



Can money buy rule of law? – overview of the recent instruments within the EU conditionality policy

Leposava Ognjanoska*

ABSTRACT: In recent years, the EU has been engaged in developing its rule of law toolbox to reverse the ongoing trend of backsliding. The aim of this paper is to explore the effectiveness of the rule of law conditionality instruments which contain a certain budgetary dimension. The link between financial tools and rule of law breaches is set out in Regulation 2020/2092. Hence, this solution also strives to limit the possibilities for such illiberal and corrupt practices to be (indirectly) supported by the EU funds. This contribution analyses the added value of the regulation in defining the rule of law as the Union's founding value, and its efforts to bring EU values enforcement under the aegis of EU law. Starting from the premise that, unlike other instruments, budgetary conditionality moves from the realm of values to the less abstract realm of money, this paper explores the potential for integrating this concept into enlargement policy. Given the EU is strongly attempting to change its approach in transforming the candidate countries, one way to inspire some real reforms on the ground is to connect the fulfillment of rule of law standards with the access to pre-accession funds. Special focus is put on the Western Balkans in the light of the new geopolitical urgency to revive the EU enlargement.

KEYWORDS: Rule of law – conditionality policy – funds – enlargement – EU-Western Balkans relations.

* Teaching and Research Assistant in European Union Law at the International Balkan University Faculty of Law, PhD candidate in Law at the Ss. Cyril and Methodius University Faculty of Law Skopje, North Macedonia.

1. Introduction

The European project relies on permanent respect for the rule of law in all Member States, and is also fundamental to the proper functioning of the European Union (EU) as an area of freedom, security and justice and an Internal Market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules.¹ The rule of law is enshrined at the core of EU's primary law, as a founding value which is not only a political statement, but it also has concrete legal effect.² Hence, the rule of law represents a shared value to Europeans but also a shared responsibility for the EU institutions and Member States.

The responsibility to uphold the rule of law lies primarily on each Member State, both as an internal constitutional responsibility, but also a responsibility with regard to the Union and in the name of the mutual trust.³ Moreover, the respect for the rule of law must be ensured throughout all EU policies, including EU finances, and this rule should be put at the heart of the EU budget.⁴ Given that threats to the rule of law challenge the Union's legal, political and economic edifice, the EU has in recent years been committed to developing certain mechanisms to encourage and enforce the rule of law.⁵

Likewise, according to the Article 49 TEU the rule of law is stipulated as a value defining EU membership, thus it is an accession criterion that has become progressively more central rising to a level of a cornerstone of the EU enlargement policy. Conditionality has been set as a crucial instrument on the side of the EU in its endeavour to transform the political, economic and legal system of the candidate countries. The logic of the policy is to make these countries accept the rules set as conditions which the applicant country has to fulfil in order to receive rewards. Hence, the main principle of conditionality is that (Member) States are prompted to comply with the requirements set forth by EU law and adhere to the conditions in exchange for advantages and benefits, including those of a financial character. Even though the conditionality was initially applied in the EU external policies, after the accession of new Member States from Central and Eastern Europe within the 2004 enlargement, it has been increasingly used in the EU's internal policies as well, replacing the principle of sincere cooperation in terms of ensuring compliance.⁶

However, one of the weakest elements in the legal-political edifice of today's EU is ensuring that the Member States are faithful to the basic principles and the rule of law as a founding value.⁷ The rule of law crisis is yet another crisis that

¹ European Commission, «Communication “Strengthening the rule of law within the Union. A blueprint for action”», COM(2019) 343 final.

² Jean-Claude Piris, *The Lisbon Treaty* (Cambridge: Cambridge University Press, 2010), 71.

³ Piris, *The Lisbon Treaty*, 71.

⁴ European Commission, «Communication “New, modern Multiannual Financial Framework for a EU that delivers efficiently on its priorities post-2020”», COM(2018) 98 final.

⁵ European Commission, «Communication “A new EU Framework to strengthen the rule of law”», COM(2014) 158 final; Commission, «“Strengthening the rule of law within the Union. A blueprint for action”».

⁶ Justyna Lacny, “The rule of law conditionality under Regulation No 2092/2020—Is it all about the money?”, *Hague Journal on the Rule of Law*, vol. 13, no. 1 (2021): 84, doi: [10.1007/s40803-021-00154-6](https://doi.org/10.1007/s40803-021-00154-6).

⁷ Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, “EU values are law, after all: enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union”, *Yearbook of European Law*, vol. 39 (2020): 4, doi: [10.1093/yel/yeaa012](https://doi.org/10.1093/yel/yeaa012).

largely shaped the Union in the previous years, in the aftermath of the 2007-2008 financial crisis, the migration crisis and the 2020 COVID-19 pandemic. It has its beginnings in the illiberal turns that emerged in some of the Member States that have joined the EU in the framework of the enlargement policy designed specifically to allow for rule in law compliance within the pre-accession conditionality. The rule of law crisis jeopardises the very essence of the European integration project. Hence, numerous actions have been undertaken by the EU aiming at safeguarding observance of the rule of law against backsliding, both in terms of pre-accession and post-accession conditionality.

Literature review on the effectiveness of the EU “rule of law toolbox” shows that most of the instruments were developed through a case-by-case approach, lacking any strategic engineering that would provide for more sustainable results in preventing and sanctioning such breaches.⁸ Further analysis reveals that Member States which have the most outstanding “track record” in rule of law infringements receive extensive EU funding that contributes to economic growth and social development but nevertheless, (in)directly empowers the illiberal political elites that rule these countries.⁹ Post-accession experience with regard to rule of law compliance also reflected on the EU’s external upholding and promotion of the rule of law within the enlargement policy. On the other hand, even though the EU is increasingly applying reinforced conditionality to the candidate countries and is no longer satisfied with “reforms on paper”, the situation on the ground reveals weakened EU leverage to yield tangible reforms, despite financial assistance as an incentive under the enlargement policy.¹⁰ Hence, the critique was also directed at pointing out that the Union should insist more effectively on observance of the rule of law as a condition for receiving funds from the EU budget.¹¹

The aim of this paper is to explore the effectiveness of the rule of law conditionality instruments which contain a certain budgetary dimension. The main argument in this regard is that, unlike other instruments, budgetary conditionality moves from the realm of values to the less abstract realm of money. The analysis is two-parted: the focus is put on the Regulation 2020/2092 (Rule of Law Conditionality Regulation or Conditionality Regulation), which contains a clear link between financial tools and rule of law breaches, examining its contribution to the development of the EU rule of law toolbox and its effectiveness to tackle breaches. In addition, the paper explores the potential to further embed this concept into the enlargement policy taking into consideration the new geopolitical urgency to revive the EU enlargement.

2. The EU internal rule of law conditionality under Regulation 2020/2092

Despite ten years of attempts to employ the existing EU rule of law toolbox in order to tackle backsliding, by launching several infringement proceedings linked to a breach of Union law or even introducing an emblematic mechanism within the

⁸ Lacny, “The rule of law conditionality under Regulation No 2092/2020”, 105.

⁹ Claudiu Talbulescu and Daniel Goyeau, “EU funds absorption rate and the economic growth”, *Timisoara Journal of Economics and Business*, vol. 6, no. 20 (2013): 153-170.

¹⁰ Lepasava Ognjanoska, “Promoting the rule of law in the EU enlargement policy: a twofold challenge”, *Croatian Yearbook of European Law and Policy*, vol. 17 (2021): 237-277, doi: [10.3935/cyelp.17.2021.455](https://doi.org/10.3935/cyelp.17.2021.455).

¹¹ Lacny, “The rule of law conditionality under Regulation No 2092/2020”, 79-105.

Article 7 TEU for the EU to act in case of serious rule of law failures in a Member State, the situation on the ground has been explained as “losing through winning”.¹² Backsliding Member States have lost cases before the CJEU and have been asked to nullify the effects in order to preserve the rule of law – however, lack of systemic compliance has continued to persist.

The idea to link the rule of law with EU funds has its recourse in Article 7 TEU under the scope of other measures that can be invoked if existence of a serious and persistent breach of the EU founding values is determined.¹³ Moreover, the provisions under Article 260 TFEU also allow for such actions, given the possibility to impose financial penalty upon a Member State for non-respect of a judgment within an infringement procedure in order to address a larger threat to the values of Article 2, not just small adjustments to correct separate violations. Acting upon Commission’s request, the CJEU ordered Poland to pay a periodic penalty payment of 1 000 000 euros per day, due to non-compliance with an interim measure issued in order to avoid serious and irreparable harm to the legal order of the EU and to the values on which that Union is founded, in particular, that of the rule of law.¹⁴ Hence, certain tools allowed the Commission and the Court to (try to) enforce the rule of law through financial sanctions, but which, used separately, have so far only limited impact.

In the light of the new seven-year budget of the Union in 2018, the Commission outlined that it was essential to strengthen the link between EU funding and the respect for the rule of law and announced a proposal to strengthen the protection of the EU budget from financial risks arising from generalised deficiencies as regards the rule of law in the Member States.¹⁵ On the same day, the Commission put forward a proposal for a Regulation establishing the rules necessary for the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States, based on the mutual trust in the responsible use of common resources and financial solidarity.¹⁶ Proposed by the Commission in 2018 and finally adopted in December 2020,¹⁷ the link between the rule of law and the urgent need to protect the Union’s financial interests was made possible thanks to the European Council’s conclusions in July 2020 which secured the political support of the Heads of State for this conditionality regime that refers to the Union budget.¹⁸

¹² Scheppele, Kochenov and Grabowska-Moroz, “EU values are law, after all: enforcing EU values through systemic infringement actions...”, 42.

¹³ Tom Theuns, “The need for an EU expulsion mechanism: democratic backsliding and the failure of Article 7”, *Res Publica*, vol. 28 (2022): 693–713, doi: 10.1007/s11158-021-09537-w.

¹⁴ Court of Justice of the European Union, “Press Release No 192/21 Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland”, Luxembourg, 27 October 2021, last accessed 19 May 2024, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf>.

¹⁵ European Commission, «Communication “A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027”», COM(2018) 321 final.

¹⁶ European Parliament Legislative Resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States [COM(2018)0324 - C8-0178/2018 - 2018/0136(COD)].

¹⁷ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, 1–10.

¹⁸ European Council, “Conclusions”, Brussels, 17-21 July 2020.

This window of opportunity was created by the institutional calendar that required adoption of the new Multiannual Financial Framework for the period 2021-2027 and cohesion programs in the light of the economic downturn, designed to strengthen the Union's resilience and recovery with regard to the COVID-19 pandemic, such as the New Generation EU. Introduction of such an instrument was objected to by Poland and Hungary, each of which brought an action for annulment of the Regulation before the CJEU, which was dismissed by the Court.¹⁹ The case was considered of exceptional importance given that the ruling was delivered by the CJEU sitting as full court, and provided fundamental statements on the power of the EU to protect its financial interests vis-à-vis upholding of the founding values, in particular the value of the rule of law.

Regulation 2020/2092 establishes rules necessary for the protection of the Union budget in the event of breaches of the rule of law in Member States. This conditionality can be applied regarding breaches of the rule of law that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. Therefore, the Regulation serves as an instrument to uphold the rule of law within the Union but also to protect the EU budget. The scope of its application is strictly tied to the Union's budget and thus limited only to cases whereas breaches of the rule of law by a Member State have a "sufficiently direct" impact on the EU budget. This essentially means that if a violation of the rule of law is detected, the Commission must then demonstrate how it has impacted the Union's finances – a mere violation of the rule of law in a Member State would not suffice to trigger the mechanism.

The Rule of Law Conditionality Regulation 2020/2092 provides a non-exhaustive list of examples indicative of a relevant breach (Article 3) relating to the effectiveness of national prosecution services and the independence of judiciary, and a more operative provision containing a more detailed description of the behaviour that constitutes a breach of the rule of law [Article 4 (2)]. From a substantial point of view, the Regulation is the first legally binding instrument under EU law which provides a clear definition of the rule of law having regard to the other Union values and principles enshrined in Article 2 TEU, which can be qualified as relatively dense.²⁰ The scope for its application is still wide as it also covers, for example, the obligation to ensure all preconditions for proper functioning of investigation and public prosecution services in relation to the implementation of the Union budget, the protection of the financial interests of the Union, or actions related to the prevention of such criminal offences. Therefore, a potential effect on the EU finances may also suffice.

Measures that may be adopted for the protection of Union's budget (Article 5) include interruptions, suspensions, or financial corrections linked to irregularities or serious deficiencies in management and control systems with sectoral approach. Such measures shall be determined in line with the principle of proportionality

¹⁹ Court of Justice of the European Union, "Press Release No 28/22, Judgments in Cases C-156/21 Hungary v Parliament and Council Press and Information and C-157/21 Poland v Parliament and Council", Luxembourg, 16 February 2022, last accessed 20 May 2024, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>.

²⁰ Niels Kirst, "Rule of law conditionality: the long-awaited step towards a solution of the rule of law crisis in the European Union?", *European Papers*, vol. 6, no. 1 (2021): 104, doi: 10.15166/2499-8249/454.

given the actual or potential impact of the breaches of the principles of the rule of law along with their nature, duration, gravity, and scope. Procedure for adoption of such measures (Article 6) contains some elements characteristic of the infringement procedure, in that if the Commission has reasonable grounds to consider that the conditions are fulfilled, it sends a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings, while the Member State concerned shall provide the required information, may make observations on the findings and propose the adoption of remedial measures to address the findings set out in the Commission's notification. If the Commission considers that the conditions are fulfilled and that any corrective measures proposed by the Member State do not adequately address the conclusions of its notification, it shall submit to the Council a proposal for an implementing decision on appropriate measures. Acting by qualified majority, the Council shall adopt the implementing decision and thus, may amend the Commission's proposal.

It should be noted that the measures and procedures prescribed by this Regulation have only a complementary/subsidiary function – if other instruments established under Union law do not allow for the effective protection of the EU fund harmed by breaches of the rule of law. This is the first legal mechanism established by the secondary law of the EU, in addition to the set of instruments established in primary law that are proving to be insufficiently effective, especially Article 7 of the TEU, and considering that amending the founding treaties is a process that requires the consent of all Member States and a long period of time. Hence, although the Regulation cannot be considered as a mechanism for comprehensive protection of the rule of law and addressing systemic deficiencies, the introduction of additional mechanisms through EU secondary legislation creates additional opportunities for safeguarding the rule of law.

From a legal point of view, this mechanism enables the creation of new legal rules for the disposal and allocation of funds, while in a political context, it attempts to address the concerns that illiberal practices contrary to the rule of law and other Union's founding values are (in)directly supported through the EU funds allocated to breaching Member States. In addition, it should be considered that the Council and the Parliament have the opportunity to amend the Regulation, with regard to its scope, conditions for application, measures and other aspects arising from the implementation in practice – in a sufficiently easier way compared to the procedure for amending the founding treaties. On the other hand, conditionality between EU funds and the rule of law as Union's founding value creates a deterrent function and is expected to have an impact on Member States that are continuously subject to proceedings due to rule of law breaches.

3. Rule of law as a keystone condition of the EU pre-accession strategy

Since the rule of law was introduced into EU enlargement policy, its role within the conditionality principle has gradually advanced, becoming the cornerstone of the accession process.²¹ The first generation of EU accessions was based on political decisions without any clear membership criteria. Article 237 EEC required states to

²¹ Lepasava Ognjanoska, "Promoting the rule of law in EU enlargement policy: a twofold challenge", 237.

be European and to be willing to take part in the European project. However, the term “European” had not only a geographical meaning, but also a political one, as it implicitly referred to democratic features of the system.

The political acknowledgment by the 1993 Copenhagen European Council²² on the European future of Central and Eastern European countries was accompanied by certain membership criteria that signalled the beginning of the EU enlargement policy. This was due to the fact that in the case of Central and Eastern European states, the accession process also included transformation of the system both politically and economically. The Treaty of Amsterdam promoted the rule of law as a founding principle and criterion for membership, while at the same time introducing mechanisms to protect the rule of law in the EU (Article 7 TEU procedure). The Lisbon Treaty recognised the rule of law as a value defining EU membership. According to Article 49 TEU, “*any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.*” Hence, Article 49 TEU, which prescribes the accession criteria, is an implicit reflection of the 1993 Copenhagen (political) criteria that set the ground for the conditionality policy as a framework for EU accession.²³

From a procedure for the accession of new contracting parties, enlargement has evolved into a comprehensive policy of “*building/shaping Member States*” involving a significant role for the EU institutions and current Member States and the gradual codification of established practices and established criteria. Enlargement policy is based on a comprehensive methodology consisting of technocratic promotion of reforms and political will, accompanied by financial instrument. Hence, it contains tools and means by which the EU has been supporting reforms in the enlargement region with financial and technical assistance to comply with Union’s values and to progressively align with the Union’s rules, standards, policies and practices with a view to accession to the Union.

The EU adopted a stricter stance and approach towards the Western Balkan countries, with special focus on the rule of law conditionality in the pre-accession phase, requesting to demonstrate a credible track record of a properly functioning judicial system, the effective fight against corruption, and protection of fundamental rights. European Council conclusions in 2006 emphasised the importance of the rule of law, stating that “*difficult issues such as administrative and judicial reforms and the fight against corruption will be addressed at an early stage*”.²⁴ Chapter 23 – Judiciary and Fundamental Rights and Chapter 24 – Justice, Freedom and Security of the Union’s *acquis* represent the concept of the rule of law in the EU enlargement policy.

This approach was first presented in the accession negotiations with Croatia – when the Chapter 23 was introduced for the first time as a separate negotiating chapter as well. Enhanced rule of law conditionality was mostly visible in the last stages of the accession negotiations when the EU imposed ten closing benchmarks for Chapter 23, most of which required real results on the ground expressed in addition to the more technical task of legal approximation. Prioritisation of the rule of law reform in the accession process was officially declared with the Commission’s Enlargement Strategy in 2011²⁵ known as the “new approach in the

²² European Council, “Presidency Conclusions”, Copenhagen, 21-22 June 1993.

²³ Leposava Ognjanoska, “Promoting the rule of law in EU enlargement policy: a twofold challenge”, 238-9.

²⁴ European Council, “Presidency Conclusions”, Brussels, 15 December 2006.

²⁵ European Commission, “Enlargement Strategy and Main Challenges 2011–2012”, COM(2011) 666.

enlargement process” which consists of strengthening the benchmarks approach through opening and closing but also interim benchmarks that would assess the country’s progress in the negotiating chapter.

Such policy shift is due to the experience from the previous rounds of enlargement which revealed the possibility for reversibility of the reform process. Post-accession conditions in terms of the rule of law protection reported stagnating and even declining trends in some of the Member States.²⁶ In parallel to the gradual development of the Union’s rule of law internal toolbox, the EU has applied even more active leverage within the enlargement policy towards the Western Balkans, thus the rule of law criteria for membership often exceeded the criteria for the Member States. In other words, the EU has been requesting more strict standards on the outside – from the candidate countries – than on the inside, in the fully-fledged Member States.

Rule of law pre-accession conditionality has been compromised by the limited availability of clear and unambiguous standards and practices but also lack of credibility on the side of the EU due to the enlargement fatigue and EU’s reduced absorption capacity, among other reasons. Credibility refers to the EU’s readiness to withhold the reward if conditions are not met, but also to deliver on the promise once they are. In 2014, the EU path for the Western Balkans faced a major turning point when the Commission openly declared the enlargement stalemate,²⁷ as one of many signals and indications of reduced credibility. Given that credibility is an essential element of the conditionality policy, this situation has undermined the EU’s transformative power. In order to reaffirm the strong focus on the rule of law, in 2015, the European Commission presented the “fundamentals first” principle meaning that negotiations in Chapter 23 and 24 will be opened first and closed last, and progress on the fundamentals will determine the overall pace of negotiations.²⁸

Hence, despite EU’s efforts to increasingly apply strengthened rule of law conditionality within the enlargement policy, the situation on the ground revealed an insubstantial ability to inspire tangible reforms. For example, Montenegro has been negotiating for twelve years already, the same level of alignment in terms of rule of law reforms prevails and the membership prospect still remains distant if conditioned by rule of law preparedness. In addition to the reduced credibility on the side of the EU, complexities of the Balkan societies overwhelmed with bilateral disputes and the systemic rule of law weaknesses should also be taken into consideration. The Commission admitted that the effectiveness of the overall accession process must be improved further – while keeping the same strategic direction, it must get much better traction on the ground.²⁹

The proposal for reinvigorating the accession process is based on more credibility and more conditionality, along with stronger political steer and improved dynamism. To achieve this goal, current enlargement methodology envisages negotiations on the fundamentals to be guided by a roadmap for the rule of law

²⁶ Leposava Ognjanoska, “Promoting the rule of law in EU enlargement policy: a twofold challenge”, 245-6.

²⁷ European Commission, “Press Release - The Juncker Commission: A Strong and Experienced Team Standing for Change”, Brussels, 10 September 2014, last accessed 24 May 2024, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_984.

²⁸ European Commission, “EU Enlargement Strategy 2015”, COM(2015) 611 final.

²⁹ European Commission, “Enhancing the Accession Process – A Credible EU Perspective for the Western Balkans”, COM(2020) 57.

chapters containing interim benchmarks and a provision that no other chapter will be provisionally closed before these benchmarks are met. This methodology is applicable for the accession negotiations with Albania and North Macedonia and the countries to follow, but has also been integrated into the existing negotiating frameworks for Montenegro and Serbia, ensuring a level playing field in the region. In order to provide dynamism into the negotiating process, chapters are organised in thematic clusters whereby the rule of law is contained under the first cluster on the fundamentals. Moreover, the results of the rule of law reforms are set as a requirement for deeper sectoral integration and progress of the process overall.

The impasse generated by enlargement increases the influence of other geostrategic players in the region and on European territory in general. The current methodology, adopted in 2020, recognises the geopolitical aspects of the process by stating that maintaining and enhancing the enlargement policy is thus indispensable for the EU's credibility, success as global actor and influence in the region and beyond – especially at times of heightened geopolitical competition.³⁰ Russia's war against Ukraine has accelerated many decisions and firmly put the enlargement back on the agenda in a way that the EU became more aware of the fact that enlarging with the countries willing and able to meet the conditions is not a "favour" or a concession but it is in EU's strategic interest as a way of structuring the continent around EU values and standards – including the rule of law.³¹ The granting of candidate status to Ukraine and Moldova in June 2022³² and the decision to start accession negotiations in December 2023³³ are the strongest indicators of significant changes in the EU's enlargement policy.

The need for the EU to favour its geopolitical interest over the pre-accession conditionality poses a question that affects its very existence and its role as a global actor based on its normative power. It goes back to the old debate on the roots of the EU integration and is also inextricably related to the rule of law and the democratic values that stand at the Union's core. The main challenge for the EU is to reconcile the two principles which are hard to cohabit: "*geopolitical interest*" while preserving the "*value of the EU conditionality*".³⁴ On the one hand, the EU must enhance its capacity for action and it is not feasible to continue weakening or delaying certain decisions on the enlargement of the Union, but on the other hand, it should also maintain the role of the rule of law as a fundamental condition of the EU's pre-accession strategy. Given the nature of the European unification project and the position of the EU as a global actor, it must not abandon the rule of law conditionality in the enlargement policy because it would mean losing the very identity and the main objective of the process. Therefore, the geo-political imperative for the EU is to both widen and deepen,³⁵ on the basis of the Union's

³⁰ Commission, "Enhancing the Accession Process."

³¹ Josep Borrell, "The geo-political imperative for the EU is to both widen and deepen", *A Window on the World Blog*, Brussels, 27 June 2022, last accessed 25 May 2024 https://www.eeas.europa.eu/node/415505_zh.

³² European Council, "Conclusions", Brussels, 23 June 2022.

³³ European Council, "Conclusions", Brussels, 14 Dec 2023.

³⁴ Klodiana Beshku, "The war in Ukraine: Europe's geopolitical momentum. Will the Western Balkans take advantage of it?", in *A year later, war in Ukraine and Western Balkan (geo)politics*, eds. Simonida Kacarska, Jelena Dzankic and Soeren Keil (Florence: European University Institute, 2023), 23-29, doi: [10.2870/275946](https://doi.org/10.2870/275946).

³⁵ Borrell, "The geo-political imperative for the EU is to both widen and deepen."

founding values, among which the rule of law is a prerequisite for the protection of all other values listed in Article 2 TEU.

4. Prospects and effectiveness of the EU rule of law conditionality

When financial assistance is not backed by credible sanctions, only formal compliance occurs, frequently in a way that compromises the assistance's main goals.³⁶ In that regard, the most important aspect is to assess the prospects and effectiveness of the newly introduced rule of law conditionality mechanisms. Regulation 2020/2092 highlights two notions related to Union funds: (i) the principle of sound financial management; and (ii) the protection of the financial interests of the Union. Thus, it applies not only to the Union budget, but also to the resources allocated through the EU Recovery Instrument, and through loans and other instruments guaranteed by the Union budget. It should be emphasised that measures should not lead to violation of the interests of beneficiaries (EU citizens) by the affected Member State and may result in further suspensions or cut-offs of EU funds if such a situation occurs. Hence, a key principle in the application of the Conditionality Regulation is that the final recipients and beneficiaries of EU funding should not be affected by measures taken under the regulation.

Some of the Member States that most violate the rule of law, such as Hungary and Poland, have opposed the rule of law conditionality aimed at safeguarding the EU budget, launching annulment actions before the CJEU that have overshadowed and delayed the application of Regulation 2020/2092. In addition to the long history of breaches of the rule of law, both countries have received extensive amounts of Union funds. For example, Hungary has received the greatest amount of Union funding per capita, with more than 95% of all public investments in the MFF 2014–2020 co-financed by the EU, while Poland is the largest overall recipient with 86 billion EUR allocated within MFF 2014–2020 from various European Structural and Investment Funds.³⁷

After CJEU's decision to dismiss the action in February 2022, followed by the Commission's Guidelines on Application of Conditionality Mechanism,³⁸ all conditions to test the instrument have been met. The Guidelines define the principles upon which the Commission will carry out its assessments, highlighting that it will be applied through thorough qualitative assessments on a case-by-case basis, taking due account of the specific circumstances and contexts of each Member State. The assessments will also be carried out in an objective, impartial and fair manner, based on a wide range of evidence and reliable information sources. The said breach affects or risks seriously affecting the sound financial management or financial interests, covering both revenue and expenditure, through sufficiently direct relation between the breach and its effect. Given that the application of the Conditionality Regulation is subsidiary – unless other procedures provided for in Union law enable it to protect the Union budget more effectively –, the indicative

³⁶ Renata Uitz, "Funding illiberal democracy: the case for credible budgetary conditionality in the EU", *BRIDGE Network*, Working Paper no. 7 (2020), last accessed 26 May 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722936.

³⁷ Lacny, "The rule of law conditionality under Regulation No 2092/2020", 80-81.

³⁸ European Commission, "Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget 2022/C 123/02", OJ C 123, 18.3.2022, 12-37.

criteria should refer to the scope of the effect and/or extent of risk the breach may entail, and types of remedies available and their suitability to different situations to address the relevant breach.

The conditions for the application of the Conditionality Regulation were fulfilled in the case of Hungary, whereby the Commission formally triggered the mechanism on 27 April 2022, thus observing “*a systemic inability, failure or unwillingness on the part of the Hungarian authorities to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption.*”³⁹ In accordance with the procedure, after several exchanges of views with Hungary, the Commission put forward a proposal to adopt budgetary measures to protect the Union budget⁴⁰ on September 18, 2022, followed by an implementing decision adopted by the Council in December 2022.⁴¹ The Commission proposed the suspension of 65% of the commitments for three operational programs under Cohesion Policy 2021-2027 but the Council decided to reduce the percentage of commitments to be suspended from 65% to 55%, equivalent to an amount of approximately 6,3 billion € in the three cohesion policy programs that operate through public procurement.

The reduction was due to the measures taken by the Hungarian authorities in the period from October to November 2022, which included adopting legislative framework to establish an Integrity Authority and an Anti-Corruption Working Group, drafting an anti-fraud and anti-corruption strategy for the period 2021-2027, audit and control mechanisms for the use of EU funds were strengthened, and the number of single-bid tenders concerning EU-funded projects was reduced. Hence, Hungary’s actions taken under the threat of financial penalties – even though still limited given the systematic issues – represent a step forward in safeguarding the rule of law in the EU through this type of budget conditionality. The measures against Hungary adopted under the Conditionality Regulation remained in force after the Commission’s assessment that the situation which led to the adoption of the measures had not yet been corrected and that the Union budget continued to present the same level of risk.⁴²

However, the case of Poland highlighted the specific requirements under the Conditionality Regulation appraising the necessity of actual or potential concrete impact of the alleged breaches of the rule of law in conjunction with the financial management of the Union budget and the Union’s financial interests. Albeit breaches of the rule of law are evidenced in a number of CJEU rulings, in line with its case-by-case approach, the Commission concluded in its assessment that there was no genuine link between the breaches of the rule of law and their effect on the sound financial management of the EU’s financial interests. Nevertheless,

³⁹ European Commission, “Communication on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget”, COM(2022) 687 final.

⁴⁰ European 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, 18.9.2022.

⁴¹ Council Implementing Decision (EU) 2022/2506 of 15.12. 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022.

⁴² Commission Decision of 13 December 2023 on the reassessment, on the Commission’s initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary, C(2023) 8999 final.

the EU has used the Recovery and Resilience Plan to impose measures to remedy certain breaches of the rule of law in a form of milestones.⁴³ In order to receive the 35.4 billion €, the Polish authorities were asked to take a series of measures aimed at restoring the independence of the judiciary, such as requiring judges sanctioned by the disciplinary chamber of the Supreme Court to have their cases reviewed by a court that complies with European law.

The essence of the measures applicable under the Conditionality Regulation goes far beyond a mere suspension of the payment of EU funds and can imply their irretrievable loss, but the real impact and effectiveness depends on the type of the measure(s) adopted for which the primary assessment of the situation is crucial. Even though financial sanctions are not a standard instrument for enforcing EU legislation, it is evident that conditionality represents an appealing solution, particularly when ordinary tools of EU law enforcement are unable to guarantee adequate adherence to EU laws, values and objectives.⁴⁴ This new form of conditionality moves from the realm of values to the less abstract realm of money, while still it serves as a nexus between solidarity and responsibility. Implementation practice so far indicates that although it cannot be considered a panacea for the rule of law crisis in the EU, it still gives more strength to the transformative effect of conditionality when it is linked to the Union's budget. It should be acknowledged that the challenges related to the rule of law apply to all EU Member States and are not limited to Poland and Hungary, which have been in the focus of implementation of this and other instruments so far.

As the EU is learning that the use of money as a tool is better than other mechanisms (Article 7 TEU, for example), there is a growing trend towards this type of conditionality in the pre-accession process as well.⁴⁵ Some form of this rule of law budget conditionality towards third countries can be found in the Article 236 (3) (4) of the Financial Regulation 2018/1046,⁴⁶ which prescribes that the EU shall support the respect for the rule of law, the development of parliamentary scrutiny and audit capacities and the fight against corruption, and increased transparency and public access to information, accompanied by the right to suspend the financing agreement if the third country violates an obligation related to respect for human rights, democratic principles and the rule of law and in serious cases of corruption. This principle is most directly embedded in the Reform and Growth Facility for the Western Balkans, which represents the latest instrument to support EU-related reforms and economic growth in the Western Balkans.⁴⁷

The facility is the financial pillar of the Growth Plan for the Western Balkans and contains key provisions to make sure the beneficiaries of these funds stay

⁴³ Council Implementing Decision EU 2022/9728 of 15-06-2022 on the approval of the assessment of the recovery and resilience plan for Poland.

⁴⁴ Antonia Baraggia and Matteo Bonelli, "Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges", *German Law Journal*, vol. 23, no. 2 (2022): 131-156, doi: [10.1017/glj.2022.17](https://doi.org/10.1017/glj.2022.17).

⁴⁵ Statement by a leading Berlin-based expert on European and international affairs at a Chatham House event in which the author of this article participated as well.

⁴⁶ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ L 193/1, 30.7.2018.

⁴⁷ Council of the EU, "Press Release – Reform and Growth Facility for the Western Balkans adopted", Brussels, 7 May 2024, last accessed 4 June 2024 <https://www.consilium.europa.eu/en/press/press-releases/2024/05/07/reform-and-growth-facility-for-the-western-balkans-adopted/#:~:text=The%20facility%20is%20the%20financial,partners%20in%20the%20coming%20years.>

aligned with the EU values, among which is the rule of law. Preconditions for the support under this instrument include that beneficiaries continue to improve, uphold and respect effective democratic mechanisms, safeguard free and pluralistic media and fight against disinformation, and the rule of law. In order to receive support under the facility, each partner in the region must prepare a Reform Agenda that should also contain the Rule of law report as well as the relevant international institutions' findings, setting out the reforms it plans to undertake in order to achieve the facility's objectives.

Some of the most relevant proposals to reinforce the EU enlargement process suggest sectoral integration and a staged approach to participation rights in EU institutions which is a form of accelerated gradual integration.⁴⁸ The proposal is in line with the revised accession methodology that already foresees the phasing-in of candidate countries.⁴⁹ On the basis of a more structured and conditional methodology, taking into consideration the principle of differentiation, further development of the EU enlargement process should entail access to the Single Market for a larger circle of associate members as one of the four tiers of European integration. However, it is made very clear that even any partial integration into the Single Market as a basic form of accession would require adherence to the rule of law in accordance with the "fundamental first" principles. Hence, it is a non-negotiable rule that the rule of law is thus a precondition for joining the EU and a country that does not respect the rule of law ultimately cannot be part of the Single Market and cannot receive EU funding.

5. Conclusion and outlook

It can be concluded that the Rule of Law Conditionality Regulation sends an unequivocal message to the breaching Member States that billions of EU funds are at stake if they do not respect the values enshrined in the EU's founding treaties. Compared with other rule of law tools whose only objective is the rule of law protection, now the core objective is extended to protection of the Union budget and the EU's financial interests through the rule of law. Subject matter of the Regulations is very clear in that context, outlining that it establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States.

The main requirement for its application – proving that breaches of the rule of law in a Member State seriously affect or risk seriously affecting the sound financial management of the Union budget or the protection of the Union's financial interests in a sufficiently direct manner – can be considered both an advantage and a limitation. Aside from its limited scope, this instrument provides the Commission with more tangible and incisive tools, thus strengthening the credibility of the initiatives to protect the rule of law as a Union's founding value. The procedure for its application resembles the infringement procedure to some extent but the threshold for deployment is significantly lower in comparison to Article 7 TEU.

⁴⁸ Franco-German Working group on EU Institutional Reform, "Sailing on High Seas – Reforming and Enlarging the EU for the 21st Century", Report, Paris-Berlin, 18 September 2023, last accessed 4 June 2024, <https://institutdelors.eu/wp-content/uploads/2023/12/20230919-Group-of-Twelve-REPORT.pdf>.

⁴⁹ European Commission, "Enhancing the Accession Process", COM(2020) 57.

Introducing rule of law instruments through the secondary law of the Union provides the Council and the Parliament with an opportunity to amend the Regulation through qualified majority voting in order to widen the scope, soften the conditions and strengthen the sanctions to better safeguard the rule of law within the EU. Initial controversies should not be seen as akin to weaker concessions – quite on the contrary, the CJEU’s decision enhanced the legitimacy of the Regulation and provided fundamental statements on the power of the EU to protect its financial interests vis-à-vis upholding of the rule of law as a founding value. Given the consensus-seeking nature of the EU decision-making process and the culture of solidarity between the Member States, political will serves as catalyst of certain processes.

Moreover, the EU enhanced the conditionality dimension of the rule of law toolbox, not only with regard to the enlargement policy and its pre-accession phase, but also in terms of the post-accession mechanisms to maintain the Union’s leverage on the inside. Conditionality represents the core element of the firm merit-based approach in the accession process, which is the basis for the EU’s transformative power. Linking the pre-accession conditionality with the access to EU funds in the pre-accession phase can provide clear and tangible incentives of direct interest to candidate countries’ citizens, and the EU can finally encourage real political will and reward results arising from demanding reforms and the process of political, economic and societal transformation.

Finally, the Commission should examine all the pathways and possible combinations of different instruments within the rule of law toolbox to allow for the most effective protection of the Union’s budgetary and financial interests vis-à-vis the defence of founding values with primary focus on the rule of law.