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Rule of law: the uncertain gamble on conditionality

Eric MAURICE

Will 2023 be the year when Hungary and Poland join the ranks of Member States that respect the values of the European Union? Nothing is less certain because, in Budapest as in Warsaw, the reforms demanded by the Union have not yet been implemented. In early February Polish president Andrzej Duda, referred a law which was supposed to bring an end to disciplinary abuses against judges to the Constitutional Court. The Hungarian government has still not completed reforms to make public procurement more transparent and to strengthen the fight against corruption.

The fact that these measures are being discussed indicates however that the balance of power has changed. 2022 was a pivotal year in the European Union's efforts to combat breaches of the rule of law in its Member States. For the first time, a range of new and old tools, specific or not, structural or conjunctural, were used to try to reverse the trend that has been developing for several years, mainly in Hungary and Poland, of undermining the independence of the judiciary, systems of checks and balances, and certain rights that are considered fundamental.

Until recently, the European Union had a range of [tools](#) in the field of the rule of law which had however had [shown their limitations](#). Article 7, often described as the "nuclear option", continues to languish at Council level, where only five hearings regarding Poland and four concerning Hungary have been organised since the opening of the procedures against the two countries, in December 2017 and September 2018 respectively. While violations of the rule of law and values are widely documented, and in some cases condemned by the European courts (CJEU and ECHR), the unanimous vote in the European Council provided

for in Article 7 to establish "*the existence of a serious and persistent breach*" of the rule of law will probably never take place, nor will the possible vote in the Council of Ministers, which could simply "*determine that there is a clear risk of a serious breach*".

Moreover, the Commission seems to have reached the limits of the logic of infringement proceedings, since the governments in office in Budapest and Warsaw refuse to heed the rulings of the CJEU that result from the proceedings. Hungary, despite a November 2021 ruling, has not amended its so-called "Stop Soros" laws designed to prevent aid being given to asylum seekers. Nor has it changed the rules in the transit zones on its border with Serbia despite a CJEU ruling in December 2020. In this case, the Commission referred Hungary to the Court to seek financial penalties, but the Court has not yet issued a judgment. The Commission also filed a case with the CJEU in December 2022 against the so-called Child Protection Act, which is considered to violate LGBT fundamental rights and which the Hungarian government is maintaining despite an infringement procedure launched in July 2021.

Poland has not complied with any of the rulings and orders issued by the CJEU regarding its judicial reforms, in particular the disciplinary regime for judges. Subject to a daily penalty payment of €1 million per day since October 2021 for failing to comply with the order of 14 July 2021 requiring the suspension of the Supreme Court's disciplinary chamber, the Polish state is refusing to comply and has already lost more than €360 million of EU funds, suspended by the Commission as part of the penalty payment. The Polish government has even defied the Commission and the Court of Justice by referring the matter to

the Constitutional Court which [declared](#), in October 2021 that the Court had exceeded its powers and that the EU Treaty is partly incompatible with the country's constitution. This decision by the Constitutional Court is itself the subject of an infringement procedure launched in December 2021, with a further referral to the CJEU announced for February 2023.

A WINDOW OF OPPORTUNITY

In this context, the Commission and Member States have taken advantage of a window of opportunity created by the institutional calendar and events. On the one hand, the new Multiannual Financial Framework for the period 2021-2027, agreed at the end of 2020, provides for a new instrument - the regulation introducing budgetary conditionality for breaches of the rule of law, and an updated version of the regulation on [common provisions](#) to the cohesion programmes. The latter introduces so-called "enabling conditions" on which the payment of cohesion funds depend, which are specific or horizontal to the objectives of a programme, i.e. applicable to all programmes. From the outset of its budget design, the European Union has therefore equipped itself with the means to link the budgetary tool to the rule of law toolkit.

Proposed by the Commission in 2018 and finally adopted in December 2020, budgetary conditionality is potentially the most effective instrument. The [general conditionality regime for the protection of the Union](#) is not a sanction mechanism covering all rule of law issues. For it to be applicable, the infringements identified must threaten "*in a sufficiently direct way*" the sound management of the budget or the protection of the financial interests of the Union.

For this reason, the CJEU found that the mechanism does not "*circumvent*" the Article 7 procedure. Budgetary conditionality differs from other tools in that it shifts the procedures from the realm of values, which is conducive to political relativism, to the realm of finance, while providing a means to demonstrate how corruption works. The other particularity of the mechanism is the sanction it carries, which is both financially and symbolically significant since it

impacts on the distribution of European funds, one of the foundations of European solidarity. The latter is based, as the CJEU recalled, on the mutual trust of the Member States in the "*responsible use of common resources*". The Hungarian and Polish governments clearly understood the threat, as they were the only ones to oppose the adoption of the conditionality regulation and to refer the matter to the Court.

In addition, and in parallel to the adoption of the multiannual budget, the Covid-19 pandemic and its repercussions led the European Union to set up the €750 billion *NextGenerationEU* plan, implemented from spring 2021 to support and help Member States to relaunch and modernise their economies, in which the Recovery and Resilience Facility, endowed with €672.5 billion, is integrated. Each national plan has been drawn up by governments and validated by the Commission and the Council, and payments of EU grants and/or loans, which run until 2026, depend on the achievement of milestones and targets detailed in the plan. To benefit from the funds in the recovery plan, each Member State must therefore do what it has committed to do. The operation of the facility introduces *de facto* conditionality, which is not specific to the rule of law, and which is used to the full in this respect by the European institutions.

Furthermore, the recovery plans and the cohesion programme facilitated the combination of tools already available to the Commission to try to enforce the rule of law, but which, used separately, have so far shown little effectiveness. For example, the annual report on the rule of law in the Member States, which has been published since 2020 without being systematically assessed by the Council^[1], only includes recommendations since 2022, which are not accompanied by any binding implementation or verification mechanism. Similarly, the European Semester, the EU's economic, budgetary and social governance cycle, is integrated into the EU's rule of law toolkit through country-specific recommendations, which may contain recommendations on administration and justice when their functioning has an impact on economic life or the state budget. But these recommendations again do not imply any obligation or binding mechanism. However,

^[1] Only the report on the general situation in the Union is discussed annually by the General Affairs Council. The reports on the Member States are discussed only in groups of five, following the order of protocol, on an irregular basis. The reports on Hungary and Poland have only been on the agenda once, in April 2022 and December 2022 respectively.

by using these two types of recommendation to define the objectives to be met in the post-covid recovery plans, the Commission has given them a new power, since their implementation depends on whether or not funds are paid out. Rather than values, the bias is towards economic efficiency, with the understanding that a more efficient and predictable justice system because it is independent, or a stronger fight against corruption, is more favourable to business climate and growth.

Moreover, since the Recovery and Resilience Facility is integrated into the EU budget, the budgetary conditionality mechanism can be applied if the condition of the judicial system jeopardises the EU's financial interests. The combined use of conditionality instruments linked to the EU budget and the milestones to be achieved in the Recovery Plans thus multiplies the EU's ability to force Member States to change their rule of law practices.

THE CASE OF HUNGARY

All of these elements were completed in 2022. On 16 February, the Court of Justice [rejected](#) the appeals introduced by Hungary and Poland against the regulation introducing budgetary conditionality. The Commission was thus able to formally trigger the mechanism on 27 April against Hungary, 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'*. The procedure ended on 15 December with the [suspension of 6.3 billion €](#), equivalent to 55% of the EU funds earmarked for Hungary in the three cohesion policy programmes that operate through public procurement. The Commission had initially proposed a 65 per cent suspension in September, but the Hungarian parliament passed two so-called 'omnibus' laws in October and November to meet the EU's demands. An Integrity Authority and an anti-corruption working group were created, an anti-fraud and anti-corruption strategy for the period 2021-2027 was drafted, audit and control mechanisms for the

use of EU funds were strengthened, and the number of single-bid tenders was reduced where EU-funded projects are concerned.

In its decision to suspend part of the cohesion funds, the Council noted, however, that *"significant weaknesses continue to seriously undermine the adequacy of the remedial measures which have horizontal, structural and systemic nature"* and stressed that the adequacy of the measures needs to be demonstrated in practice and through a longer implementation period. The measures taken by Hungary under the threat of financial penalties are therefore a step forward, albeit a limited one, which has prompted the institutions to step up their pressure through the widespread use of conditionality.

While it decided to suspend cohesion funds under the budgetary conditionality mechanism, the Council [adopted](#) Hungary's €5.8 billion recovery and resilience plan, including twenty-seven "super milestones" on justice, transparency in public procurement, and the fight against fraud, corruption and conflicts of interest. The twenty-seven measures correspond to the shortcomings identified in the conditionality mechanism procedure and take up the recommendations expressed in the framework of the European semester. The Council specified that these milestones must be *"fully and correctly"* implemented before Hungary can submit its first payment claim.

On 22 December 2022, the Commission approved the partnership agreement with Hungary for Cohesion Policy 2021-2027, for a total amount of almost €22 billion. It sets judicial independence as a horizontal condition, i.e. one that could justify the suspension of the entire €22 billion programme, and makes the disbursement of funds conditional on the implementation of the twenty-seven super-milestones required under the RRP. It also sets out a series of specific enabling conditions for several programmes, notably in the areas of LGBT rights and asylum. In the two cases, the Commission is trying through conditionality to obtain the changes that Hungary has so far refused to make via legal action before the Court of Justice.

Hungary thus represents a kind of textbook case of how the EU can deploy the different types of conditionality at its disposal in a broad and complementary way, with the Member State in question potentially risking a total loss of almost €30 billion by 2027, or one fifth of its 2022 GDP.

THE CASE OF POLAND

Poland, which like Hungary is subject to the procedure in Article 7 and is more subject to infringement proceedings as well as Court of Justice rulings on the rule of law than Hungary, is less affected by the various conditionality instruments.

The Commission has not triggered the budgetary conditionality mechanism against Hungary as it could not demonstrate that the infringements of the independence of judges directly threaten the management of the budget and the financial interests of the Union, as required by the Regulation. It [concluded](#) €76.5 billion partnership agreement with Poland as of June 2022, without mentioning *a priori* any enabling conditions that would leave Poland at risk of having its funds suspended. Instead, as with Hungary, it has used the Recovery and Resilience Plan to impose measures to remedy certain breaches of the rule of law.

[Approved](#) by the Council in June 2022, the Polish plan, worth €35.4 billion (€23.9 billion in grants and €11.5 billion in loans), requires in particular that the disciplinary system for judges be transferred to a court other than the disciplinary chamber of the Supreme Court. It also demands that judges sanctioned by the disciplinary chamber of the Supreme Court should have their cases reviewed by a court that complies with European law. The objectives also include the right of Polish courts to submit preliminary questions to the CJEU and to verify whether a judge fulfils the conditions of independence and impartiality and has been "*established by law*[2]". Regarding the practices of the Law and Justice (PiS)-led government, the plan calls for an improvement in legislative work, through the introduction of public consultations and the limited use of fast-track procedures in parliament.

[2] Judges appointed since the so-called unconstitutional reforms of the Constitutional Court, the Supreme Court and the National Judicial Council are no longer considered to be "established by law".

As with Hungary, the required milestones repeat recommendations previously made under the Rule of Law mechanism or the European Semester. And similarly, the decision validating the plan states that "*Poland should fulfil those milestones before the submission of the first payment request and no payment under the facility may be made before their fulfilment*". So, to receive the €35.4 billion of its recovery plan, the Polish government will have to undo much of the judicial system that was created to gain control of the judiciary. The stakes and economic pressure are high, as the plan represents about 5% of Polish GDP in 2022, and the growth potential brought by the plan is estimated by the Commission to be between 1.1% and 1.8% by 2026, whilst the country's most recent [growth forecasts](#) are of the order of 0.4% in 2023 and 2.5% in 2024.

CONFIRMATION BY ROMANIA

By virtue of opportunity and political logic, the Recovery and Resilience Plans have thus become the EU's main instrument for action on the rule of law. Their mode of operation, which makes the disbursement of funds conditional on the achievement of predetermined objectives, and the size of the sums at stake constitute a powerful lever for forcing governments to do what they have refused to do or have been slow to implement. This has been confirmed by another Member State, Romania, whose problems with the rule of law have been less conspicuous but nevertheless persistent dramatic in recent years.

Since its accession in 2007, Romania has been subject to a special instrument, the Cooperation and Verification Mechanism (CVM), which aims to facilitate and monitor reforms of the judicial system and improvements in the fight against corruption. The CVM, which was supposed to work by incentives, in particular peer pressure, did not provide for sanctions if no progress was made. The Court of Justice nevertheless [ruled](#) in 2021 that the CVM was binding, stressing that "*Romania is required to take appropriate measures to meet the benchmarks [of the CVM] and to refrain from implementing any measure that could jeopardise their being met*". In November 2022, after fifteen

years of slow progress punctuated by backtracking by the various governments in power in Bucharest, the Commission considered that Romania's progress was "sufficient" and proposed to close the CVM^[3]. In the meantime, some of the long-awaited measures under the mechanism have been taken under the Recovery and Resilience Plan.

With €29 billion in grants and loans, Romania's RRP includes 117 investment measures and 64 reforms. Among the latter, included in the "health, economic and social resilience" pillar, in a chapter on good governance, are several objectives concerning the judiciary and the fight against corruption. Among the targets to be met to qualify for a first instalment are reforms in education, railways and water management, but also the adoption of an anti-corruption strategy. Romania received €2.6 billion on 27 October 2022.

Milestones for the next disbursement include the reform of laws related to the judiciary, the status of magistrates, the organisation of the judiciary and the Superior Council of Magistracy, which were requested under the CVM since 2018 and were finally enacted in November 2022. By the end of the plan in 2026, Romania will also have to implement a strategy for the development of the judiciary, amend the criminal code and the criminal procedure code, and bring into force consolidated laws on integrity and the revision of the government's ethics and conduct codes. The RRP even sets very specific targets, such as an 85% occupancy rate for prosecutors in the National Anti-Corruption Directorate by 30 June 2023, the implementation of at least 70% of the measures in the new anti-corruption strategy by 31 December 2025, and a 50% increase in the value of assets managed by the National Agency for Seized Property Management.

THE STRATEGY'S LIMITATIONS

The conditionality associated with the disbursement of the Recovery Plan funds has been used successfully so far in Romania, where the current government, unlike several of its predecessors, is quite willing to address the problems identified by the European institutions. While the deployment of the various conditionalities

in the case of Hungary and Poland demonstrates the breadth of the range of instruments available and the size of the sums involved, its effectiveness remains hypothetical for the time being.

The main reason, in contrast to the Romanian example, is that the governments in Budapest and Warsaw are not spontaneously inclined to remedy the breaches of the rule of law that they themselves have committed. While the economic pressure of the pandemic, inflation and the war in Ukraine has left them with little choice but to negotiate the terms of a recovery plan on EU terms, they may be tempted to buy time to re-create some room for manoeuvre under the circumstances. While the Polish President's strategy of delaying the adoption of the law on the disciplinary system for judges, a condition that would allow a first payment, is probably part of political manoeuvring within the ruling majority, the attitude of the Hungarian Prime Minister raises many doubts about his motives and intentions.

Despite the measures conceded in the autumn that reduced the amount of cohesion funds suspended by the European Union, Hungary seems to be becoming more radical in its opposition to the objectives, values and interests of the Union. This is most evident in the closeness shown to Russia, Belarus and China, as well as in repeated blockages in the discussions on sanctions against Russia due to the war in Ukraine. The Commission's [referral](#) of Hungary to the Court of Justice in February 2023 for voting twice against the EU's position at the World Health Organisation is a sign of concern about a Member State that is increasingly disregarding its obligations as a member of a political community and of values.

The developments in Hungary and Poland since the outbreak of the war in Ukraine provide a contrast which is affecting the way the European Union is addressing the question of the rule of law. Poland, by virtue of its geographical and political position, is a central part of the EU's and NATO's strategic response to the war in Ukraine, whether in terms of receiving refugees, maintaining lines of communication and supply, or organising material military support. The institutions half-heartedly acknowledge that this situation justifies

[3] A CVM had also been set up for Bulgaria, which also joined the EU in 2007. The Commission proposed in 2019 to close the mechanism for Bulgaria. The closure has not been formally decided, but the Commission no longer publishes a monitoring report.

a certain flexibility in the dialogue with Warsaw, while trying to remain firm on the objectives of restoring the rule of law.

This raises the question of the degree of exigency in the elaboration of the objectives and the evaluation of their implementation. For Hungary, Poland and Romania, as for the other twenty-four Member States, the list and timetable of milestones and targets is the result of a more or less intense and difficult dialogue between the Member States, who designed the plan, and the Commission, which assessed and approved the plans before validation by the Council. In the case of Poland in the spring, and Hungary in the autumn, dialogue developed into cooperation between governments and the Commission working together to draft the plan. The compromise reached with Poland to approve the recovery plan has been widely criticised, including within the Commission, as Frans Timmermans and Margrethe Vestager opposed the agreement reached, and the two Commissioners in charge of justice, Vera Jourova and Didier Reynders, expressed their doubts in letters to Ursula von der Leyen.

A QUESTION OF POLITICAL STEERING

In October 2021, the President of the Commission publicly set three conditions for the approval of the Polish plan: *"to dismantle the disciplinary chamber, to end or reform the disciplinary regime, and to start a process to reinstall the judges"*. However, the adopted plan allows the transfer of the disciplinary chamber to another court, the Supreme Administrative Court, which allows it to continue to exist, and the review of the cases of judges sanctioned by a new court does not guarantee their relocation. The conformity of the measures taken with the initial ambitions, which reflected the requirements of the Court of Justice, therefore remains subject to an assessment by the Commission, which will have a political dimension.

The political steering of conditionalities by the Commission is not unequivocal. Discussions on the recovery plans were conducted by the services of the Commissioners responsible for economic portfolios, Valdis Dombrovskis and Paolo Gentiloni. The objectives

and requirements of these financial services are not the same as those of their colleagues in DG Justice who are traditionally in charge of the traditional instruments of the rule of law toolbox. The Commission will eventually have to find an internal balance between the economic and legal dimensions to ensure that the use of conditionality is managed in the best possible way. The potential power of the budgetary conditionality mechanism, the favourable conditions in cohesion programmes, and the milestones in Recovery and Resilience Plans will only be effective if the Commission maintains a clear and demanding line in their application.

Similarly, the Commission will only be able to ensure the effectiveness of these new instruments if it makes full use of their combination with traditional instruments such as infringement procedures and appropriate use of the recommendations of the rule of law mechanism and the European semester. This is all the more necessary since conditionality cannot cover all violations of the rule of law, as the constraints of the law do not allow for a systemic application of the logic of financial sanctions. The conditionality mechanism is only legal because it requires a direct link between rule of law violations and the EU budget to be demonstrated, and the milestones imposed in the recovery plans must have an economic and social justification, as the Recovery and Resilience Facility is legally based on the EU's economic and social competences.

The recent referrals to the Court against Hungary and Poland are a positive sign in this respect. By using Article 2 TEU for the first time as the basis for its case against a Member State, in this instance Hungary, in the infringement proceedings concerning the Child Protection Act, the Commission has shown that it is continuing to broaden its interpretation of the Treaties to feed into its action on the basis of the case law of the Court of Justice^[4]. For its part, the Council cannot rely solely on these instruments and must pursue Article 7 by maintaining the possibility of a vote on the *"clear risk of a serious breach"* in Hungary and Poland if the situation does not improve in both states. The first test for both institutions will come if either of these two Member States presents reforms that still do not

^[4] Article 2 TEU lists the common values on which the Union is founded. It is on the violation of these values that the Article 7 procedure is based, but it had never been advanced in infringement proceedings. The CJEU referred to it for the first time in its [judgment of February 2022](#) rejecting the Hungarian and Polish appeals against the budgetary conditionality mechanism.

meet the Union's demands, or if they do not show an intention to legislate soon.

For the European Union, the resolution or otherwise of the rule of law issue is linked to two medium-term deadlines. The first is the outcome of the parliamentary elections in Poland in autumn 2023. A political changeover, after two terms of office for the ruling Law and Justice party, would facilitate a return to political cooperation and a judicial system more in line with values and treaties. The second will take place in the second half of 2024 when Hungary takes over the EU Council Presidency, followed by Poland in the first half of 2025. While the political direction of the Polish government will then depend on the autumn 2023 elections, it is certain that, barring any

unforeseen events, Viktor Orban's government will hold the Hungarian presidency and be in a position to influence the agenda.

The introduction of conditionalities has strengthened the hand of the European Union in dealing with states that violate its values in a systemic way. It must not deprive them of their effectiveness.

Eric Maurice

Head of the Foundation's Brussels Office

Contributor to this study: Amandine Guérin, research assistant at the Foundation's Brussels office

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