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Hungary, Poland, and Access to EU Funding: The EU Charts a New Course Under The Necessity of Legislation, Conditionality, and The Rule of Law.

Blake S. Rutherford

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**HUNGARY, POLAND, AND ACCESS TO EU FUNDING: THE EU
CHARTS A NEW COURSE UNDER THE NECESSITY OF LEGISLATION,
CONDITIONALITY, AND THE RULE OF LAW.**

*Blake S. Rutherford**

ABSTRACT

In recent years, there has been considerable backsliding in Hungary and Poland regarding the rule of law, media plurality, judicial independence, and emergency powers. In response, the European Union (“EU”) exercised its authority under Article 7 of the Treaty of the Functioning of the European Union to withhold COVID-19 relief funds in an effort to compel these nations to realign with EU principles. This article examines the history, consequence, and legal effect of the landmark decision, Hungary v. Parliament and Council. It argues that the EU was on sound legal footing to utilize money as a means to protect the values of the institution. However, the implications of invoking Article 7 are far-reaching, which requires the EU to establish clarity as to the “rules of the road” for Member States going forward, particularly regarding the application of rule of law principles.

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I. INTRODUCTION: TAKING HUNGARY AND POLAND SERIOUSLY

In 2010, the Fidesz Party came to power in Hungary.¹ This propelled Viktor Orbán to power and ushered in a new era of hard-

¹ Krisztina Than & Gergely Szakacs, *Fidesz wins Hungary election with strong mandate*, REUTERS (Apr. 11, 2010, 2:55 PM), <https://www.reuters.com/article/us->

right politics in that nation.² Orbán vowed to build an “illiberal state.”³ The nature of this characterization was ambiguous at its inception, however, in the decade following his election, his endeavors, joined by Poland, have become more apparent.⁴ By 2018, Orbán had linked illiberal democracy with Christian democracy in an attempt to legitimize his authoritarian aims.⁵ Over time, actions in Hungary and Poland crystallized these attitudes. There have been dramatic rollbacks in freedom of speech, press freedom, and human rights protections in both nations.⁶ Curtails on the independence of the judiciary followed, causing many scholars to question as early as 2017 whether the rule of law was backsliding in the European Union.⁷

Other scholars, like Samuel Huntington, argued in as early as 1991 that waves of democratization are often followed by “reverse waves,” in which “democratic systems were replaced . . . by historically new forms of authoritarian rule.”⁸ At the time, Huntington could merely speculate about what the future in 2022 held, however, inferences from events in the 1990s, notably reverse waves in Sudan and Nigeria, inform present-day circumstances in Hungary and Poland.⁹ Germane to the present day, Huntington noted, “[t]he

hungary-election/fidesz-wins-hungary-election-with-strong-mandate-idUKTRE63A1GE20100411.

² Lisa Teno, *Hungary: Authoritarianism by Another Name?*, GEOPOLITICAL MONITOR (June 1, 2021), <https://www.geopoliticalmonitor.com/hungary-authoritarianism-by-another-name>.

³ Luca Kristóf, *Cultural Policy in an Illiberal State. A Case Study of Hungary after 2010*, 3 E. EUR. J. SOC’Y & POL. 126, 126 (2017).

⁴ Heino Nyssönen & Jussi Metsälä, *Liberal Democracy and its Current Illiberal Critique: The Emperor’s New Clothes?*, 73 EUR.-ASIA STUD. 273, 273 (2020).

⁵ *Id.* at 275 (arguing “Hungary’s political situation could be called soft authoritarian. In as much as ‘illiberalism’ belongs to Orbán’s political vocabulary, the term soft authoritarianism is our own innovation drawing on Hungarian history.” (citation omitted)).

⁶ Ruth Wodak, *Entering the ‘post-shame era’: the rise of illiberal democracy, populism and neo-authoritarianism in EUrope*, 9 GLOB. DISCOURSE 195, 195 (2019).

⁷ *See, e.g.*, Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3 (2017) (at this time, Pech and Scheppele believed that the response of EU states was ineffective at bringing Member States back in line with the values of the Union).

⁸ Samuel P. Huntington, *Democracy’s Third Wave*, 2 J. DEMOCRACY 12, 18 (1991).

⁹ *Id.* at 17-19. (identifying seven factors that contribute to transitions away from democracy: “1) the weakness of democratic values among key elite groups and the

overwhelming majority of transitions from democracy, however, took the form either of military coups that ousted democratically elected leaders, or executive coups in which democratically chosen chief executives effectively ended democracy by concentrating power in their own hands”¹⁰ To that end, Ivan Krastev has argued that in recent years “[p]erhaps the most alarming development” has been the evolutions in Hungary and Poland where leaders are “demonizing the political opposition, scapegoating minorities, and undermining liberal checks and balances.”¹¹ There are, perhaps, many explanations for the development of a counternarrative to the democratizations of the 1990s and 2000s, but Aron Buzogány and Mihai Varga argue that it is too simplistic to suggest it is a knee-jerk response to liberalism as pundits often project, but rather the confluence of “long-term strategic goals and short-term power maximizing considerations.”¹² This involved the increased influence of conservative intellectuals over a period of time as well as the growth of conservative think-tanks, foundations, and media outlets.¹³

Tensions between Hungary, Poland, and the European Union (“EU”) escalated between 2017 and 2018, when the European Parliament passed a resolution declaring Hungary at risk of breaching the EU’s core values.¹⁴ This measure was in response to concerns

general public; 2) severe economic setbacks, which intensified social conflict and enhanced the popularity of remedies that could be imposed only by authoritarian governments; 3) social and political polarization, often produced by leftist governments seeking the rapid introduction of major social and economic reforms; 4) the determination of conservative middle-class and upper-class groups to exclude populist and leftist movements and lower-class groups from political power; 5) the breakdown of law and order resulting from terrorism or insurgency; 6) intervention or conquest by a nondemocratic foreign power; 7) ‘reverse snowballing’ triggered by the collapse or overthrow of democratic systems in other countries.”)

¹⁰ *Id.* at 18.

¹¹ Ivan Krastev, *Eastern Europe’s Illiberal Revolution*, FOREIGN AFFS. (Apr. 16, 2018), <https://www.foreignaffairs.com/articles/hungary/2018-04-16/eastern-europes-illiberal-revolution>.

¹² Aron Buzogány & Mihai Varga, *Illiberal thought collectives and policy networks in Hungary and Poland*, EUR. POL. & SOC’Y, July 2021, at 1, 2.

¹³ *Id.*

¹⁴ Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence

regarding Hungarian efforts to diminish the independence of its electoral system judiciary; promote corruption and conflicts of interest; limit privacy and data protection; thwart academic freedom, as well as the freedom of expression, speech, religion, and association; oppose the right to equal treatment; and curtail the rights of minorities and migrants, and the economic and social rights of the Hungarian people.¹⁵

Prior to initiating this act against Hungary, the European Commission pursued a similar action against Poland, described as the EU's "nuclear option," regarding efforts to inhibit its independent judiciary through the appointment of PiS loyalists, the ruling party, in a form of court-packing. Poland said at the time that its efforts were aimed at creating efficiency, accountability, and professionalism while reducing corruption.¹⁶ The Commission ultimately referred that matter to the Court of Justice of the European Union ("CJEU").¹⁷ The CJEU entered a preliminary order requesting that Poland institute interim measures to bring it into compliance, which Poland ignored.

of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded (2017/2131(INL)), 2018 O.J. (C 433) 1.

¹⁵ *Id.* ¶ E(1).

¹⁶ Opinion of the Venice Commission on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, ¶ 6, CDL-AD 031 (Dec. 11, 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e). It is referred to as the "nuclear option" because the outcome, resulting from the procedures outlined under Article 7 of the Treaty of the European Union, may result in the suspension of the right to vote on EU decisions.

¹⁷ *Rule of Law: European Commission refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures*, PUBAFFS. BRUXELLES (Mar. 31, 2021), <https://www.pubaffairsbruxelles.eu/eu-institution-news/rule-of-law-european-commission-refers-poland-to-the-european-court-of-justice-to-protect-independence-of-polish-judges-and-asks-for-interim-measures> ("The Commission considers that the Polish law on the judiciary undermines the independence of Polish judges and is incompatible with the primacy of EU law. Moreover, the law prevents Polish courts, including by using disciplinary proceedings, from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice.").

In October of 2021, the CJEU ordered Poland to pay a fine of €1,000,000 per day from the date of the order.¹⁸

That same year, Orbán imposed restrictions on the LGBTQ community.¹⁹ Orbán also called for new rules to allow national parliaments to suspend the EU's legislative process, which struck at the heart of the European Union's notion of primacy. Both matters were highlighted in the European Commission's 2021 "Rule of Law Report," which raised serious concerns about the actions of Hungary as well as Poland.²⁰

The confluence of these actions by Hungary and Poland from 2018 to 2021 brought to the forefront the purpose and effect of both the Treaty on the Functioning of the European Union ("TFEU") and Article 7 of the Treaty on the European Union ("TEU").²¹ It also accelerated EU-based legal mechanisms against both nations pursuant to Article 2 of the TEU.²² This confrontation with Brussels reached its apex when, in 2020, the European Council pursued the means to withhold funds from Member States.²³ This determination sparked an

¹⁸ Case C-204/21, *Comm'n v. Poland*, ECLI:EU:C:2022:991, ¶ 42 (Dec. 15, 2022).

¹⁹ Elena Sánchez Nicolás, *Orbán counters EU by calling referendum on anti-LGBTI law*, EU OBSERVER (July 22, 2021, 8:43 AM), <https://euobserver.com/rule-of-law/152509>.

²⁰ *Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions*, COM (2012) 673 final (Nov. 14, 2012), <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0673:EN:NOT>.

²¹ Consolidated Version of the Treaty on the Functioning of the European Union art. 7, Oct. 26, 2012, 2012 O.J. (C 326) 1 OFFICIAL J. OF THE EUROPEAN UNION, 13, 17 (2008) [hereinafter TFEU]; Consolidated Version of the Treaty of the European Union art. 7, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU]. This requires an analysis under Article 2, which states, in part, "Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."

²² TEU art. 2 (stating that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.").

²³ General Secretariat of the EUCO, *European Council meeting (10 and 11 December 2020) – Conclusions*, EUCO 22/20 (Dec. 11, 2021) (stating, in pertinent part, that "a

annulment action from Hungary, supported by Poland, before the CJEU in March of 2021. That autumn, the European Council acknowledged the virtue of withholding funds from Hungary and Poland, although it agreed to await the final ruling of the CJEU.²⁴ Once that ruling was published, the dynamic within the EU and the global community shifted. The idea that the EU was incapable of holding its backsliding Member States accountable received international scrutiny, including the relationship between the role of politics, the rule of law, and broader EU principles generally.²⁵ The financial regulation established a series of mechanisms for the CJEU to reconsider the relationship between Member States, EU values, law, and economics.²⁶

On February 16, 2022, the CJEU reached a determination on Hungary's annulment action.²⁷ This landmark decision, which involved the full session of the Court, denied Hungary's annulment action and thereby held that the EU could withhold funds if Member

The objective of the Regulation on a general regime of conditionality for the protection of the Union budget is to protect the Union budget, including Next Generation EU, its sound financial management and the Union's financial interests. The Union budget, including Next Generation EU, must be protected against any kind of fraud, corruption and conflict of interest. b) The application of the conditionality mechanism under the Regulation will be objective, fair, impartial and fact-based, ensuring due process, non-discrimination and equal treatment of Member States.”).

²⁴ *Id.*

²⁵ French Presidency of the Council of the European Union, *Recovery, Strength, and a Sense of Belonging*, <https://wayback.archive-it.org/12090/20221120095833/https://presidence-francaise.consilium.europa.eu/en/programme/programme-of-the-presidency> (last reviewed Mar. 7, 2022) (“A humane Europe . . . defends the rule of law and upholds its values . . .”).

²⁶ Commission Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of July 18, 2018 on the Financial Rules Applicable to the General Budget of the Union (amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014 and Decision No. 541/2014/EU, and repealing Regulation (EU, Euratom) No. 966/2012, 2018 O.J. (L 193) 1 [hereinafter the “Financial Regulation”].

²⁷ Case C-156/21, *Hungary v. Eur. Parliament*, ECLI:EU:C:2022:97 (Feb. 16, 2022), <https://curia.europa.eu/juris/document/document.jsf?docid=254061&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=310867> [hereinafter CJEU].

States breach EU's core democratic principles.²⁸ It is not subject to appeal, and it paves the way for European Commission President Ursula von der Leyen to act against Hungary and Poland, although the timeline for such action is unknown.²⁹

Money plays a considerable role in the power dynamic of the EU.³⁰ Last year, the EU offered €750bn (\$895bn) in loans and grants in exchange for Member States' overhauling their economies in line with Brussels-approved plans.³¹ Hungary and Poland are two of the largest net recipients of EU funds.³² The impact on both nations could be considerable, however, this paper does not endeavor to forecast how the European Commission will act. Rather, it examines the legal framework the CJEU has imposed for the withholding of funds from Member States. It is convenient to say that the CJEU may do so based on "EU principles," but what did the CJEU intend? How does the conditionality mechanism function with respect to this decision? And what are the implications for Member States in the future? These are the questions this paper will attempt to answer.

There was considerable concern about Hungary's transition against EU principles well before this legal action. Editorial comments in *Common Market Law Review* revealed the following, for example:

Hungary has been in the spotlight on the European scene for the past two years, ever since the conservative-nationalist Fidesz Party and its ally, the Christian democrat KDNP party, won the general election of April 2010. Since then much has been written regarding what may be termed "the Hungarian problem". Nonetheless, there are reasons

²⁸ *Id.*

²⁹ Matina Stevis-Gridneff et al., *Top European Court Rules E.U. Can Freeze Aid to Poland and Hungary*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/world/europe/eu-court-funds-hungary-poland.html>.

³⁰ Giacomo Benedetto, *Power, money and reversion points: the European Union's annual budgets since 2010*, 24 J. EUR. PUB. POL'Y 633, 633-34 (2017).

³¹ *Recovery plan for Europe*, EUR. COMM'N, https://ec.europa.eu/info/strategy/recovery-plan-europe_en (last visited Jan. 19, 2023).

³² Tamara Kovacevic, *EU budget: Who pays most in and who gets most back?*, BBC NEWS (May 28, 2019), <https://www.bbc.com/news/uk-politics-48256318>.

to tread carefully when commenting on the matter in this editorial. The problem appears to go well beyond its legal and even political dimensions. It has deep and intricate historical, social and cultural aspects. When discussing such a problem, we must always remind ourselves of our lack of knowledge concerning the specific cultural background; and we should recall the sensitivity of this multifaceted situation.³³

And there has been long-standing concern about Hungary's negative influence on the EU generally. To be sure, the problem, according to scholars, was the following:

The problem of Hungary once again brings out the discrepancy between, on the one hand, the self-understanding of the Union as founded on universal values and as the guarantor of their protection within the Union's territory and, on the other hand, the limited capacities of the European Union to involve itself and intervene in the internal orders of its Member States.³⁴

In 2018, the concerns were no less severe. A Guest Editorial in *Common Market Law Review* foreshadowed today's developments. "At issue is whether illiberal democracies become part of the European public order as laid out in Article 2 TEU, or are opposed by it. In any event, the consequences could be truly far-reaching."³⁵ On par with this is the consideration that in short order Hungary has managed to transform from a success story in the form of moving from Communism, to democracy, to now being a quasi-authoritarian state. Nasiya Daminova, writing in the *Hungarian Journal of Legal Studies*, observed:

³³ Editorial Comments, *Hungary's new constitutional order and "European" unity*, 49 COMMON MKT. L. REV. 871, 871 (2012).

³⁴ *Id.* at 877.

³⁵ Armin von Bogdandy et al., *A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines*, 55 COMMON MKT. L. REV. 1, 2 (2018).

The 'nuclear option' of Art. 7 TEU was specifically included in the EU primary law as a mean to guarantee that any Member State respects not only the Treaty provisions as such, but also the common values captured in Art. 2 TEU - including the compliance with the Rule of Law principle. Art. 7 TEU comprises the preventive (Art. 7(1) - determining a clear risk of a breach) and the sanctioning arms (Art. 7(2) - a serious and persistent breach of the common EU's values by a Member State). Art. 7(1) TEU allows the Council (of the EU) to invoke the preventive mechanism at the request of the European Parliament, one third of the Member States or of the European Commission. The Council then has to make a final decision by a majority of four-fifths of its members, after obtaining the consent of the European Parliament.³⁶

This paper endeavors to explain and elaborate on the history, consequence, and the ultimate legal effect of the CJEU's decision in *Hungary v. Parliament and Council*. To be sure, it is necessary to consider the wide-ranging matters that impacted the determination to finally, in the mind of the Court, revisit the importance of the rule of law, its clarity, and the means whereby an ancillary standard of evaluation could be employed.

Conditionality plays a central role in the EU's efforts to refocus its attention on key principles and, therefore, it is important to provide context to that development. That context is offered in Section II. Section III of this paper addresses the importance of direct effect as a means for lackluster EU decision-making prior to the CJEU's ruling in *Hungary v. Parliament and Council*. Section IV analyzes Hungary and Poland's path towards autocracy and the dramatic about-face of the EU to thwart those efforts, including utilizing the EU budget as a tool for institutional protection. Section V considers the "conditionality mechanism" developed by the EU to secure funding, the claims by the parties, the opinions of the Advocate General and CJEU, and the

³⁶ Nasiya Daminova, *Rule of Law vs. Poland and Hungary – an Inconsistent Approach?*, 60 HUNGARIAN J. LEGAL STUD. 236, 239 (2019).

relationship between the financial regulation and Article 7 of TEU. Finally, Section VI evaluates the future legal implications on Member States in the aftermath of the CJEU's ruling.

The EU was right to finally recognize the critical importance of money as a means of protecting the values of the institution – values that are currently under serious threat in Hungary and Poland. As the breadth of this paper argues, the EU has, for the first time, wielded a very large stick in the battle over rights and values. Dynamics, however, are ever-changing, and although the European Commission has the legal authority necessary, we do not yet know how they will choose to use it. That matters, of course, albeit more so as a policy and political matter. Legally, the Commission considered a novel regulatory approach to holding Member States accountable, and the CJEU upheld that approach under the laws of the EU. The Court was on sound legal footing, as I argue. It is a monumental victory in support of the spirit of Article 2, but also affords much-needed clarity and, as I describe, critical “rules of the road” going forward for all EU Member States.

II. CONTEXT: FORECASTING CONDITIONALITY AS A MEANS FOR FUTURE EU FUNDING

As a preliminary matter, the European Union was founded on values that are common to the EU.³⁷ The Court stated, “once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded.”³⁸ This principle is well established in EU law, yet the CJEU extended its reasoning. It determined that Article 7 “is capable of constituting the basis of a conditionality mechanism covered by the concept of ‘financial rules’ within the meaning of Article 322(1)(a) TFEU.”³⁹ The Court elaborated,

³⁷ TEU art. 2.

³⁸ CJEU, *supra* note 27, ¶ 125.

³⁹ *Id.* ¶ 128.

In that regard, it should be noted, first, that the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law . . . and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget.⁴⁰

The Court, for the first time, reached the determination that there was a "clear relationship" between the respect for the rule of law and the implementation of the EU budget.⁴¹ The effect of such reasoning was the acknowledgment by the Court that Article 4(1) established a horizontal conditionality mechanism:

[S]ince it provides that appropriate measures are to be taken where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of its financial interests of the Union in a sufficiently direct way.⁴²

This was a considerable transformation. Laurent Pech and Sebastian Platon noted the significance of a previous CJEU ruling against Poland in 2019 as a precursor for what the CJEU could consider in years ahead.⁴³ They opined:

The Court's ruling also establishes a solid *de facto* precedent with respect to any future attempt in Poland or elsewhere to take control of a court via a retroactive lowering of the retirement age of judges under false pretences. The ruling will similarly add to the growing

⁴⁰ *Id.* ¶ 129.

⁴¹ *Id.* ¶ 130.

⁴² *Id.* ¶ 134.

⁴³ Laurent Pech & Sébastien Platon, *The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case)*, EU L. ANALYSIS (June 30, 2019), <http://eulawanalysis.blogspot.com/2019/06/the-beginning-of-end-for-polands-so.html>.

body of evidence which shows repeated violations by the Polish government of the principle of loyal cooperation in its dealings with the Commission, the Council and now the ECJ.⁴⁴

The concerns about Poland's intentions regarding their judiciary were on the radar of scholars and skeptics alike. Regarding the 2019 judgment, Pech and Platon noted:

Most importantly, this ruling does not directly engage with one of the decisive issues raised by the Commission: the decision of the Polish President to increase the number of posts within the Supreme Court, which will eventually enable the ruling party to capture it. However, considering the arguably unlawful nature of the procedure having been used by the Polish President to appoint individuals to the Supreme Court, this issue should eventually reach the ECJ as it was the subject of the most recent preliminary ruling request adopted by a not yet captured chamber of Poland's Supreme Court on 12 June 2019.⁴⁵

It is not surprising that the CJEU would eventually be faced with a determination regarding the actions of Poland, at first, and then Hungary, regarding intra-state reforms that raised alarm within the EU community. The significant mechanism, as the European Commission ultimately approved, was to link EU principles to the administration of the budget. This determination created a horizontal conditionality mechanism that has resulted in a recalibration of the EU economic structure, one based on principles aligned with money, rather than just principles alone.

⁴⁴ *Id.*

⁴⁵ *Id.*

III. THE GENERAL PRINCIPLE OF DIRECT EFFECT: A TWO-PART TEST THAT INFORMS FUTURE EU DECISION-MAKING

The concept of direct effect is well established in EU law and allows for a measure to be enforceable if it is clear and precise, unconditional, and does not give Member States discretion in its application.⁴⁶ The ramifications of the CJEU decision in the Hungary and Poland matter resulted in specific considerations about the manner in which Member States receive future EU funding. It set forth criteria for addressing the administration of EU funds. The criteria are best summarized as follows: (1) maintain key values of the EU (i.e., rule of law, solidarity) after accession; and (2) demonstrate “mutual trust” among Member States that EU funds will be used in a manner consistent with the common resources of the EU as necessary to effectuate the distribution of funds to Member States.⁴⁷

There was, prior to the CJEU’s decision, a consideration, generally, that national courts should be granted more discretion when confronted with the resisting substance of national law. This served as a preview to the nationalism tendencies that influenced Hungary and Poland, which also informed similar aspects that alarmed the European Commission. The doctrine of direct effect has never been called into question, however, there was a sentiment that perhaps the notion of direct effect was a misnomer. In 2014, Sophie Robin-Olivier argued,

But the effects of EU law in national courts have diversified and grown more complex to such an extent that *Van Gend en Loos* seems to grasp only a thin fragment of EU law enforcement issues. It seems, rather, that *Van Gend en Loos* no longer gives an accurate idea of the ways through which EU law penetrates member states through its enforcement in

⁴⁶ Case C-26/62, *Van Gend en Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. (English Special Edition) 1, <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87132&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=290324>.

⁴⁷ *See id.*

national courts. And it would be an error, I believe, to cling too rigidly to its doctrine, in trying to address the new challenges that the evolution of EU law has created.⁴⁸

This sentiment was clearly alive within Hungary and Poland after the European Commission instituted its rules regarding EU funding. In a speech in Strasbourg in the autumn of 2021, Polish prime minister Mateusz Morawiecki told EU Member States that Poland would not be subjected to “financial blackmail,” once the daily penalties were imposed as result of Poland’s top court determining that EU law was incompatible with Polish national law.⁴⁹ This is not insignificant. Professor Daniel Halberstam has described the *Van Gend* decision as a “constitutional juggernaut on direct effect, holding that the Treaty of Rome creates rights

for individuals that Member State courts must protect.”⁵⁰ Furthermore, in Professor Halberstam’s view, the decision “holds that Member State courts owe the Community a duty of obedience that is not mediated by the national political branches, national laws, or even the national constitution.”⁵¹ The confrontation initiated by Hungary and Poland is one that reaches the very core of the EU.

To be sure, the European Commission recognized the importance of funding as a means of encouragement and deterrence.⁵² These efforts have frustrated both dissenting nations. Be that as it may, the CJEU was forthright in establishing a pathway for the European Commission to impose its will, which in this case is not a carrot, but a stick. EU president Ursula von der Leyen said, “[t]he rule of law is the

⁴⁸ Sophie Robin-Olivier, *The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections*, 12 INT’L J. CONST. L. 165, 166 (2014).

⁴⁹ Piotr Skolimowski et al., *Poland Escalates Rule-of-Law Dispute, Risking EU Funding*, BLOOMBERG (Oct. 19, 2021, 8:15 AM), <https://www.bloomberg.com/news/articles/2021-10-19/poland-escalates-rule-of-law-dispute-risking-eu-recovery-money#xj4y7vzkg>.

⁵⁰ Daniel H. Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY* 26, 29 (Miguel Poiaras Maduro & Loïc Azoulay eds., 2010).

⁵¹ *Id.* at 30.

⁵² *Id.*

glue that binds our union together.”⁵³ The CJEU expressed a similar sentiment:

While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.⁵⁴

The second prong of the test involves the notion of “mutual trust,” which has its roots in Article 2 of the TEU. Judge Sacha Prechal observed, “Although the notion of mutual trust is not mentioned in the Treaties, it has become an essential building block of the Union legal system and, in the meanwhile, has been assigned the status of a principle, arguably a structural principle of EU constitutional law.”⁵⁵ The CJEU, acknowledging this structural principle, applied it to the administration of EU funds.⁵⁶ To be sure, this offers wide latitude to the European Commission, in conjunction with Article 2, to reach determinations presently and in the future.

According to the principle, which Iris Canor has characterized as a “horizontal *Solange*,” Member States must believe that all other Member States are complying with EU law.⁵⁷ Thus the relationship between the first prong of the test and the second is axiomatic. As

⁵³ *Rule of Law: President von der Leyen says the Commission will act to protect EU citizens' rights and common values*, PUBAFFS. BRUXELLES (Oct. 19, 2021), <https://www.pubaffairsbruxelles.eu/eu-institution-news/rule-of-law-president-von-der-leyen-says-the-commission-will-act-to-protect-eu-citizens-rights-and-common-values>.

⁵⁴ CJEU, *supra* note 27, ¶ 18(6).

⁵⁵ Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, 2 EUR. PAPERS 75, 76 (2017).

⁵⁶ *Id.*

⁵⁷ Iris Canor, *Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 183, 183 (Armin von Bogdandy et al. eds., 2021).

Canor noted, “By now, it is well-established jurisprudence that in cases where a Member State systematically violates the rule of law, the trust otherwise conferred upon it by other Member States is to be suspended and the cooperation with its judiciary should be deferred.”⁵⁸

IV. THE PATH FROM THEN TO NOW: POLAND, HUNGARY, AND THE EVENTUAL URGENCY OF THE EUROPEAN COMMISSION

1. *Judicial Rollback in Poland*

Shortly after gaining control of the Polish government, the PiS Party began instituting a series of reforms aimed at the judiciary. First, they passed amendments limiting the Constitutional Tribunal, which is responsible for resolving constitutional questions related to actions taken by the executive and legislative branches.⁵⁹ As Mark Brzezinski noted, it “was a unique creation in the Soviet bloc and a radical departure from orthodox communist constitutionalism.”⁶⁰ By 2017, the PiS Party had passed measures to replace the Supreme Court justices

⁵⁸ *Id.* at 184-85, 200. Canor argued that Member States should be able to freeze their horizontal relationship with a Member State, which infringes the rule of law, under a less stringent test than the Court had imposed at the time. It is not necessary to revisit those arguments based on this new ruling, however it is worth noting the following: “Indeed, in my opinion, the principle of mutual trust transformed the EU and indirectly introduced into the European legal order the principle of self-help. Due to the systemic deficiency in the home State, the host State might be prevented from being able to perform its own obligations stemming from EU law (i.e., enforce the home State’s civil judgments or execution of a European Arrest Warrant, etc.). Therefore, the principle of mutual trust permits the court in the host State to take the law into its own hands and to independently decide to withhold its cooperation with this failing home State. Just like in other cases regarding the interpretation of EU law, a domestic court is not obliged to make a request for a preliminary ruling to the CJEU, except when it decides on the non-application of EU legislation.”

⁵⁹ See Michael Hoffman, *[PiS]sing off the Courts: the PiSParty’s Effect on Judicial Independence in Poland*, 51 VAND. J. TRANSNAT’L L. 1153, 1161 (2018).

⁶⁰ Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AM. J. COMPAR. L. 153, 153 (1993).

as well as other top officials in other courts with members of the PiS Party.⁶¹ According to Grzegorz Ekiert:

Three new laws give the ruling party the right to subvert constitutionally prescribed terms of judicial appointments, replace all members of the Supreme Court and heads of all other courts in the country. They are designed to put the national judicial system under the control of the Ministry of Justice. These laws evidently breach the Polish Constitution and were introduced without consultation and debate. The manner in which these laws were enacted violated parliamentary procedures. This legislative coup provoked huge street protests across the country and fears over the erosion of the rule of law across Europe.⁶²

The reforms in Poland triggered a swift and robust response from all facets of Europe.⁶³ Despite actions taken by the European Commission regarding Poland, the assault on the independent judiciary abided. This led the European Commission to file an infringement action against Poland in 2019, asserting that Poland had failed to fulfill its obligations under Article 19(1) of the TFEU.⁶⁴ In July 2021, the CJEU ruled that Poland's regime for judges was incompatible with EU law.⁶⁵

The risk to judicial independence caught the attention of the world community.⁶⁶ As of last year, Poland is atop the judicial risk

⁶¹ Grzegorz Ekiert, *How to Deal with Poland and Hungary*, 13 SOC. EUR. 1, 2 (2017).

⁶² *Id.*

⁶³ See Alistair Walsh, *What are the Polish judicial reforms?*, DEUTSCHE WELLE (Nov. 5, 2019), <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>.

⁶⁴ *EU court says Poland broke law by making judges retire early*, DEUTSCHE WELLE (June 24, 2019), <https://www.dw.com/en/eu-court-says-poland-broke-law-by-making-judges-retire-early/a-49332774>.

⁶⁵ Case C-791/19, *Comm'n v. Poland*, ECLI:EU:C:2021:596, ¶ 1 (July 15, 2021).

⁶⁶ Capucine May, *Judicial independence under attack in 45 countries*, HUM. RTS. OUTLOOK (Nov. 18, 2021), <https://www.politico.eu/wp-content/uploads/2021/11>

index as one of a select few nations where the threat to judicial independence is the most severe.⁶⁷ Of course, Member State judiciaries are independent and complex systems.⁶⁸ Naturally, the formation of the CJEU along with the institution of doctrine consistent with the TFEU has had an influence on wider concepts of judicial independence.⁶⁹ Nevertheless, efforts within Poland extended beyond judicial reform.⁷⁰ This illuminated a myriad of factors pertinent to the EU's concept of the rule of law, which was an important consideration. French President Emmanuel Macron acknowledged:

[A]bandoning principles, turning their backs on Europe, having a cynical approach to the European Union that only served as dispensing credit without respecting its values... Europe isn't a supermarket. Europe is a common destiny. It is weakened when it accepts its principles being rejected. The countries in Europe that don't respect the rules should have to face the political consequences. I will speak to everyone with respect but I won't compromise on European principles - on solidarity or democratic values.⁷¹

This strong rhetoric illuminated principles within the EU. Consider what Laurent Pech, Patryk Wachowiec, and Dariusz Mazur believed,

Indeed, Poland can now be considered the first EU Member State to no longer have an independent judicial branch following years of sustained attacks deliberately targeting Polish courts, judges and prosecutors culminating in the adoption of the "muzzle law" of 19 December 2019. This law, for the first time in the history of the EU,

/18/Judicial-independence-under-attack-in-45-countries-%E2%80%93-Poland-slips-furthest-in-global-ranking.pdf.

⁶⁷ *Id.*

⁶⁸ See Hoffman, *supra* note 59, at 1175-76.

⁶⁹ See generally R. Daniel Keleman, *The Court of Justice of the European Union in the Twenty-First Century*, 79 L. & CONTEMP. PROBS. 117 (2016).

⁷⁰ For a general discussion, see Fryderyk Zoll & Leah Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 FORDHAM INT'L L.J. 875 (2019).

⁷¹ Ekiert, *supra* note 61, at 3.

“legalised” the blatant unconstitutional and systemic violation of EU and ECHR judicial independence requirements. In practice, this means that any Polish judge at any point in time can now be the subject of arbitrary disciplinary investigations, proceedings and/or sanctions (including dismissals), initiated, conducted and adopted by unlawful bodies (as a matter of EU law) – not to forget the subject of arbitrary criminal proceedings – for fulfilling their EU law duties and applying EU rule of law requirements.⁷²

Perhaps there were circumstances that created a specialized dynamic within the EU at the time. However, Poland’s attitude towards the rest of the Member States exacerbated a circumstance that could otherwise be easily diffused. The broader challenge was understanding the intimacy between idea and execution. To be sure, the institution is still figuring that out. Be that as it may, legal certainty is a fundamental principle.

The principle of legal certainty requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by EU law remain foreseeable. It appears in various guises in the case-law of the Court in order to preserve the certainty, stability, unity and consistency of the EU legal order. It is the root and foundation of two other principles of EU law which are its corollaries: the principle of legitimate expectations and the principle of the authority of *res judicata*.⁷³

In the case of Poland, the limitations on the judiciary caused the EU, for the first time, to initiate an action under its Rule of Law framework. The Venice Commission, too, expressed concern.⁷⁴ At the time, Poland did not pay any attention to either, but times have changed. In a move Professor Pech described as a “fake compliance

⁷² Laurent Pech et al., *Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action*, 13 HAGUE J. RULE L. 1, 2 (2021).

⁷³ Joined Cases C-542/18 RX-II & C-543/18 RX-II, Simpson & H.G. v. Council of the EU & Eur. Comm’n, ECLI:EU:C:2019:977, ¶ 90 (Sept. 12, 2019).

⁷⁴ Opinion of the Venice Commission on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, ¶ 45, CDL-AD 001 (Mar. 11, 2016).

trick,” Polish President Andrzej Duda introduced legislation in February of 2022 to dismantle the controversial disciplinary chamber for judges attempting to end the dispute with the EU.⁷⁵

2. *Erosion of Civil and Political Rights in Hungary*

Democratic discontent is particularly acute in Hungary. Nationalist leaders, like Orbán, have found a willing accomplice in a frustrated populace. Direct attacks on the EU, led by the strange and dark narrative that “Brussels is the new Moscow,” gave rise to broader sentiments of victimization and fear.⁷⁶ Further complicating matters is the prevailing attitude, promulgated by the Hungarian government, that refugees in Europe are all potential terrorists.⁷⁷ Establishing a collective purpose and national pride are important tenets of Orbán’s power grab. In 2014, he said, “I don’t think that our European Union membership precludes us from building an illiberal new state based on national foundations.”⁷⁸ To be sure, this was a repudiation of EU values and a threat to further integration. How, after all, is it possible to marry the system Orbán outlined and the system of accountability, liberty, and democratic governance that has allowed Member States to coexist on a transparent and trustworthy legal, social, political, and economic plane for decades?

Since 2010, Orbán’s government has instituted measures that caught the attention of the European Commission and the ire of the European Court of Justice. These include the Hungarian Citizenship

⁷⁵ Anna Włodarczak-Semczuk et al., *Polish president submits bill in move to end rule of law row with EU*, REUTERS (Feb. 3, 2022, 12:13 PM), <https://www.reuters.com/world/europe/polish-president-submits-bill-move-end-rule-law-row-with-eu-2022-02-03>.

⁷⁶ John Shattuck, *Democracy and Its Discontents*, 40 FLETCHER F. WORLD AFFS. 173, 176 (2016).

⁷⁷ Matthew Kaminski, ‘*All the terrorists are migrants*’, POLITICO (Nov. 23, 2015, 5:30 AM), <https://www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen>.

⁷⁸ Honor Mahony, *Orban wants to build ‘illiberal state’*, EU OBSERVER (Jul. 28, 2014, 5:57 PM), <https://euobserver.com/eu-political/125128>.

Law (2011),⁷⁹ a razor-wire border fence to limit the entrance of refugees (2015),⁸⁰ the refusal of aid to undocumented immigrants (2018),⁸¹ and the imposition of a ban on teaching about homosexuality and transgender issues in schools (2021), among others.⁸² At one point in time, there was a concern among scholars and policymakers that the EU, whose remote governance structure in Brussels is detached from the people, may be insufficient to address the rise of authoritarianism.⁸³ However, as previously noted, the withholding of money is a considerable stick in the European Commission's arsenal, and they have chosen to use it.⁸⁴

The need for funding is considerable within Hungary. Capital projects, public investment opportunities, and employment strategies are all tied to EU funding in one way or another.⁸⁵ Hungarian officials have decried the ruling of the CJEU.⁸⁶ Hungarian Justice Minister Judit Varga, however, called it "living proof that Brussels is abusing its power."⁸⁷ Sebastian Kaleta, Poland's deputy minister of justice, said

⁷⁹ See András Cieger, *National Identity and Constitutional Patriotism in the Context of Modern Hungarian History: An Overview*, 5 HUNGARIAN HIST. REV. 123, 142-43 (2016).

⁸⁰ David Greene, *Hungary Erects Razor-Wire Fence to Slow Refugee Flow Into European Union*, NAT'L PUB. RADIO (Aug. 27, 2015, 5:11 AM), <https://www.npr.org/2015/08/27/435113641/hungary-erects-razor-wire-fence-to-slow-refugee-flow-into-european-union>.

⁸¹ Vanessa Romo, *Hungary Passes 'Stop Soros' Laws, Bans Aid to Undocumented Immigrants*, NAT'L PUB. RADIO (June 20, 2018, 7:08 PM), <https://www.npr.org/2018/06/20/622045753/hungary-passes-stop-soros-laws-bans-aid-to-undocumented-immigrants>.

⁸² Krisztina Than, *Hungary's anti-LGBTQ law breaches international rights standards - European rights body*, REUTERS (Dec. 14, 2021, 5:45 AM), <https://www.reuters.com/world/europe/hungarys-anti-lgbtq-law-breaches-international-rights-standards-european-rights-2021-12-14>. For a broader discussion of all the changes to Hungarian law under Orbán's regime, see Tamás Hoffmann & Fruzsina Gárdos-Orosz, *Populism and Law in Hungary – Introduction to the Special Issue*, 47 REV. CENT. & E. EUR. L. 1, 1-11 (2022).

⁸³ Shattuck, *supra* note 76, at 179.

⁸⁴ Nanette Neuwahl & Charles Kovacs, *Hungary and the EU's rule of law protection*, 43 J. EUR. INTEGRATION 17, 17 (2020).

⁸⁵ Shattuck, *supra* note 76, at 180.

⁸⁶ See *EU court says Poland broke law by making judges retire early*, *supra* note 64.

⁸⁷ Quentin Ariès et al., *Top E.U. court says bloc can withhold billions of euros from Hungary and Poland for violating rule of law*, WASH. POST (Feb. 16, 2022, 5:02 PM),

the ruling amounted to “historic blackmail.”⁸⁸ To withhold funds, the European Commission would need at least fifteen of the twenty-seven Member States representing at least 62% of the total population of the Union.⁸⁹ On April 3, 2022, Hungary held parliamentary elections, and Orbán was re-elected to a fourth term.⁹⁰ He has accused the European Commission of using this financial regulation to meddle in Hungarian elections, although that appears to be more nationalist rhetoric aimed at directing the attention of the Hungarian people towards a convenient political adversary.⁹¹

3. *The Importance of the EU Budget as a Means of Institutional Protection*

The EU budget is one of the principal instruments providing practical effect to the principle of solidarity in Article 2 of TEU.⁹² As noted in Section III, the implementation of that principle, through the EU budget, is based on mutual trust between Member States that there will be a “responsible use of the common resources included in that budget.”⁹³ Additionally, the EU has recognized the importance of sound fiscal management and efficient implementation of the budget as a means of protecting its financial interests.⁹⁴ To be sure, the administration of EU funds cannot be properly guaranteed if there is

<https://www.washingtonpost.com/world/2022/02/16/ecj-rule-of-law-poland-hungary-funds>.

⁸⁸ *Id.*

⁸⁹ Jakub Gábor, *Impact of Brexit on voting power in Council of the European Union*, 3 OPEN POL. SCI. 192, 193 (2020).

⁹⁰ Rob Schmitz, *Viktor Orban claims a 4th term and extends his autocratic rule in Hungary*, NAT’L PUB. RADIO (Apr. 4, 2022, 5:04 AM), <https://www.npr.org/2022/04/04/1090746234/viktor-orban-claims-a-4th-term-and-extends-his-autocratic-rule-in-hungary>.

⁹¹ Krisztina Than, *Hungary’s Orban accuses EU, U.S. of meddling as 2022 election race heats up*, REUTERS (Oct. 23, 2021, 12:19 PM), <https://www.reuters.com/world/europe/budapest-hosts-rival-political-rallies-hungarys-2022-election-race-heats-up-2021-10-23>.

⁹² CJEU, *supra* note 27, ¶ 129.

⁹³ *Id.*

⁹⁴ *Id.* ¶ 130.

an absence of independent judicial review.⁹⁵ Therefore, the CJEU reasoned:

That sound financial management and those financial interests are liable to be seriously compromised by breaches of the principles of the rule of law committed in a Member State, since those breaches may result, inter alia, in there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure.⁹⁶

4. *The Importance of Limitation and Procedure Within the Financial Regulation*

I delve into the conditionality mechanism in intimate detail in Section V below, however, it is important to note the degree to which limitation and procedure matter in the broader context of this financial regulation. The European Commission was careful to limit the conditionality mechanism to “situations and conduct of authorities that are related to the implementation of the Union budget”⁹⁷ Additionally, the financial regulation required that the European Commission “use an evidence-based approach and to respect the principles of objectivity, non-discrimination and equality of the Member States before the Treaties.”⁹⁸ Article 322(1)(a) of the TFEU, for example, affords the European Parliament and Council with the authority to promulgate regulations related to “the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts.”⁹⁹ Therefore, the procedures contained in the financial regulation, as the CJEU noted, were “intended to regulate all aspects relating to the implementation of the Union budget covered by

⁹⁵ *Id.* ¶ 132.

⁹⁶ *Id.* ¶ 131.

⁹⁷ *Id.* ¶ 147.

⁹⁸ *Id.* ¶ 148.

⁹⁹ *See also id.* ¶ 67.

Title II of Part Six of the TFEU and therefore to implementation in the broad sense.”¹⁰⁰

These factors had a considerable influence on the CJEU in determining that there was a legal basis for the financial regulation. The Court looked to provisions like Article 5(2) of the financial regulation that concerned the legal and financial effects of measures that protect the EU budget as establishing a procedure for also implementing the budget.¹⁰¹ Because Hungary asserted that the financial regulation did not establish financial rules, the CJEU looked to these provisions to deny its claims.¹⁰²

5. *The Opinion and Potential Influence of the Advocate General*

On December 2, 2021, Advocate General Manuel Campos Sánchez-Bordona delivered his opinion.¹⁰³ He determined that the financial regulation was intended to create a mechanism to ensure proper management of the EU budget.¹⁰⁴ While he viewed Article 7 as a sanction mechanism, he found that the financial regulation established a conditionality instrument to protect the EU.¹⁰⁵ In an important distinction, the Advocate General determined that EU institutions have the discretion, or choice, to determine legislative measures, particularly since compliance with the rule of law may, in the Advocate General’s view, be important to the finances of the EU.¹⁰⁶

As discussed in Section III, the necessity of establishing a sufficiently direct link between the breach of the rule of law under Article II and the administration of the budget is necessary, a point which the Advocate General emphasized.¹⁰⁷ However, as discussed in

¹⁰⁰ *Id.* ¶ 151.

¹⁰¹ *Id.* ¶ 152.

¹⁰² *Id.* ¶ 153.

¹⁰³ Court of Justice of the European Union Press Release No. 217/21, Advocate General’s Opinion in Case C-156/21 and Case C-157/21: Hungary v. Parliament and Council; Poland v Parliament and Council (Dec. 2, 2021).

¹⁰⁴ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Section IV(4), the Advocate General also realized the virtue of limitation. In other words, he saw the importance of the financial regulation being limited to not all breaches of the rule of law, but rather only those breaches that relate to the EU budget.¹⁰⁸

The larger issue, as I note in Section V(3), is the impact of the financial regulation on Article 7. To that end, the Advocate General determined that Article 7 does not preclude the use of other instruments to protect the EU.¹⁰⁹ Additionally, there is similarity between the financial regulation and other conditionality and regulatory mechanisms within EU law. With that in mind, the Advocate General determined that the financial regulation was compatible with Article 7 in pertinent part because the financial regulation is limited to the breach of the rule of law, as opposed to any of the values of the EU. Additionally, as discussed in Section IV(4), the Advocate General determined that the procedure established in the financial regulation does not offend institutional balance since Article 322(1)(a) of the TFEU relates to the implementation of the budget specifically.¹¹⁰

V. THE “CONDITIONALITY MECHANISM” OR A LINK BETWEEN BREACH OF THE RULE OF LAW AND RISK TO SOUND FINANCIAL MANAGEMENT OF THE EU: A FOUR-PART TEST ESTABLISHED IN *HUNGARY V. PARLIAMENT AND COUNCIL*

The CJEU, interpreting the financial regulation in *Hungary v. Parliament and Council*,¹¹¹ plowed new ground, and therefore it is necessary to consider the current and future implications of the Court’s determination. The tether between the rule of law and the EU budget is one that requires four criteria to fall within the scope of the financial regulation. Their criteria addressed the applicability of “conditionality mechanism” in intimate detail.¹¹²

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Financial Regulation, *supra* note 26.

¹¹² CJEU, *supra* note 27, ¶¶ 122, 139 (stating “It follows from the foregoing that Article 2(a), Article 3, Article 4(2) and Article 5(1) of the contested regulation are

1. *The Functionality of the Conditionality Mechanism*

The European Commission, setting forth the financial regulation, outlined a scheme whereby Member States, not exclusively Hungary and Poland, would adhere to objectives aligned with Article 2 and Article 7.¹¹³ The TFEU is clear that there is no hierarchy among values, as the CJEU determined.

[R]espect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.¹¹⁴

The test consists of four criteria, generally: (1) applicability to rule of law principles under Article 2; (2) actions affecting EU financial matters; (3) actions germane to an EU Member State; and (4) actions relevant to financial matters of the EU.¹¹⁵

a. Principles of the Rule of Law under Article 2

For the conditionality mechanism to have applicability, the European Commission must demonstrate that there are “reasonable grounds for considering . . . that there have been breaches of the

constituent elements of the horizontal conditionality mechanism established in Article 4(1) of that regulation, by laying down the definitions necessary for its implementation, by specifying its scope and by prescribing the measures to which it may lead. Those provisions thus form an integral part of that mechanism and therefore fall within the concept of ‘financial rules’, within the meaning of Article 322(1)(a) TFEU.”)

¹¹³ CJEU, *supra* note 27, ¶ 111.

¹¹⁴ *Communication From the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law*, at 4, COM (2014) 158 final (Nov. 3, 2014).

¹¹⁵ *Id.*

principles of the rule of law in a Member State.”¹¹⁶ The Commission has established a three-prong process for reaching this determination. First, the Commission will make an assessment as to whether rule of law principles, as codified in Article 2 of the TEU, have been breached. Second, the Commission will make a recommendation to the offending Member State. Finally, the Commission will monitor the Member States’ response to its recommendation. If it is not satisfied with that response, Article 7 of the TEU provides a “last resort.”¹¹⁷

Hungary and Poland argued that the “condition must be closely linked either to one of the objectives of a programme or of a specific EU action, or to the sound financial management of the Union budget”¹¹⁸ However, the CJEU disagreed and held that the “mechanism can also entail ‘horizontal conditionality’ in the sense that the condition in question can be linked to the value of the rule of law contained in Article 2 TEU, which must be respected in all areas of Union action.”¹¹⁹

¹¹⁶ CJEU, *supra* note 27, ¶ 111.

¹¹⁷ *Rule of law framework*, EUR. COMM’N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en (last visited Feb. 11, 2023); *see also* Financial Regulation, *supra* note 26, art. 6 (establishing the procedure the European Commission must follow); *see* CJEU, *supra* note 27 (stating in Art. 16 that “the identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission’s annual Rule of Law report and EU Justice Scoreboard, reports of [OLAF] and the [EPPO] as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (the Venice Commission)], in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.”).

¹¹⁸ CJEU, *supra* note 27, ¶ 123.

¹¹⁹ *Id.*

b. Affect or Serious Risk of Affecting EU Financial Matters

To meet the second prong of the test, the breach of the rule of law must “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.”¹²⁰ To understand what impacts the criteria directly, we look to the provisions in the regulation itself, notably articles 8 through 10.

(8) Member States can only ensure sound financial management if public authorities act in accordance with the law, if cases of fraud, including tax evasion, tax evasion, corruption, conflicts of interest or other violations of law are effectively prosecuted by investigative and prosecuting authorities, and whether arbitrary or unlawful decisions by public authorities, including law enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.

(9) The independence and impartiality of the judiciary should always be guaranteed and the investigation and prosecution services should be able to perform their functions properly. The judiciary and the investigation and prosecution services should be provided with sufficient human and financial resources as well as procedures to enable them to act effectively and with strict respect for the right of access to an impartial tribunal, including respect for the rights of the defence. Final judgments should be effectively enforced. These conditions are required as a minimum guarantee against arbitrary and illegal decisions by public authorities liable to harm the financial interests of the Union.

(10) The independence of the judiciary presupposes, in particular, that the judicial body concerned is able to

¹²⁰ *Id.* ¶ 111.

exercise its jurisdictional functions, both under the applicable rules and in practice, in full autonomy, without being subject to any hierarchical or subordinate with respect to anyone and without receiving orders or instructions from any source whatsoever, and that it is thus protected from interference or external pressure likely to undermine the independence of judgment of its members and to influence their decisions. The guarantees of independence and impartiality postulate the existence of rules, in particular with regard to the composition of the authority and the appointment, the duration of the functions as well as the causes of challenge and dismissal of its members,

These three provisions implicate Hungary and Poland distinctively based on the findings of the European Commission, but of course they have applicability to all Member States going forward.

c. Attributable to an EU Member State

While this appears self-evident, the European Commission justified its proposal by the need “to protect the Union’s financial interests from the risk of financial loss caused by generalised deficiencies as regards the rule of law in a Member State.”¹²¹ As a precondition to joining the EU, Member States agree to the values contained in Article 2 of the TEU. It is a long-standing principle that Member States cannot assent to the principles of Article 2 upon joining the EU and later free themselves from those obligations.¹²² It follows that establishing a relationship between the rule of law and EU finances merits a demonstration that the breach in question is attributable to the Member State exclusively.

¹²¹ *Id.* ¶ 118.

¹²² *Id.* ¶ 126.

d. Relevant to the Proper Implementation of the EU Budget

Breaches of the rule of law undermine or present a serious risk of undermining the good management of the EU budget or the protection of the EU's financial interests, in a sufficiently direct manner in one of eight ways:

- (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures;
- (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;
- (c) the proper functioning of investigation and prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or the protection of the financial interests of the Union;
- (d) the effective judicial review by independent courts of actions or omissions by the authorities mentioned in points (a), (b) and (c);
- (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;
- (f) the recovery of funds unduly paid;

- (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with the EPPO [European Public Prosecutor's Office] in their investigations or prosecutions pursuant to applicable Union acts in accordance with the principle of sincere cooperation;
- (h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.¹²³

The principle of proportionality has, according to Darren Harvey, "always operated as a means of protecting individuals from excessive uses of public power."¹²⁴ In this instance, the CJEU considered these requirements in the context of proportionality and held that these requirements along with the measures permissible to protect the EU budget under Article 5 of the financial regulation were proportionate.¹²⁵ In reaching that determination, the CJEU considered the "nature, duration, gravity and scope of violations of the principles of the rule of law."¹²⁶

2. *Legal Criticisms by Hungary and Poland*

Hungary first brought the action before the CJEU stated that the Court should annul Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council which set forth the regime of conditionality for protection of the EU budget.¹²⁷ Hungary raised several arguments in favor of its annulment action.¹²⁸ First, the regulation did not have an appropriate legal basis. Second, the regulation infringed and circumvented Article 7 of TEU, was contrary

¹²³ *Id.* ¶ 22.

¹²⁴ Darren Harvey, *Federal Proportionality Review in EU Law: Whose Rights are they Anyway?*, 89 NORDIC J. INT'L L. 303, 303 (2020).

¹²⁵ CJEU, *supra* note 27, ¶ 23(3).

¹²⁶ *Id.*

¹²⁷ 2020 O.J. (L 433 I) 1.

¹²⁸ *Id.*

to the powers defined in Article 4(1), infringed on the power conferred in Article 5(2) and the principle of institutional balance in Article 13(2), and infringed on the powers of CJEU set forth in Article 269. Third, the regulation resulted in legal uncertainty and a lack of legal clarity. Fourth, the regulation was likely to result in disproportionate outcomes. Fifth, because the regulation did not exempt the Member State from funding existing obligations, it infringed upon EU law regarding budget deficits.¹²⁹ Poland ultimately intervened in the case, joining Hungary's arguments in full.

3. *Relationship Between the Financial Regulation's Conditionality Mechanism and Article 7 of the TEU*

One of Hungary's primary and perhaps strongest legal arguments was that the regulation infringed and circumvented Article 7. Article 7 provides a two-step process to determine whether there is a breach under the Article. First, once a proposal is submitted by one-third of Member States, the European Council, having the support of four-fifths of its members and the consent of the European Parliament, may determine if there is a clear risk of a serious breach under Article 2.¹³⁰ Second, the European Council, by unanimity, may then determine, based on the proposal, that a breach under Article 2 has occurred.¹³¹ If that occurs, the Council, by qualified majority, may choose to suspend certain rights under the Treaties.¹³² Further clarifications regarding voting procedures are set forth in Article 354 of the TFEU.¹³³

Despite Hungary's claim, the CJEU found that the procedure set forth in the regulation was complimentary to Article 7.¹³⁴ The Court amplified its reasoning in relation to Article 7:

Breaches of the principles of the rule of law, in particular those that affect the proper functioning of

¹²⁹ CJEU, *supra* note 27, ¶ 1-9.

¹³⁰ TEU art. 7.

¹³¹ *Id.* art. 7(2).

¹³² *Id.* art. 7(3).

¹³³ *Id.* art. 7(5).

¹³⁴ CJEU, *supra* note 27, ¶ 18(14).

public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.¹³⁵

Here, the Court appears to place a premium on the harms that “affect the proper functioning of public authorities and judicial review.” This can be interpreted to mean the various actions in Hungary, including the rise of corruption, and Poland, where judicial review remains in a perilous state. The CJEU was not persuaded that Article 7 of the TEU is the only mechanism whereby a Member State may be held accountable for violations of Article 2 of the TEU. The Court was quick to observe that “numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.”¹³⁶ Specifically, the Court noted that Article 19 of the TFEU requires Member States to “establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law”¹³⁷ Furthermore, the CJEU has interpreted Article 19(2) to afford the European Parliament and Council to do whatever is necessary to accomplish the objective set forth in the Article 19(1),¹³⁸ which reads:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative

¹³⁵ *Id.* ¶ 18(15).

¹³⁶ *Id.* ¶ 159.

¹³⁷ *Id.* ¶ 161; *see also* TFEU art. 19(1).

¹³⁸ *See* Case C-824/18, A.B. v. Sądownictwa, ECLI:EU:C:2021:153, ¶¶ 108-09 (Mar. 2, 2021).

procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹³⁹

This placed Hungary—and by extension Poland—in a precarious legal position based on the facts described in Sections IV(1) and IV(2), and it rendered its legal argument regarding Article 7 ultimately insufficient.¹⁴⁰

Prior to the ruling of CJEU, Article 7 of the TEU had been in a state of scrutiny for some time. Scholars expressed concern about its formulation, utility, and a trend of non-enforcement. Consider what Petra Bárd, Sergio Carrera, Elspeth Guild, and Dimitry Kochenov expressed in 2016:

The formulation of a pre-Article 7 procedure is a milestone in a worrying trend of non-enforcement of European values to be witnessed for almost two decades. The Amsterdam Treaty introduced the Article 7 sanction mechanism in 1999, and soon the Nice Treaty added a preventive arm to it. Whereas there were good reasons for instigating the mechanism in the recent history of integration, instead of making use of the already diluted procedure of Article 7(1), the Commission decided to water down the process even further by inserting a preventive-preventive process. Moreover is used selectively, thereby questioning the objectivity of the process and the equal treatment of Member States. Despite its weaknesses, the creation of the Commission's new EU Rule of Law Framework can be seen as an acknowledgment of the rule of law problem, and as a step in the right direction to overcome it. On a positive note, the ongoing rule of law debate shifted its focus from an Article 7 TEU emergency-led context toward a discussion on shared

¹³⁹ TFEU art. 19(1).

¹⁴⁰ CJEU, *supra* note 27, ¶ 163.

European values and legal principles. Beyond supervision, EU values shall be promoted actively. Still, previous mechanisms and the EU Rule of Law Framework are crisis-driven and do not constitute a permanent and periodic monitoring and evaluation process of EU Member States' compliance with Article 2 TEU legal principles. Neither do they go far enough in ensuring objective, independent and regular scrutiny of EU Member States' rule of law obligations.¹⁴¹

Later, in 2019, Bard and Anna Śledzińska-Simon proposed that the CJEU introduce rule of law infringement procedures as part of a wider EU rule of law toolbox.¹⁴² In what would prove to be a prescient declaration, they called for the CJEU to identify the rule of law problem explicitly. In *Hungary v. Parliament and Council*, this proved to be an important determination, which, as discussed in Section V(1)(a), has now provided critical rules of the road for the European Commission and Member States. This is essential to the future functionality of the EU in part because a sentiment had been building that the EU was incapable, as a matter of institutional political will, of enforcing rule of law violations. Martijn Mos, too, argued that the ambiguity surrounding the rule of law principle under Article 2 caused compliance to be difficult to evaluate.¹⁴³ At the time, the culprit, considered by many, was the lack of clarity. Rather, Mos considered it to be a problem of ambiguity.¹⁴⁴ He determined,

Drawing on contracting theory, I see them as incomplete contracts: although all parties agreed to uphold the values, it is unclear how this commitment requires member states to behave in practice. What is

¹⁴¹ Petra Bárd et al., *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*, 91 LIBERTY & SEC. EUR. i, ii (2016).

¹⁴² Petra Bárd & Anna Śledzińska-Simon, *Rule of law infringement procedures: A proposal to extend the EU's rule of law toolbox*, 9 LIBERTY & SEC. EUR. 1 (2019).

¹⁴³ Martijn Mos, *Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary*, 36 E. EUR. POL. 267, 268 (2020).

¹⁴⁴ *Id.*

more, even though virtually all agreements in business and international relations resemble incomplete contracts, the EU does not have the institutional machinery in place that can both specify and enforce the contractual obligations. The Union's fundamental values, in other words, constitute a flawed attempt at incomplete contracting. As a result, these values are at once ambiguous and unenforceable.¹⁴⁵

Roland Bieber and Francesco Maini also expressed concern about the efficacy of the EU legal protocols:

The EU depends on Member States' compliance for the fulfilment of its goals, for the implementation of its laws and, ultimately, for its existence. The Court of Justice has accordingly characterized the deliberate refusal of a Member State to implement EU law as a "failure in the duty of solidarity" that "*strikes at the fundamental basis* of the Community legal order." It is true that uniform and timely implementation of all EU law by all Member States at all times may constitute an ideal to strive for rather than a practical reality. Nevertheless, for an internal market, an area of freedom, security and justice, a common fisheries policy, and so on, to exist at all, the assumption of compliance must be sustainable, and credible means and procedures to detect and terminate breaches must be in place.¹⁴⁶

I raise these issues to amplify the importance of the CJEU's determination in *Hungary v. Parliament and Council*, to clarify the ambiguity surrounding the understanding of rule of law principles under Article 2, and to recognize the complementary nature of the financial regulation and Article 7. To be sure, there has been an urgent call among scholars to improve the rule of law toolbox within the EU.

¹⁴⁵ *Id.*

¹⁴⁶ Roland Bieber & Francesco Maini, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 51 COMMON MKT. L. REV. 1057, 1058 (2014).

For example, Professor Pech, writing in 2020, offered an extensive evaluation of the rule of law principle within the EU.¹⁴⁷ In rhetoric more relevant to the scope of this paper, Professor Pech noted:

Nothing was however done either by the European Council or the Council to stop Hungary's descent into authoritarianism. Instead, the Justice and Home Affairs Council merely stressed in June 2013 the importance of "respecting the rule of law" before calling on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues."¹⁴⁸

All of this is to say that the concerns expressed by scholars over the past many years may very well be alleviated because of the structure and procedure of the financial regulation, the opinion of the Advocate General, and the ultimate legal conclusions by the CJEU as discussed throughout Sections I-V of this paper. Section VI of this paper outlines future considerations of EU law in response to the CJEU decision in *Hungary v. Parliament and Council* and how the reasoning of the European Commission, in fostering the financial regulation, and the CJEU, in interpreting the financial regulation in accordance with EU law, will impact the dichotomy between the institutional practice of the EU and Member States' cooperation going forward.

¹⁴⁷ Laurent Pech, *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox* (Reconnect Eur., Working Paper No. 7, 2020), <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>; see also R. Daniel Kelemen & Laurent Pech, *Why autocrats love constitutional identity and constitutional pluralism* (Reconnect Eur., Working Paper No. 2, 2018), <https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf>.

¹⁴⁸ Pech, *supra* note 147, at 18.

VI. FUTURE EU LAW CONSIDERATIONS IN THE AFTERMATH OF THE CJEU'S DECISION IN *HUNGARY V. PARLIAMENT AND COUNCIL*

The CJEU decision has considerable implications on Hungary and Poland. Beyond those two Member States, however, there is a new paradigm whereby the EU has officially aligned its core principles with EU funding and established a procedure and remedy mechanism under Article 7 to evaluate and potentially withhold funds if a Member State runs afoul of Article 2 of the TEU. This is a considerable development under EU law, particularly because it takes a broad reading of the rule of law principles.¹⁴⁹ Professor Kim Scheppele noted that the “rule of law cannot be used as a standard for assessing the conduct of states because it is too vague or because states may have their own distinct approaches on the subject.”¹⁵⁰

One of the challenges within the EU was the imbalance of power between the institution and the Member States. Consider what Kim Scheppele and Daniel Kelemen observed:

The EU was built with many avenues for Member States to check the power of the Union institutions (above all through the powerful role of the intergovernmental Council in EU decision-making), but without many tools for EU institutions to check the Member States' commitment to the basic values of the EU once they entered the Union.¹⁵¹

The circumstances in the EU after this judgment are substantially different. There is more mutuality between the institution and the Member States. Based on the rhetoric of the European Commission, there also appears to be a newfound political will among the institutional leadership to hold Member States

¹⁴⁹ See *European Union's Top Court Rules Against Hungary and Poland in Rule of Law Showdown*, WORLD JUST. PROJECT (Feb. 16, 2022), <https://worldjusticeproject.org/news/european-union%E2%80%99s-top-court-rules-against-hungary-and-poland-rule-law-showdown>.

¹⁵⁰ *Id.*

¹⁵¹ Kim Lane Scheppele & R. Daniel Kelemen, *Defending Democracy in EU Member States: Beyond Article 7 TEU*, in *EU LAW IN POPULIST TIMES* 548, 548 (Francesca Bignami ed., 2019).

accountable,¹⁵² although it is unknown what the final determinations will be regarding funding for Hungary and Poland. Whether it is right that the legal mechanisms made enforcement of EU principles difficult from the outset, as some scholars have argued,¹⁵³ in the aftermath of this decision, and to paraphrase Professor Pech, the bad workman can no longer blame his tools.¹⁵⁴

Certainly, the advantage of the “conditionality mechanism” as well as the broad understanding of Article 2 affords clear “rules of the road” for the European Commission, the CJEU, and Member States. This clarity, particularly as it pertains to the understanding and applicability of Article 7 and ancillary provisions, coupled with more alignment in the balance of power and accountability among the EU generally, has the potential to enshrine a more harmonious enterprise. The situation in Hungary and Poland is not going to change overnight and more action by the European Commission has begun. In the aftermath of Orbán’s re-election, on April 5, 2022, the Commission President notified the Hungarian government that it was triggering the “conditionality mechanism,” which formally initiated the process towards financial sanctions.¹⁵⁵

VII. CONCLUSION

The EU wielded a significant financial stick in an effort to hold Hungary and Poland accountable to the rule of law. Corruption, lack of media diversity and judicial independence, and excessive

¹⁵² See *Transparency, integrity and accountability in the EU institutions*, EUR. PARL. (March 2019), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/608873/IPOL_BRI\(2019\)608873_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/608873/IPOL_BRI(2019)608873_EN.pdf)

¹⁵³ See, e.g., Dimitry Kochenov, *Article 7: A Commentary on a Much Talked-About ‘Dead’ Provision*, in *DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES* 127, 127-54 (2021). Cf. Kim Lane Scheppele et al., *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*, 39 *Y.B. EUR. L.* 3 (2020).

¹⁵⁴ Anna Wójcik, “*A Bad Workman Always Blames His Tools*”: An Interview with LAURENT PECH, *VERFASSUNGSBLOG* (May 28, 2018), <https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech>.

¹⁵⁵ Alice Tidey, *Hungary could lose out as EU moves to link cash to rule of law respect*, *EURO NEWS* (Apr. 6, 2022), <https://www.euronews.com/my-europe/2022/04/05/watch-live-ukraine-likely-to-overshadow-vdl-s-address-to-meps-on-bloc-political-prioriti>.

emergency powers are issues that continue to concern the EU. The economic strain created by withholding funds has placed limitations on both governments which, in turn, may influence behavior in ways that realign Hungary and Poland with EU principles. That is to be determined, of course, as domestic political initiatives and rising nationalism provide a counterbalance to these penalties. More to the point, the EU was well within its legal authority to impose these penalties on Hungary and Poland. In a manner that was dramatic and also underutilized, the EU finally exercised that authority in the most significant way its charter afforded: money. It may be that all sides can reach an agreement to avoid further backsliding, but as of this writing no such deal has been reached. To complicate matters, the EU has threatened to withhold regular EU payouts if Hungary and Poland do not institute rule-of-law reforms.¹⁵⁶ The outcome of this would be staggering and unprecedented. In this still early legal history of the EU, the rule of law is having an important and consequential moment, which requires the EU to implement clear “rules of the road” for Member States going forward.

¹⁵⁶ Maïa De La Baume, *EU report renews Hungary, Poland rule-of-law critiques amid key negotiations*, POLITICO (July 13, 2022, 7:33 PM), <https://www.politico.eu/article/commission-unveil-critical-rule-law-report-against-hungary-poland>.