

NEW RULE OF LAW CONDITIONALITY REGULATION: LIMITS AND NEXT STEPS



OBJECTIVES & SCOPE

Regulation 2020/2092 establishes the rules necessary for protecting the EU budget in the case of breaches of the value of the rule of law in the Member States (MS) – by allowing the Commission to withhold EU funds from MS governments and entities involved in such violations.

Namely, with its adoption, the Commission to sanction MS responsible for a rule of law violation that “(i) affects or (ii) risk affecting” the sound financial management of “the EU budget” or the protection of the EU financial interests in a “sufficiently direct way”.

The Regulation entered into force on 1 January 2021 and has, since, been binding in its entirety and directly applicable in all Member States. Practically, however, its implementation has been delayed due to a political agreement among MS interpreting and redefining its scope and implementation terms.

ADDED VALUE

- ✓ **Wider scope & harder-hitting.** The Regulation is complementary to previous conditionality mechanisms incorporated in EU funding programmes, and it applies when other financial instruments would have had less impact. The main difference is that the Regulation is the only mechanism that targets systemic and widespread breaches of human rights and the rule of law (e.g. the collapse of a country’s judiciary, like in Poland, or state-sponsored corruption, like in Hungary). In the past, the Commission could only address individual violations of instrument-specific objectives (e.g. suspension of structural funds due to the violation of the equality enabling objectives of the fund by some Polish municipalities that had declared themselves LGBT-Free Zones).
- ✓ **Preventive enforcement mechanism.** The Conditionality regulation is the only enforcement tool at the Commission’s disposal that can be deployed preventively. This is because the Conditionality regulation allows EU institutions to suspend funds merely when there is **a risk** for the EU’s budget or financial interests stemming from a violation of EU values. Conversely, pre-existing infringement actions and financial penalties could only intervene once the Member State has already violated EU values and the CJEU had confirmed the existence of violation after years-long court proceedings.
- ✓ **Faster.** As a result of the simplified procedure, the EU Council, by Qualified Majority Voting (55% MS representing 65% of the population), could adopt a final hard-hitting decision to withhold payments in weeks, compared to other mechanisms (i.e. infringement actions) requiring years-long complicated litigation.
- ✓ **Increasing political saliency.** By linking the use of European taxpayers’ money to the rule of law, the EU has helped make the rule of law crisis a more salient issue in national and European debates.

LIMITS & PITFALLS

THE LINK TO THE FINANCIAL INTERESTS OF THE EU

The Regulation allows the Commission to intervene and suspend the disbursement of EU funds only when the violation of the rule of law represents a risk for the sound financial management of the EU's budget or for the EU's financial interests. Unfortunately, that means that it will not be possible for the Commission to make use of this tool for all MS human rights and rule of law violations.

This wording represents a limitation of the use of the Regulation by the Commission.

Indeed, the Commission will be required to establish a "*direct and causal link*" between the violation of the rule of law and the impact on the EU's budget or financial interests.

THE UNCLEAR ROLE OF THE EUROPEAN COUNCIL

The Regulation allows a Member State, who has been subject to the procedure, to request to refer the matter to the European Council (Recital 26). This referral is supposed to have a suspensory effect. Hence, the Commission could not continue the procedure until the European Council has discussed the concerns raised by the Member States.

The CJEU has clarified that the Recital is not binding, and the Commission cannot be forced to suspend the procedure. However, it is likely that the Commission will voluntarily postpone the enforcement of any measures pending the European Council's decision.

Hence, while neither the CJEU's ruling nor the Commission's guidelines recognise a role for the European Council in the procedure, MS could consistently use the mechanism of referral to delay the enforcement of the regulation.

NO CLEAR PATHWAY TO REDIRECT SUSPENDED FUNDS

The political agreement reached at the European Council level subordinates the enforcement of the Regulation to the adoption, by the Commission, of implementing guidelines that set out the exact methodology the Commission will use to assess rule of law violations and trigger the mechanism.

The Commission adopted the said *guidelines* in March 2022, raising several concerns as regards the impact of funds' suspension on ordinary citizens.

On paper, they recognise that the residents, civil society and companies of a country experiencing democratic backsliding should not be punished for their governments' transgressions. However, in practice, the situation is not clearcut. This is because:

- (i) *The fox is entrusted with guarding the henhouse:* Both the Conditionality Regulation and the guidelines provide that MS against which the mechanism is triggered are solely responsible for honouring payments towards final recipients and beneficiaries of EU funds in their country (Art. 5(2)).
- (ii) *The onus of unlocking EU funds is put on ordinary citizens:* The guidelines provide that final recipients should exhaust internal administrative and judicial remedies before sending a complaint to the Commission. Yet, it is likely that the enforcement of the conditionality mechanism will stem from a generalised lack of judicial independence (e.g. Poland). Hence, it seems illogical to ask individuals and local organisations to rely on national courts when they cannot be considered independent.

- (iii) *And it could take years:* On the basis of final recipients complaint, the Commission could decide to launch infringement procedures before the CJEU. However, infringement procedures can take years, and the funds will remain suspended during the total length of the court proceeding.

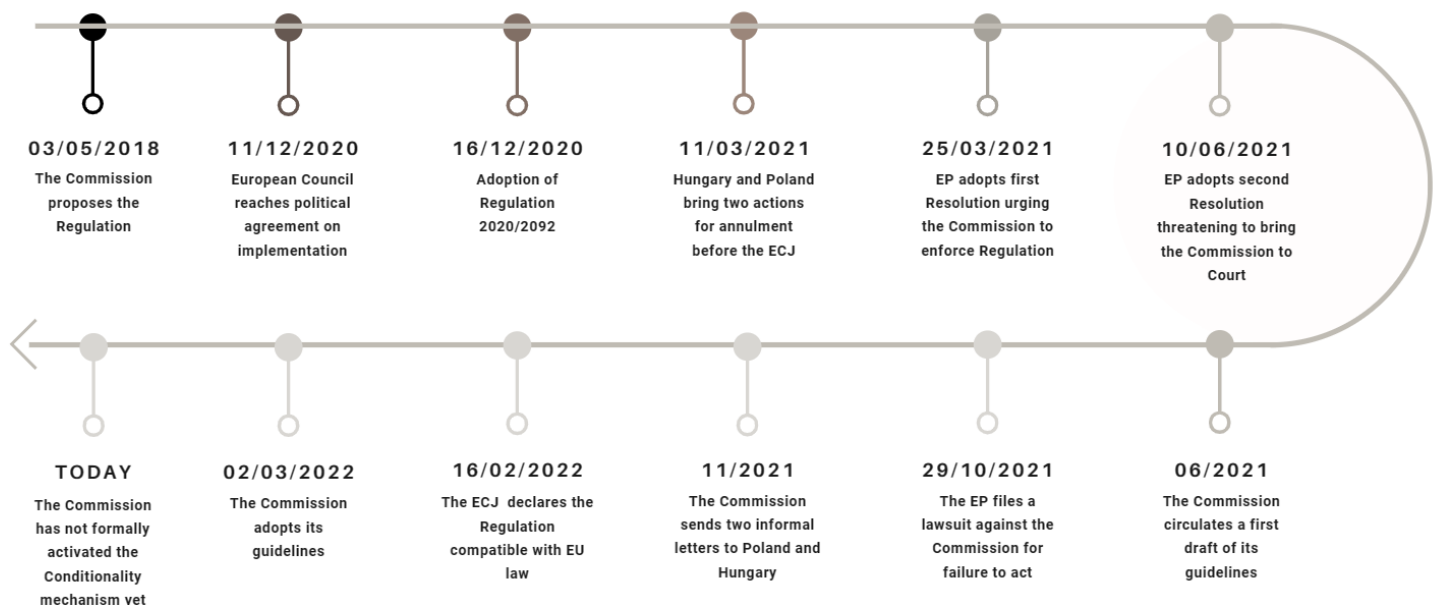
Finally, none of the relevant legal instruments (*Conditionality Regulation, Financial Regulation and Programme-specific Regulations*) provides further clarity. In particular, none of these regulations provides the Commission with the legal power to:

- (i) introduce systems to bypass the centralised management of sanctioned countries, and
- (ii) re-allocate budgets through other different methods of management (e.g. disbursement via regions/municipalities/civil society/EU agencies or the Commission itself).

ADOPTION AND ENFORCEMENT TIMELINE

The Commission has not yet put in place the first step to make use of this tool, namely sending an official written notification to Europe’s worst offenders – despite the marked deterioration in the rule of law in countries such as *Poland* and *Hungary*.

The timeline below highlights the main developments since its proposal to date, including the drivers of the delays in the regulation’s enforcement.



WHAT'S NEXT?

Given that

- The Regulation has been *cleared as compatible with EU law* by the Court of Justice of the EU in February 2022, and *Hungary* and *Poland's* actions for annulment have been rejected, and
- That the Commission has given no indications as to when it is planning to send the first written notifications to concerned Member States (e.g., Poland and Hungary)

The Member States and the European Parliament should urge the Commission to:

- (I) Start the regulation's enforcement by sending written notifications to the concerned Member States.
- (II) Open a targeted consultation with human rights stakeholders to clarify the impact of funds' suspension on final beneficiaries and recipients.
- (III) Not endorse the Hungarian and Polish National Recovery and Resilience plans (i.e., freeze the disbursement of COVID-19 Funds).

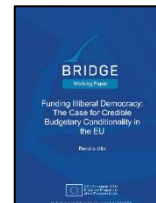
READING REFERENCES



1) August 2021 – 6 Reasons why the EU should use the approval of National Recovery and Resilience Plans to enforce the rule of law in Hungary and Poland



2) July 2021 – The EU Conditionality Regulation – Variations on Procrastination



3) 2020 – Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU