2022), pp. 107–138.

initiatives in the rule of law process.

## NGOs and EU law

The Treaty on European Union provides that every citizen has the right to participate in the democratic life of the Union and that decisions in the EU are to be made as openly and as closely as possible to the citizen.

The Treaty requires EU institutions to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. It also obliges the EU institutions to maintain an open, transparent and regular dialogue with representative associations and civil society. In particular, the European Commission has been obliged to extensively consult stakeholders.

Such legal and programmatic assumptions are particularly relevant in the context of the erosion of democracy and the rule of law, which has been progressing intensively in the EU Member States in recent years. One of its effects is the shrinking space for civil society (e.g. through the introduction of the 'foreign agents' law in Hungary, which stigmatizes organizations receiving foreign funding). As a result, access to decision-making and national control mechanisms at the level of EU Member States is restricted, for example by a lack of consultation, the seizure of control over the judiciary and other democratic institutions, or hijacked by ruling groups and their supporters.

As a consequence, much of the discussion about the state of democracy and human rights in EU Member States undergoing democratic erosion has moved to the international level, including the European level, including at the level of the EU, the Council of Europe or the judgments of the European Court of Human Rights.

What place do and can civil society organizations and initiatives have in these fora?

Civil society here applies to both formalized organizations and informal, grassroots social movements which are independent of politics and business and, primarily, are not an 'extension' of the ruling party under the guise of an organization or social movement. What legitimacy do they have that justifies their participation in rule of law procedures in EU Member States?

From an EU point of view, the main advantage of NGOs and civil society initiatives is that they are very familiar with the local, national context. This enables them to be an important source of information for supranational bodies, including the EU.

## What NGOs can do under EU rule of law procedures

In the EU legal system, there are procedures which directly and indirectly apply to the protection of the fundamental values of the EU. Among these, procedures conducted by political bodies can be distinguished from those of a judicial nature.

In political procedures, decisions are made by bodies consisting of politicians (the Commission, EU Council or European Council). They are often of a non-binding nature – they belong to ‘soft law’. They are primarily based on dialogue between EU bodies and governments of Member States. In judicial procedures, decisions are made by the Court of Justice of the EU and are based entirely on the provisions of the EU Treaties.

## Political mechanisms for the protection of the rule of law

The EU institutions are reacting to the undemocratic trends, processes and phenomena in Hungary and Poland in a manner that is not entirely consistent, as pointed out by other authors of this study. Undoubtedly, however, there is a platform in the EU for discussion on the rule of law in Member States.

The main tool for protecting EU values provided by the EU Treaty is the procedure under Article 7 of the EU Treaty. It presupposes a dialogue between Member States regarding a possible threat to EU values in one of those countries. This procedure has been referred to as the ‘nuclear option’. However, in the case of Hungary and Poland, it proved to be a misfire. More than five years after its launch, no binding decisions have been reached with regard to Poland, nor has the Polish government been induced to refrain from breaching the rule of law, while the crisis is only getting worse.

The Polish government took the position from the very beginning that the changes to the judiciary and, more broadly, the justice administration, which have been introduced since 2015, are in line with EU law. Prime Minister Mateusz Morawiecki presented a so-called White Paper on the reform of the judiciary in Poland in 2018. Its addressee was to be the Council, i.e. the governments of the Member States.

In such conditions, non-governmental organizations dealing with changes introduced in the judiciary had no platform to argue against the theses presented by the government. The Association of Polish Judges ‘Iustitia’ drafted a response to the White Paper<sup>43</sup> and addressed it to the Member States. However, it is not known whether it has

43 Reply of the Iustitia Association to the White Paper on Reforms of the Polish Judiciary presented by the Government of the Republic of Poland to the European Commission (2018), [https://www.iustitia.pl/images/pliki/response\\_to\\_the\\_white\\_paper.pdf](https://www.iustitia.pl/images/pliki/response_to_the_white_paper.pdf), accessed on 11/07/2023.

become the subject of discussion under the procedure of Article 7 of the EU Treaty. In this procedure, Member States assess another Member State on a *peer review* basis, in the form of a debate at ministerial level, which is closed to the public. Access to the documents is limited and usually delayed. This makes the Article 7 procedure of the EU Treaty non-transparent, which, in turn, affects the ability of the media or civil society to monitor it on an ongoing basis.

A partial response to the shortcomings and limitations of the Article 7 TEU procedure is the so-called **rule of law framework (rule of law framework)** established by the European Commission in 2014. This procedure is seen as a step before the formal launch of the Article 7 TEU-based treaty procedure. The rule of law framework provides an opportunity for players other than Member State governments to participate in the rule of law debate as well. Examples include the Venice Commission (the Council of Europe's European Commission for Democracy through Law), judicial councils and NGOs.

The procedure has only been initiated once to date – in 2016 against Poland. It was conducted for almost 2 years, until the end of 2017, when a decision was made to initiate the Article 7 TEU procedure. At that time, the rule of law framework was considered to have exhausted the possibility of resolving the rule of law problems in Poland. However, at no stage of the procedure did the European Commission involve NGOs in the ongoing discussion on the state of the rule of law in Poland. As a result, the procedure differed little from the subsequent Article 7 TEU procedure conducted in the Council of the EU. However, the transparency of the rule of law framework itself was at a much higher level – the opinions and recommendations of the European Commission describing legislative changes in great detail were publicly available.<sup>44</sup>

In response to the establishment of the rule of law framework the Council, namely the EU Heads of Government and Heads of State, initiated an annual **debate on the rule of law**, which, like Article 7 TEU, takes place between states.<sup>45</sup> NGOs do not have any chance of participating in this discussion. In previous years, it took the form of a general discussion on a specific issue (e.g. media freedom). However, since Germany took over the Presidency of the Council in 2020, the discussions have involved a group of Member States partly based on the **Commission's annual rule of law reports**. As the Council itself points out, this discussion takes the form of a 'structured, informal, open and constructive political dialogue'. From the point of view of civil society, in practice, the informal nature of this dialogue limits its transparency. This, combined with the lack of binding decisions on the state of the rule of law, makes this dialogue an ineffective

44 Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, C/2016/5703.

45 See R. Coman, *The Rule of Law Debate in the Council: Weak Consensus and Impossible Deliberation and Persuasion in Times of Dissensus and Contestation*. In *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges* (pp. 171–194). Cham: Springer International Publishing (2022).

tool for protecting and strengthening the rule of law in EU countries.

The European Parliament is also a political player involved in discussions on the state of the rule of law in the EU. In 2018, the European Parliament decided, among other things, to initiate Article 7 TEU proceedings against Hungary. This decision was preceded by several **hearings** with rule of law players, including NGOs. Such hearings provide a platform to present and gather information that can then be taken into account in the European Parliament's committee reports and resolutions. Such hearings are organized on many occasions by the political groups which are in the EP and therefore, as it were, alongside the official procedures conducted by the EP's committees.

## Legal mechanisms

One of the most important competences of the European Commission to ensure that EU law is respected is the possibility of initiating legal proceedings against a Member State for possible breaches of EU law (the so-called **infringement procedure** under Article 258 of the Treaty on the Functioning of the EU).

The procedure consists of two stages – the first is handled by the Commission. In the second, the case is referred to the EU Court of Justice. In the first stage, the Commission seeks to communicate with the Member State, demonstrate a possible breach of EU law and persuade the Member State's government to rectify this. The formal elements of this procedure (including a *letter of formal notice* initiating the procedure) are accompanied by less formal methods based on discussion and negotiation with the Member State.

At this stage, the European Commission should gather as much information as possible to verify possible allegations. NGOs with information and knowledge about whether EU law is actually being breached in a Member State can play an important role. However, the participation of NGOs in this procedure is not regulated – apart from the general rules on transparent lobbying, which apply, for instance, to meetings with EU Commissioners. In 2018, Polish associations of judges reported on meetings with Commissioner Frans Timmermans about changes in the judiciary in Poland.<sup>46</sup>

Any individual and non-governmental organization may submit a formal petition to the European Commission on a possible breach of EU law by a national law or practice. Such a petition can lead to the initiation of infringement proceedings if the information contained in it is confirmed. This special complaint procedure was cre-

<sup>46</sup> 'Timmermans discussed the situation in Poland with representatives of the Iustitia organization' *Dziennik Gazeta Prawna*, 7/05/2018, <https://www.gazetaprawna.pl/wiadomosci/artykuly/1121855.timmermans-rozmawial-o-sytuacji-w-polsce-z-przedstawicielami-organizacji-iustitia.html>, accessed on 1/07/2023.

ated for environmental cases. Such a complaint regarding the Białowieża Primeval Forest was filed in 2016 by ClientEarth, Dzika Polska, Greenmind, Greenpeace Polska, Ogólnopolskie Towarzystwo Ochrony Ptaków, Pracownia na rzecz Wszystkich Istot and WWF Polska.<sup>47</sup>

Information on the Commission's proceedings is usually limited to the announcement of the opening of proceedings, the charges formulated and the decisions made, e.g. to refer the case to the CJEU. By contrast, it is difficult to find information on what the proceedings themselves are like and how information is gathered, as well as what meetings have been held with representatives of the Member State or NGOs.

If political procedures do not produce any binding solutions, the involvement of the EU courts seems inevitable. So far, issues regarding the rule of law have been dealt with in **three judicial procedures**, with the CJEU making the final decisions:

- infringement proceedings  
(Article 258 of the Treaty on the Functioning of the EU),
- proceedings on questions referred for a preliminary ruling  
(Article 267 of the Treaty on the Functioning of the EU)
- proceedings for the annulment of an EU Act  
(Article of the Treaty on the Functioning of the U).

None of these proceedings involves the institution of *an amicus curiae* – an opinion expressed by a third party not directly affected by the proceedings but able to provide information that is relevant to the subject matter of the case being examined.

Possible participation in national proceedings may make an NGO a participant in proceedings before the CJEU if a national court refers a question to the Court for a preliminary ruling. Unfortunately, the level of transparency of proceedings before the CJEU leaves much to be desired. Hearings have only recently been streamed online. Most pleadings, with the exception of requests for preliminary questions) are also not available online.

Associations of judges from Portugal, Romania and Malta have initiated a number of proceedings on judicial independence before national courts. These then went to the CJEU under the preliminary question procedure. In August 2022, four international as-

<sup>47</sup> 'Complaint to the European Commission concerning alleged breach of Union law over logging Białowieża forest', *Client Earth*, 19/04/2016, <https://www.clientearth.org/latest/documents/complaint-to-the-european-commission-concerning-alleged-breach-of-union-law-over-logging-bialowieza-forest/>, accessed on 1/07/2023

sociations of judges initiated proceedings to annul the milestones in the Polish National Recovery and Reconstruction Plan, negotiated by the European Commission with the Polish government and approved by the EU Council.<sup>48</sup> The associations argue that neither the milestones nor the EU Council's decision to unblock funds for Poland implement the judgments of the CJEU and on the independence of judges in Poland.<sup>49</sup>

## Procedures for monitoring the rule of law

Regardless of developments at the political and legal level before the CJEU, procedures are in place in the EU to expertly monitor issues related to the EU's core values. The European Commission has been preparing **annual reports on the rule of law** in all EU countries since 2020. As part of their preparation, consultations are held in which NGOs regularly participate. They submit written comments. However, the conclusions contained in the rule of law reports are rarely translated into decisions in counter-insurgency proceedings. They do, however, allow the situation regarding the rule of law in all 27 EU countries to be presented and compared. They help identify the most important challenges that are common to the Member States in this regard. Of all the mechanisms available in the EU, NGOs have the best access precisely to the annual rule of law report procedure. But they no longer have any influence on any decisions regarding the implementation of the conclusions and recommendations in the reports.

The European Commission also coordinates the annual Justice Scoreboard report, which collects and presents data on the quality, including efficiency and independence, of judicial systems in the Member States. As the European Commission points out, the objective of this tool is to help Member States improve the efficiency of their national justice systems by providing objective, reliable and comparable data.

## Civil society's influence on EU procedures: the easiest ways to participate

EU political procedures to protect the rule of law in the EU are primarily framed as a debate between governments. They tend to be non-transparent and do not provide platforms for civil society to participate in the debate. Civil society organizations and initiatives have the greatest access to the consultation procedure for the annual rule of law reports in all EU countries and to the hearing organized in the

48 'NextGenerationEU: ministers approve the assessment of Poland's national plan by the European Commission', Council of the EU. Press release. 17/06/2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/06/17/recovery-fund-ministers-welcome-assessment-of-poland-s-national-plan/>, accessed on 1/07/2023.

49 'Four European organizations of judges sue EU Council for disregarding EU Court's judgments on decision to unblock funds to Poland', Press release, 28/08/2022, <https://www.aej.org/media/files/2022-08-29-86-Poland%20Action%20for%20anulment%20EU%20Council%20PRESS%20RELEASE-%20EN%20-%20to%20circulate.pdf>.

European Parliament. However, these procedures do not directly result in binding decisions with respect to the Member States. Unfortunately, social organizations do not have the opportunity to participate extensively in procedures before the Court of Justice of the EU.

Civil society organizations and initiatives do not have easy access to decision-making processes regarding protection and enactment of the EU's fundamental values – on neither the political nor the judicial track.

What is left for them? One solution to the difficulty of accessing EU bodies is networking – working in partnership with other organizations that have experience and resources in contacting these EU bodies.

Polish NGOs often use these paths. In any case, this primarily requires appropriate human resources – experts who are able to collect relevant information and present it to the EU bodies. However, there is no guarantee that these EU institutions will make use of this information and make decisions based on it.

From a practical point of view, the 'presence' of NGOs at European level requires networking within wider NGO networks. Networking is an opportunity to strengthen the voices of civil society organizations and initiatives from Poland in Brussels. This is an important task and, as an appropriate response by the EU institutions to threats to EU values in the Member States primarily requires precise, up-to-date information.

# Independence of prosecutors: EU law to the rescue



Patryk Wachowiec

**While EU law provides mechanisms for safeguarding judges encompassing various aspects of the judiciary, there is a lack of similar protection for prosecutors. Nevertheless, recent CJEU case law suggests that Member States are obliged to ensure the independence of prosecutors under Union law.**

## Much about judges...

EU law provides extensive protection for judges of Member States. The Court of Justice of the European Union (CJEU) has progressively increased this protection to various aspects of national judicial systems, including their structure, the status of judges, and conditions of their work.

This protection was strongly confirmed in the CJEU's judgment in the case of Portuguese judges. According to the CJEU, the principle of effective judicial protection, as stated in the second subparagraph of Article 19(1) TEU, is fundamental to the rule of law, a core value of the Union (Article 2 TEU).<sup>50</sup> Therefore, Member States must ensure effective judicial protection in fields covered by EU law, which means that all national courts interpreting or applying Union law must adhere to the requirements of the EU legal order.<sup>51</sup> These requirements are primarily outlined in Article 47 of the Charter of Fundamental Rights, guaranteeing the right to a fair and public hearing by an independent and impartial tribunal established by law.

The obligation for national courts to uphold these guarantees extends beyond spe-

<sup>50</sup> Judgment of 27 February 2018, C-64/16, para 32–36.

<sup>51</sup> C-64/16, para 37.

cific cases falling within the scope of EU law, such as cases regarding environmental protection, consumer rights and VAT. It applies to all national courts that could potentially<sup>52</sup> interpret or apply Union law, including constitutional tribunals. Even seemingly ‘domestic’ cases may involve Union law, necessitating the application of effective judicial protection. Consequently, judges serving in national courts are also entitled to these guarantees.<sup>53</sup>

The saga of the Portuguese judges and subsequent CJEU judgments confirm that the second subparagraph of Article 19(1) TEU is the primary source of protection for judges at EU level. Recent case law clarifies the requirements for effective judicial protection regarding the appointment,<sup>54</sup> retirement,<sup>55</sup> salaries,<sup>56</sup> transfer or secondment of judges between courts,<sup>57</sup> as well as disciplinary, criminal and civil liability.<sup>58</sup>

The CJEU establishes minimum standards in these areas because of the potential risks to judicial independence, political interference in judicial decisions and the erosion of public trust in courts. As a result, the protection of judges under EU law is comprehensive, covering all elements of the national judiciary.

### ... little about prosecutors

The protection of prosecutors in the EU legal order has received less attention than the protection of judges. However, it is important to recognize that the independence of prosecutors is essential for upholding the rule of law and ensuring equal treatment before the law for everyone.<sup>59</sup> When prosecutors are not independent of the political authorities, it can result in unjust persecution of certain individuals while allowing others suspected of committing crimes to go unpunished.

From a political point of view, gaining control over the prosecutor’s office may be more appealing than politicizing the judiciary. Undermining judicial independence is more visible and likely to face significant public opposition. In contrast, capturing the prosecutor’s office can achieve similar effects of targeting political opponents and protecting allies at a lower cost.<sup>60</sup> Recent years have shown the severe consequences faced by

52 Judgment of 16 November 2021, from C-748/19 to C-754/19, para 64.

53 Order of 2 July 2020, C-256/19, para 38.

54 Judgment of 19 November 2019, C-585/18, C-624/18, C-625/18, para 134–139.

55 Judgment of 24 June 2019, C-619/18, para 110.

56 Judgment of 7 February 2019, C-49/18, para 66.

57 Judgments of 6 October 2021, C-487/19, para 117; of 16 November 2021, from C-748/19 to C-754/19, para 71

58 Judgment of 18 May 2021, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, paras 198 and 229.

59 J. Gutmann, S. Voigt, ‘The Independence of Prosecutors and Government Accountability’, *ILE Working Paper Series* 2017, No. 8, <http://hdl.handle.net/10419/169353>, p. 2.

60 S. Voigt, A. J. Wulf, ‘What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence’, *Journal of Institutional Economics* 2019, Vol. 15(1), pp. 104–105.

Polish prosecutors who resist political interference, including disciplinary proceedings, punitive transfers and demotions.

When looking for EU sources of protection of the independence of prosecutors, it is worth noting three regulations that provide strong grounds for assuming the existence of such guarantees:

- Article 325(1) TFEU, which provides for the obligation of Member States to effectively combat illegal activities affecting the Union's financial interests;
- Directive 2014/41 on the European Investigation Order;
- the second subparagraph of Article 19(1) TEU and the principle of effective judicial protection arising from it.

A line of reasoning may be presented for each of these regulations on the basis of the existing case law of the CJEU and other sources, which would enable independence to be guaranteed for prosecutors under EU law.

## **A. Combating infringements of the Union's financial interests**

The principle of sincere cooperation, as stated in Article 4(3) TEU, includes the obligation for Member States to effectively apply EU law on their territory and not undermine the Union's objectives. This principle entails the need for appropriate sanctions and effective prosecution of breaches of EU law.<sup>61</sup>

Protecting the Union's financial interests is one of its objectives<sup>62</sup> reflected in Article 325(1) TFEU. This provision requires Member States to counter fraud and other illegal activities affecting the Union's financial interests. It is a specific obligation inferred from the principle of sincere cooperation and necessitates the implementation of measures that have a deterrent effect and ensure effective protection.

Analogies can be drawn between this regulation and Article 19(1) TEU. The CJEU has emphasized that Article 325(1) TFEU also obliges Member States to achieve a specific outcome, namely the adoption of genuinely deterrent and effective measures for safeguarding the Union's financial interests.<sup>63</sup>

<sup>61</sup> Judgment of 21 September 1989, 68/88, para 23–25.

<sup>62</sup> Judgment of 18 November 1999, C-209/97, para 29.

<sup>63</sup> Judgment of 5 June 2018, C-612/15, para 64.

Article 325(1) TFEU requires Member States to combat all illegal activities that can affect the Union's financial resources. This includes various prohibited acts such as corruption, tax offences, fraud and misconduct. The CJEU has emphasized that the risk of harming the Union's financial interests can arise at any level and involve multiple entities,<sup>64</sup> regardless of whether actual harm has taken place.<sup>65</sup>

While Member States have the freedom to choose the types of sanctions, EU law acknowledges that criminal measures can be effective, especially for serious infringements.<sup>66</sup> Some EU regulations even require specific acts to be established as crimes with minimum penalties.<sup>67</sup> The CJEU has also addressed the importance of provisions from national criminal procedures to safeguard the EU's financial interests.<sup>68</sup>

The CJEU checks the effectiveness of national provisions on the basis of their ability to combat actions that are detrimental to the Union's financial interests. This includes examining whether they pose a systemic risk of impunity<sup>69</sup> and enable the recovery of funds that contribute to the Union's budget revenue.<sup>70</sup> The CJEU also considers the adequacy of limitation periods and the remedies available during investigations, as well as the execution of sentences.

According to the CJEU's case law, Member States are required to adjust their criminal and procedural provisions to protect the Union's financial interests. It is therefore suggested that this obligation extends to the organization of the prosecution service, the status of prosecutors and the conditions of their work. Several requirements mentioned above support this conclusion, including the need to combat illegal actions targeted against the Union's financial interests including, the obligation to achieve a specific outcome through deterrent and effective measures, the lack of requirement for actual harm to those interests and the need to eliminate systemic risks of impunity.

Merely having a list of offences and penalties or provisions of criminal procedures that comply with EU law may not be sufficient to adequately protect the Union's financial interests. The effectiveness of prosecution relies on an equal response to all offences, regardless of the status of the individuals involved. Flaws in the organization of the prosecution service can lead to selective responses, inade-

64 Judgment of 10 July 2003, C-11/00, para 104.

65 See, to that effect, judgment of 18 October 2007, C-19/05, para 35.

66 Judgment of 8 September 2015, C-105/14, para 39.

67 See Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (OJ C 316/49 of 27.11.1995, p. 57).

68 Judgment of 17 January 2019, C-310/16, para 29.

69 Judgment of 2 May 2018, C-574/15, para 65.

70 Judgments of 8 March 2022, C-213/19, para 211 and 1 October 2020, C-603/19, para 56.

quate deterrence or repression of innocent parties, which would result in abuses and systemic impunity. Therefore, the requirements of Article 325(1) TFEU encompass not only the provisions of substantive and procedural criminal law but also the organization of the prosecution service and the performance of official duties by prosecutors.

Just as the organization of the national judiciary, the exclusive competences of the Member States should be aligned with EU law with regard to the shape of the prosecution service and the determination of the conditions for prosecutors to hold office.

## B. European Investigation Order

Directive 2014/41 on the European Investigation Order (EIO)<sup>71</sup> serves as another means of protecting the independence of prosecutors. It allows certain national authorities to obtain evidence for ongoing or future criminal proceedings from other Member States.

The directive identifies two groups of authorities allowed to issue EIOs:

1. judges, courts, investigating judges, or prosecutors directly involved in the case, as well as
2. other authorities performing investigative functions in criminal proceedings.

In the case of the second group, which can include police, fiscal, or customs authorities, the EIO must be subsequently approved by the authorities specified in the first group. The approval involves the examination of the legality and necessity of the requested actions and the consideration of the suspect's or accused's rights, such as the right to a defence and the presumption of innocence. Essentially, an EIO that is also a 'judicial decision' must be issued or verified by a judge, court, investigating judge or competent prosecutor.

The distinction between these groups issuing and approving EIOs serves the purpose of 'judicializing' the procedure,<sup>72</sup> maintaining mutual trust between Member States and their judicial authorities and avoiding government intervention. The CJEU has clarified that an EIO can be issued or approved by prosecutors subordinated to the executive

<sup>71</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130 of 1/5/2014, p. 1).

<sup>72</sup> See European Investigation Order in criminal matters. Initiative Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden, 2010/0817 (COD), p. 17.

authority,<sup>73</sup> but the distinction between ‘judicial’ and ‘other’ authorities in the directive is linked to the principle of separation of powers and the rule of law.<sup>74</sup>

Therefore, prosecutors participating in the EIO mechanism, including the verification of orders issued by other authorities, should have a certain level of independence from the executive authority. This ensures a clear distinction between judicial authorities and other investigative entities, such as the police, and prevents the approval of orders by prosecutors from becoming a mere formality.

Directive 2014/41 requires a degree of independence for prosecutors, although these guarantees may be weaker than the obligations under Article 325(1) TFEU. The EIO temporarily affects the rights of suspects or accused individuals and the directive simultaneously explicitly involves prosecutors in the procedure.

While recognizing the diversity of prosecutorial systems and the varying degrees of subordination to the executive authority, it is important to have safeguards in place to ensure that the EIO mechanism satisfies its objectives at both the institutional and individual levels of the prosecutor’s service. These guarantees are necessary to uphold the intended purpose of the mechanism, as well as the rights of the suspects or accused individuals affected by the EIO.

### C. Principle of effective judicial protection

The principle of effective judicial protection, as inferred from the second subparagraph of Article 19(1) TEU, serves as another basis for upholding the independence of prosecutors. This assessment is primarily based on the CJEU’s case law in the cases of the Romanian judges.

In these cases, the CJEU examined the compatibility of certain measures implemented in the Romanian justice system with EU law. Two key issues were addressed, namely the appointment mechanism for temporary leadership in the *Inspekția Judicială* (responsible for disciplinary investigations against judges and prosecutors) and the establishment of a specialized section within the Romanian prosecution service to prosecute judges and prosecutors for crimes they committed. These measures were introduced to enhance the Romanian justice system and address complaints about a public official’s misconduct.

In its judgment of May 2021, as in the Polish cases, the CJEU emphasized that, while

<sup>73</sup> Judgment of 8 December 2020, C-584/19.

<sup>74</sup> Judgment of 2 March 2023, C-16/22, para 35.

the organization of the judiciary falls within the authority of the Member States, they nevertheless must adhere to EU law, including the requirements of effective judicial protection. The structure of bodies involved in criminal or disciplinary proceedings against judges should also prevent the system from being used as a tool for having political control over judicial decisions. It is important for prosecuting authorities to act objectively and impartially and be shielded from external pressures.<sup>75</sup>

Furthermore, when a Member State, like Romania, establishes a special section to prosecute judges and prosecutors, EU law requires that its establishment be justified by objective and verifiable reasons related to the sound administration of justice. It is important to prevent the misuse of such a section to have political control of or external influence over the activities and decisions of judges and prosecutors. Additionally, judges and prosecutors subjected to disciplinary or criminal proceedings should enjoy the safeguards provided by EU law, including the right to a fair trial and defence.<sup>76</sup> Failure to ensure these guarantees could undermine trust in the justice system, a cornerstone of a democratic state based on the rule of law.

The CJEU's judgment in the cases of the Romanian judges confirms that the second paragraph of Article 19(1) TEU also applies to prosecutors. This encompasses prosecutors involved in criminal or disciplinary proceedings against judges or other prosecutors and those subjected to such proceedings. While Romania and Bulgaria face additional obligations in the fight against corruption because of their specific legal regimes within the EU, the CJEU's judgment explicitly refers to other provisions of EU law that are applicable to all Member States, including the principle of effective judicial protection and the value of the rule of law under Article 2 TEU. Therefore, the conclusions of this judgment are applicable to all Member States.

The CJEU's judgment in the cases of the Romanian judges represents the only explicit statement on the independence of prosecutors under Article 19(1) TEU, in contrast with numerous judgments regarding Article 325(1) TFEU. However, considering the significant similarities discussed earlier between these two provisions (effective judicial protection and effective prosecution of illegal activities that are detrimental to the Union's financial interests), the protection of prosecutors under the second subparagraph of Article 19(1) TEU appears equally promising.

<sup>75</sup> Judgment of 18 May 2021, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para 198–199.

<sup>76</sup> C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para 213.

## Conclusions

Based on these considerations, a number of conclusions can be drawn on the Independence of prosecutors under EU law:

1. EU law encompasses the organization of the prosecution service and the independence of prosecutors.
2. The protection of prosecutors is inferred from the obligations to safeguard the EU's financial interests, the European Investigation Order and the principle of effective judicial protection.
3. National provisions and their practical application should ensure effective prosecution for crimes against the EU's financial interests.
4. The relationship between the executive authority and the prosecution service should not incentivize offences or enable systemic impunity.
5. The European Investigation Order requires decisional independence and greater separation of prosecutors from the executive authority compared to other investigative bodies.
6. The principle of effective judicial protection necessitates impartial and objective actions by prosecutors prosecuting judges or other prosecutors and freedom from external pressure.
7. The establishment of specialized bodies investigating judges or prosecutors must be justified by objective reasons to maintain trust in the justice system.
8. Safeguarding prosecutorial independence is crucial, as gaining control over the prosecution service may be more effective and cost-efficient than targeting the judiciary.

It would be desirable to explore the scope of protection in various procedural situations through preliminary references to the CJEU. An appropriate response from the CJEU could prompt changes to the organization of the prosecution service in countries such as Poland, especially during their efforts to restore the rule of law in favourable political circumstances.

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