

What does the judgment of the Court of Justice of 16 February 2022 mean for the conditionality mechanism?

Adopted on 16 December 2020, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on the general system of conditionality to protect the Union budget entered into force on 1 January 2021. In view of the reservations raised by Poland, among others, in the course of work on the Regulation, the European Commission agreed that, in the event of an action for annulment against the Regulation, the guidelines on how the act would be applied would be finalised after the judgment of the Court of Justice of the European Union so as to take into account any relevant elements arising from such a judgment. Until these guidelines are finalised, the European Commission has undertaken not to propose measures under the Regulation.

Poland and Hungary have decided to bring an action for annulment against the regulation on the general system of conditionality aimed at protecting the Union's budget. On 16 February 2022. The Court of Justice of the European Union handed down judgments in Cases C-156/21 and C-157/21 dismissing the actions of both countries. These rulings fully confirm the content of the Regulation as a whole.

Regulation 2020/2092 makes the disbursement of EU funds, including from the Reconstruction Fund, conditional on respect for the principle of "rule of law" in the Member State. High penalties are foreseen for those countries that systematically violate the rule of law in a way that jeopardises the European Union budget. However, there are many inaccuracies in the debate on the regulation. The regulation contains general and broad wording, which gives rise to the assumption that it will be interpreted arbitrarily.

It is worth highlighting the key elements of the regulation.

Firstly, the Regulation, by means of an act of secondary legislation, defines the values of the "rule of law", a primary law concept from Article 2 of the Treaty on European Union. According to Article 2 TEU, 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 based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women.

The concept of "rule of law" is not defined by the Treaties. Instead, its definition is introduced by Article 2(a) of Regulation 2020/2092, stating that the term "rule of law" refers to a Union value listed in Article 2 TEU. It includes: the principle of legality, which means a transparent, accountable, democratic and pluralistic law-making process; the principle of legal certainty; the prohibition of arbitrariness in executive action; the principle of effective judicial protection, including access to justice, by an independent and impartial judiciary, also in

relation to fundamental rights; the principle of separation of powers; and non-discrimination and equality before the law.

On the date of entry into force of Regulation 2020/2092, the presented definition of the concept of “rule of law” became mandatory for Member States. The result is that a Member State can be sanctioned on the basis of a definition that does not appear in any of the Treaties. By indicating in the body of the Regulation that “the rule of law shall be understood in a way which takes into account the other values and principles of the Union enshrined in Article 2 TEU”, the definition of the rule of law encompasses as a meta-principle the entire “content” of Article 2 TEU. This means that the value of the rule of law takes on the character of a so-called umbrella clause under which all other values are covered.

Importantly, in its judgment of 16 February 2022 The Court of Justice did not share Poland's basic plea that the regulation constitutes a circumvention of the procedure provided for in Article 7 of the Treaty on European Union. This provision indicates situations where the values of the Union described in its Article 2, including for example the rule of law, may be violated. This provision guarantees that proceedings in the field of the rule of law are dealt with unanimously by the European Council. By contrast, by providing for qualified majority voting in the Council of the European Union, Regulation 2020/2092 circumvents the requirement for unanimity.

Secondly, it follows from the Regulation (as also confirmed by the Court) that the conditionality mechanism will be applied where it is established that breaches of the rule of law in a Member State **affect or create a serious risk of affecting - in a sufficiently direct manner** - the sound financial management of the Union budget or the protection of the Union's financial interests. The assessment of this impact will rest solely with the Commission and, at a later stage in the procedure, with the Council of the European Union. It is worth emphasising that the wording used in the regulation is evaluative and therefore allows the EU institutions to make arbitrary decisions.

At present, therefore, the European Commission is free to blackmail a Member State under the sanction of withdrawing funds. In accordance with Article 4(h) of Regulation 2020/2092, the European Commission may indicate any situation where, in its view, an EU value is affected. The Commission acquires almost unlimited power when it comes to how to block funds for a Member State. It is not a question of proving a breach of the rule of law, as the serious risk of an impact - in a sufficiently direct manner - on sound financial management is in itself sufficient grounds for withdrawing funds.

Thirdly, Regulation 2020/2092 establishes an open catalogue of elements which may be affected by breaches of the rule of law entitling the adoption of appropriate measures.

The provisions of the regulation indicate, inter alia, the activities of such state bodies as national courts, public procurement authorities, financial control authorities, investigation services and public prosecution services. In doing so, the requirements of Regulation 2020/2092 are not limited to the control of purely legal solutions, but also extend to organisational issues, such as ensuring the financial and human resources necessary for the proper functioning of the said bodies. Regulation 2000/2092 even considers overly "restrictive procedural rules" as indicating a breach of the rule of law. This legal framework for the Commission's assessment from the point of view of the rule of law places key areas of state authority under its supervision.

As can therefore be seen, the areas targeted by the rule of law violations are of a general and systemic nature. Therefore, it cannot be considered that the assessment of a possible infringement will be made on a case-by-case basis and will only concern corruption and value for money in the spending of EU funds in individual cases.

It should be noted that the judgment at no point quotes or refers to the conclusions of the European Council of 11 December 2020, which were said to ensure that the Regulation would not be applied in an arbitrary manner.

The lack of reference by the Court of Justice to the content of the conclusions is not necessarily surprising. The nature of the European Council's conclusions is important. There are divergent interpretations in doctrine as to how such documents should be treated. Although it is argued that under certain conditions conclusions may have legal effects, it should be stressed that the conclusions of the European Council are political documents. They cannot therefore change the legal nature of the regulations or their very content. By omitting to mention the adoption of the conclusions by the European Council in December 2020, the Court of Justice emphasised their non-binding nature.

It is worth pointing out that the regulation on the general system of conditionality aimed at protecting the Union's budget is already being applied. The European Commission, in a letter addressed to the Polish government at the end of 2021, identified four key areas to be examined in a future procedure against Poland, namely:

- the jurisprudence of the Constitutional Tribunal on the Union's lack of competence with regard to the judiciary;
- the issue of the organisation of justice;
- the issue of the organisation of the prosecution service;
- the activities of the Central Anticorruption Bureau.

Fourthly, the questionable issue is the infringement of the principle of equal treatment of Member States. Under the first sentence of Article 4(2) of the Treaty on European Union, the Union shall respect the equality of Member States before the Treaties as well as their

national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Regulation 2020/2092 not only condones but may also contribute to the perpetuation of breaches of the cited principle of equality.

In accordance with recital 16 of the preamble to Regulation 2020/2092, a finding of a breach of the rule of law requires a thorough qualitative assessment by the Commission. This assessment should be objective, impartial and fair and should take into account relevant information from available sources and recognised institutions, including, inter alia, the conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Group of States against Corruption (GRECO) and the Venice Commission.

In this connection, it must be clearly emphasised that the Venice Commission, in its Report on Judicial Appointments (CDL-AD(2007)028), adopted at its 70th Plenary Session (16-17 March 2007), explicitly stated that:

*"5. In some **older democracies** there are systems where the executive has a strong influence on the appointment of judges. Such systems can work well in practice and allow for an independent judiciary because the executive is constrained by the legal culture and traditions that have developed over a long period of time.*

*6. However, the **new democracies** have not yet had the chance to develop traditions that can prevent abuse. That is why, at least in new democracies, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state authorities in the appointment of judges."*

If the Commission is to make an "in-depth qualitative assessment" based, inter alia, on the positions of the Venice Commission, which makes the assessment of specific legal solutions for judicial appointments dependent on the division of countries into "old democracies" and "new democracies", it is obvious that Regulation 2020/2092 generates a serious risk of differential treatment between Member States.

In addition, it follows from the regulation that measures for the protection of the Union budget, and therefore decisions on blocking funds due to individual Member States, are taken by the Council of the European Union by qualified majority. Qualified majorities are determined, inter alia, by taking into account the population of the voting Member States. The Member State against which the measures are to apply shall not be excluded from the vote. This leads to clear discrimination against small and medium-sized Member States. In other words, the so-called conditionality mechanism will be much easier to apply to Poland than, for example, to Germany or France.

Taken together, all the above arguments mean that Regulation 2020/2092, despite its apparent safeguards about the need for objectivity and the link between breaches of the rule of law and implementation of the Union budget, is an arbitrary tool in the hands of the European Commission and the Council for blackmail.