



## **Saar Expert Papers**

*Thomas Giegerich*

The Rule of Law in the European Union –  
Countering Recent Challenges to Self-  
Evident Truths Politically, Judicially and  
Financially

## **About the author**

Univ.-Prof. Dr. iur. Thomas Giegerich, LL.M. (Univ. of Virginia) is the Director of the Europa-Institut (<https://europainstitut.de/>) and holds a Chair for European Law, Public International Law and Public Law. He presented this Paper at the Final Conference “Current Issues of European Integration and Western Balkans” by the SEE|EU Cluster of Excellence in European and International Law on 17 December 2021. For an earlier and more extensive German version, see *Giegerich*, Die Unabhängigkeit der Gerichte als Strukturvorgabe der Unionsverfassung und ihr effektiver Schutz vor autoritären Versuchungen in den Mitgliedstaaten, *Zeitschrift für Europarechtliche Studien* 22 (2019), pp. 61 – 111.

## **Preface**

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## **Editor**

Lehrstuhl Prof. Dr. Thomas Giegerich  
Universität des Saarlandes  
Postfach 15 11 50  
66041 Saarbrücken  
Germany

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## **I. The Commitment to Constitutional Values of the EU and its Member States**

The European unification process has from the outset been a project that is committed to constitutional values. The common constitutional values of the EU and Member States are now set forth in Art. 2 TEU. Art. 49 (1) sentence 1 TEU expressly stipulates that only those European States which respect these values and are committed to promoting them can join the EU. At their core, the constitutional values of Art. 2 TEU are inviolable. It is part of the judicial functions of the Court of Justice of the EU (CJEU) pursuant to Art. 19 (1) subparagraph 1 TEU to define and uphold that core.

On the relationship between the values enshrined in Art. 2 TEU, the EU legislature said this: “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.”<sup>1</sup>

## **II. The Special importance of the Rule of Law for European Integration: The EU as a “Union Based on the Rule of Law”**

The rule of law plays a prominent role at the Union and national levels, because the EU is a “Union based on the rule of law” which the CJEU has defined by the following three characteristics: firstly, the primacy of EU law over the law of the Member States;<sup>2</sup> secondly, the direct applicability of many EU law provisions;<sup>3</sup> and thirdly, the comprehensive judicial protection of natural and legal persons against acts of the EU

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<sup>1</sup> Recital (6) of the preamble to Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433 I, p. 1).

<sup>2</sup> ECJ, Case 6/64, *Costa v. ENEL*, ECR 1964, 1251; confirmed by the Declaration (no. 17) concerning primacy in the annex to the Final Act of the Intergovernmental Conference of Lisbon of 13 Dec. 2007 (OJ C 306, p.256).

<sup>3</sup> ECJ, Case 26/62, *van Gend & Loos*, ECR 1963, 1.

institutions as well as national measures relating to the application to them of an EU act.<sup>4</sup>

### III. The Courts as Integration Factors in the Multilevel System of the EU

In the “Union based on the rule of law”, the courts both at the Union and the national levels have always been important integration factors. Individuals enforce their rights emerging from EU law in the national courts that act as courts of the Union in the functional sense and cooperate with the CJEU in the preliminary ruling procedure under Art. 267 TFEU in order to implement those rights effectively.<sup>5</sup>

Such utilisation of Member States’ courts by the EU, in order to achieve effective enforcement of Union law *vis-à-vis* the Member States’ executive and legislative branches of government, has broken open the national sovereignties: The classic international confrontation of the Member States and the EU has been replaced by a common supranational confrontation of the EU, Union citizens and national courts *vis-à-vis* the political branches of the Member States.<sup>6</sup>

At the same time, Art. 267 TFEU has also split up the judiciaries of the Member States: The lower instance national courts are supposed to use their comprehensive right of requesting preliminary rulings from the CJEU also in opposition to the higher instance national courts. With the help of the CJEU, the lower instance national courts can and should induce the national supreme courts to keep the national legal systems in conformity with Union law. It is important to note in this context that Art. 267 (2) TFEU guarantees to every court of a Member State the right to request a preliminary ruling from the CJEU, if it considers that a decision on a question of Union law is necessary to enable it to give judgment in a case pending before it. That right cannot be limited by national law.<sup>7</sup>

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<sup>4</sup> ECJ/CJEU, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518 margin note 66; Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117 margin note 31; Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586 margin note 49.

<sup>5</sup> *Lenaerts*, *New Horizons for the Rule of Law Within the EU*, *German Law Journal* 21 (2020), 29 f.

<sup>6</sup> *Lenaerts* (note 5), 31.

<sup>7</sup> ECJ/CJEU, Joined Cases C-188/10 und C-189/10, *Melki*, ECR 2010, I-5667 margin notes 40 ff.; Case C-416/10, *Križan*, ECLI:EU:C:2013:8, margin notes 62 ff.; Case C-112/13, *A./. B u.a.*,

## IV. Independence as an Elementary Prerequisite of a Functioning Judiciary and its Protection under EU Law

The independence of the courts is an elementary prerequisite of a functioning judiciary. Judicial independence is not only a compulsory requirement of the separation of powers principle, but also a condition of the proper functioning of the Member States' courts in the EU: A national court cannot effectively enforce Union law *vis-à-vis* the national political branches, if it is dependent on them. A lower national court which is dependent on the national Supreme Court cannot effectively join forces with the CJEU to overcome the latter's resistance to Union law.

The independence of national courts must not only be protected against interferences by the political branches. Rather, the independence of courts and individual judges must not be jeopardised either by intra-judicial interferences such as those originating from court presidents, higher courts or self-governing bodies of the judiciary (e.g., supreme judicial councils). On the other hand, the integration of the judicial branch in the democratic system of government needs to be maintained, too, because judges deliver their decisions "in the name of the people". It is therefore important to ensure that the judiciary does not develop into a state within the state, but remains accountable to the public.<sup>8</sup> This amounts to a tightrope walk in any constitutional system that takes both democratic legitimacy and separation of powers seriously. Member States have a certain margin in achieving the proper balance between independence and accountability of their judiciary, but they must not undermine the independence of the courts and of individual judges which is at the core of the principle of the rule of law.

The independence of the courts has long explicitly been guaranteed by public international law as well as Union law. First and foremost, Art. 6 (1) ECHR that extends to civil and criminal proceedings comes to mind,<sup>9</sup> as well as Art. 47 CFR, which covers all judicial proceedings concerning rights or freedoms guaranteed by Union law. The

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ECLI:EU:C:2014:2195, margin notes 28 ff.; Case C-614/14, *Ognyanov*, ECLI:EU:C:2016:514, margin notes 14 ff.; C-564/19, *IS*, ECLI:EU:C:2021:949, margin notes 67 ff. (see *Bárd*, The Sanctity of Preliminary References, *Verfassungsblog*, 26 November 2021).

<sup>8</sup> *Seibert-Fohr*, European Standards for the Rule of Law and Independent Courts, *Journal für Rechtspolitik* 20 (2012), 161 (166 f.).

<sup>9</sup> See ECtHR, judgment of 9 February 2021, *Xhoxhaj v. Albania* (No. 15227/19); judgment of 7 May 2021, *Xero Flor v. Poland* (No. 4907/18); judgment of 22 July 2021, *Gumenyuk and others v. Ukraine* (No. 11423/19).

CJEU has meanwhile determined that judicial independence is part and parcel of the essence of the right to a fair trial enshrined in Art. 47 (2) CFR<sup>10</sup> so that any restriction in that regard is absolutely precluded.<sup>11</sup>

It is true that Art. 47 CFR, like all fundamental rights of the Union, binds Member States only when they are implementing Union law.<sup>12</sup> However, courts cannot be independent with regard to proceedings pertaining to EU law, and dependent with regard to other proceedings. Only if the independence of the national courts is guaranteed comprehensively, Member States will fulfil the rule of law requirements of Art. 2 TEU, which are indivisible. This has been reconfirmed by the recent case-law of the CJEU that brought Art. 19 (1) subparagraph 2 TEU into play in this context. That provision covers every Member State court which could be called upon to rule on questions concerning the application or interpretation of EU law.<sup>13</sup> This is true for practically all national courts, given the extensive penetration of EU law into the legal systems of the Member States.

## **V. The Copenhagen Rule of Law Criterion in Accession Negotiations**

According to the Copenhagen criteria, the stability of the constitutional structures of a candidate country and in particular its respect for the rule of law, including the independence of its courts, is crucial for accession to the EU.<sup>14</sup> In the context of the EU's eastward and south-eastward enlargements, the rule of law came into focus because the candidate countries from the former Communist bloc had been dictatorships for decades, without independent courts, where political power could arbitrarily disregard the law.

Some time ago, the Commission included judicial reform in its pre-accession strategy in order to ensure the independence, impartiality and effectiveness of the courts, bringing candidate countries closer to relevant EU standards even before the start of

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<sup>10</sup> CJEU, Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, margin notes 59, 63.

<sup>11</sup> See Art. 52 (1) CFR.

<sup>12</sup> Art. 51 (1) CFR.

<sup>13</sup> CJEU, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117. See also the cases concerning Poland below under VI.2.

<sup>14</sup> Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, para. 7 A iii ([https://www.europarl.europa.eu/enlargement/ec/pdf/cop\\_en.pdf](https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf) [20 March 2020]).

the actual accession negotiations. In the course of the accession negotiations, the establishment of an independent, impartial, professional and efficient court system of integrity plays a prominent role. Negotiations on other topics will be frozen until the candidate country has remedied shortcomings in this regard.<sup>15</sup> In support of the pre-accession strategy, association agreements with candidate countries now always include specific commitments regarding the further development of the rule of law, in particular the strengthening of the independence of the judiciary.<sup>16</sup>

The Act of Accession of Romania and Bulgaria established a special regime with benchmarks for judicial reform and the fight against corruption under the supervision of the Commission even after the EU accession of these two States.<sup>17</sup> The CJEU ruled last May that the mechanism for cooperation and verification of progress in Romania established by the Commission is binding on Romania and establishes binding benchmarks that Romania is required to meet and not frustrate. Moreover, the benchmarks have direct effect, so that Romanian courts are required to disapply national provisions contrary to them, even if they have constitutional status.<sup>18</sup>

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<sup>15</sup> See *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A credible enlargement perspective for and enhanced EU engagement with the Western Balkans – COM(2018) 65 final, pp. 3 ff., 10, 17; European Commission, 2018 Communication on EU Enlargement Policy – COM(2018) 450 final, p. 2.

<sup>16</sup> See e.g. Art. 2, Art. 74 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the former Yugoslav Republic of Macedonia, of the other part of 9 April 2001 (OJ 2004 L 84, p. 13); Art. 1 (2) lit. a, Art. 2, Art. 80 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part of 29 April 2008 (OJ 2013 L 278, p. 16); Art. 1 (2) lit. a, Art. 2, Art. 78 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and Bosnia and Herzegovina, of the other part of 16 June 2008 (OJ 2015 L 164, p. 2); Art. 1 (2) lit. a, Art. 3, Art. 83 of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part of 27 October 2015 (OJ 2016 L 71, p. 3).

<sup>17</sup> Art. 4 (3) of the Treaty of Accession (OJ 2005 L 157, p. 11), Art. 37, 38 of the Act of Accession (OJ 2005 L 157, p. 203), Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56) and Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 58).

<sup>18</sup> CJEU, Joined Cases C-83/19, C-127/19, C-195/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393. See *Tănăsescu/Selejan-Gutan*, The ECJ Ruling on Judicial Independence in Romania, *Verfassungsblog* of 2 June 2021.

## **VI. Mechanisms to Enforce the Rule of Law Requirement *vis-à-vis* Member States**

The EU is taking the Copenhagen political criteria seriously even after accession, as has become clear in the last three years. If there are reasonable doubts regarding respect for the rule of law by a Member State because it undermines the independence of its courts, three enforcement procedures must be distinguished – a political one pursuant to Art. 7 TEU in conjunction with Art. 354 TFEU, a judicial one before the CJEU, based on Art. 258 or Art. 267 TFEU with a financial enforcement component, and a purely financial one that has recently been introduced but not yet applied. The Commission introduced a new rule of law mechanism in 2020 that accompanies these enforcement procedures. That mechanism provides for annual rule of law reports by the Commission elaborating on the strengths and weaknesses of all the Member States in this regard.<sup>19</sup>

### **1. Political Enforcement Mechanism pursuant to Art. 7 TEU in conjunction with Art. 354 TFEU**

Four years ago the Commission initiated the political enforcement mechanism against Poland regarding a serious breach of the rule of law.<sup>20</sup> The Commission accuses Poland of systematically undermining the independence of its courts.<sup>21</sup> Concerning Hungary, the European Parliament initiated the procedure under Art. 7 TEU more than three years ago.<sup>22</sup> The Council has not taken any decision on either Poland or Hungary. The handling of the two Art. 7 TEU procedures proves that the political enforcement mechanism is a paper tiger.

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<sup>19</sup> 2020 Rule of Law Report: The rule of law situation in the European Union, COM(2020) 580 final, 30 Sept. 2020 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN>).

<sup>20</sup> COM(2017) 835 final (<https://ec.europa.eu/transparency/regdoc/rep/1/2017/DE/COM-2017-835-F1-DE-MAIN-PART-1.PDF> [12 March 2020]).

<sup>21</sup> See the Commission's pertinent press release of 20 December 2017 ([https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5367](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367) [12 March 2020]).

<sup>22</sup> P8\_TA(2018)0340 ([https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf) [12 March 2020]). Hungary's action for annulment of that resolution was dismissed by the CJEU (Case C-650/18, ECLI:EU:C:2021:426).



## 2. Judicial Enforcement Procedures before the CJEU (Art. 258, 267 TFEU)

The apparent ineffectiveness of the political enforcement procedures draws the attention to the CJEU in order to protect the “Union based on the rule of law” and its judicial component, the independence of the judiciary. Both the infringement procedure pursuant to Art. 258 TFEU and the preliminary ruling procedure pursuant to Art. 267 TFEU can be and have been used. For the sake of brevity, I will confine myself to the infringement procedures. With regard to specific rule of law issues, there is only one condemnation of Hungary by the CJEU so far,<sup>23</sup> but there is a whole series of pertinent decisions against Poland of which I only mention four.

In 2019, the CJEU determined that Poland had violated Art. 19 (1) subparagraph 2 TEU (to be interpreted in the light of Art. 47 CFR) with regard to the Supreme Court by disregarding the principles of the irremovability of judges and judicial independence.<sup>24</sup> While the Court recognised that the organisation of justice in the Member States fell within their competence, they were required to comply with their obligations deriving from EU law when exercising that competence, including those pursuant to Art. 19 (1) subparagraph 2 TEU.<sup>25</sup> It then underlined that the “requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded ...”<sup>26</sup> The Court also pointed out that by acceding to the EU, all Member States had “freely and voluntarily committed themselves to the common values referred to in Article 2 TEU”.<sup>27</sup>

In the parallel case concerning the lower courts in Poland, the CJEU unsurprisingly also found a violation of Art. 19 (1) subparagraph 2 TEU (to be interpreted in the light

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<sup>23</sup> CJEU, Case C-286/12, ECLI:EU:C:2012:687. But see also CJEU, Case C-66/18, ECLI:EU:C:2020:792: Violation of fundamental rights by law that compelled the Central European University to close its Budapest campus.

<sup>24</sup> CJEU, Case C-619/18, ECLI:EU:C:2019:531.

<sup>25</sup> *Id.*, margin note 52.

<sup>26</sup> *Id.*, margin note 58.

<sup>27</sup> *Id.*, margin note 42.

of Art. 47 CFR), as the challenged legal changes were incompatible with the principles of the irremovability of judges and judicial independence.<sup>28</sup>

In a third treaty-infringement procedure concerning disciplinary proceedings against judges and the newly established Disciplinary Chamber of the Supreme Court, the CJEU held that Poland had violated Art. 19 (1) subparagraph 2 TEU and Art. 267 TFEU.<sup>29</sup> In this case, the Commission has meanwhile initiated the enforcement procedure according to Art. 260 (2) TFEU because of non-compliance by Poland.<sup>30</sup>

A fourth still pending procedure concerns the so-called Polish muzzle law that tries to prevent Polish judges from ensuring effective judicial protection and fair trial rights in consequence of the aforementioned and other CJEU case law, particularly by increasing the powers of the Disciplinary Chamber of the Supreme Court whose independence and impartiality are not guaranteed.<sup>31</sup> The Commission charges Poland with violations of Art. 19 (1) subparagraph 2 TEU, Art. 47 CFR, Art. 267 TFEU and the principle of primacy of EU law. On 14 July 2021, the Vice-President of the CJEU issued an Order under Art. 279 TFEU requiring Poland immediately to suspend the application of the relevant national provisions, pending delivery of the final judgment.<sup>32</sup> On 6 October 2021, the Vice-President rejected the application by Poland seeking cancellation of that Order.<sup>33</sup> Because of Polish non-compliance, the Vice-President, on 27 October 2021, imposed a daily penalty payment of EUR 1 000 000 on Poland.<sup>34</sup> If Poland continuously refuses to pay the imposed penalty, the EU could set off its claim against that Member State's pecuniary claims arising under EU law. Since set-off is recognized as a method of reciprocal settlement of claims in the legal systems of all Member States, one can infer that a corresponding unwritten general principle of EU law exists. Ultimately, this is the only way to ensure the effectiveness of CJEU rulings,<sup>35</sup> without which the EU's character as Union based on the rule of law would be lost.

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<sup>28</sup> CJEU, Case C-192/18, ECLI:EU:C:2019:924.

<sup>29</sup> CJEU, Case C-791/19, ECLI:EU:C:2021:596.

<sup>30</sup> See the Commission Press Release of 7 Sept. 2021 ([https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_4587](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4587)).

<sup>31</sup> Pending Case C-204/21.

<sup>32</sup> Case C-204/21 R, ECLI:EU:C:2021:593.

<sup>33</sup> Case C-204/21 R-RAP, ECLI:EU:C:2021:834.

<sup>34</sup> Case C-204/21 R, ECLI:EU:C:2021:878.

<sup>35</sup> According to Art. 280, 299 TFEU, imposition of penalty payments on Member States by the CJEU are not otherwise enforceable.

This recent case law proves that violations of the constitutional values of the EU enshrined in Art. 2 TEU are not only enforceable in the political procedure under Art. 7 TEU, but also in the judicial infringement procedure under Art. 258 TFEU. It is true that Art. 269 TFEU largely excludes the CJEU from exercising jurisdiction in proceedings pursuant to Art. 7 TEU. However, that does not mean that the Court of Justice would be prevented from exercising jurisdiction in relation to Art. 2 TEU in the infringement procedure. Yet, Art. 269 TFEU may be the reason why the Commission has not charged any Member State directly with violating Art. 2 TEU as such and the CJEU has not made any such determination.

### **3. The New Financial Rule of Law Mechanism: Regulation 2020/2092**

Every year, Poland and Hungary receive billions of Euros from the EU funds.<sup>36</sup> Therefore, the question was raised as to if and how financial means of coercion could be used against them to remedy their violations of fundamental constitutional values of the Union. This discussion resulted in the adoption of Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.<sup>37</sup> The Regulation is a compromise between the European Parliament that intended to use the budget to protect the rule of law and argued for a broad application, and the Council that wanted to use rule of law requirements to protect the budget and insisted on a direct link between breaches of rule of law principles and negative budgetary effects.<sup>38</sup> The Regulation is based on Art. 322 (1) (a) TFEU that empowers the EU legislature to adopt financial rules for implementing the EU budget. It aims to protect “the Union budget in the case of breaches of the principles of the rule of law in the Member States” (Art. 1).

Invoking the rule of law value enshrined in Art. 2 TEU, Art. 2 lit. a of the Regulation defines the “rule of law” (for purposes of the Regulation) as including “the principles of legality implying a transparent, accountable, democratic and pluralistic law-making

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<sup>36</sup> In the period of 2014-2020, Poland received more than € 86 billion from various EU funds ([http://ec.europa.eu/regional\\_policy/sources/policy/what/investment-policy/esif-country-factsheet/esi\\_funds\\_country\\_factsheet\\_pl\\_en.pdf](http://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-factsheet/esi_funds_country_factsheet_pl_en.pdf) [12 March 2020]); Hungary received € 25 billion ([http://ec.europa.eu/regional\\_policy/sources/policy/what/investment-policy/esif-country-factsheet/esi\\_funds\\_country\\_factsheet\\_hu\\_en.pdf](http://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-factsheet/esi_funds_country_factsheet_hu_en.pdf) [12 March 2020]).

<sup>37</sup> OJ 2020 L 433 I, p. 1. For an initial assessment, see *Hott*, *Der neue Konditionalitätsmechanismus – ein scharfes Schwert?*, Saar Blueprints, 10/21 DE, available at [https://jean-monnet-saar.eu/wp-content/uploads/2021/10/Luis\\_Hott\\_Konditionalitaetsverordnung.pdf](https://jean-monnet-saar.eu/wp-content/uploads/2021/10/Luis_Hott_Konditionalitaetsverordnung.pdf).

<sup>38</sup> See Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, § 86.

process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.”<sup>39</sup> According to Art. 3 of the Regulation, “endangering the independence of the judiciary ... may be indicative of breaches of the principles of the rule of law”.

Hungary and Poland opposed that Regulation but were unable to prevent it because the Council could adopt it by a qualified majority. However, a political link existed between the Regulation and the Multiannual Financial Framework 2021-2027<sup>40</sup> and the EU Recovery Instrument (Next Generation EU)<sup>41</sup> which required unanimity in the Council, pursuant to Art. 312 (2) and Art. 311 (3) TFEU, respectively.<sup>42</sup> In order to prevent an impending veto by Hungary and Poland against the latter two legal acts, a compromise was found at the European Council of December 2020.<sup>43</sup> According to that compromise with which the Commission specifically agreed, the Commission will “adopt guidelines on the way it will apply the regulation”, to be developed in close consultation with the Member States. Should an action for annulment be lodged against the regulation, the guidelines would be finalised only after the judgment of the CJEU. The Commission promised that it would not propose measures under the regulation before the guidelines were finalised.

Since Hungary and Poland have lodged annulment actions that are still pending,<sup>44</sup> the guidelines have not yet been finalised and the regulation thus not been applied. This intervention by the European Council in the adoption and implementation of a legislative act has been criticised as being *ultra vires*.<sup>45</sup> The continued inaction of the Commission regarding implementation of the regulation has led the European Par-

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<sup>39</sup> The same definition appears in the 2020 Rule of Law Report (note 19), p. 1, where it has general application. The Commission there adds that “[t]hese principles have been recognised by the European Court of Justice and the European Court of Human Rights.”

<sup>40</sup> Council Regulation 2020/2093 of 17 December 2020 (OJ 2020 L 433 I, p. 11).

<sup>41</sup> See Art. 2 (1), 3 (3) of Regulation 2020/2092 of 14 December 2020 (OJ 2020 L 433 I, p. 23), referring to necessary amendments of the EU’s Own Resources Decision to enable implementation of Next Generation EU.

<sup>42</sup> See Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§87 ff.

<sup>43</sup> Conclusions of the European Council (EUCO 22/20) of 11 December 2020, paras. 2, 3. See Editorial Comments, Compromising (on) the general conditionality mechanism and the rule of law, CMLRev 2021, 262 ff.

<sup>44</sup> Case C-156/21 and C-157/21.

<sup>45</sup> *Alemanno/Chamon*, To Save the Rule of Law you Must Apparently Break it, *Verfassungsblog*, 11 December 2020; *Scheppele/Pech/Platon*, Compromising the Rule of Law while Compromising on the Rule of Law, *Verfassungsblog*, 13 December 2020; *Stäsche*, Europäischer Rechtsstaat als Spielball der EU-Institutionen?, *Zeitschrift für Europarechtliche Studien* 24 (2021), pp. 561, 610 ff.

liament to institute proceedings against the Commission for failure to act pursuant to Art. 265 TFEU.<sup>46</sup>

With regard to the actions for annulment by Hungary and Poland against Regulation 2020/2092, the CJEU decided to assign the cases to the full Court and granted the request by the European Parliament to hear them in the expedited procedure.<sup>47</sup> Both measures are very exceptional and indicate the importance of the cases. Ten Member States and the Commission have intervened in support of the defendants, the European Parliament and the Council of the EU. In his opinions of 2 December 2021, the Advocate General proposed dismissal of both actions.<sup>48</sup> He explained in particular that the EU legislature had used the appropriate legal basis and that the procedures pursuant to Art. 7 TEU are not exclusive as means to protect the rule of law.

The regulatory technique used by Art. 6 (9) – (11) of the Regulation (and accepted by the Advocate General<sup>49</sup>) is the conferral of implementing powers on the Council in accordance with Art. 291 (2) TFEU. The Council is empowered to adopt an implementing decision on appropriate financial measures by a qualified majority,<sup>50</sup> upon the proposal of the Commission (which it may amend also by a qualified majority). The Commission is obliged to initiate the sanctioning procedure if it has reasonable grounds to consider that breaches of rule of law principles in a Member State affect or seriously risk affecting the EU's budget or financial interests in a sufficiently direct way, unless "other procedures set out in Union legislation would allow it to protect the Union budget more effectively".<sup>51</sup> The Council is usually required to do adopt an implementing decision within one month, a period that may be extended by a maximum of two months, but only if exceptional circumstances arise. The Commission is expressly referred to its rights under Art. 237 TFEU in order to ensure a timely decision. Recital (23) of the preamble also mentions the Commission's rights under the Council's Rules of Procedure, referring to Art. 11 (1) which empowers the Commission to initiate a vote in the Council. If the Council nevertheless let the deadline pass unused, it will violate the Regulation and likely cause the Commission to bring an action for failure to act pursuant to Art. 265 TFEU. Regulation 2020/2092 leaves little room

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<sup>46</sup> Pending Case C-675/21.

<sup>47</sup> Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 3, 16.

<sup>48</sup> Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974; Opinion of the Advocate General in Case C-157/21, ECLI:EU:C:2021:978.

<sup>49</sup> Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 252 ff.

<sup>50</sup> Art. 16 (3) – (4) TEU.

<sup>51</sup> Art. 6 (1) read together with Art. 4 (1) of Regulation 2020/2092.

for discretion to either the Commission or the Council – both are bound to react swiftly and decisively to breaches of rule of law principles with sufficiently direct consequences for the EU’s finances; there is, however, discretion with regard to the specific means used to counter those breaches.<sup>52</sup>

Recital (26) of the preamble tries to give the European Council an emergency brake function in that decision-making process on financial sanctions: “The procedure for adopting and lifting the measures should respect the principles of objectivity, non-discrimination and equal treatment of Member States and should be conducted according to a non-partisan and evidence-based approach. If, exceptionally, the Member State concerned considers that there are serious breaches of those principles, it may request the President of the European Council to refer the matter to the next European Council. In such exceptional circumstances, no decision concerning the measures should be taken until the European Council has discussed the matter. This process shall, as a rule, not take longer than three months after the Commission has submitted its proposal to the Council.”<sup>53</sup>

The Advocate General expressly underlined that there is no basis in the Treaties for giving the European Council any emergency brake powers in the legal sense.<sup>54</sup> An appeal to the European Council by a Member State based on recital (26) cannot affect the Council’s decision-making power. It can only start a political discussion, subject to Art. 11 (1) of the Council’s Rules of Procedure:<sup>55</sup> “The Council shall vote on the initiative of its President. The President shall, furthermore, be required to open a voting procedure on the initiative of a member of the Council or of the Commission, provided that a majority of the Council’s members so decides.” That means that every single member of the Council and the Commission can cut short the diversions via the European Council by a motion to vote, provided that the motion is supported by a simple majority of the Council.

It remains to be seen how effective the new Regulation will be in repelling attacks by Member States on the rule of law, because its scope is limited: Financial sanctions

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<sup>52</sup> *Stäsche* (note 45), p. 598.

<sup>53</sup> See also para. 2 (j) of Conclusions of the European Council of 11 December 2020 (EUCO 22/20).

<sup>54</sup> Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 257 ff.

<sup>55</sup> OJ 2009 L 325, p. 35.

such as suspension of payments (Art. 5)<sup>56</sup> may be imposed only if “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 the financial interests of the Union in a sufficiently direct way” (Art. 4 (1)).<sup>57</sup> The Advocate General placed great emphasis on the requirement of a clear link between breaches of the rule of law and the protection of the EU budget when he confirmed that the Regulation was rightly based on Art. Art. 322 (1) (a) TFEU.<sup>58</sup> This means that the scope of the Regulation may be narrower and thus its deterrent effect on serious breaches of the rule of law more limited than one would hope. It remains to be seen whether the CJEU will follow the Opinion in this regard when it delivers its judgment in early 2022.<sup>59</sup>

One should not forget in this context that the financial mechanism under the Regulation has a subsidiary character *vis-à-vis* other procedures set out in Union law whose use would allow protecting the Union budget more effectively.<sup>60</sup> This is why the Commission has so far withheld its consent to the spending plans submitted by Hungary and Poland concerning their share of the Next Generation EU Fund.<sup>61</sup>

## VII. Conclusion: In Defence of European Constitutional Values

We are currently witnessing autocratic offensives in many parts of the world, including Europe. Our common constitutional values that are embodied in Art. 2 TEU, first and foremost the rule of law, are no longer self-evident truths. Rather, we must actively defend them at all levels of the European multi-level system. Our first line of defence is the accession process which has to ensure that only those States can become EU members that credibly and sustainably fulfil the political accession criteria. Our second line of defence runs within the EU. There we must ensure by all available

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<sup>56</sup> Art. 5 (2) of the Regulation protects the final recipients or beneficiaries of payments from Union funds – the financial sanctions are aimed at governments and not Union citizens.

<sup>57</sup> Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 164 ff.

<sup>58</sup> *Id.*, §§ 164 ff.

<sup>59</sup> See *Gremminger*, The New Rule of Law Conditionality Mechanism clears its first hurdle, European Law Blog, 14 December 2021.

<sup>60</sup> Art. 6 (1) of Regulation 2020/2092. See also Conclusions of the European Council of 11 December 2020 (EUCO 22/20), para. 2 (d).

<sup>61</sup> *Stäsche* (note 45), p. 613.

means, both political and legal, that all Member States respect our common constitutional values.

It is true that the EU, as a community of constitutional values, thrives on conditions that it cannot guarantee itself,<sup>62</sup> namely on the consensus of the vast majority of Union citizens on those values. However, such a consensus can erode, if the competent institutions of the EU and the Member States do not fend off attacks on common constitutional values, giving the impression that they are either unwilling or unable to defend them. In this regard, the resolute decisions by the CJEU in rule of law cases against Hungary and Poland are most welcome. So is the new financial rule of law mechanism to protect the EU budget. Hopefully, we will not one day have to consider seriously whether EU law permits or even requires the exclusion of a Member State for betrayal of the fundamental values of European integration.

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<sup>62</sup> See *Böckenförde*, Die Entstehung des Staates als Vorgang der Säkularisation, in: *id.*, Recht, Staat, Freiheit, 1991, p. 92, 112.